HOW EFFICIENT IS THE COMMISSION AT MAKING DECISIONS UNDER ARTICLE 101(3)?

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STRUCTURE OF PRESENTATION

- The substantive competition rules on efficiencies
- Jurisprudence and guidance on efficiencies
- Decisions on efficiencies
- Object restrictions and efficiencies
- Conclusion
Article 101 - there is an explicit efficiency ‘defence’ in Article 101(3)

Article 102 - Domco may produce efficiency arguments in favour of its behaviour: see in particular paragraph 41 of Case C-209/10 Post Danmark A/S
EUMR - Article 2(1) refers to ‘technical and economic progress’, and efficiencies can be taken into account when the Commission makes its appraisal of a merger: see for example paragraphs 76-88 of the *Horizontal Merger Guidelines*
THE SUBSTANTIVE RULES ON EFFICIENCIES

- It is clear, therefore, that the substantive competition rules do provide for adequate consideration of efficiency arguments, albeit that they operate differently from one competition law provision to another.

- But how much do we know about the analysis of efficiency arguments in practice?
HOW EFFICIENT IS THE COMMISSION AT MAKING DECISIONS UNDER ARTICLE 101(3)?

JURISPRUDENCE AND GUIDANCE ON EFFICIENCIES

- There is abundant guidance available on the analysis of efficiencies
  - The jurisprudence of the Courts, including recent cases
    - GlaxoSmithKline; MasterCard v Commission; FAPL/Karen Murphy; Pierre Fabre (Article 101)
    - PostDanmark (Article 102)
    - Ryanair v Commission (EUMR)
THE SUBSTANTIVE RULES ON EFFICIENCIES

There is abundant guidance available on the analysis of efficiencies

- Decisions of the Commission, including recent cases
  - CISAC Agreement; GlaxoSmithKline; MasterCard (Article 101 - all negative)
  - Tomra; Telefónica; Intel (Article 102 - all negative)
  - Ryanair/Aer Lingus; Olympic/Aegean Airlines (1); Deutsche Börse/NYSE (EUMR - all negative)
THE SUBSTANTIVE RULES ON EFFICIENCIES

- There is abundant Commission guidance available on the analysis of efficiencies
  - Article 101(3) Guidelines
  - Vertical Guidelines
  - Horizontal Cooperation Agreement Guidelines
  - TTBER Guidelines
  - Horizontal Merger Guidelines
  - Article 102 Guidance on Enforcement Priorities, paragraph 30
DECISIONS ON EFFICIENCIES

 Are there any Commission decisions **upholding** an efficiency claim?
  - Article 7 Regulation 1/2003 **prohibition decisions**: but these are negative decisions only, rejecting efficiency arguments
  - Article 10 Regulation 1/2003 **declarations of inapplicability**: but there has never been one (see further below)
DECISIONS ON EFFICIENCIES

- Are there any Commission decisions *upholding* an efficiency claim?
  - **Informal guidance** under Regulation 1/2003: but this has never been given (nor asked for?)
  - **Article 9 commitment decisions**: but they do not involve a finding of (non-)infringement

- To what extent can/should Article 9 decisions have normative effects?
**DECISIONS ON EFFICIENCIES**

- Are there any decisions upholding an efficiency claim?
  - Decisions of national competition authorities?
    - NCAs cannot adopt a non-infringement decision under Articles 101 and 102 *(Tele2Polska)*
    - An NCA could make a decision acknowledging efficiencies under domestic law where there is no effect on trade between Member States
How Efficient is the Commission at Making Decisions Under Article 101(3)?

Decisions on Efficiencies

- Are there any decisions *upholding* an efficiency claim?
  - Decisions of NCAs
    - Note the decision of the Polish competition authority on *Rafting on the Pieniny River* permitting price fixing under Article 8 of the Polish Competition Act
    - See also the informal opinion of the OFT on *Rural Broadband Wayleave Rates*, but this was not a formal decision
DECISIONS ON EFFICIENCIES

- Are there any decisions *upholding* an efficiency claim?
  - National courts/Article 267 references
    - Efficiencies may be raised as a defence in litigation before a national court
    - A national court could itself rule on the matter
    - Or it could make an Article 267 reference
DECISIONS ON EFFICIENCIES

But are there any decisions *upholding* an efficiency claim?

- National courts/Article 267 references
  - See eg *Beef Industry Development Society v Competition Authority*: efficiency defence dropped before trial
  - See also *FAPL* and *Pierre Fabre*: efficiency defences unavailable or unlikely to be available
DECISIONS ON EFFICIENCIES

Provisional conclusion:
- There is a lack of *positive* decision-making from the Commission, NCAs and Courts on efficiency arguments under Article 101(3)
- This absence of decisions makes it difficult to assess the likelihood of efficiency arguments being successful
Can ‘object restrictions’ pass the Article 101(3) test?

- In law yes: Matra Hachette v Commission; GlaxoSmithKline; MasterCard v Commission; Pierre Fabre
- The Article 101(3) Guidelines acknowledge this (paragraph 46)
- So do the Vertical Guidelines (paragraph 225)
Can ‘object restrictions’ pass the Article 101(3) test?

- There have been examples of object restrictions satisfying Article 101(3): eg *Austrian Airlines/Lufthansa*
- BUT there seems to be a widespread belief that object restrictions will never pass the test
OBJECT RESTRICTIONS AND EFFICIENCIES

Can ‘object restrictions’ pass the Article 101(3) test?

- Some Commission statements get very close to saying this: eg TTBER Guidelines, paragraph 18
- This is highly unfortunate, and is among the reasons that firms claim that they are not party to an agreement that restricts by object
OBJECT RESTRICTIONS AND EFFICIENCIES

Can ‘object restrictions’ pass the Article 101(3) test?

- The object-effect distinction in Article 101(1) would be much less contentious if it were demonstrably the case in law and practice that object restrictions can be defended under Article 101(3)
- Note how many cases in the EU Courts explore the object-effect distinction
Can ‘object restrictions’ pass the Article 101(3) test?

Recent judgments on ‘object’ restrictions

- *Dole and del Monte v Commission; Expedia; Allianz Hungaria; Protimonopolný úad Slovesnkej republky*
- Note also *Lundbeck; Telefónica/Portugal Telecom*
OBJECT RESTRICTIONS AND EFFICIENCIES

Solution: Article 10 declaration of inapplicability

- Of course there has to be a suitable case: is there?
- Is there a danger of Article 10 leading to ‘back-door’ individual exemption?
- That was a legitimate concern in the years immediately after Regulation 1/2003 came into force
OBJECT RESTRICTIONS AND EFFICIENCIES

Solution: Article 10 declaration of inapplicability?

- But Regulation 1/2003 has worked very well in practice: is back-door individual exemption a concern today?

- And how else is it possible to clarify the law under Article 101(3) (and ‘Article 102(3)’?)
Could resale price maintenance ever satisfy Article 101(3)?

- Rpm is regarded as an object restriction
- Object restrictions can be defended under Article 101(3)
- The vertical guidelines recognise that Article 101(3) could apply to rpm
Could resale price maintenance ever satisfy Article 101(3)?

But how will there be a decision?
- Article 10?
- Article 9?
- Informal guidance?
- NCA applying national law?
- Private enforcement - but rare for rpm to be litigated

Solution: Article 10 declaration
CONCLUSION

Could the system be more efficient?

- Articles 101 and 102 and the EUMR accommodate efficiency arguments
- There is plenty of case-law and soft guidance
- However the decision-making process prevents the generation of ‘real life’ examples of successful efficiency claims
- And that is not efficient!