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Problems of the Assessment of Economic Theories and Economic Evidence in the EC Merger Control: Case of Non-Horizontal Mergers

Abstract

This thesis is targeting a complex topic of integration of economic analysis (economic theories and evidence) into the legal framework of EU merger control. Inspired by the calls for a “more economic approach” in EU competition law this work attempts to highlight both the limits and perspectives for incorporation of the economic analysis under the set of legal rules (both substantive and procedural) that govern initial merger assessment of the Commission and the subsequent review of the Commission’s findings exercised by the Courts. The correlation between legal rules and economic analysis is studied on the example of non-horizontal concentrations that should be assessed taking into account both anti-competitive effects stemming from the future conduct of the merged entity and economic efficiencies that can be generated through vertical integration or conglomerate diversification. Application of economic theories and assessment of economic evidence is placed in the context of the applicable legal rules and standards such as standard of proof, standard of judicial review, margin of assessment in complex economic matters, and legal standards governing admission, presentation and assessment of economic evidence. The correlation of the specified legal rules and economic analysis was studied on the examples of unilateral (vertical foreclosure) and coordinated (tacit collusion) effects’ scenarios which are typical for non-horizontal settings. The observed enforcement practices demonstrated the need for further development of functional rules, tests and methodologies, which are pre-requisite for an effective and consistent application of the effects-based assessment.