



Prove it!

New Evidentiary Hurdles for Merging Parties and
Government Regulators – The view from Europe

I. European Merger Control: From Structure to Effects

- Structural Approach used to dominate European Merger Control
 - Commission focussed on risk to competition rather than on negative effects for consumers („Gefährdungstatbestand“)
 - Market integration played a key role in the assessment of mergers
- The Economisation of Merger Control
 - Focus of the analysis has shifted substantially
 - from: worsening of market structure & will other suppliers find it harder to compete effectively?
 - to: ability and incentive for the merging firms to make use of additional pricing power
 - Review by CFI reflects changes to substantive assessment
 - from formal assessment of „manifest errors“ to substantive review of the facts
 - willingness to challenge factual assessment as well as use of economic theory



II. The Changing Face of the Merger Control Process (1)

- Change in substantive test affects the review process
 - shift from objective, external to more subjective, firm specific facts
 - changes to the tools used in the analysis
 - extensive use of economic theory / econometric studies
 - analysis of very detailed market data
 - relevance of internal documents
 - changes to the fact finding process
 - more sophisticated questionnaires to all participants
 - data requested may not be readily available to companies
 - need to verify (third) party data before use in decision
 - need to operate a black-box procedure during the investigation to reconcile rights of defence and confidentiality requirements

II. The Changing Face of the Merger Control Process (2)

- Adding procedural layers to the administrative process
 - involvement of Chief Economist
 - introduction of the Devil's Advocate Panel
- Working around time constraints
 - further front loading the process / relying on „complete“ Form COs
 - prolonging the procedure artificially
- Rediscovering presumptions – passing the buck to the parties

II. The Changing Face of the Merger Control Process (3)

- The recent judgement in Sony / BMG raises three new issues
 - managing the persuasiveness of a Statement of Objections
 - function of the factual submissions / economic analysis by the parties
 - directly relying on facts presented by the parties in the decision
 - need to thoroughly analyse the validity and weight of economic argument
 - the standard of proof – the same for clearance and prohibition decisions?
- How literally should the judgement be taken?

III. Putting the present System under Pressure

- Effectively, only 2 months (between opening of Phase 2 and issuance of SO) available for in-depth fact gathering and economic analysis
- There are limits to further front loading the process
 - new facts will emerge during the process – in particular as third parties start to provide input to the Commission
 - front loading carries danger of unduly burdensome shotgun approach
- Need to maintain rights of defense
 - The review process will continually raise new legal and economic issues
 - rights of defence must allow the parties to respond to developments when they occur in the process



IV. A more efficient use of resources – a possible solution?

- Prioritise effectively
 - Focus early on the most important cases
 - Focus early on the most relevant issues
- Tighten internal procedures to include check & balances early
- Acknowledge that today's SO marks the end of the investigative process
 - it effectively constitutes the factual basis of the decision for final comments by parties
 - well reasoned articulation of concerns must occur at an earlier stage
- No „moving of the goal posts“ - concerns must be articulated at an early stage of the investigation



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