



New Evidentiary Burdens: the View from the US

Structure versus Effects in the Analysis of the
Agencies, the Parties, and the Courts

Hypothetical Merger

- Merger of “closest competitors” among national boutique retail chains
- Challenges for the players:
 - How will the agencies analyze?
 - How should the parties analyze?
 - How will the courts analyze?



Agency Analysis

- What will the agencies analyze in this hypothetical? Competitive effects
 - Natural experiments in entry/exit
 - Geographic proximity
 - Presence of other competitors
 - Walmart?
 - Other boutiques?



What should the parties focus on?

- Are there “silver bullets” for competitive effects?
- Evidence of:
 - Uniform pricing
 - No response to entry/exit
 - More substantial response to another competitor’s entry/exit



Hypothetical, cont'd

- Suppose the investigation shows:
 - Strong price effects from entry/exit of merging parties in local geographies
 - Strong effect based on proximity of stores of merging parties
 - Some constraint by Walmart when one merging party present, but less substantial than effect of the other's presence
 - Limited or no effect from other boutiques
 - Insufficient evidence to test effect of online alternatives on “bricks and mortar” stores



But what is the market?

- Do we do a Brown Shoe market analysis?
 - Why should we care?
 - Under such an analysis, is Walmart in the market? Other bricks and mortar boutiques? Online retail?



What should the players do?

- What should the agencies do?
 - Argue that market definition is irrelevant?
 - Try to prove a structural market, and maybe never get to competitive effects?
- What should the courts do?
 - Ignore structural issues?
 - Ignore competitive effects?
 - Try to reconcile the two, even if it's a force fit?



What should the parties do?

- If a “silver bullet” on competitive effects is available, consider going in with it already prepared
- If no “silver bullet” is available, how to advise clients when:
 - Unknown how much agencies will take structural analysis into account (eg in assessing litigation risk)
 - Unknown how much courts will take structural analysis into account





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