

Unilateral Effects

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The Insight of the 1992 Guidelines

- ❖ New insight of 1992 guidelines is that unilateral effects can arise outside monopoly context
 - ❖ Daimler-Chrysler not the same as Daimler-BMW
 - ❖ Return to sub-markets?
- ❖ Most important change in merger law since 1982 Merger Guidelines
- ❖ Synthesis of economic theory and practical judgment about merger investigations
- ❖ Profound impact on merger enforcement

What the Guidelines Say

- ❖ Focus is on localized competition where “individual sellers compete more directly with those rivals selling closer substitutes”
- ❖ Requires “a significant share of sales” to “consumers who regard the products of the merging firms as their first and second choices”
- ❖ 35% screen for merged entity’s market share
- ❖ Pragmatic tests reflecting quality of analytical tools available in merger investigations

The Lawyer's Approach

- ❖ The lawyer's approach focuses on defining markets and identifying next best substitutes
- ❖ Why? That's what the Guidelines say
- ❖ Analysis driven by interviews and documents
 - ❖ *Too many documents*
- ❖ The economist's critique: Lawyers use models but don't articulate them sufficiently
- ❖ 35% share screen and next-best substitutes analysis embody assumptions about the effects of cannibalization on merged firm's incentives

The Economist's Alternative

- ❖ Economists are less tethered to the Guidelines
 - ❖ Institutional bias against the market definition-driven approach of the Merger Guidelines and case law
- ❖ Attempt to get closer to the “real answer” through econometrics or merger simulations
 - ❖ Models with well-articulated specifications
- ❖ Data is to economists what documents are to lawyers
 - ❖ Both want too much
- ❖ The jargon of dead Frenchmen

The Role of Simulations

- ❖ Modeling and simulations can be useful if sufficiently attuned to market realities and based on defensible assumptions
- ❖ Small differences in assumptions can often make big differences in results
- ❖ What are we trying to show?
 - ❖ Magnitude of price increase?
 - ❖ Whether to get to next step of analysis?
- ❖ The risk of false empiricism

Some Issues With Simulations

- ❖ Merger simulations are likely to find more problematic mergers than the lawyer's approach
- ❖ Models are designed to predict a price increase
 - ❖ How does the plaintiff's expert defend a model that predicts a price increase for safe harbor mergers?
- ❖ Economist's retort: "But this is before entry, repositioning, and efficiencies are considered"
 - ❖ That still means shifting the burden of proof to the merging parties

More Issues With Simulations

- ❖ What happens to next-best substitutes in a world of logit models?
 - ❖ IIA assumption of identical cross-elasticities of all products with respect to a given product
- ❖ More complex models impose great costs and have insatiable appetite for data
 - ❖ Issues with retail-level data as proxy for wholesale competition
 - ❖ Assumptions regarding elasticities over relevant range
- ❖ Do models follow the Guidelines?
 - ❖ Source of anticompetitive unilateral effects
 - ❖ Burden of proof

Another Burden of Merger Review

- ❖ Even proponents concede that modeling can be very expensive but may yield little of value
 - ❖ Costly for parties to get data, clean it up for economists, and analyze it
- ❖ Scheffman critique raises valid implementation and theoretical issues
- ❖ Reassuring to read Froeb critique of \$100,000 rebuttal report
- ❖ Merger proponents forced to perform defensive modeling