Prediction in Antitrust is Hard
(But Some Predictions are Harder than Othe

Washington Bar Association's

31st Annual Antitrust, Consumer ProtT5 s es

"Prediction is Hard, Especially When It's About the Future"

- Antitrust often requires and agencies to make predictions about how conduct today will influence competition in the future
  - E.g. Section 7 of the Clayton Act requires agencies and courts to engage in predictive analysis
- Agencies and courts' ability to successfully and accurately do so turns on our understanding of
  - (1) Present competitive dynamics;
  - (2) How the proposed merger might change incentives and perhaps the underlying competitive dynamics; and
  - (3) How the proposed merger might alter firms' incentives to enter the marketplace

Yogi Berra

Prediction in Antitrust

- Modern antitrust analysis incorporates all kinds of predictive fact-finding:
  - Attempted monopolization and "dangerous probability of success"
  - Recoupment analysis in predatory pricing
  - Traditional merger analysis: effects, entry, efficiencies
  - Failing firm defense
- But courts and agencies nonetheless have generally been reluctant to:
  - Predict a specific path for technological evolution (see, e.g., Genzyme / Novazyme)
  - Trade off static versus dynamic welfare costs and benefits
- How well agencies and courts predict turns upon the quality of inferences that can be generated from the available economic tools

Prediction in “Just” Hard Cases

- Bread and butter merger analysis
- “Actual-Actual Competition”
  - Two merging parties already compete in the market, or have committed to entering the market in the near future
  - Primary focus of analysis is how merger changes competitive incentives for merging firms
- Familiar economic tools and methods available for these cases and spelled out in the 2010 Horizontal Merger Guidelines
  - Diversion ratios, pricing pressure indices, customer testimony, natural experiments, market structure, etc.
- Entry analysis often limited to declaring barriers “low” or “high”
  - Observation: Economic tools for predicting entry lag behind adoption of sharpened tools with respect to firm pricing incentives, merger simulation, and econometric evidence

- Generic pharmaceutical mergers:
  - Actavis/Warner Chilcott (2013)
    - Actavis was likely to be the first to have the capability to enter the market with a generic version of several of Warner

U.S. v. Microsoft – A Note on Prediction of "Nascent" Competition

- The case involved past conduct but how that conduct was interpreted depended upon predictions about the future
  - This is a familiar issue in antitrust cases where a plaintiff must establish to some degree a "but for" world where the offending conduct did not take place
  - This is simpler in a cartel case where a plaintiff has to show what the market price would have been absent collusion; in an exclusionary conduct case, the plaintiff has to explain how the market would have evolved but-for the monopolist's conduct
- The *Microsoft* case is especially interesting because the Government's theory of harm was based upon an economic theory that was itself predictive in nature

U.S. v. Microsoft (cont.)

The Government's theory of harm was that Microsoft employed tying and other exclusionary conduct to maintain its dominant

U.S. v. Microsoft (cont.)

Carlton & Waldman (2002) show:

- H

U.S. v. Microsoft (cont.)

- The D.C. Circuit accepted the Government’s theory o harm:
  - “The question in this case is not whether Java or Navigator would actually have developed into viable platform substitutes, but (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue.”
  - “It would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will—particularly in industries marked by rapid technological advance and frequent paradigm shifts.”
  - “The District Court made ample findings that both Navigator and Java showed potential as middleware platform threats.”

U.S. v. Microsoft (cont.)

- In a sense, Netscape and Java could be analogized to "potential" competitors.
  - Unlike a true potential competitor – which has not yet made the decision to enter – Netscape and Java have brought products to market
- Unlike merger cases involving potential competitors, the question is not "will the firm be able to enter?" but rather "will the firm's product become a substitute for the monopolist's?"
  - The question was whether those products posed a competitive threat to Microsoft in the future, despite not providing an alternative to customers in the present

U.S. v. Microsoft (cont.)

- This is as much a question of technology as it is of economics
  - Economic theory demonstrates it is possible to maintain

Prediction in Really Hard Cases

- Simple "Potential Potential Competition"
  - Neither of the merging parties are competitors in a market that already exists and neither has committed to entering the market in the near future
- Predictive analysis is based upon
  - (1) present competitive dynamics
  - (2) how the merger changes post-merger competitive dynamics between firms already in the market; and importantly,
  - (3) whether <u>both</u> parties are likely to enter the relevant market absent the merger and, if so, how the merger will influence the competitive dynamics in the market compared to the competition that would have existed without the merger
- Question: What economic analyses and evidence is sufficient to satisfy the burden imposed by this third element and warrant a conclusion about "likely" competitive effects?

Prediction in Unbelievably Hard Cases

- Not-so-simple "Potential Potential Competition"
  - Neither of the merging parties are in the market, neither have committed to entering the market in the near future, <u>and</u> the market does not exist
- Same question:
  - What set of economic analyses and other types of evidence shou be required to justify a finding that a merger between two firms is likely to substantially lessen competition in a market which does not now exist and may never exist?
- My answer:
  - Such a finding is beyond the limits of what we can or should expe from antitrust analysis given current tools

FTC v. Nielsen-Arbitron

- Novel theory
  - Potential-Potential competition case in a high-tech industry where the relevant market does not yet exist
- The merging parties
  - Nielsen: TV ratings
  - Arbitron: Radio ratings
- Future market of concern
  - “National syndicated cross-platform audience measurement devices”
- Theories of Harm
  - Unilateral effects
  - Reduce future competition between Nielsen and Arbitron and “less innovation” in the relevant market

FTC v. Nielsen-Arbitron

- Competitive effects analysis in a future market case requires overcoming unique challenges
- More difficult, and less reliable evidence available, to gather conventional economic inputs for merger analysis:
  - Define the relevant market
  - Identify likely buyers and sellers
  - Understand product substitutability
  - Identify set of potential entrants and likely post-merger incentives
- In the absence of these conventional types of evidence or economic analyses, the Commission relied upon inferences from a systematic relationship between market structure and the rate of innovation

FTC v. Nielsen-Arbitron

- Relevant questions are not whether merger analysis should be predictive (it must be!), or fact-intensive (it better be!), but what set of facts, evidence, and economic analyses renders such prediction sufficiently reliable to show likely harm to competition?
- Economic tools do not predict all things with the same level of accuracy
- Challenge Question: Consider the unanswered questions in Nielsen-Arbitron and identify a professional economic methodology that supports a finding of likely harm to competition based upon the available data

- The Majority did not know whether Nielsen and Arbitron each could and would develop a cross-platform product absent the merger
  - Across how many platforms must the product provide audience measurement?
  - Is syndication required for a successful cross-platform product?
  -

Then Things Really Got Hard: Predicting Innovation in High-Tech Markets

- Predicting competitive effects when the primary theory of harm is reduced innovation presents additional challenges
  - Features of high-tech markets pose well-known challenges
    - Dimensionality of competition, network effects, complementary products, dynamic competition
  - Entry and exit
    - Possibility of rapid technological innovation may mean room for many possible new entrants
    - On the other hand, network effects and lock-in effects from an

Wrapping Up

- Merger analysis is necessarily predictive
- But it can co-exist with a healthy skepticism concerning the inferences drawn from economic analysis about future competition, innovation, and entry
- Courts and agencies have traditionally demonstrated that skepticism
  - Nielsen-Arbitron a potentially important deviation
- Developing better, empirically-grounded, and user-friendly economic tools for understanding entry and other supply-side activity a challenge for economists and potential focus for 2028 Horizontal Merger Guidelines