

New Economy and Antitrust Discussion Outline

I. *New Economy and Antitrust*

[1] Congress should not revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological innovation are central features.

Findings in Support

[a] The basic economic principles that guide antitrust law remain relevant to and appropriate for the antitrust analysis of industries in which innovation, intellectual property, and technological change are central features.

[b] Antitrust analysis, guided by sound economic principles, is sufficiently flexible to provide a sound competitive assessment in such industries. Over the past 30 years, antitrust law has been refined to incorporate new economic learning that encourages a more targeted and sophisticated competitive assessment of firms' agreements, unilateral conduct, and proposed transactions, such as mergers or acquisitions. These changes have altered antitrust analysis in ways that improve the potential for a sound competitive assessment in industries characterized by innovation, intellectual property, and technological change. For example:

[i] In the analysis of joint firm conduct under Section 1 of the Sherman Act and the analysis of unilateral firm conduct under Section 2 of the Sherman Act, antitrust law has largely turned away from the application of *per se* rules toward a more sophisticated and complex, "Rule-of-Reason" type of analysis, which typically requires the assessment of a more nuanced assessment of a variety of factors than *per se* rules.

[ii] Likewise, the analysis of mergers has moved away from a reliance primarily on structural presumptions about concentration toward a more complex analysis that incorporates predictions of competitive effects using tools of modern economic analysis.

[iii] The antitrust "Rule of Reason" and current merger analysis require both consideration of, and according weight to, procompetitive efficiencies that may result from firms' agreements, unilateral conduct, or proposed transactions. This is a significant change from the typical antitrust analysis of thirty years ago.

[iv] In particular, both the courts and the federal antitrust agencies have evidenced a greater appreciation of the importance of intellectual property in promoting innovation and, accordingly, the need to incorporate this recognition into a dynamic analysis of competitive effects.

[c] The evolution of antitrust law over the past thirty years—both through case law and agency guidelines—has shown that new or improved economic learning can be incorporated into antitrust analysis as appropriate. Allowing the ongoing incorporation of economic learning into antitrust case law and agency guidelines is preferable to attempts at legislative change to specify different antitrust

analyses for industries characterized by innovation, intellectual property, and technological change.

[i] Economic learning remains an ongoing process. Thus, it is important that antitrust law continue to develop through mechanisms that allow ongoing reassessments of economic principles relevant to antitrust analysis.

[ii] It is more efficient to allow antitrust law to develop through the case law and agency guidelines than through legislative change. Allowing antitrust law to develop through case law and agency guidelines has worked reasonably well over the last thirty years to incorporate economic learning in antitrust analysis. By comparison, legislative change is more difficult to achieve and could inadvertently preclude the further development of antitrust law to incorporate future economic learning and thus ossify outdated standards.

[2] In industries in which innovation, intellectual property, and technological change are central features, antitrust enforcers should avoid static analyses and should consider market dynamics in assessing the competitive effects of unilateral conduct, joint agreements, or proposed transactions, such as mergers or acquisitions. Antitrust enforcers also should ensure proper attention to economic and other characteristics of such industries that may, depending on the facts at issue, have important bearing on a valid antitrust analysis.

Findings in Support

[a] Innovation provides a significant share of consumer benefits associated with competition in the most dynamic industries. Over time, small increases in productivity can dwarf even significant reductions in static efficiency.

[b] Antitrust analysis must pay careful attention to the incentives and obstacles facing firms seeking to develop and commercialize new technologies. Antitrust enforcers should explicitly recognize that market conditions, business strategies, and industry structure can be highly dynamic.

[c] Current market shares may overstate or understate likely future competitive significance, and this must be recognized properly to account for dynamic effects in a relevant antitrust market.

[d] Further consideration should be given to efficiencies that lead to more rapid or enhanced innovation, including the development of new or improved products.

[e] A price above marginal cost, by itself, does not suggest market power in a relevant antitrust market. Firms with low marginal costs but large fixed costs, particularly for research and development and other innovative activity, may need to price significantly above marginal costs simply to earn a competitive return in the long run.

[f] A number of industries in which innovation, intellectual property, and technological change are central features also have one or more of the following

characteristics. Depending on the facts at issue, such characteristics may have an important bearing on a proper antitrust analysis:

- Very high rates of rapid innovation;
- Falling average costs (on a product, not a firm, basis) over a broad range of output;
- High fixed costs and low marginal costs;
- Relatively modest capital requirements;
- Quick and frequent entry and exit;
- Demand-side economies of scale;
- Switching costs;
- Need to collaborate with rivals to achieve efficiencies;
- First-mover advantages.