



€ European Union policymakers have in principle put innovation at the heart of

INNOVATION IN EU MERGER CONTROL: WALKING THE TALK

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1. See
[http://ec.europa.eu/europe
2020/index_en.htm](http://ec.europa.eu/europe2020/index_en.htm).

2.

In order to assess how DG COMP has tackled these claimed efficiencies in practice, we looked at all Phase II cases under the new ECMR (2004-11). As only a small proportion of cases go into Phase II (about five percent), the analysis can only rely on 42 cases. Table 1 shows the results. There were no negative decisions.

Of the 42 Phase II cases, efficiency claims were put forward in 11 cases. In nine cases, both static and dynamic efficiencies were claimed; in two cases, only dynamic efficiencies were claimed. This means that in only 26 percent of the cases did parties to the merger claim efficiencies. Interestingly, out of the 42 cases, there were at least two in which the Commission suggested that it would very likely have accepted efficiency claims, but it did not verify them because the parties did not claim and substantiate them. This shows (a) the aforementioned placing of the burden of proof on the notifying parties, and (b) the trade-off that DG COMP constantly faces between its willingness (and ability) to identify and introduce efficiency considerations in its analysis, and the fear of taking on the burden of proof and causing a significant loss of legal certainty.

Of the 11 claimed cases, efficiency claims were accepted in only two. Both static and dynamic efficiency claims have a low acceptance rate, but dynamic efficiencies in particular have a very low probability of acceptance. There seem to be no major differences in how decisive the various conditions for acceptance were (verifiability, merger-specificity, and consumer benefit).

Even in the unlikely event of claimed efficiencies being accepted, the claimed and accepted efficiencies, whether static or dynamic, have never proved to be decisive in case decisions, ie have never changed a case decision.

It is worth noting that the two cases that were accepted are both related to non-horizontal activities. The European Commission specifically highlights that, unlike horizontal integration, vertical

only four out of the 42 cases claimed innovation effects. Only one innovation claim was accepted, but did not influence the decision. With so few data points, one cannot draw any firm conclusions. Nevertheless, some interesting observations can be made. The verifiability condition seems to be the most difficult to meet. This is consistent with case law and the horizontal merger guidelines, all suggesting that efficiencies are much more likely to be considered when their effect on consumer welfare (via their direct effect on prices) is more immediate and verifiable. This is unfortunate for innovation impact assessments of mergers because innovation effects are typically uncertain and become clear only over the medium to long-term.

That the Commission accepted the existence of

II mergers simply did not offer any innovation efficiencies, and therefore the parties did not raise the issue. That, however, seems unlikely. When we look at the sectors and the companies involved, there are several Phase II cases in which innovation effects can be presumed to be present. A case can be defined as innovation-sensitive, when either (i) it is in a medium or high-tech sector (ie a sector with an above-average research and development intensity), and/or (ii) the par-

12. The classification of industries as medium and high-tech is based on the OECD classification. The classification of firms into innovation-active or not is done on the basis of their presence in the EC-IPTS Scoreboard of top R&D spenders (see: <http://iri.jrc.ec.europa.eu/research/scoreboard.htm>). The sector definition used here may be too broad to reflect the market associated with the specific merger case. Similarly, firms may be among the top R&D spenders, but not necessarily active in R&D for the specific market involved in the case. On the other hand, firms may be innovation-active, but not big enough to qualify for the scoreboard.

13. Out of the total of 28 innovation-sensitive cases, 20 involved firms that are in the scoreboard of largest R&D spenders (see footnote 12). Twelve cases score positive on both criteria (including three out of the four claiming cases). All 12 aborted/withdrawn cases can be classified as innovation-sensitive. Seven of these cases involved firms that are in the largest R&D spenders scoreboard. Three of these cases scored positive on both criteria.

14. Failure to provide information on efficiencies will not be taken to imply that the proposed concentration does not create efficiencies or that the rationale for the concentration is to increase market power. Not providing the requested information on efficiencies at the notification stage does not preclude providing the information at a later stage (Commission Regulation (EC) No.802/2004). Note that innovation could still be of relevance in any of the other 21 cases that

The indirect effects on innovation which in the absence of unidirectional effects predicted through the product market effect are typically in theory, it is no surprise that earlier empirical taken into account elsewhere in the case analyses generated mixed findings: sometimes

positive, sometimes insignificant, but often Theoretical studies on industrial organisations provide arguments for both positive and negative effects on the technological activities of the merging firms after a merger

More recent work has looked at factors that help to produce more clearcut predictions. Of particular use for better determining the impact of merged duplicated R&D, R&D inputs will decrease after the merger, but R&D efficiency will increase

and product markets in which the merging parties economies and/or synergies in R&D by combining the R&D capabilities of merging parties, in which case merged firms have a bigger incentive to perform R&D before their merger. This can, however, be counteracted by increased organisational complexity.

A merger might reduce R&D competition. The possibility to better coordinate R&D investment after the merger will typically lead to lower R&D expenditures, unless technology spillovers are important, in which case a merger will lead to higher R&D expenditures.

were not considered highly innovation-intensive. For instance, one of the four cases in which innovation-related efficiencies were alleged is not in the set of innovation-intensive cases.

15. It is not the aim of this Policy Contribution to take part in the debate about which welfare standard ... consumer surplus vs. total welfare ... is the most appropriate.

16. In general, the longer the start of the efficiencies is projected into the future, the less probability the Commission may be able to assign to the efficiencies actually being brought about (ECMG, paragraph 86).

17. For example Caves (1989), Cohen and Levin (1989), Röller et al (2001), Kamien and Schwartz (1982), De Bondt (1997).

18. For example Hall (1999), Hitt et al (1991), Ravenscraft and Scherer (1987), Valentini (2011).

19. See Cassiman et al (2005) for a review of the analyses of the impact of technology and market-relatedness together with other characteristics. Other factors beyond the technology-relatedness of the merging parties include the debt-financing character of the deal and the quality of the pre- and post-acquisition integration strategy.

R&D inputs and R&D efficiency can increase or decrease depending on which effect dominates the merger. After classifying the merger according to the technological and product-market relatedness of merging parties, the effect on the R&D

be examined in all Phase I cases would imply an unrealistic burden on DG COMP's case-handling capacity. Notwithstanding these arguments, one

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