Is there a problem with today's standard of proof in merger control?

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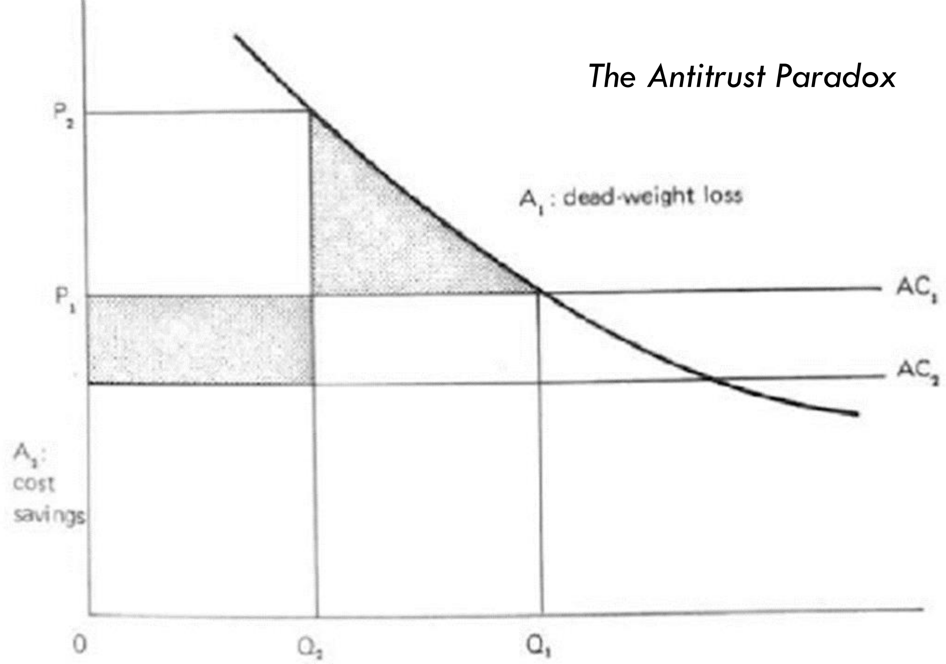
The Antitrust Paradox



The central problem with today's standard [consumer welfare standard] is the burden of proof: antitrust enforcers are forced to demonstrate their case in the face of an avalanche of modelling by consultants, hired by companies that almost by definition have endless resources.

Total versus consumer welfare standard – our experience

Prior/Nordgården

The Norwegian Competition Authority's decision V2005-12:

"The Norwegian Competition Authority will therefore place **less emphasis on savings in fixed costs than savings for every unit that is produced, because only the last-mentioned form of saving can be imagined passed on to consumers in the form of lower prices."**

Decision of the Ministry 2. February 2006:

"[…] the balance between positive and negative socio-economic effects of an enterprise association must occur in the same way according to the current law as according to the previous. [total welfare] **A possible distinction between efficiency gains according to whether they are due to fixed or variable costs have with this conclusion no importance."**

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Why did we change to consumer welfare?

NOU 2012:7

- **Reduce problems associated with information biases** between the competition authorities and the companies involved – especially with regard to efficiencies/slack – (DNB-NOR 2003).
- **Positive influence on which mergers that are proposed** – one example (noted by Salop in Consumer L. Rev. 336 (2010)) could be joint production or a full merger (including joint pricing) – both alternatives may increase total welfare, but the latter alternative clearly increase welfare less as prices increase.
- **Proceedings will be less resource-intensive** with a consumer welfare standard and the decision made will be more predictable for the parties!
- A pure consumer welfare standard **can help to reduce the possibilities related to lobby activity**!

Proposal for changes – relevant market

- Relevant market versus competitive impacts:
  - Basically, the same core issue: «*Thus, an estimate of the diversion ratio implies an estimate of the* ***cross price elasticity, which is the fundamental economic measure of competition between two products***. (Hausman et al 2011)
  - Farrel and Shapiro (2010) provided a **simplifying alternative** focusing directly on competitive impacts by looking on cross-price elasticity between the parties only – used in several cases in Norway
  - **Not possible to avoid the hard work related to cross-price elasticity** by changing the burden of proof – this would end badly:
  - *The tribunal here leaves an impression of having taken overlap between the products as a starting point, as I have previously pointed out. But, as mentioned,* ***overlap is simply not the same as substitutability in the sense of competition law****. Based on this, I cannot see that the tribunal through the first part of its reasoning has proved that the products are substitutable.* (my translation of paragraph 126, Norwegian Supreme Court in the Finn/Nettbil case, 2023)

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Proposal for changes – avoiding scrutiny

- Low thresholds in Norway – and also possible to order notification of concentrations that falls below the turnover thresholds
- There is really **no mergers that are small enough to avoid scrutiny in Norway**:
  - Decision V2023-3 (ØB Group – Betongvarer): the relevant turnover for Betongvarer in 2021 was **NOK 17.2 (EUR 1.5 million)** – ØB Group – NOK 1.8 billion.
  - Decision clearly not based on «bigness», but on competitive effects on the relevant market as described by economic theory
  - More focus on «bigness» and large enterprises would likely lead to more lobby activity from rivalling firms – one example is the **suggestion to ban price discrimination** in the grocery sector

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Proposal for changes – presumption and burden of proof

- Firm size: I do not know of any **presumption based on economic theory** that mergers involving firms above a certain size lead to adverse effects on competition
- **Given a significant cross-price elasticity** horizontal mergers is indeed bad for consumers in the absence of efficiencies. Vertical mergers lacks the crucial ingrediencies of cross-price elasticity – with no other information it is not possible to say if the merger is bad or not
- I would argue that the burden of proof on the parties with regard to efficiencies is too high – **the presumption that the parties have better information is not necessarily true** – at least for small mergers:
  - From ØB Group – Betongvarer V2023-3 (492), my translation:
  - *"It is reasonable to assume that if ØB Group had considered cost savings from sand and gravel as an efficiency gain, **they would have stated it already in the notification, or at least in the letter of 9 March 2023.**"*

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New (and old) indicators

- Margins is of cause relevant evidence and used in combination with cross-price elasticity it enables well founded analysis of effects – challenging to estimate relevant margins
- Margins, HHI and market studies are hardly new indicators or methods
- Methods focusing on the price of a transaction seems more “new”
- Consumer welfare: A simple test – price up or down – well founded in economic theory – developed tools to cope with market definition and also to simplify the analysis – why make the test more complicated again?
- Relevance of competition rules for efficiency should not be overstated: over 60 % of GDP in Norway in the public sector + state ownership in “big” firms + heavy regulation in several markets (energy, telecom) + some markets even have exemption from competition rules – agriculture and books

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