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G:GENESIS

Vertical and conglomerate mergers

- Focused firm expansion strategies in the domestic market often seek to build around core business strength
 - Build a stronger position in existing markets
 - Limited for already dominant firms?
 - Move into upstream/downstream/adjacent markets to core business
 - Strong efficiency rationale
 - Portfolio economies, avoid double marginalisation, etc
 - Exploits core competencies
- May also raise specific competition issues, such as the potential for:
 - Input foreclosure (partial or full)
 - Customer foreclosure
 - Anti-competitive bundling/tying
 - Removal of a potential entrant

- RSA Competition Authorities have largely adopted the broad approach outlined in the EU non-horizontal merger guidelines, namely:
 - Ability to engage in foreclosure/bundling (market power in the upstream/complementary market, alternatives available, quality/price/capacity of alternatives)
 - Incentive to engage in foreclosure/bundling (internal profitability analysis of such a strategy)
 - Impact on competition
- No anti-competitive effect is found if one of the elements are missing or if efficiencies outweigh the anti-competitive effect.
- *Sasol-Engen*: large focus of the hearing was precisely on the ability and incentive to foreclosure coastal refining competitors from the inland market
- *MTN/Verizon*: Found unable to foreclose using mobile data services as other adequate suppliers, limited use in VPNs, small share in VPN market

- Tribunal/Commission have developed a more sophisticated view of bundling yet remains hard to pin down anti-competitive potential
 - *“It is only in certain circumstances that a bundling strategy could lead to anti-competitive outcomes by reducing rivals’ ability to compete and thereby permitting the bundling firm to raise prices in the long run.”*
- Telkom/BCX
 - Preference not to rule on this aspect as other grounds to prohibit
- Naspers/M-Net/SuperSport
 - Tribunal focus on incentive to bundle (citing lack of evidence of this occurring at the firm or more broadly in the industry) and technical ability to bundle (logistics of offer)
- MTN-Verizon:
 - Found that whilst likely to bundle, this was unlikely to be exclusionary due to limited leverage from mobile data market into VPNs; expensive as low market shares in bundled product; ability of competitors to offer own bundle (even if not the same)

- In a concentrated economy, potential entry theories hold some appeal
- Focus has generally been on the ‘potential future harm’ version of the test
 - *“The relevant test for potential entry has three essential components, namely that the potential competitor is likely to enter the market, would do so within a reasonable period of time and would enter the market on such a scale as to present a competitive constraint on the acquiring firm.”* MTN-Verizon
- Current competition harm requires evidence that market participants actually limit price levels due to concern over entry threat
- MTN/Verizon (telecoms)
 - Potential for Verizon to enter infrastructure level?
 - Found no evidence of detailed business plans to enter (so unlikely) and other firms may enter either individually or on a shared basis (so not uniquely placed)

- Customer foreclosure is likely to be rare and would usually require substantial proportion of the customer base to achieve outcome
 - Lends itself to establishing minimum quantitative criteria for ready assessment
 - Concerns have largely been dismissed on the basis of customer foreclosure potential regardless of incentive/effect
- Mandla Matla Publishing-Independent Newspapers a total foreclosure potential of 26% was deemed not substantial.
- MTN-Verizon a maximum potential foreclosure of 20% equally found not to be substantial
 - Also found that unlikely to be in a position to foreclose full 20%
 - Entry plans were undeterred including that of the intervenor

- Generally accepted that efficiencies are natural consequences of vertical and conglomerate mergers
 - Vertical: avoidance of double marginalisation; integration benefits
 - Conglomerate: optimal pricing for complementary products; scope economies
- Tribunal has adopted total welfare standard for efficiencies
- Sasol-Engen
 - Careful quantification of efficiencies but found not to outweigh the anti-competitive effect
- However, efficiency quantification does not frequently form a strong part of the investigation or defence
 - Focus primarily on addressing the anti-competitive concerns due to general perception that efficiency effects weighted lightly

- A number of vertical mergers have been fiercely contested at the Tribunal stage after a Commission investigation
- Direct intervention by competitors/customers permitted and a permissive approach has typically been adopted
 - *“Not only does this approach encourage widespread participation in matters of considerable public moment, but the intervention process frequently contributes significantly to the quantum of information and quality of argument submitted to the Tribunal” – Naspers/MNet/SuperSport*
- Yet this is also potentially open to strategic intervention
 - *“they are heaven sent opportunities for competitors of the merging parties to harass and delay the conduct of legitimate business, and...they offer significant opportunities for gathering information” - ibid.*
- Vertical mergers arguably pose particular problems for the Tribunal in distinguishing legitimate concern from abuse
 - Competitors the subject to potential harm and may hold key information but also benefit from derailing pro-competitive mergers

- Tribunal approach has been to remain very permissive and award an adverse costs order if the alleged grounds for intervention are found to be devoid of substance
- Question is whether there are better means to at least eliminate intervention that lacks substance
 - Can one identify a few conservative thresholds for initial screening?
 - Arguably easier on ability (dominance, critical input) than incentive (more complex to determine)
 - What role should the Commission (and its report) play in advising the Tribunal?
 - Extent of investigation, information considered, analysis performed
 - Should potential interveners be required to engage more thoroughly at the Commission phase?

- Competition authorities in RSA have not taken an unduly hostile approach to vertical and conglomerate mergers
 - Approach to assessment draws on the more reasoned approach that has emerged in other jurisdictions
 - In many cases arguments dismissed on one of the necessary conditions required for anti-competitive effects to be demonstrated
- Many of the more fiercely contested mergers have been vertical
 - Usual scepticism over the views of competitors less justified when harm to consumers is through harm to competitors
 - Scope to consider whether ex-post cost approach to intervention an adequate deterrent

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