

>> New Approaches to Economic Challenges [C6]

Implications of globalisation for competition policy: the need for international co-operation in merger and cartel enforcement

THEME OF THE PROJECT

Competition law enforcement preserves the integrity of the free market...

Competition law enforcement exists to preserve the integrity of free markets, undistorted by anti-competitive conduct. More vigorous competition has two main benefits: first, it protects consumers from companies that may, at times, seek or use market power to raise prices or reduce outputs. Second, it promotes productivity growth.

...not just in the OECD but globally...

Historically based within OECD countries, competition law has gone global in the last 20 years. There has been a sixfold increase in the number of jurisdictions with competition law enforcement since 1990, from fewer than 20 to about 120 today.

...but this presents challenge for co-ordination between competition authorities

The past decades have witnessed a rapid globalisation of economic activity which has significantly changed the character of the world economy. Globalisation results in large economic benefits but poses challenges for competition authorities, who must respond to anti-competitive conduct and mergers which increasingly have cross-border effects.

RESULTS OF THE WORK STREAM

Competition law cases increasingly have an international dimension...

There is compelling evidence that the international dimension of competition law cases has increased.

- In recent years, more than 90% of fines against cartels by the US authorities have

been international. The number of cartel cases investigated in the European Union involving a participant from outside the EU has increased by more than 450% since 1990.

- Mergers and acquisitions inherently involve cross-border dimensions and multiple competition authorities when merging companies are global operators with a geographical overlap. Mergers and acquisitions with a cross-border dimension have increased about 250%-350% since 1990.

International agreement have forged consensus on the goals of competition law ...

Significant efforts have been made to ensure that jurisdictions adopt common principles and analytical approaches to assessing anti-competitive conduct and mergers. Today, despite the different wordings in national competition statutes, most authorities agree on the goals for competition law, on the principles underpinning a sound competition policy, and on the appropriate tools to investigate and assess business conduct and transactions.

...and effective co-operation between competition authorities has improved...

Co-operation has improved with the increasing number of co-operation agreements between competition authorities. These agreements are typically bilateral, with the most significant exception being the European Union's network for co-operation between competition authorities. A few competition authorities – such as those in the US, EU, Canada, Japan, the Republic of Korea and Australia – co-operate frequently but most other authorities have little co-operating on enforcement cases. Even the closest bilateral arrangements make no provision to recognise the interdependency of decisions, and lack formal mechanisms to avoid inconsistency. Rather, their value is limited to

information exchange.

...but global merger cases present a particularly complex challenge...

Competition authorities can generate harmful externalities on one another's economies if the authorities disagree about the effects of a global merger. Furthermore, a decision to block a merger by a large jurisdiction effectively vetoes it. Therefore, mergers involving the largest global companies will become increasingly difficult, as multiple approvals are required and the merger must satisfy the most cautious of investigating authorities. Administrative costs from multiple parallel investigations are high and delays in closing deals impose a variety of costs on business.

... as do global cartels

Similarly, global cartels might face parallel investigations, with some jurisdictions much better able to prosecute price-fixing behaviour than others. When the cartel has effects in one jurisdiction, but several of the firms involved are headquartered elsewhere, enforcement might be patchy and inconsistent. In some cases, in the absence of co-operation from a foreign jurisdiction, a competition authority will be unable to investigate and prosecute a global cartel.

NEW APPROACHES AND POLICY IMPLICATIONS

The harm from coordination failure in competition law can be substantial...

Co-ordination failure can have a number of perverse effects. In particular,(1) inconsistent international treatment of the same merger could lead to an otherwise harmless and efficient merger being blocked or a merger deemed harmful by certain jurisdictions being permitted; (2) refusal of requests to co-operate can make it difficult for competition authorities to enforce their national laws; (3) duplicative and potentially excessive amounts of information are generated by multiple jurisdictions.

Since 1995, merger deals affected by divergent jurisdictional decisions had a deal value of approximately USD 100 billion. Inability to detect global cartels could account for damages

to consumers that, for some cartels, could exceed USD 100 million. Annual administrative costs from multiple merger filings of a complex transaction can easily exceed several millions USD.

...and the rationale for strengthening co-operation is increasing...

First, international business is more globalised, and there is still considerable scope for further economic integration. Secondly, there are more competition authorities (because there are more jurisdictions with competition laws), so the complexity of co-operation – which we measure by the number of pairs of authorities needing to co-operate – has increased substantially: by 53 times since 1990, for cartel cases, for example. The number of competition cases with an international dimension will continue to grow rapidly, even if the spread of competition laws now levels off as almost all major economies have competition authorities in place.

...hence new approaches to international co-operation in enforcing competition law are needed

Techniques for bilateral co-operation have improved since the mid-1990s, thanks in part to the efforts of the OECD and other international bodies, as well as through the efforts of the authorities themselves. Continuing, and deepening, the existing system of bilateral co-operation is important. However, making it work will be increasingly complex, as business becomes ever more globalised, spanning more and more jurisdictions enforcing competition law. In the face of this challenge, updating or renewing the current co-operation frameworks may be necessary. An important first step in this direction has been taken by revising the OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings in September 2014.

PROJECT PAPERS

- **OECD (2014)** "New Approaches to Economic Challenges – Implications of globalisation for competition policy: the need for international co-operation in merger and cartel enforcement" DAF/COMP(2014)4/REV1