

Economic Analysis for Lawyers

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Purpose of Competition Law

Sound competition policy sets rules and administrable standards to distinguish between legitimate precompetitive conduct, including aggressive competition, and illegitimate anticompetitive conduct

Why economic analysis for lawyers

- Provides analytical framework
- Theory (simplification)
- Application
 - Asking the right questions as to models
 - Asking the right questions as to results
- Goes to issues of market definition, competitive effects and to damage calculations

Important for institutional design

- Does the antitrust authority (or court) ask the right questions
- Does the design of the inquiry lead to an efficient judicial process
- How procedurally and substantively to deal with complex and simple cases

History of US Antitrust

Until the mid 1970s, much of US Antitrust Law was an intellectual embarrassment:

- Vertical Restraints Price
- Vertical Restraints Non-Price
- Exclusionary Conduct
- Mergers

Rules vs. Standards

- Move from per se illegality to rule of reason as move from rules to standards
- However, to have effective standards, need to have clear goals
- Goals of antitrust (consumer vs. total welfare) remain unclear in courts

US Reducing Excesses - Procedural

- *Twombly*
- *Matshushita*
- *Daubert*
- Antitrust Injury

US Reducing Excesses - Substantive

- Vertical Restraints Price
- Vertical Restraints Non-Price
- Exclusionary Conduct

Economic analysis does matter- Robinson Patman cases

Counts				Counts			
Pre-1993				Post-1993			
"Both" Counts Twice				"Both" Counts Twice			
All Cases	Plaintiff	Defendant	Total	All Cases	Plaintiff	Defendant	Total
Primary	24	58	82	Primary	1	18	19
Secondary	93	273	366	Secondary	28	66	94
Total	117	331	448	Total	29	84	113
Row Percents				Row Percents			
Pre-1993				Post-1993			
"Both" Counts Twice				"Both" Counts Twice			
All Cases	Plaintiff	Defendant	Total	All Cases	Plaintiff	Defendant	Total
Primary	29.27	70.73	100	Primary	5.26	94.74	100
Secondary	25.41	74.59	100	Secondary	29.79	70.21	100
Total	26.12	73.88	100	Total	25.66	74.34	100
Col Percents				Col Percents			
Pre-1993				Post-1993			
"Both" Counts Twice				"Both" Counts Twice			
All Cases	Plaintiff	Defendant	Total	All Cases	Plaintiff	Defendant	Total
Primary	20.51	17.52	18.30	Primary	3.45	21.43	16.81
Secondary	79.49	82.48	81.70	Secondary	96.55	78.57	83.19
Total	100	100	100	Total	100	100	100

US Summary

- Things have gotten better but only after a long period of time
- The past 30 years of the Supreme Court decisions has corrected bad doctrine to comport with economic insights but some areas still need fixing (e.g., mergers, tying)
- Changes in procedural and substantive law should – and does – have the effect of depressing the number of cases brought

Europe

Economic analysis more problematic until relatively recently

Reasons:

- Less of an economic focus (shift in past decade to “effects”)
- Less institutionalization of economists at DG Comp and slower development of a professional class of economists and slower acceptance by practicing lawyers
- Legal education traditionally lacking in economic analysis

Conclusion

Both the United States and Europe experiences illustrate:

- Case development a learning process
- Economic analysis is not easily integrated by the courts (or agencies)
- Sound economic analysis critical for both predictability and yielding better results