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Assessing unilateral effects in horizontal mergers: Closeness of competition and the role of bidding data

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Overview

- Closeness of substitution as an offence or as a defence
- What type of bidding analysis may produce the most robust evidence?
- Should the analysis focus on ‘winner and runner up’-data or on tender participation overall?
- Legal threshold for intervention under the SIEC standard - what degree of competitive interaction between the parties raises concerns?

Closeness of substitution in the EUMR framework

Horizontal Merger Guidelines, para. 25:

25. Generally, a merger giving rise to such non-coordinated effects would significantly impede effective competition by creating or strengthening the dominant position of a single firm, one which, typically, would have an appreciably larger market share than the next competitor post-merger. Furthermore, mergers in oligopolistic markets ([29]) involving the elimination of important competitive constraints that the merging parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors may, even where there is little likelihood of coordination between the members of the oligopoly, also result in a significant impediment to competition. The Merger Regulation clarifies that all mergers giving rise to such non-coordinated effects shall also be declared incompatible with the common market ([30]).

Closeness of substitution offence / defence

Horizontal Merger Guidelines, para. 28:

28. Products may be differentiated ([32]) within a relevant market such that some products are closer substitutes than others ([33]). The higher the degree of substitutability between the merging firms' products, the more likely it is that the merging firms will raise prices significantly ([34]). For example, a merger between two producers offering products which a substantial number of customers regard as their first and second choices could generate a significant price increase. Thus, the fact that rivalry between the parties has been an important source of competition on the market may be a central factor in the analysis ([35]). High pre-merger margins ([36]) may also make significant price increases more likely. The merging firms' incentive to raise prices is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes ([37]). It is therefore less likely that a merger will significantly impede effective competition, in particular through the creation or strengthening of a dominant position, when there is a high degree of substitutability between the products of the merging firms and those supplied by rival producers.

‘Distant competitor defence’ in bidding markets

- Recent experience

  - Decision M.7429 of 29.6.2015 - ***Siemens / Dresser-Rand***: Phase 2 clearance, no remedies

  - Decision M. 7802 of 19.1.2016 - ***Amadeus / Navitaire***: Phase 1 clearance, no remedies

  ➢ Higher chances to prove distant competitor defence in bidding markets due to availability of detailed data on competitive interactions?

Analysis of bidding data

Switching analysis	How many times has A won a customer from B and vice versa?
Participation analysis	How often has A participated in bids won by B and vice versa (overall participation); how often were they winner and runner-up (ranking)?
Price sensitivity analysis	Is the price of A affected by the number of bidders, or by B's participation in tenders?

Focus on overall participation or on the ‘last round’?

- Clarification of Commission’s approach in Siemens/Dresser-Rand and GE/Alstom

- Distinction between

  - Second price framework: winner- and runner-up data

  - First price framework: overall participation

➢ Decision on framework may be decisive for outcome of the merger review – important element for advisors to consider when assessing prospects of mergers in bidding markets

What degree of substitutability indicates concerns?

- No concerns if parties are ***never*** closely competing (Siemens/Dresser-Rand and Amadeus/Navitaire)
- **Legal uncertainty** in other cases
- SIEC threshold requires **elimination of *significant* competition** between the parties, competitive harm must be comparable to creation of a dominant position

4. The creation or strengthening of a dominant position held by a single firm as a result of a merger has been the most common basis for finding that a concentration would result in a significant impediment to effective competition. Furthermore, the concept of dominance has also been applied in an oligopolistic setting to cases of collective dominance. As a consequence, it is expected that most cases of incompatibility of a concentration with the common market will continue to be based upon a finding of dominance. That concept therefore provides an important indication as to the standard of competitive harm that is applicable when determining whether a concentration is likely to impede effective competition to a significant degree, and hence, as to the likelihood of intervention ([4]). To that effect, the present notice is