Some developments and controversies in unilateral effects analysis

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IBC Competition Economics 2012
Overview

Developments and controversies

- Market definition is dead!

UPP, GUPPI, IPR and all that jazz...

- Price pressure analysis is too difficult. No, wait, it’s too easy!

- Either way, it’s too interventionist

Some other thoughts
Market Twain

Market definition not a US-style statutory predicate. Plus, price pressure tests not used that often...

<table>
<thead>
<tr>
<th>Number of cases</th>
<th>2008-09</th>
<th>2009-10</th>
<th>2010-11</th>
<th>2011-12*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Price pressure analysis**</td>
<td>5</td>
<td>0</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>All decisions‡</td>
<td>80</td>
<td>72</td>
<td>73</td>
<td>88</td>
</tr>
<tr>
<td>Proportion</td>
<td>6%</td>
<td>0%</td>
<td>7%</td>
<td>6%</td>
</tr>
<tr>
<td>All CRM† cases‡</td>
<td>29</td>
<td>22</td>
<td>21</td>
<td>26</td>
</tr>
<tr>
<td>Proportion</td>
<td>17%</td>
<td>0%</td>
<td>24%</td>
<td>19%</td>
</tr>
</tbody>
</table>

*To end February, other years to end March
**For case details, see next slide
†Case Review Meeting—indicates merger subject to in-depth first-phase review
‡Source: www.oft.gov.uk/shared_oft/mergers_ea02/webstats.pdf
<table>
<thead>
<tr>
<th>Case number</th>
<th>Merger parties</th>
<th>Decision date</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>ME/3534/08</td>
<td>Lovefilm/Amazon</td>
<td>15/04/08</td>
<td>Clearance</td>
</tr>
<tr>
<td>ME/3777/08</td>
<td>CGL/Somerfield</td>
<td>20/10/08</td>
<td>Conditional clearance</td>
</tr>
<tr>
<td>ME/3827/08</td>
<td>Tesco/Brian Ford</td>
<td>22/12/08</td>
<td>Clearance</td>
</tr>
<tr>
<td>ME/3933/08</td>
<td>CGL/LBA Co-Op</td>
<td>06/03/09</td>
<td>Conditional clearance</td>
</tr>
<tr>
<td>ME/3887/08</td>
<td>Holland &amp; Barrett/Julian Graves</td>
<td>20/03/09</td>
<td>Reference</td>
</tr>
<tr>
<td>ME/4570/10</td>
<td>Carpetright/Allied Carpets</td>
<td>13/09/10</td>
<td>Clearance</td>
</tr>
<tr>
<td>ME/4551/10</td>
<td>Asda/Netto</td>
<td>23/09/10</td>
<td>Conditional clearance</td>
</tr>
<tr>
<td>ME/4475/10</td>
<td>Inovis/GXS</td>
<td>25/06/10</td>
<td>Clearance</td>
</tr>
<tr>
<td>ME/4805/10</td>
<td>Unilever/Alberto Culver</td>
<td>18/03/11</td>
<td>Conditional clearance</td>
</tr>
<tr>
<td>ME/4739/10</td>
<td>Sector Treasury Services/Butlers</td>
<td>31/03/11</td>
<td>Reference</td>
</tr>
<tr>
<td>ME/4960/11</td>
<td>Princes/Premier Foods</td>
<td>22/06/11</td>
<td>Conditional clearance</td>
</tr>
<tr>
<td>ME/5072/11</td>
<td>Sports Universal Process/Pro Zone</td>
<td>04/10/11</td>
<td>Clearance</td>
</tr>
<tr>
<td>ME/5085/11</td>
<td>Amazon/Book Depository</td>
<td>26/10/11</td>
<td>Clearance</td>
</tr>
<tr>
<td>ME/5191/11</td>
<td>Shell/Rontec</td>
<td>03/02/12</td>
<td>Negotiating UILs</td>
</tr>
<tr>
<td>ME/5252/11</td>
<td>Jewson/Build Centre</td>
<td>08/02/12</td>
<td>Negotiating UILs</td>
</tr>
</tbody>
</table>
Alphabet soup: ingredients
It’s all too difficult!

**Myth**
- The analysis is too new
- It’s too complicated
- It always uses consumer surveys and they’re too expensive

**Reality**
- Used regularly since 2005
- The ingredients for alphabet soup are the same as for market definition. But when products are differentiated, markets can look too narrow and price pressure analysis is more sensible. So the focus on margins and diversion is not a consequence of using price pressure analysis, it is the cause of it
- It uses evidence from internal documents, supply disruptions, market research and econometrics*
*Cases referred to using sources of diversion ratios other than surveys*

<table>
<thead>
<tr>
<th>Case number</th>
<th>Merger parties</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>ME/4570/10</td>
<td>Carpetright/Allied Carpets</td>
<td>Event analysis (store closure)</td>
</tr>
<tr>
<td>ME/4475/10</td>
<td>Inovis/GXS</td>
<td>Parties’ win/loss data</td>
</tr>
<tr>
<td>ME/4805/10</td>
<td>Unilever/Alberto Culver</td>
<td><em>Kantar Worldpanel</em> data</td>
</tr>
<tr>
<td>ME/4739/10</td>
<td>Sector Treasury Services/Butlers</td>
<td>Parties’ win/loss data</td>
</tr>
<tr>
<td>ME/4960/11</td>
<td>Princes/Premier Foods</td>
<td>Econometric analysis</td>
</tr>
<tr>
<td>ME/5072/11</td>
<td>Sports Universal Process/Pro Zone</td>
<td>Parties’ win/loss data</td>
</tr>
</tbody>
</table>
No, wait, it’s all too easy!

Myth
- The ingredients may be poorly measured
- This is no more true of alphabet soup than of other evidence
- The analysis requires lots of hidden and unrealistic assumptions

In defence of assumptions
## It’s too interventionist!

<table>
<thead>
<tr>
<th>Myth</th>
<th>Reality</th>
</tr>
</thead>
<tbody>
<tr>
<td>● The analysis is determinative</td>
<td>● Analysis is seen in the light of other evidence: “…the evidence on diversion and the GUPPI calculations <em>corroborate this view.</em>”</td>
</tr>
<tr>
<td>● By comparison to the traditional market definition and market share approach, it leads to more intervention</td>
<td>● There is pragmatic value (to the OFT and parties) in determinative ‘bright lines’ but it is the parties’ commercial decision to offer UILs</td>
</tr>
<tr>
<td></td>
<td>● Of the 15 ‘price pressure’ cases above, only two were referred</td>
</tr>
<tr>
<td></td>
<td>● In the seven conditional clearances, the analysis has been exculpatory to the traditional approach in five cases and corroborative of it in two</td>
</tr>
</tbody>
</table>

*Unilever/Alberto Culver, paragraph 94*
Other thoughts

Merger simulation

• Aggregation aggravation—no-one pays $235.4126706p for this steak and kidney pie!
• Are retailers’ and consumers’ preferences synonymous?

Counterfactual

• No ‘first to file’ rule so Seagate/Samsung and Western Digital/Hitachi both likely 3-to-2s for the OFT
• More inevitably exiting firm defences, at OFT and CC
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