Structural presumptions in merger control?

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Structuring a Structural Presumption for Merger Review

BY FILIPPO LANCIERI, TOMMASO VALLETTI *April 14, 2023*

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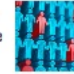

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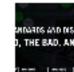

Reregulate.

Or: If you are (very) big **you should make, not buy**

Where do we stand

- Why mergers?
- Why change? Aka the limits of the “consumer welfare standard”
- How has it worked
- Experts, limited resources, incentives, “market definition”, and spamming: misallocation
- Can we rescue the consumer welfare standard:
  - A detour: Innovation Theory of Harm

A modest proposal in merger control

- Stronger rebuttable structural presumption
- Largest firms are those that, prima facie, are more likely to have market power
- Also the firms where the risk of harm to markets and other societal interests are the greatest, precisely due to their size
- **Presumption**: a merger involving a firm above a certain size threshold would likely lead to adverse effects on competition. A merger involving that firm would not be allowed (unless the parties demonstrate that the merger will lead to significant efficiencies that will be shared with consumers)

“Large” firms

- Firm-level indicators: turnover, market capitalization (e.g. DMA + monthly active users). Margins (textbook definition of market power)
- Industry-level indicators: 1) Companies’ share at the industry level. Databases based, e.g., on NAICS, or Orbis (Koltay & al., 2022: in the past 20 years, market power problems have emerged where the share of the 4 largest firms exceed 50%. 2) Use current HHI methods, but focusing on HHI levels (rather than increments)
- Nocke and Whinston (2022): HHI levels actually OK when an authority wants to prevent *significant consumer harm*. Reduction in consumer surplus is higher the smaller the number of firms. With fewer rivals, non-merging firms replace less of any reduction in the merging firms’ suppl
- (Transaction-level indicators: focus on the acquisition price. Fumagalli & al., 2023.)

Efficiencies

- Are mergers involving large firms generating efficiencies?

- Where is the evidence?
    - Asker & Nocke (2021)
    - Kwoka (various)
    - “Focarelli & Panetta (2003)”

Institutions

- **Revive Industry Studies**: All indicators (+ others, e.g., profitability, entry & exit in industries) collected on an ongoing basis, rather than case-by-case
- Regular statistical evidence on competitive levels of markets. Case teams get structural indicators from the industry unit, and add theirs
- **Real change?** Depends on standards of proof. Risk is a whack-a-mole, just shifts the battle from harm calculation to relevant market definition
- A possibility: (i) market share definition/intervention thresholds based on easy-to-collect structural parameters, (ii) the strength of the evidence for the rebuttal grows with market share/level of the structural parameter
- Easier for industries like pharma, more challenging for fluid industries (digital). Thresholds can be easily established for core segments (search, app stores)
- It frees **regulatory resources** and could lead to better scrutiny