

EUROPEAN CHAMPIONS

IMPROVING ENFORCEMENT IN THE CURRENT FRAMEWORK

Damien Neven (Graduate Institute, Geneva and CRA)

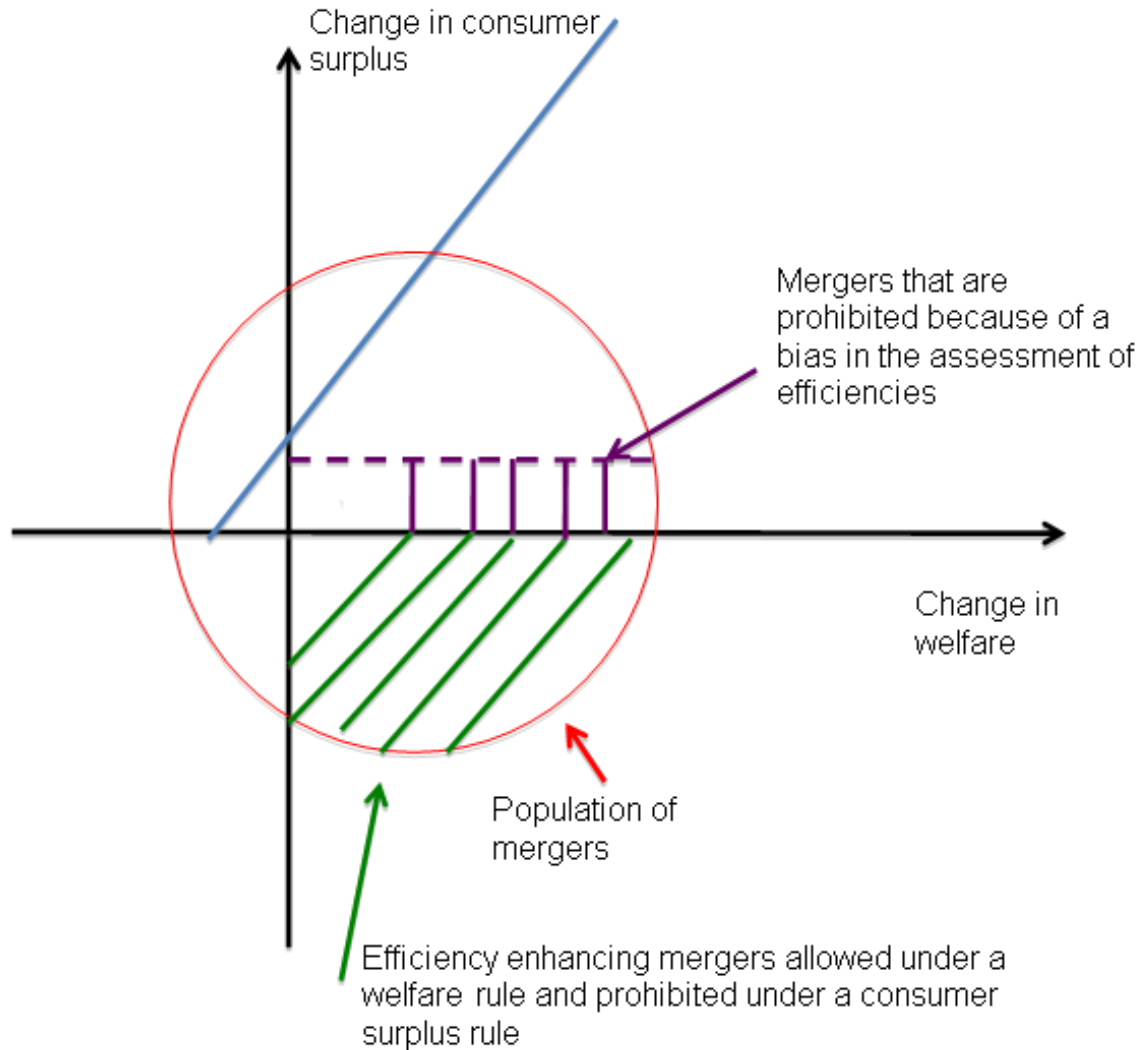
Brussels (12/11/2014) – Bruegel workshop

Overview

- The focus on the nationality of the acquirers may be misplaced (driven by political considerations)
- There is no clear theory as to why the nationality of acquirers should matter.
- In the absence of a clear theory, the empirical evidence is merely a collection of hard facts
- The merger control framework (at least in the EU) is neutral with respect to the nationality of acquirers (see for instance Art 21(4) of the merger regulation)
- Two more general questions :
- Is the current merger control framework biased against the development of more efficient firms (champions) ?
- Is the public interest test in EU merger control (and member states) adequate ?

Allowing for the development of champions

- The consumer welfare standard (used in the EU) is biased against the development of more efficient firms
- Relative to a total welfare standard, it denies the development of more efficient firm for which the increase in profit compensates for the fall in consumer surplus.
- Mergers that lead to an increase in welfare must involve efficiencies (the mere exercise of market power reduces welfare)
- There may be good reasons not to adopt a total welfare standard (in terms of political economy and the precision of enforcement)
- But the proper assessment of efficiencies is then essential in the enforcement of a consumer surplus standard (see Roeller, 2011)
- If efficiencies are not properly assessed, the bias against more efficient firms will be exacerbated



Assessment of efficiencies

- In the enforcement of a consumer surplus standards, the efficiencies are a matter of degree and the benchmark against which they need to be assessed is case specific (as it depends on the extent of the arm that has been identified)
- The Commission has not developed meaningful standard : efficiencies are often dismissed (or more rarely, validated) on very general grounds
- The Commission has not provided much guidance on the type of evidence that would suffice to consider that the relevant criteria are met (verifiability, merger specificity, consumer benefit). Its guidance has been mostly negative and not constructive.
- The Commission often discusses efficiencies as a discrete issue. Yet, the *magnitude* and *likelihood* of efficiencies matter.
- Some of the presumptions of the Commission (for instance, regarding pass-through) seem misguided

The public interest test

- The merger regulation allows for public policy considerations at the national level to play a role – in the form of the additional remedies (prudential rules, security, plurality of the press and possibly others at the discretion of the Commission). Art 21(4)
- Member states can only impose additional undertakings (so that consumers cannot be harmed)
- There is little guidance regarding the positive list (what does security mean ?) and with respect to additional considerations
- The implementation by member states is not transparent and appears to be uneven (with apparently active enforcement in France, the UK, Spain and Italy)
- The Commission could provide guidance on the criteria and impose constraints the way in which member states exercise their prerogative

The public interest test

- The main risk in implementing a public interest test (as illustrated by the UK experience – see Chisholm and Jung, 2014) is capture by particular interest.
- The response to the risk of capture lies in institution design
- Public interest considerations should only be allowed if (i) a proper theory of effect can be developed (ii) if the theory can be operationalized (in terms of empirical tests) and (iii) accountability of the decisions can be ensured (through transparency and appeal procedures)
- For instance, there may be a good case for allowing public interest considerations for regulated sectors (as there is interplay between mergers and the operation of regulation and because the institutional guarantees provided by regulatory authorities).

The public interest test

- But there is arguably not case based on the anticipation that foreign acquirers will behave differently from domestic acquirers (for instance with respect to the location of RD centres).