

Importance of the Effects-Based Approach and the Rule of Reason in Competition Law

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The Apparent Emerging Consensus

- The Norm: “Effects-Based” Analysis
 - Departures from rule of reason must be based on demonstrable economic effect
 - Some object-based (form-based, per se) infringements survive: e.g., price fixing by rivals
- The Relevant Effects are Effects on Consumers
 - Focus of competition law: “consumer welfare”
 - “Competition, not competitors”

Persistent Issues

- What Is “Effects-Based” Analysis?
 - What effects count – actual, likely?
 - When are per se/object-based tests appropriate?
 - Role for abbreviated (quick look) effects tests?
- What Is “Consumer Welfare”?
 - Consumer welfare or total welfare?
 - Consumers only as purchasers of goods/services – e.g., not as workers?

Agenda

- Trade-offs in the Design of Legal Rules
- Modern Trend: From Categories to Concepts
- Implications of Effects-Based Analysis for Agencies , Companies, and Courts
- Contact: wkovacic@law.gwu.edu
- Gavil, Kovacic & Baker, *Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy* (Thomsen, 2d ed., 2008)

Evaluating Analytical Methods in Competition Law: Three Criteria

- *Accuracy*: Is the Diagnosis Correct?
 - Especially if sanctions are powerful
- *Speed*: How Long Does It Take?
- *Cost*: How Expensive Is It to Apply?
 - Agencies and courts: expertise, personnel, time
 - Companies: information, time, predictability

Some Major Tradeoffs

- More Complete Effects-Based Tests Tend to:
 - Yield more accurate diagnoses
 - Take longer, cost more (resources, predictability)
- Object-Based/Per Se Rules Tend to:
 - Reduce implementation costs
 - Increase predictability
 - Undergo modifications/inspire exceptions
 - Price fixing in cartel vs. price fixing in partnership

Modern Trends

- From Categories to Concepts
- Toward More Elaborate Analysis of Effects
- Continued Role for Object/Per Se Tests
 - To condemn: horizontal price fixing
 - To exculpate: safe harbors based on market shares

US Law: 1970 to 2010

Per Se Illegal in 1970

- Horizontal price fixing, and market allocation
- All vertical restraints
- See also:
 - Tying
 - Group boycotts
 - Horizontal mergers > 5%

Per Se Illegal in 2010

- Horizontal price fixing
- Dying per se rules
 - Tying
 - Group boycotts

What Happened?

- Changes in Economic Learning
- Increasing Complexity of Conduct
 - Multi-dimensional strategies: Microsoft
 - Bundling and loyalty discounts
- New Intermediate Methods of Analysis
 - Quick look
 - Presumptions and burden shifting

Modern Framework

- Story of Anticompetitive Effects
 - Short cuts for remaining per se rules
- Market Power
 - Screen to exculpate
- Justifications
- Balancing

Implications for Agencies

- More Disclosure of Reasoning
- Guidelines
- Expertise
- Research Agenda
 - Monitoring changes in learning
 - Evaluation of effects

Implications for Courts

- Expertise
 - More specialization
 - Appointed experts
- Deference?
 - Automatic or earned?
- Time
 - Longer process

Implications for Companies

- Less Predictability
 - Depends on quality of guidance
- More Opportunities for Nuanced Analysis
- More Need to Engage in Continuing Conversation with Agencies

Concluding Thoughts

- Change in Form , Rhetoric, or Substance
- Comparison to Medicine
- Emphasis on System Capacity