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Competition law in times of economic crisis: In need for adjustment?

Alexis Walckiers

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Relaxing competition law standards in times of economic crisis?

- competition policy supports the good functioning of markets by ensuring that all companies compete on their merits
  - competition enforcement avoids that companies focus on maximizing rent extraction
  - at the expense of consumers, other businesses in the value chain (and their employees), innovation and competitiveness
- the assumption should therefore be that relaxing competition law enforcement is even more costly (for citizens, consumers and workers) in times of economic crisis, and will not necessarily reduce inequalities
- Hans Zenger notes that
  - relaxing competition law standards may produce short-term benefits by providing temporary relief for ailing industries
  - but, once a crisis has passed, the situation becomes even worse, since consumers then have to continue bearing the burden of inefficient operators or excessive market power, with nothing to show for it in return

Relaxing competition law standards in times of economic crisis?

- relaxing competition law standards does not reduce inequalities
  - *The Economist* observes that inequality has reached a stage (focus on the US) where it can be "inefficient and bad for growth"
  - The priority should be a Rooseveltian [Theodore!] attack on monopolies and vested interests, be they state-owned enterprises in China or big banks on Wall Street. The emerging world, in particular, needs to introduce greater transparency in government contracts and *effective competition law*. (Special report "True Progressivism")
- need for competition authorities to maintain standards while reinforcing communication, Commissioner Almunia:
  - We must renew our fight *against monopolistic power* that distorts the level playing field and intervene only when market failures prevent economic agents from taking the right decisions. This is the *best path to get out of the crisis stronger*. (Paris, 10 February)
  - When citizens wonder in these difficult times what the EU is doing for them, *competition can be presented as a community policy that delivers practical benefits*. Our action has helped – among other things – to give Europe cheaper telecom services; it has made it easier to choose between airlines; it has accompanied the emergence of the digital sector – as in the landmark Microsoft cases – it has brought more choice and better prices to a range of consumer goods, and much more. (Trier, 18 October)

Move to social welfare standard?

- Francisco Enrique González-Díaz suggests to re-think the standards of proof in merger review
  - "in order to ensure that mergers beneficial to consumers and society as a whole be permitted and that type I errors be minimized"
  - according to him, in comparison to the total welfare standard, the consumer welfare standard leads to over-enforcement and deprives society of welfare gains
    - which is costly in times of economic crisis
  - raises the question of under-enforcement and type-II errors
    - mergers that are cleared under the consumer welfare standard, but would not be under the total welfare standard
    - for instance, efficiencies could lead to redundancies that are likely to affect the total welfare negatively, in a region or in the European Union (at least in the short term)
    - these transitory effects are likely to be costly in times of economic crisis

Failing firm defense

- the horizontal merger guidelines cites three cumulative criteria for the analysis of a failing firm defense
  - in the absence of a merger, the allegedly failing firm would be forced out of the market
  - there is no less anti-competitive alternative than the notified merger
  - in the absence of a merger, the assets of the failing firm would exit
- Francisco Enrique González-Díaz proposes an alternative framework
  - assess which is the most likely counterfactual scenario
  - compare the factual and the counterfactual scenarios
- his proposal highlights that the second condition of the guidelines could be clarified
  - it also raises the question of how the most likely counterfactual scenario should be selected
  - interaction between the failing firm defense and bankruptcy law
    - more efficient to facilitate transmission of assets of firm in financial distress?

Dealing with mergers in declining industries

- Hans Zenger argues that competition authorities should account for the following effects in industries with structurally declining demand
  - public good nature of downsizing: positive externality on competitors
  - mergers are less anti-competitive when demand is declining
  - the socially optimal number of undertakings is lower in smaller markets
  - large firms are more inclined to reduce overcapacities
- taking these factors into account
  - would a crisis cartel be even more efficient?
  - could a crisis cartel help maintaining a larger number of competitors in the market?