Overview

Since the 2004 revision of the EU Merger Regulation introducing the substantive test of a “Significant Impediment to Effective Competition” (SIEC), economic analysis has played an increasingly important role in both European Union and Member State merger control investigations. Analyzing mergers in light of the horizontal and non-horizontal merger guidelines that the European Commission and National Competition Authorities (NCAs) have published since then requires specialist economic knowledge, in particular in the fields of industrial organization and econometrics. NERA has a long and successful history of applying cutting-edge theoretical and empirical economic analysis to support clients and their legal advisers in merger proceedings at both the European Union and Member State levels.

NERA’s Experience and Expertise

NERA’s European Competition Economics practice has substantial experience and expertise in supporting clients throughout the merger review process, on all economic issues and across a wide range of industries. In addition, its global footprint enables NERA to assist clients in multiple merger filings around the world.

NERA’s experts work closely with their clients to identify the available data and the best analytical approaches to inform the case at hand. Combining economic theory with empirical methods and data management experience, NERA’s experts produce timely and compelling analyses to determine a merger’s likely competitive effects. On this basis, they support their clients in assessing the regulatory risk of a transaction and in interacting with the relevant competition authorities.

NERA is one of the top competition practices in the world, with over 130 dedicated competition experts within a wider team of regulatory, finance, and sector specialists. NERA’s experts work on some of the highest-profile global deals. Our economists have supported merging parties and third parties in proceedings before the European Commission, NCAs such as the German Bundeskartellamt, the French Autorité de la Concurrence, and the UK Competition and Markets Authority (CMA), and national and European Union courts. Recent large and well-known cases include the GE/Alstom transaction before the European Commission and the Reckitt Benckiser/K-Y transaction before the CMA. NERA has worked on matters involving practically all industries, ranging from transportation, gas and electricity, oil field services, and mining to chemicals, aircraft, agriculture, consumer products, pharmaceutical products, hospitals, and microprocessors.

Economic Analysis in Merger Control Proceedings

Given the tight regulatory timeline involved in merger control, it is important for economic advisers to get involved early in the process. In this way, they can support the parties in the accurate preparation of the merger notification and the prompt identification of any competition issues.
Following the applicable guidelines, the economic analysis of a merger covers the following areas:

**Market Definition and Market Power**
The definition of the relevant product and geographic markets continues to provide the leading framework in which the competitive effects of a merger are analyzed. Market definition is often made operational through the test of a “Small but Significant and Non-transitory Increase in Price” (SSNIP), and there are many empirical techniques with which NERA can shed light on the test’s results. Having defined the relevant markets, market shares can be calculated, providing a first indication of the likelihood of competition concerns.

**Analyzing Non-Coordinated and Coordinated Effects in Horizontal Mergers**
Horizontal mergers are mergers between actual or potential competitors in the same market and are the most likely to raise competition concerns. They can give rise to non-coordinated and coordinated effects. Non-coordinated (also known as unilateral) effects arise when one merging firm internalizes the positive effect that an increase in the price of its products would have on sales of the products of the other merging firm, thereby creating an incentive to raise prices. This incentive, known as pricing pressure, depends on the closeness of competition between the merging firms and their margins. To quantify unilateral effects, NERA’s experts have deployed a variety of high- and low-tech empirical techniques, such as:

- Price-concentration analysis;
- Bidding analysis;
- Calculation of pricing pressure indices (such as UPP or GUPPI); and
- Merger simulation.

Coordinated effects arise when the merger makes it easier for firms in the relevant market to explicitly or tacitly coordinate their behavior to harm their customers. To investigate tacit coordination, NERA assists their clients and the relevant competition authorities in determining whether the following conditions, generally known as the Airtours criteria, are met:

- The understanding can be internally sustained (retaliation/deterrence); and
- The understanding can be externally sustained (reaction of actual/potential competitors and customers).

One of the challenges here is to evaluate the incentives of insiders and outsiders in the merger and the effective profitability of colluding.

**Analyzing Non-Horizontal Merger Effects**
NERA also has extensive experience in the assessment of non-horizontal (vertical and conglomerate) mergers. Vertical mergers are mergers between firms that are active at different levels of the value chain and are likely to enhance consumer welfare. There are, however, circumstances in which vertical mergers may give rise to competition concerns. In particular, a vertical merger may afford the merged entity the ability and the incentive to deprive its competitors of vital inputs or customers, with possible detrimental consequences for consumers. NERA can support the merging parties with so-called vertical arithmetic exercises or other analytical techniques to determine whether the competition concerns are warranted. Foreclosure effects are also relevant for the assessment of conglomerate mergers, which are mergers between firms that are neither direct competitors nor have a supplier/customer relationship.

**Assessing Efficiencies**
The competition authorities’ assessment of a merger will also include efficiencies, and some authorities have become more receptive to efficiency claims over the last few years. Efficiencies need to benefit consumers, be verifiable, and be merger-specific for the authorities to take them into account. As the burden of proof rests with the merging parties, it is crucial that the parties and their advisers have these issues on their radar during the early stages of the investigation.

**Identifying Optimal Remedies**
In the event that competition issues have not been resolved by the analysis so far, NERA also provides assistance in the identification of optimal remedies. Remedies are increasingly focused on directly addressing the relevant theory of harm. Timely economic analysis can avoid unnecessary divestments and assuage the concerns of the competition authority with minimal costs for the merging firms.
Collaboration Across Practices

In addition to competition, NERA has extensive experience in other areas that complement competition work. NERA’s European competition experts are able to draw on the diverse analytical skill-sets and industry expertise of the firm’s global network of economists. Such collaboration exists in sectors such as telecommunications, postal services, energy, transport, and water, as well as with NERA’s Intellectual Property, Securities and Finance, and Transfer Pricing Practices.

About NERA

NERA Economic Consulting (www.nera.com) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA’s economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world’s leading law firms and corporations. We bring academic rigor, objectivity, and real-world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

NERA’s clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings, and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world’s largest economic consultancies. With its main office in New York City, NERA serves clients from more than 25 offices across North America, Europe, and Asia Pacific.

Contact

For more information or to contact our experts, please visit https://www.nera.com/at-europemerger.