

The International Comparative Legal Guide to: **Merger Control 2008**

A practical insight to cross-border merger control issues



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Similarities and Differences in the Use of Economics in Merger Cases by the European Commission and the US Agencies

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Introduction

In this short paper we present our views on some recent developments in the economic assessment of transatlantic mergers by the US agencies and the European Commission (EC). We discuss what general inferences could be made from these recent cases and what we believe is likely to happen during 2008.

I. General Similarities and Differences

The role of economics (and economists) in merger enforcement. For many years, the US antitrust agencies have relied heavily on in-house economists to evaluate the potential effects of mergers. The creation of the Chief Economist Office in 2003 and the recent increase in the size of the Chief Economist Team (CET) (from 10 to 20 PhD economists) highlights how the EC is now following this example by increasing the weight given to economic analysis in its merger inquiries. The expectation is that from this year forward there will be at least one PhD-level economist working with the EC case team on each sizeable merger requiring substantive analysis. Before the CET was set up, it was common not to have any economists working with the case team even for complicated mergers that were subject to a Phase II review and economists were only marginally involved in some high-profile negative decisions reached by the EC. (See End Note 1 below.)

Despite this impressive increase in economics staffing and economist participation at the European Commission, the level of economic support within DG Competition still trails that of the two US competition enforcement agencies. The Bureau of Economics of the Federal Trade Commission and the Economic Analysis Group of the US Department of Justice each have approximately 50 PhD economists dedicated to the analysis of competition cases. It is routine at both agencies for economists to be assigned to merger investigations from the outset, not only for major matters but, also, for relatively minor ones. Economists at the US agencies often are involved not only in the analysis of matters that have been deemed serious enough to warrant intensive study, but also in the determination of whether potential cases merit intensive scrutiny in the first instance.

Notwithstanding the differences that remain, the key fact is that now, more than ever, the two jurisdictions share a common focus on the economic issues underlying mergers and other competition cases. Because the same modern theories of industrial organisation and microeconomics are accepted on both sides of the Atlantic, the analytic approaches taken in the evaluation of mergers will be very similar in the two jurisdictions. It is our view that other areas of disagreement as to enforcement priorities have diminished as a

result of the common analytic foundation that unites the competition enforcement regimes of the United States and Europe. This is most obvious in the area of horizontal mergers. Perhaps the most telling evidence of this is the striking resemblance between the approaches taken in the EC's new horizontal merger guidelines (see End Note 2) issued in 2004 and those of the horizontal merger guidelines published by the DOJ and FTC in 1992 and revised in 1997. (See End Note 3.) Each is founded on the same economic principles.

This being said, differences do remain. There is perhaps a more systematic approach on the part of European enforcers with regard to mergers that might give rise to "non-horizontal" effects, including vertical mergers and transactions that might facilitate exclusionary conduct by means, for example, of bundling strategies. While the US agencies do actively consider and assess modern economic theories of vertical and other "non-horizontal" effects in the merger enforcement context, the fact remains that the US competition authorities last published guidelines on the evaluation of non-horizontal mergers in 1984, notwithstanding the large volume of more recent advances in the economic analysis of vertical (and other non-horizontal) mergers. (See End Note 4.) In contrast, the EC has issued in February 2007 its new draft Guidelines on Non-Horizontal and Conglomerate Mergers, which explicitly take modern theories of non-horizontal effects into account. (See End Note 5.)

The EC's draft non-horizontal guidelines, which explain in some detail the nature of non-horizontal theories of competitive effects, and explain the nature of evidence required to establish whether such concerns are warranted, have been subjected to consultation and review on both sides of the Atlantic. (See End Note 6.) The final version of the Guidelines is expected to be issued shortly. The Guidelines have been welcomed by economists working in this area in the EU since they specify a limited set of instances where a vertical or conglomerate merger might potentially create competition problems. We expect the new Guidelines will reduce enforcement in this area to a few selected cases each year involving issues where economic theory and facts would predict that potential problems might arise. We also expect that more sophisticated economic analysis (e.g., specific modelling of the *ability* and *incentive* to foreclose downstream rivals) will be undertaken in those selected cases.

Some procedural implications. The common analytical thread that guides US and EC enforcers is beneficial not only to the extent that each jurisdiction relies on current economic thinking, but, also, because a common focus increases the likelihood that parties to mergers involving global geographic markets will focus on similar sets of questions and information requests in each of the two

jurisdictions, potentially reducing the costs of compliance. When competition is more localised, however, different issues may arise in each of the two jurisdictions, reducing this benefit.

The highly similar (if not entirely congruent) analytical approaches taken by the US and EC agencies also make it easier for them to coordinate their actions. This can reduce duplication of effort when, again in the context of global mergers (or other competition matters) in global antitrust markets, one of the two agencies takes the “lead” on an informal basis. This also assists the parties and their counsel - and their economists - by allowing them to focus on the key issues likely to be raised on both sides of the Atlantic, rather than dealing with the potential for idiosyncratic concerns from each direction.

This increased inter-jurisdictional coordination is not costless to outside parties. Because the US and EC agencies share information, it will be important to ensure that the data and argumentation provided to one agency are consistent with those provided to the other. In the United States, for example, parties to mergers are not required to make an early determination of relevant geographic and product markets. In the European Commission’s initial Form CO process, on the other hand, parties are asked to identify the relevant product and geographic markets. To the extent that early submissions to the EC concerning relevant product or geographic market definitions are shared with the reviewing US agency, this can constrain the abilities of parties or their counsel to credibly offer more refined market definitions to the US agencies later on.

II. Impact of Differences in EC and US Procedure on the Timing and Substance of Economic Analyses to be Provided to the Agencies

Differences in timing and nature of information submissions. As noted earlier, one way that the European merger review process differs from that of the US is that in the EC process parties must make up-front statements on the nature of relevant markets and key competitive constraints. Inevitably, this leads to cautious positions being taken initially by the merging parties and it might lead to delays and inefficiencies in the discussion and in-depth analysis of key substantive issues. For example, in some cases a disproportionate amount of time can be spent discussing market definition and competitive effects in peripheral markets where anti-competitive effects are unlikely.

Information provided to the European Commission in the initial-filings stage can come to the attention of the US competition authorities through the agencies’ information-sharing mechanisms, giving the American case teams information on the nature and identities of what parties believe to be the relevant markets and key competitive constraints. Information flows both ways across the Atlantic, however.

If and when a US investigation rises to the point of a Second Request, the US agency can require production of a wide array of documents and data bearing on competition, competitors, the potential for entry and efficiencies, costs, and a host of other considerations. These information demands can result in the submission of millions of pages of documents. There is always the potential that such document submissions will include evidence contrary to representations that were made to the EC case team before such materials were screened by the parties’ counsel. Thus, while on the one hand there is the possibility that representations made to the EC in a draft Form CO could raise suspicions among DOJ or FTC investigators if the parties subsequently attempt to take an alternative position, it can also be the case that conclusions

reached by the DOJ or FTC staff on the basis of documents and data required under a Second Request (or even in the context of pre-merger filings) might conflict with arguments set forth in the Form CO. Should the reviewing US agency inform the EC case team that such conflicting conclusions were based on information supplied by the parties, this might undermine the parties’ credibility before DG Competition.

Differences in the roles of economists early in the merger review process. Because the EC process requires parties to commit to market definitions much earlier than does its American counterpart, economists can play a significant behind-the-scenes role in many cases in the pre-notification phase and during Phase I. This being said, in many cases counsel may deem it inadvisable to proffer an economists’ “white paper” during the pre-notification phase or during a Phase I review as such might raise additional questions and, in a worst-case scenario, potentially prompt the case team to open an in-depth investigation. In the United States, economists retained by the parties will frequently also play an active behind-the-scenes role, assessing merger-related issues and preparing counsel for meetings with the agency case team. However, it is also not uncommon for counsel to merging parties to include their economists in early meetings with staff of the reviewing agency, in order to resolve the agency’s standing economic or factual questions prior to the statutory Second Request deadline. The aim of such work is to convince the agencies not to issue a Second Request, thereby saving the merging parties the very substantial time and monetary cost of this investigation phase.

As EC or US merger investigations progress (later into Phase I or into Phase II in Europe, or into the Second Request phase in the US), the role of economists increases further. It then becomes likely that some specific issues become central to the overall assessment and it is likely that detailed economic analysis of these issues will be presented by the economists to their counterparts in the agencies. (See End Note 7.)

III. Use of Sophisticated Empirical Analysis (e.g., Econometric Analysis, Simulation Analysis, Bidding Analysis etc.) by the Agencies

Abilities of the EC and US agencies to gather necessary data. As a threshold issue, the abilities of any enforcement agency to engage in a sophisticated empirical analysis will be constrained by (a) the quantity and nature of the available information, and (b) when the agency receives this data, relative to the point in time when it must make an enforcement decision.

When a Second Request has been issued, US enforcers have the ability and incentive to compel the parties to provide, among other things, whatever documents and data they have produced in the ordinary course of business that are responsive to the terms of that Second Request (subject to negotiated reductions in the scope of that information demand). Second Requests can require, among other things (see End Note 8) and depending on what the parties keep in the ordinary course of business, the production of large volumes of statistical data. Depending on the nature and quality of the data maintained by the parties, this can allow the reviewing agency to undertake substantial empirical analyses. Should the matter proceed to litigation, still further discovery is possible, allowing the agency to perform further analyses.

The EC typically does not require the parties to a merger to provide a wide-ranging set of documents and data analogous to that required pursuant to a Second Request. Instead, the EC often requires the submission, at short notice, of relevant data and documents at various stages during the investigatory process, and written

responses to questionnaires. Such information demands can be directed not only to the parties to the transaction of interest but also to interested third parties. (See End Note 9.) The EC also can request interested third parties to voluntarily offer data and analyses to assist it in its deliberative process. Under such circumstances, the parties to a merger are free to submit data that they choose to provide.

In contrast, the Second Request process is formally structured in such a way that the parties to a transaction can choose - if they deem such to be advisable - to time their production of evidence in a way that limits the time available to the agency to analyse that data. The Hart-Scott-Rodino law typically allows the FTC or DOJ only thirty calendar days to decide whether to bring suit to block a merger once the parties have certified that they have complied with the terms of the Second Request. If that notice of substantial compliance is served shortly after (or simultaneously with) the delivery of the data - and assuming that the agency is unable to challenge the parties' representation that they have complied substantially with the terms of the Second Request - the agency's economists might have little time to use that data effectively. On the other hand, it is frequently the case that parties voluntarily provide the agencies with requested statistical (and other) information earlier than this, thereby affording the agency staff more time to use such data to test empirical propositions pertaining to the effects of the merger.

Use of empirical data: econometric and statistical analyses. It has been rare in the past for staff economists at the European Commission to themselves carry out detailed empirical analyses during merger investigations. Instead, the economists typically focussed on the review of empirical analyses prepared by economists for the merging parties (and, frequently, by other interested parties). This has mostly been due to 'capacity constraints'. Historically there have not been enough economists at the European Commission with the required data handling skills. To the extent that 'capacity constraints' might extend beyond the availability of human capital to a reluctance to demand empirical data in sufficient scope and quantity, this problem would be exacerbated.

The 'capacity constraint' issue is illustrated by observations by Lars-Hendrik Röller, the first Chief Economist for DG Competition. Röller has noted that capacity constraints have distorted the ability of case teams to process relevant empirical information in antitrust cases (and merger cases). According to Röller, outside parties in competition matters historically have presented empirical evidence whenever it supported their own best interests, while the Commission did not perform its own analyses and might have thus missed opportunities to strengthen its case or support higher fines in antitrust cases. (See End Note 10.)

The strengthening of the Chief Economist's Team appears to be easing this handicap. This change can for instance be detected in the recent decision to prohibit the acquisition of Aer Lingus by Ryanair. (See End Note 11.) In this case, besides assessing the "robustness" of the econometric analysis presented by the economists acting respectively for Ryanair and Aer Lingus, the Commission carried out its own econometric analysis. This analysis played a central role in the Commission's final decision. In this case, the Commission staff also acted as an "arbitrator" of the contradictory econometric evidence presented by the acquiring party (Ryanair) and the target (Aer Lingus) that was actively resisting the hostile takeover.

While American antitrust enforcers often have more access to company data than the EC, it does not follow that the DOJ and FTC always apply sophisticated empirics in their merger investigations. In many matters, the nature or quantity or quality of the available data is not conducive to the performance of such studies. On the

other hand, it is not uncommon, in industries for which such data exist - consumer goods and retailing are prime examples, where large volumes of pricing and other transactional data are, for example, available on a per-transaction basis - and where an actionable case appears likely, for the DOJ and FTC to engage in detailed econometric studies, using internal staff and, when necessary, by retaining outside experts.

Prospective merger partners often will voluntarily provide econometric evidence to the DOJ or FTC staff as part of their evidence. It should be noted that the US agencies will, as a general matter, accord little weight to outside parties' econometric (or other technical) analyses if the parties do not also submit all supporting data and models that have been used to develop their analyses and test the robustness of their findings. This is now increasingly the case in the EC review process as well.

A noteworthy example not only of the importance of econometric analysis to the outcome of a US merger investigation and challenge, but also of the fact that such is not a new development, involved the proposed merger of two 'office supply superstore' chains, Staples and Office Depot. (See End Note 12.) In *Staples*, the FTC relied upon econometric results, as well as less formal statistical findings and documentary evidence, to challenge that proposed merger in early 1997. At trial, both sides deployed econometric studies and relied upon the expert testimony of noted econometricians.

Bidding analyses: Bidding analyses are now fairly common on both sides of the Atlantic in the context of merger cases that lend themselves well to such analysis. These analyses can be more or less sophisticated depending on the quality of the data available and how critical the outcome of the analysis is to the overall decision. In Europe, such analyses have played a central role in a number of recent cases (such as GE/Instrumentarium, Oracle/PeopleSoft, and Axalto/Gemplus - see End Note 13) and there is now a general expectation that bidding data would be collected and submitted to the Commission. In the United States, such evidence is routinely provided in the context of mergers involving markets for high-technology, defense, and other products and services that are procured in auction or bid markets.

Merger simulations. Theoretical approaches to merger analysis often impel the agencies and outside parties to pursue empirical analyses. It is increasingly common in both the US and EC for outside parties' economists to provide the case teams with the results of empirically-calibrated game-theoretic models of competitive effects in the context of vertical and horizontal mergers. Such models are also developed and applied by the staffs of the US and EC competition agencies. Such merger simulation models rely on various empirically derived parameters, including, among other things, estimates of the extent to which various products are substitutes in demand. The determination of such elasticities requires the use of demand estimation techniques or of alternative empirical approaches.

IV. Use of Competitor and Customer Questionnaires/Interviews

The US and EC agencies each undertake customer and competitor interviews when gathering background information relevant to their analyses of mergers. These tend to be telephone interviews, where the goal is to collect as much valuable information as possible in an informal setting. The US and EC investigative processes diverge, however, in that the American process does not have a direct analogue to the EC practice of sending questionnaires to customers and competitors. In the US, customer and competitor information (beyond that obtained by means of telephone interviews) is most

often obtained as the result of specific requests rather than a common questionnaire circulated to market participants.

The agencies also reach out to third parties to seek their views considering proposed settlements. The European Commission engages in a questionnaire-based procedure known as “market testing” in order to elicit the views of interested third parties. Different approaches are taken in the US. The Federal Trade Commission must allow a fixed period during which public comments can be received before accepting a remedy as final, while the Department of Justice must have a federal judge approve its consent decree following a period during which members of the public can offer comments.

In terms of substantive, rather than procedural, differences between the two approaches, several issues are worth highlighting.

First, the EC process has historically given more weight to the views of competitors than the US process. While the US Agencies understand full well that there can be cases where injury to competitors will occur side-by-side with reductions in competition, competitor complaints are often greeted with scepticism, because competitors may also have the incentive to complain when a merger is efficient and to keep quiet when it is anticompetitive. The reason is that rivals will have an incentive to complain when the merger increases the competitive pressures they face, and will have no reason to complain if the effect of a merger is to relax such competitive pressures (i.e., because the merged entity would increase prices).

Second, the EC’s approach to “market testing” can mean that the customers who take a more active role in the process tend to have a disproportionate say in the final Commission’s decision as to the remedy package that is accepted (and more generally play a significant role in shaping the case team’s view of the substantive issues). (Customer complaints can also play a key role in the US to the extent that customer complaints increase the risk of enforcement action by the US agencies.) Because of the way the administrative process is set in the EU, issues of sampling bias and, therefore, the accuracy of the information collected by means of market testing have never been tested in Court.

Lastly, the significant reliance on “market testing” and the more limited reliance on data analysis and document discovery in the EC process has also meant that the process is inherently better able to identify the key substantive issues in mergers with a fairly concentrated customer base than in consumer products mergers (or more generally mergers with a very dispersed customer base). This factor would appear to be much less of an issue in the American context.

V. Conclusion

While we have focussed on a number of differences in this paper, it is remarkable how much convergence has occurred in terms of the use of economic analysis during merger reviews on both sides of the Atlantic. In particular, the institutional reforms within DG Competition associated with the creation of a Chief Economist and Chief Economist’s Team of PhD economists has substantially improved the amount and the impact of economic reasoning within the EC merger review process.

One significant benefit from the increased convergence is that parties to transatlantic mergers, and indeed the reviewing agencies in each jurisdiction, will find it easier to coordinate their activities in the differing jurisdictions than before, allowing each to navigate the merger process with greater efficiency. The analysis of substantive issues by parties engaged in transatlantic mergers can now largely deal with the same sets of issues and concepts,

irrespective of jurisdiction. The timing of the notifications and of the parties’ main submissions in each jurisdiction also can be coordinated to a very significant extent in these cases. It is also increasingly easier for the agency case teams on both sides of the Atlantic to informally discuss the issues arising in global matters.

Such coordination nevertheless requires a significant effort in terms of coordination for the merging parties, their outside counsel, and their economists on each side of the Atlantic. The benefit from this is reduced risk of inconsistency between presentations to the agencies in each jurisdiction and between the enforcement decisions that these agencies ultimately take. In addition, such enhanced international coordination can work to reduce the cost to merging parties of overall compliance by allowing at least a subset of the substantive arguments and analyses to be presented to all of the agencies involved (which can include other competition agencies in addition to those of the US and EC). We have been reminded of the importance of such coordination time and again as we have advised parties to global mergers (and other global antitrust matters) before the EC and the US agencies.

Note

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End Notes

- 1 In fact “capacity building” [to undertake sophisticated economic analysis] was one of the key goals of the first Chief Economist, Lars Hendrik Röller. See for instance one of his speeches in 2005 available at http://ec.europa.eu/comm/competition/speeches/text/sp2005_011_en.pdf.
- 2 In February 2004, the European Commission issued the final version of its new horizontal merger guidelines, O.J. (C 31) 5 (2004).
- 3 U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, April 2, 1992 (revised April 8, 1997). The 1997 revisions were limited to the agencies’ treatment of efficiencies. This document is available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>.
- 4 See “Non-Horizontal Merger Guidelines,” available at <http://www.usdoj.gov/atr/public/guidelines/2614.htm>. The failure of the US agencies to offer more recent policy guidance as to non-horizontal mergers may reflect the view that it is difficult to craft non-horizontal guidelines that are on the one hand specific enough to provide reliable guidance, while on the other sufficiently grounded in economic theory to be sufficiently comprehensive.
- 5 See Draft commission notice: Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (13 February 2007). Available at http://ec.europa.eu/comm/competition/mergers/legislation/non_horizontal_consultation.html.
- 6 See, e.g., Robert J. Levinson, “Tour d’horizon du projet de Lignes directrices de la Commission européenne sur les concentrations non-horizontales,” in *Revue Lamy de la Concurrence*, No. 11, April/June 2007. See also Joint Comments of the American Bar Association’s Section of Antitrust Law and Section of International Law on the European Commission’s Draft Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings (available at http://ec.europa.eu/comm/competition/mergers/legislation/files_non_horizontal_consultation/aba.pdf). Levinson was a member American Bar Association working group that prepared these comments.

- 7 In this context, it should be noted that a number of procedural steps have been implemented recently in the EC process to deal with data confidentiality issues (e.g., the creation of data rooms) to enable the economists to reproduce and test the results presented by the economists on the other side.
- 8 Following the issuance of a Second Request, the reviewing US agencies also have the power to subpoena executives to testify under oath in investigational hearings, and to require third parties to provide documentary information. At this stage as well as earlier in the process, the US agencies also rely on informal means, such as telephone interviews of executives of the parties or of interested third parties.
- 9 We refer here to the formal Article 11 requests.
- 10 See, for instance, Röller's speech at the George Mason Law Review Symposium on "Hot Topics in EU Antitrust Law" on 20 September 2005. His presentation is available at http://ec.europa.eu/comm/competition/speeches/text/sp2005_017_en.pdf. Similar points have also been made by the current Chief Economist, Damien Neven in his paper "Competition Economics and Antitrust in Europe" in Economic Policy, October 2006, pages 743 - 791.
- 11 See the Commission's press release on <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/893>.
- 12 Further information on the role of econometrics in the Staples case can be found, for example, in Jonathan Baker's paper "Econometric Analysis in *F.T.C. v. Staples*" (July 18, 1997) that is available at <http://www.ftc.gov/speeches/other/stspch.shtml>.
- 13 The GE/Instrumentarium decision is available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3083_en.pdf, the Oracle/PeopleSoft decision is available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3216_en.pdf, and the Axalto/Gemplus decision is available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3998_20060519_20212_en.pdf.

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