Antitrust Policy for Innovation

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Schumpeter v. Brandeis v. Chicago

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What Is the Role of Innovation for Antitrust Enforcement?

• A standalone basis for antitrust liability in monopolization or merger enforcement?

• A defense against liability in monopolization or merger enforcement?

• A complement to conventional price-centric antitrust enforcement?
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Monopolization:
The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

• No requirement to show an adverse effect on consumers; higher prices are presumed from monopoly

• Should there be a similar presumption that monopoly harms innovation?
  • Probably yes (Arrow replacement vs. preemption incentive & appropriation)

• Monopolization cases have not been decided based on presumed innovation effects
  • E.g., Plaintiffs alleged harm to innovation in U.S. v. Microsoft, but the Court did not address these allegations
  • Will U.S. v. Google or F.T.C. v. Facebook be different (for zero-price services)?
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Mergers:

Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly.

• Mergers can reduce innovation incentives under some, but not all, circumstances
  • “Downward Innovation Pressure” versus “Upward Pricing Pressure”
• But it is difficult to find examples in which the innovation benefit from a merger more than compensates for likely higher prices
  • E.g. Goettler & Gordon for microprocessors
  • Perhaps accelerate innovation of patented drugs or winner-take-all technology
• Market definition is an unnecessary burden for innovation-centric merger enforcement
Number of Firms Post-Merger

Merger raises price and harms innovation
Innovation Rate

Number of Firms Post-Merger

Merger raises price and promotes innovation
What Is the Role of Innovation for Antitrust Enforcement?

• A standalone basis for antitrust liability in monopolization or merger enforcement
  • Difficult to find examples of cases in price or related non-price (quality) effects are absent and liability depends on innovation effects
• A defense against liability in monopolization or merger enforcement
  • Schumpeterian arguments that monopoly or large increases in concentration are often alleged by defendants and sometimes accepted by courts – probably too much
• A complement to conventional price-centric antitrust enforcement