MORE ECONOMICS IN ASSESSMENT OF COORDINATED EFFECTS: IMPALA LITIGATION AND UNWORKABLE LEGAL STANDARDS

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Abstract

Recent developments in the competition law jurisprudence in the EU indicate continuous movement towards a more economics-based assessment of the effects on competition in eventually all areas of competition law enforcement. Facing new challenges of increased complexity of the economic theories and economic evidence Commission and Community Courts attempted to develop workable legal standards in order to assure the efficiency and predictability of the competition law enforcement. However, the quest for clearly formulated legal standards wasn’t always productive. Present paper addresses these issues on the example of the assessment of coordinated effects (tacit collusion/collective dominance) under the EC Merger Regulation. Author takes the position that in this particular area of competition law enforcement, search for a general, and catch-all legal standards has in fact delayed the incorporation of the economic assessment in the respective legal procedures. While the impact of the recent Impala litigation remains uncertain, the author argues that it represents an important milestone in the development of economically sound legal standards in this field.

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1. Introduction.

Recent developments in the merger review jurisprudence brought the attention of the practitioners and academia to the issue of the appropriate legal test to be used for the assessment of collective dominance or collusive practices in ex ante merger assessment. While the issue appeared to be relatively settled after the Airtours judgment (1), which produced a three-prong cumulative legal standard that had to be met by the Commission when making the case for collective dominance in its individual merger decisions, the Impala I judgment (2) rendered by the CFI cast some doubts regarding the solidity and consistency of this standard, which will be discussed in detail in the present paper. On a more general note, recent developments of the Community jurisprudence, particularly in the field of merger control, tend to point in the direction of a more economic-based assessment, attempting to formulate the standards of proof and scope of judicial review exercised by the Community Courts over the Commission’s merger decisions. The Impala II judgment (3) by ECJ explicitly addressed some of these issues, which might indicate continuous reforming of the progressing merger review practice with subsequent impact on legal certainty, predictability and expediency of the Community merger review. Present paper approaches these issues on the particular example of the assessment of coordinated effects or tacit collusion in merger assessment context, which might be telling of the general tendencies in the development of the EC merger control.

Continuous reforming of legal standards, their adaptation to the emerging economic theories represents a normal course of events. The development of the US antitrust law heavily influenced by the dominant schools of economic thought provides an illustrative example in this regard. At the same time, there could be instances where the development of legal standards is lagging behind the emerging economic research or inhibits its application in the enforcement practice. It is suggested that this could be the

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(3) Case C-413/06 P, Bertelsmann AG and Sony Corporation of America v Impala (Impala II). [2008] ECR 1-4951