

Merger Efficiencies

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Antitrust Mergers

Merger control is about prediction



Problem: merger law of efficiencies does not make economic sense

Law regarding merger efficiencies is not clear

- Don't get used often before agencies and courts
- Courts often don't know how to measure efficiencies
- When they do get used cost reducing efficiencies given more weight in practice than quality enhancing efficiencies

Economics and law of efficiencies

general agreement that efficiency considerations should matter when courts or agencies decide whether to block a particular merger

broad consensus frays when it comes to specific cases

- antitrust law (mostly) focuses on consumer welfare rather than total welfare
- which mergers will likely lead to efficiency gains is the subject of debate among economists
- even where a merger or course of conduct may bring efficiency gains, it may at the same time carry costs for consumers or competition, and there is not a clear consensus on how to balance those costs and benefits

Efficiencies Matter for Health Care

Massive consolidation wave since passage of the
ACA

Price and quality issues both particularly important

Price and Quality have different potential relationships

Depending on the model the effects can be pro-competitive, anti-competitive or ambiguous regarding price and quality efficiencies

History of Efficiencies I

Different goals of antitrust

FTC v. Proctor & Gamble (1967)

- “[p]ossible economies cannot be used as a defense to illegality”
- Based on reading of legislative history

1968 DOJ Horizontal Merger Guidelines

- Provide small opening for efficiencies

Virtually no rulings on substantive efficiency arguments until RSR v. FTC (1979) (rejecting efficiencies)

History of Efficiencies II

DOJ 1982 Horizontal Merger Guidelines

- Creates efficiencies defense

DOJ 1984 Horizontal Merger Guidelines

- Treated as a factor rather than defense

Shift from Chicago on merger efficiencies to Harvard

Case law begins to shift in the 1980s to recognize efficiencies

FTC v. University Health, Inc. (11th Circuit 1991)

History of Efficiencies III

- 1997 Merger Guidelines revisions makes efficiencies part of the competitive effects analysis
- Introduction of “extraordinary” efficiencies overcoming anti-competitive threat
- FTC v. H.J. Heinz Co. (DC Cir. 2000)
- 2010 Merger Guidelines include language on innovation and fixed cost efficiencies

Measuring Efficiencies in the Merger Guidelines

Merger Guidelines Section 10

- Must be merger specific
- “Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means.”
- “Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.”

Measuring Efficiencies in the courts

- “Actual practice suggests that the agencies have adopted an intermediate path between wariness about proof of efficiencies and recognition that where efficiencies do exist it could be costly to ignore them” Shelanski (2014)
- no court has held that efficiencies overcome anti-competitive effects of a merger
- Courts focus on cost efficiencies
- Give short shrift to quality efficiencies (particularly in hospital cases)

Measuring Efficiencies on Cost

More art than science by the agencies

Judges are confused too but need not be

Bad case law from the 1960s allows agencies significant power to block mergers that would otherwise be efficient

Measuring quality efficiencies empirically

Empirically a challenge but not impossible:

Measure quality efficiencies all the time in health care setting

- Academic measurements in economics and public health
- Government measurements for CMS reimbursement
- Outside the US in price controlled health care markets (UK and the Netherlands)

Measuring quality efficiencies in court

Courts measure efficiencies all the time in conduct cases

- RPM
- Tying in franchising contracts
- Makes existing (Northwest Wholesale Stationers) or new markets (BMI) more efficient

This shows that efficiencies analysis is administrable

St Luke's

- Hospital acquisition of physician group
- Court looks very skeptically at efficiencies
 - does not understand bilateral monopoly
 - does not understand quality based efficiencies due to ERMs

Conclusion

1. Agencies and courts should not be afraid of quality analysis
2. Should provide equal weight to quality as to price
3. Agencies can provide guidance in new
Commentary on the type