CRA Annual Brussels Conference:

Economic Developments in Competition Policy 2018

Issues in Merger Control: Killer Acquisitions, Platform Mergers, Attention Markets and Bargaining in Media Deals

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December 5, 2018

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The merger deal – what it was

- This was a vertical media merger between Altice (owner of MEO, one of the two main pay-TV platforms) and Media Capital (a content producer and owner of the most viewed TV channels).
- Both had significant market shares.
- After **an in-depth investigation**, the AdC established significant competition concerns regarding this deal. As a result of our concerns, the parties ultimately **withdrew** the merger.
- Occurred more or less at the same time as AT&T/Time Warner.
- On both deals, some questions overlapped.
- The key aspect was the **risk of foreclosure**, by the merged entity, of rivals in the pay-TV market.

- And note that 83% of households in Portugal watch TV through pay-tv platforms.

- With this in mind, let me highlight 3 takeaways from our **specific experience** for the wider debate on media mergers.

1. In vertical (media) mergers, facts are key, and decisions must be guided by sound economic analysis

- There is no simple rule to apply: the answer and the assessment remain **case-specific**.
- Meaning that the **dividing line** between pro-competitive and harmful vertical mergers greatly depends on the **facts** of the case.

- I don't think it is useful here to go over the facts of this case, so I will jump to the sound economic analysis part:
- We analysed several **vertical theories of harm,** and paid special attention to the **risk of input foreclosure**.
- It was therefore of paramount importance to **assess the risk** associated with this harm to competition.
- In order to do just that, we firstly looked at the **ability and the incentives** of the merged entity to actually deny MEO's competitors access to key media content – i.e., total input foreclosure.
- And we concluded that **it would be possible** for the merged entity to engage in this type of behavior after the merger.
- This was obtained from looking on how important Media Capital's TV channels are and how consumers would react if those channels were extracted from their current provider's programming grid.
- We carried out a **consumer survey** on phase II and concluded that there were **no substitutes** from other sources that would allow them to react if access to the channels was denied. So, ability proven, we moved to incentives.
- These risks were only relevant if the merged entity could profit from foreclosing rivals.
- And we concluded that the estimated gains in profits from pay-tv provision more than offset the losses in revenues on advertising and customer interaction services as well as carriage fees.
- That is, the merged entity **would have more to gain than to lose** from denying rivals access to its TV channels.
- We also looked at **partial input foreclosure**, i.e., the possibility that the vertically integrated firm would be willing to supply its channels to MEO's rivals, although at significantly **higher prices**.
- And here, the economists on the case team assessed this risk using a **Nash bargaining** framework, such as the one used in previous media mergers by the European Commission and the US agencies.
- This allowed us to conclude that the merger strengthened Media Capital's bargaining position in negotiations with MEO's rivals over carriage fees. The bargaining model also showed that post-merger, Media Capital and MEO's rivals would always have an incentive to reach an agreement.
- However, it also predicted significant increases in **carriage fees**, therefore substantially raising MEO's rivals' costs.
- Bill and Greg, who are the experts on this technical aspect, have just addressed it before me. And I know that you Cristina have written about the role of bargaining models on vertical media mergers.

- The message I would like to stress here is that this was **an important element in our analysis** and led to predictions that were relevant for our assessment of the merger.

2. **On remedies: when assessing complex foreclosure concerns, specification is key in determining where they could effectively work.**

- The merging parties presented a set of **behavioral** remedies, aimed at addressing input foreclosure, as well as customer foreclosure.

- What's important here?
  We found the remedies package **poorly specified**, allowing for too much discretion for the merged entity, which in turn posed a high risk of circumvention that could also not be effectively monitored. And finally, they were also likely to create distortions in the market.

3. **While acknowledging the efficiencies that vertical mergers may entail, competition agencies must not hesitate when significant risks for competition and consumer welfare are identified.**

- So, it came to a point in which we had a sound economic analysis that showed that the integrated firm would have **the ability and the incentive** to engage in total and partial foreclosure strategies.
- In both foreclosure outcomes, **the ability** of MEO's rivals to **compete** would be hindered.
- Moreover, **entry barriers for new players**, both traditional and online, would be raised.
- And so, faced with less competitive pressure, MEO would have an increased ability to **raise prices to final consumers**, and would be **less pressured** to acquire and produce high-quality content.
- The end-result of the merger would ultimately and likely be an increase in subscriber fees for households.
- This outcome is **precisely what merger control was designed to**.

- This was also, by the way, not the first time that the AdC opposed a vertical merger, including one in media in 2014.

To sum up, our experience allows to highlight the following:

- **Don't extrapolate too much from so-called similar cases. Facts are key** in assessing vertical mergers, and you must use **sound economic analysis to explore the different theories**.

- Remedies must be **clearly and exhaustively specified** and we should only accept them if we think they will be effective and easily monitored.

- Vertical deals may exhibit efficiency gains, but they can also harm consumers. **Merger control was designed to detect and prevent precisely those deals.** Work on a sound economic analysis to sustain your decision and put the consumer first.

- And finally, once you have done an excellent job on your analysis, the **real** challenge will be to explain your decision outside the small circle of competition economists. Which goes back to the notion that we need to do a better job at conveying the benefits of competition to the general public.

- As someone put it yesterday at a conference on the Treaty of Lisbon, 11 years after it was signed there are still articles that are underused. Well, I don't think we are underusing articles 101 and 102. But we are not overusing them either.