

European Merger Control: Getting the Efficiencies Right

Peter D. Camesasca

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A longstanding question on both sides of the Atlantic is the extent to which, and circumstances in which, anticipated postmerger efficiencies may justify a merger's approval. In the United States, efficiencies defenses were rejected in principle by the Supreme Court nearly 40 years ago.¹ Nonetheless, they have since been given at least partial weight by several lower courts.² Moreover, regulators have cautiously acknowledged the possible relevance of some merger-specific efficiencies, at least in the absence of a near-monopoly, in successive versions of the Horizontal Merger Guidelines.³ Suggestions as to when and to what extent efficiencies should be taken into account have also been offered by texts and commentaries.⁴ Even so, the issue cannot be regarded as set-

¹ *E.g.*, *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967).

² *E.g.*, *FTC v. University Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 61 (D.D.C. 1998); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054 (8th Cir. 1999).

³ *United States Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines* (1992 rev. 1997).

⁴ 4A P. AREEDA, H. HOVENKAMP, & J. SOLOW, *ANTITRUST LAW* § 970 (1998). *See also* 1 ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* 335 (4th ed. 1997).

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