TOWARDS A SYSTEMATIC CONTROLLING OF ANTITRUST DECISIONS?

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I. INTRODUCTION

In an imperfect world, it is impossible for competition authorities to get every case right in an economic sense, i.e. with a view to actual pro- and anticompetitive effects. This is particularly true since antitrust decisions involve the prediction of future effects (for instance, in merger control cases) and/or the assessment of counterfactuals (like in abuse of market power cases or cartel damage estimations). Especially in merger control and abuse of market power or monopolization cases, the benefit of hindsight often allows for an *ex-post* analysis with superior knowledge and, thus, an *ex-post* assessment of antitrust decisions yielding insights about strengths and weaknesses of the decisions.

In our view, systematic *ex-post* analyses may form an important part of due process in the sense of a systematic "controlling" of the processes and decisions of competition authorities in order to improve future decisions and, thus, reduce error costs. Competition authorities have a responsibility towards society and companies alike to improve antitrust decisions over time and to learn from past decision "errors." Figuratively, the due process requirement should not end with the case decision. A systematic controlling of antitrust decisions indirectly improves the legal rights of the parties involved by making competition policy better over time. Such a "controlling" approach refers to reviewing past decisions in order to make better future decisions – in contrast to going back to change or revise past decisions.

II. ERROR COST FRAMEWORK

The so-called "error cost framework" is commonly used to evaluate antitrust rules and decisions. The starting point of this approach is the assumption that competition policy enforcement is always imperfect. Two types of errors can then occur in the application of antitrust law: Type 1 "false positives," where competition authorities intervene without true justification because the analyzed conduct did not, in fact, harm competition; and Type 2 "false negatives," where the authority does not intervene but the respective conduct does indeed harm competition.[3] There can be various reasons for these errors, such as basic uncertainties about future developments and counterfactuals, (strategic) information asymmetries, individual rent-seeking behavior and lobbying activities, etc. The aim of the error cost framework is to add up the costs for the two error types with potential transaction costs that are associated with the legal analysis process ("regulation costs") to try to assess the social costs of single instruments, rules, and/or competition policy as a whole.[4] While a simultaneous reduction of both types of errors obviously improves welfare, possible

3 See, e.g. Baker, J.B. (2015), Taking the Error out of "Error Cost" Analysis: What's Wrong with Antitrust's Rights, *Antitrust Law Journal*, 80(1).

4 See, *inter alia* Easterbrook, F. H. (1984), Limits of Antitrust, *Texas Law Review*, 63(1); Christiansen, A. & Kerber, W. (2006), Competition Policy with Optimally Differentiated Rules Instead of "Per Se Rules vs Rule of Reason," *Journal of Competition Law & Economics*, 2(2), pp. 215-244.

trade-offs between false positives and false negatives, (i.e. a reduction of false positives through a more lenient antitrust policy) come at the price of an increased probability of false negatives, are more controversial, and are not always well researched.

For reasons of simplicity, we use the term "decision error" to denounce a final decision that deviates from the actual effects (irrespective of whether they are observable at the time of the decision or not). Thus, we ignore the multi-stage character of antitrust decision-making, as well as nuanced decisions that may be too complex to put into a "yes-or-no" framework. However, neither simplification should considerably change our reasoning.

III. *EX-POST* ANALYSIS

There can be three main motivations for *ex-post* evaluations of competition policy decisions:[5]

i. *Regime accountability* with the purpose of showing whether the overall antitrust regime was worth its running costs (paid by taxpayers). Here, one has to check whether the overall benefits exceed the costs and whether another regime would have been more efficient and, therefore, would have created higher overall benefits.

ii. *Authority accountability* to verify whether, under given institutional and other constraints at the time of the decision, the analysis and the conclusions reached by the competition authority[6] were correct.

iii. *Policy learning* shows whether, with the benefit of hindsight, the final decision did in fact protect competition and minimized decision errors of both types.

Regime accountability focuses more on the evaluation of whole competition policies and their possible welfare effects, whereas the other two refer to single decisions and possible errors of both types that occur. Therefore, different methods are necessary to identify the various effects.[7]

However, more interesting than these methods are the reasons for *ex-post* evaluation itself. As already mentioned, *regime accountability* targets the whole competition policy regime by analyzing whether this regime is overall beneficial for welfare or, as an extreme alternative, whether a society would benefit more from not having competition policy rules at all. When conducting such an analysis, the deterrence effect of an antitrust regime must be considered.[8] If companies act rationally, the existence of competition rules and minimum-effective enforcement activities will cause some level of compliance and induce them to skip anticompetitive merger plans or collusive conducts for which the detection and enforcement probability is sufficiently high. The more transparent the competition rules in a given regime, the easier it is for rational companies to comply. *Ex-post* analysis may contribute to improving the transparency of competition rules and, thus, the anticipatable nature of antitrust decisions for companies (as a part of due process). The better deterrence works, the lower the costs for both taxpayers (costs of running competition authorities) and companies for achieving a certain amount of protection within the competitive process.

Authority accountability attempts to detect both types of decision errors in explicit decisions made by the competition authorities. The goal is to find out whether the authority came to the right conclusion given the knowledge available at the time of its decision and given all institutional constraints and limitations (like a lack of budget and/or staff, institutional restrictions, or political influence).[9] In the case of a merger, for instance, it is notoriously difficult to predict the exact (positive and negative) effects on competition and welfare before the merger is completed because of the *ex-ante* lack of post-merger market data. As a consequence, two types of decision errors may exist:

5 See, *inter alia* Budzinski, O. (2013), Impact Evaluation of Merger Control Decisions, *European Competition Journal*, 9(1), pp. 199-224.

6 We use the general term "competition authority" to cover different regimes with different decision competence structures. For instance, in the U.S. competition agencies like the Federal Trade Commission or the Antitrust Division of the Department of Justice do not directly decide whether to prohibit a merger or a specific monopolization or abuse conduct, but need to challenge the parties in front of a court. (Although an agency decision not to challenge a case often does *de facto* represent an antitrust decision.) In contrast, in the EU, competition agencies at the European and national levels usually enjoy far-reaching powers for making decisions.

7 The main methods used to evaluate competition policy decisions *ex-post* are structural models and simulations, difference-in-difference ("DiD") methods, event studies, surveys, and case studies.

8 See Buccirossi, P., Ciari, L., Duso, T., Spagnolo, G. & Vitale, C. (2013), Competition Policy and Productivity Growth: An Empirical Assessment, The Review of Economics and Statistics, October 2013, 95(4), pp. 1324-1336.

9 Kovacic, W.E. (2006), Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities, *The Journal of Corporation Law*, 31, pp. 503-547.

(a) A case was decided wrongly because the authority misapplied or ignored available information and evidence.

(b) A case was decided wrongly in terms of actual effects because of information or evidence not available to the authority, i.e. the authority correctly applied available information and evidence but the post-case development, with hindsight, still shows that the decision was wrong with respect to the effects that actually occurred.

Type (a) is clearly a decision error the authority needs to be held accountable for. However, if only *ex-post* data – the benefit of hindsight – revealed effects that could not be anticipated by the competition authority at the time of the decision (type (b)), then the authority cannot be held accountable for this "decision error." Or, in other words, according to the concept of *authority accountability* it does not constitute a decision error if the benefit of hindsight was required to reveal the effects in question. If a decision error of Type 1 or 2 occurs due to this imperfect information, the competition authority cannot be held responsible for a "wrong" decision – in the pre-merger world without all subsequently available information, the decision was "right."

Given all the limitations and constraints that have to be considered, the concept of *authority accountability* only provides a narrow scope for the evaluation of competition policy decisions. It excludes the detection of type (b) errors, which however also lead to a decrease in welfare and a worse level of protection for competition. Consequently, some of the causes for decision errors (both false positives and false negatives) will be overlooked, namely where the authority cannot be made responsible, perhaps because institutional constraints did not allow it to gather or make appropriate use of the relevant information or evidence. This points towards the benefits of a systematic controlling of antitrust decisions going beyond the narrow scope of *authority accountability*.

The concept of *policy learning* tries to heal the shortcomings of *authority accountability* from a due process or controlling perspective by targeting a broader scope and taking into account new available information on the cases after the decision was made, with the aim of identifying the causes for these decision errors and improving future competition policy (decisions) by minimizing errors. In an imperfect world there will always be some kinds of errors – therefore it is highly relevant for competition authorities to improve their *ex-ante* decisions by reviewing them *ex-post*, learn from potential mistakes, and thus increase citizens' welfare.[10] Along with improving decisions under the existing framework, this particularly includes learning about better practices and rules, i.e. creating knowledge for improving the (institutional) framework of decision-making as well. Since competition, competitive strategies and markets are ever-changing, this learning process is never-ending, and a continuous process of improvement is necessary.

IV. LIMITATIONS AND CHALLENGES

However, *ex-post* evaluation is not advantageous for competition authorities in all cases. When many cases are found to be erroneous from an *ex-post* evaluation perspective, this may (i) have negative effects on the authority's reputation (perhaps decreasing positive deterrence effects), (ii) increase the probability of damage claims by the companies involved (with the potential of creating legal uncertainty over long periods accompanied by significant procedural costs), and (iii) lead to some kind of selection bias, where rational agencies tend to choose cases for review that have a low probability of causing negative *ex-post* evaluations. These disadvantages, however, are strongly related to the *ex-post* evaluation motives of *regime* and *authority accountability* and less prevalent for the concept of *policy learning*. Thus, the potential negative effects of *ex-post* evaluations also point towards employing *ex-post* analysis explicitly for *policy learning only*. Eventually, in an imperfect world even *ex-post* evaluations will not be completely free of potential errors (partly because of the use of unreliable *ex-post* evaluation methods).[11]

Ex-post analysis of single-case antitrust decisions, as well as of overall regimes or more macroeconomic developments, are frequently conducted by independent researchers as part of their scientific research programs and activities (and not on behalf of competition authorities). For instance, Ashenfelter & Hosken (2010)[12] and Kwoka (2015)[13] collect and summarize existing *ex-post* analyses of merger cases. The recent discussion about the rise of so-called superstar firms and an overall increase in market concentration along with a widespread lessening in

10 Hosken, D., Miller, N. & Weinberg, M. (2017), Ex Post Merger Evaluation: How Does it Help Ex Ante?, *Journal of European Competition Law & Practice*, 8(1), pp. 41-46.

11 See Budzinski, O. (2013), Impact Evaluation of Merger Control Decisions, *European Competition Journal*, 9(1), pp. 199-224.

12 Ashenfelter, O. & Hosken, D. (2010), The Effects of Mergers on Consumer Prices: Evidence from Five Selected Case Studies, *The Journal of Law and Economics*, 53(3), pp. 417-466.

13 Kwoka, J. (2015), Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy, Boston: MIT.

competition intensity follows more macro-level *ex-post* analyses.[14] However, while highly important, such analyses cannot replace a systematic control of authority decisions. Integrating systematic *ex-post* analysis into an expanded due process would offer several advantages.

One issue is the reduction of selection biases through a more systematic choice of cases. Obviously, a systematic control using *ex-post* evaluations will not and should not conduct *ex-post* analyses for every single case. The necessary resources will neither be realistically available, nor would it be an efficient approach. Instead, criteria for the systematic and transparent selection of cases need to be developed. A discretionary choice by the authorities themselves would generate incentives for a biased selection favoring cases where easy confirmation of the authorities' decision can be expected.

A second issue is the availability of data, which often renders independent *ex-post* analysis by "outsiders" (e.g. independent researchers from universities) impossible. Integrating *ex-post* analysis into the competition policy process, on the one hand, can improve access to relevant data. However, on the other hand, this may generate additional data delivery duties (and burdens) for companies.

This leads to a third issue, namely the question of publication of results. In order to safeguard the process, some form of publication of results for *ex-post* evaluations is necessary in order to create transparency. Furthermore, the results of *ex-post* analyses are not identical with learning effects improving future decisions. Instead, any discussion of *ex-post* evaluation insights should include independent scientific input. The latter is beneficial and helpful, yet it requires some public access to evaluation results. On the other hand, justified business and data secrecy concerns may limit publication. Moreover, the publication of evaluation results may lead to – intended and unintended – effects on reputation and – involuntarily – emphasize elements and aspects of *regime* and *authority accountability* over *policy learning*.

A fourth issue relates to who shall conduct the *ex-post* analyses and evaluations. While we advocate not relying only on "accidental" *ex-post* analyses conducted by independent researchers, a more systematic approach may still find it favorable to systematically include independent researchers. In addition to the reasons outlined in the preceding paragraph, the participation of independent researchers could reduce bias incentives that authority insiders face when reviewing their own or their colleagues work.

V. CONCLUSIONS AND IMPLICATIONS

Competition authorities have a responsibility to strive towards making the best possible antitrust decisions in order to simultaneously (i) protect competition as a welfare-enhancing process for society, (ii) safeguard the rights of companies to freely choose competition strategies and business activities, as well as (iii) justify the spending of taxpayer money. Most competition authorities employ a variety of actions and expend efforts to do exactly this. One area where further improvement potentials may be reaped, from an economic perspective, is a more systematic application of *ex-post* evaluations of antitrust decisions. In an imperfect world, competition authorities dealing with counterfactuals and predicting future effects cannot avoid running into false positives and false negatives at times. However, creating knowledge about which decisions have been mistakes of what type by using the benefit of hindsight represents a powerful tool to (imperfectly) reduce future decision errors. A systematic integration of *ex-post* analyses and evaluations into the competition policy process may establish something like a systematic control of antitrust decisions. This may benefit both society (in terms of welfare) and the companies acting under the jurisdiction of antitrust law. However, this benefit is not meant to come through revisions of past decisions, perhaps even accompanied by damage claims. Instead, generating knowledge for better future decisions as well as for better rules, practices and procedures represents the benefit (reducing error costs) that, at the end of the day, also contribute to an (extended and figurative) due process.

Thus, the implementation of systematic *ex-post* analyses and evaluations should be done with *policy learning* in mind. While the matter of adequate methods for conducting such analyses has been thoroughly discussed, there has been less research on a number of issues relating to how an efficient systematic controlling procedure may look like. Case selection, data availability, publication and publicity, as well as the question who should conduct the *ex-post* evaluations represent some of the challenges that need to be tackled. Notwithstanding, a more systematic integration of *ex-post* case analyses into the competition policy process offers great potentials from an economic perspective.

14 See, inter alia Autor D.; Dorn, D; Katz, L.F.; Patterson, C. & Van Reenen, J. (2017a), The Fall of the Labor Share and the Rise of Superstar Firms, *NBER Working Paper No. 23396*; Autor D.; Dorn, D; Katz, L.F.; Patterson, C. & Van Reenen, J. (2017b), Concentrating on the Fall of the Labor Share, *American Economic Review: Papers and Proceedings* 2017, 107(5), pp. 180-185; OECD (2018), Market Concentration – Issues paper by the Secretariat, Paris; Grullon, G.; Larkin, Y. & Michaely, R. (2018), Are U.S. Industries Becoming More Concentrated?, available at https://ssrn.com/abstract=2612047.

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