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Reflections on the relevance of efficiency defences in modern EU antitrust law

Ekaterina Rousseva

Policy Coordinator, European Commission, DG Competition, Directorate A Unit 2

The content of this presentation does not necessarily reflect the official position of DG COMP or the European Commission

Arguments

- Under the modernised antitrust rules undertakings may have less need to invoke efficiency defences
 - (i) analysis on substance
 - (ii) procedural instruments
- This does not undermine the role of efficiency gains in the antitrust analysis
- Efficiency defences remain important: reduce enforcement errors, last possibility for undertakings to protect their rights
- Burden of proof, consistency with the principle *in dubio pro reo*

Objectives of the competition rules – constraints on the efficiency defence

- Allocative vs productive and dynamic efficiency, total vs consumer welfare
- Article 101 (3): a fair share for consumers
- *Case 6/72 Continental Can*: Articles 101 & 102 pursue the same objectives
 - Art 102 protects consumers by means of undistorted competition (*Deutsche Telekom* para 180)
- Objectives: consumer welfare and efficient allocation of resources (Article 101 (3) Guidelines, Article 102 Guidance paper)
 - Protecting an effective competitive process
- The efficiency defence is not absolute

Consequences of the effects-based analysis on the frequency of efficiency defences

- Two step analysis under Articles 101 and 102
 - establishing restriction of competition/anticompetitive foreclosure (*prima facie* case of infringement)
 - efficiency defence under Articles 101 (3) & 102
- Effects-based analysis (first step) – thorough analysis, high evidential burden on the Commission
- Consequences: (i) *prima facie* infringement more seldom than under the former form-based approach, recourse to efficiency defences less needed
 - (ii) if a *prima facie* case of infringement is established - reciprocal high evidential burden for the efficiency defence

Efficiency considerations without an explicit balancing exercise under Article 101

- Genuine agency agreement & qualitative selection distribution: efficient forms of organisation
- Ancillary restraints: allow implementation of non restrictive transactions
- Restrictions necessary for entry or development of new markets: solve hold up-problems; dynamic efficiency
 - Para 60 Guidelines on VR, Para 18 (3) Article 101 (3) Notice
 - Case T- 328/03 O2 Germany GmbH OHG

Efficiency Considerations outside the efficiency defence under Article 102

- Pure volume rebates: *'it is of the very essence of a system of quantity discounts that larger purchasers of a product or users of a service enjoy lower average unit prices'* (C-163/99 Portugal v Commission, 51; 85/76 Hoffmann-La Roche)
- Predatory pricing: instead of dominant undertakings to prove efficiency, the burden is on the Commission/plaintiff to prove inefficient (below cost) pricing
- Excessive prices: the United Brands test (cost -profit), the assessment of the excessiveness of the profit margin takes into account R&D and investment risks

Efficiency Considerations outside the efficiency defence under Article 102

- Refusal to deal
 - The condition that the refused input is indispensable for competition in a downstream market:
 - unique condition, high evidential burden on the Commission
 - protects investments
 - whether the consequences of the refusal outweigh negative consequences of imposing an obligation to supply
 - The condition that the refusal harms consumers
 - from “new product” to development of a secondary market and/or technical progress (Magill – IMS Health – Microsoft)
 - competitors are prevented from bringing novel products and/or follow-up innovations is stifled
 - competitors should not merely duplicate the product
 - genuine dynamic efficiency

Procedural instruments

- Commitment decisions (Art. 9 Reg. 1/2003)
 - No conclusion as to whether there is an infringement
 - No detailed analysis of negative or positive effects, no efficiency defences – procedural efficiency
 - If undertakings commit to terminate the problematic practice – no need for efficiency considerations
 - If undertakings offer to modify their practice (more likely in Article 101 cases) the commitments may ensure that the restrictions do not go beyond what is necessary for the positive effects to take place

Procedural Instruments

- Commission's discretion
 - to prioritize : focus on cases where efficiency gains are unlikely
 - not to investigate: close a case if the efficiency gains appear significant
- Block Exemption Regulations – practices are presumed efficient below the market share thresholds
- The procedural instruments may obviate the need to resort to efficiency defences but may allow for less explicit ways of appreciating the efficiency gains

Efficiency Defence Article 101 (3)

- Recent experience
 - MasterCard , Morgan Stanley/Visa, Groupement des Cartes Bancaires, CISAC
 - Industrial restructuring agreements: *Amicus curiae* - Irish High Court, preliminary ruling C-209/07 Beef Industry Development Society and Barry Brothers
- The Union Courts in GlaxoSmithKline (T- 168/01;C-501/06 P)

Reflections on the defence under Art.101(3)

- First condition: substantiated efficiency claims, objective benefits
 - Closer scrutiny than before; important for the examination of the rest of the conditions
 - GlaxoSmithKline
 - appreciable objective advantages
 - prospective analysis
 - causal link: not necessarily direct, but proven convincingly

Some reflections on the defence under Art.101(3)

- The agreement is indispensable for the attainment of the efficiency gains (third condition)
 - Necessary for more efficiency than if there was no agreement/restrictions
 - Not strict, of reasonableness
 - Often failed as there are less restrictive alternatives (Morgan Stanley/Visa, CISAC, restructuring agreements, RPM)
- Fair share for consumers
 - Not every part of the efficiency (GlaxoSmithKline: not all funds must be invested in R&D)
 - Positive effects should offset, not exceed the negative effects
 - Victims and Beneficiaries essentially the same (T-168/01GlaxoSmithKline,para251)

Efficiency Defence Article 102

- Early controversy: no exception in the text; no reference to benefits in Art. 2 Reg 1/2003
- Case law negating the availability of the defences (*Michelin I para 85, France Télécom para 217, Atlantic Container para 1112*)
- Case law making room for efficiency defences (*Michelin II, para 98, British Airways (ECJ) para 86, Microsoft para 1135, TeliaSonera, para 76*)
 - negative effects may be counterbalanced by advantages in terms of efficiency which also benefit the consumer; proportionality
- Guidance paper: defence modelled on the conditions of Article 101 (3)
 - Need for consistency with Article 101 (given possible parallel application)

Efficiency Defence Article 102 (Difficulties)

- First condition: predatory prices
- Second condition: predatory pricing, rebates, contractual tying
- Fourth condition unlikely to be satisfied where dominance approaches to dominance: refusals to deal
- Efficiency offence?
 - inappropriate qualification, as the defence is for a prima facie case of infringement, following a thorough assessment
 - Example: the condition for indispensability in refusals to deal
- The case of naked restraints

Burden of proof

- Evidential: who adduces the evidence
 - Legal burden: who risks in case of doubt (*non liquet*) – more theoretical
- “... before there is any need to allocate the burden of proof at all, each party bears the burden of adducing evidence in support of its respective assertions. A substantiated submission by the Commission can be overturned only by an at least equally substantiated submission by the parties. The rules governing the burden of proof **are only applicable at all where both parties provide sound, conclusive arguments and reach different conclusions.**” (AG Kokott in Case C-105/04 P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission)

Burden of proof

- Denial defences: directed narrowly against a prima facie case of infringement, shifts the burden of production of evidence
- Affirmative defences: concedes the prima facie case but claims a legally recognised exception, the proponent of the defence bears the evidential and the legal burden

Burden of proof Article 101(3)

- Art. 2 Reg 1/2003 the benefits to be proved by the undertakings
- *Non liquet* unlikely as the evidential burden under Art. 101 (3) is specified
 - Possibly under the second condition: whether the efficiency gains neutralize the negative effects
- Article 101 (3) affirmative defence – Opinion of AG Trstenjak in Beef Industry, para 55
 - the proponent bears the evidential and legal burden
- The Commission does not establish *ex officio* the conditions of Article 101 (3), though cannot remain passive if they are invoked (56 & 58/64 Consten v Grundig)
- No suggestion in the case law that bearing the legal burden of proof for efficiency defence could be in conflict with the principle *in dubio pro reo* (C- 501/06 P *GlaxoSmithKline*)

Burden of Proof vs Obligation to give reason

- Advocate General Trstenjak in *Beef Industry Development*
 - The Commission is obliged to carry out an appropriate examination of the undertakings' arguments under Article 101 (3)
 - This does not mean that the Commission is required to prove that the conditions of Article 101 (3) are not fulfilled
 - the Commission's reasoning must have a certain minimum of substance
- The distinction reflects the Commission's investigative/prosecutorial and adjudicative functions
- The distinction clear and important in private enforcement

Burden of proof for the efficiency defence

Article 102

- No reference for benefits under Art 2 of Reg/2003
- But: (i) the burden of proof lies upon the one who affirms a fact, not the one who denies it (ii) the knowledge of the efficiency with the dominant undertaking; (iii) probatio diabolica if the Commission bears the burden; (iv) Recital 5 of Reg 1/2003
- The case law suggests that the dominant undertaking establishes the justifications (Michelin II, British Airways)
- GC clarified in Microsoft : *it is for the dominant undertaking concerned, **and not for the Commission**, before the end of the administrative procedure, to raise any plea of objective justification **and to support it with arguments and evidence*** (T-201/04 para 688)

Burden of proof for the efficiency defence

Article 102

- Legal burden: less clarity in the case law
- However: as under Article 101(3), the defence operates as an affirmative defence – evidential and legal burden on the proponent
- Problems if different rules apply under Articles 101 and 102 (especially where the provisions apply in parallel)
- In *dubio pro reo* & the distinction between burden of proof and the obligation to give reason: same arguments as under Art. 101 (3)

Conclusions

- The rarity of successful efficiency defence an anticipated consequence of the effects-based analysis
- The analytical assessment and procedural instruments allow for efficiency considerations to be taken into account in more subtle ways
- Efficiency defence are nevertheless important for reducing enforcement errors, protecting undertaking's rights
- Imposing the burden of proof for the efficiency defence on undertakings appear consistent with general principles of law