

# Predictability

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# Business Perspective

- Microsoft: Considerable experience under Section 2
  - Product design, packaging, pricing, licensing
- Predictability of utmost concern
  - Firms really want to know the rules of the road
  - Yet application of law increasingly difficult to predict
  - Consequences to business and consumers greater than ever
- Rule of Reason
  - Hard to apply when experts fundamentally disagree as to whether particular effects are procompetitive or anticompetitive
  - Windows integration examples

# Predictability

*Various Factors Combine to Make Predictions Increasingly Uncertain*

## New Business Models

- Development of compatible “ecosystems”
- Very low marginal cost products or services
- Complex relationships among firms

## New Technologies

- IP-based
- Increasing antitrust focus on product design
- Engineering trade-offs difficult to assess
- Time lag between design, assertion of antitrust claims

# Predictability

*Various Factors Combine to Make Predictions Increasingly Uncertain*

## Multiple Constituencies

- Rise of “multi-sided markets”
- Differing business interests (and thus varying potential antitrust claims) even of similarly-situated firms
- Web search example

## Multiple Enforcers

- DOJ, FTC, States, competitors, consumers
- With globalization, increasing assertiveness and number of foreign agencies: EU, Asia
- Broad scope of prosecutorial discretion
- Interaction among enforcers

# Stakes Higher than Ever

## Product Design Timeline



## Design decisions

- Often must be made years before product release
- Often difficult or impossible to "undo" later
- Relied upon by third parties, other parts of the product
- Windows 95 example

# Stakes Higher than Ever

## IP Licensing

- Decisions often irreversible: Once proprietary technology licensed, typically can't get it back
  - Trade secrets revealed
  - Firms rely upon licensed IP
- Global antitrust enforcement
  - Agency demand for licensing on a worldwide basis
  - Agency imposing greatest licensing obligations *de facto* determines rules (likely not to be U.S.)
- Risk that value of IP is diminished
  - Royalties not established by market forces

# Consequences

Risk of overdeterrence arises from combo of

- Difficulty in predicting outcomes, changing course later
- Variety and number of possible claims
- Desire to avoid controversy

Consumer welfare effects

- Limitations on product improvement
  - Windows, Office examples
- Antitrust advice to (gulp) raise prices
  - Lower package prices would be efficient absent any effect on competitors (demand aggregation)
- Increased R&D costs
  - Slowed decision-making; use of senior exec time
  - Work with questionable commercial value

# Suggestions

## Clarity

- Stronger presumption that conduct widely practiced by firms with and w/o market power is efficient

## Convergence

- Redoubled effort by U.S. agencies to evangelize U.S. approach
  - Provides greater predictability than other approaches

## Comity

- Increasingly important to allocate responsibility among multiple agencies
- Greater deference to rules of defendant's home jurisdiction

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