Mergers & Dynamic Efficiencies

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Partner, Crowell & Moring
In the background...

- Technological innovation is a key source of economic growth;

- The economic value of technological innovation accrues not solely, or even principally, to the firm involved, but also to society at large.
1. Prediction in Antitrust Enforcement

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Concentration $\rightarrow$ Harms Competition $\rightarrow$ Lowers Welfare
(as evidenced by prices)

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Empirical Support?

- Merger Retrospectives
  - Selection issues
    - No study of mergers that were stopped
    - Focus only on marginal or close-call mergers
    - Limited data sets skew focus to specific industries

Michael Katz & Orley Ashenfelter, Daniel S. Hosken & Matthew Weinberg, *Generating Evidence to Guide Antitrust Enforcement*, 5 *Competition Pol’y Int’l* 1 (2009);
1. Prediction in Antitrust Enforcement

**Empirical Support?**

- **Merger Retrospectives**
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  - **Key findings:**
    - Tendencies discerned: mergers tend to produce short term price increases and generate efficiencies
    - Limited findings do not support enforcement antipathy towards efficiencies

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"there is remarkably little empirical evidence on the effects of mergers to guide regulators"

Michael Katz & Orley Ashenfelter, Daniel S. Hosken & Matthew Weinberg, *Generating Evidence to Guide Antitrust Enforcement*, 5 COMPETITION POL’Y INT’L 1 (2009); Carlton, Why We Need to Measure the Effect of Merger Policy and How to Do It
2. Making Sense of Innovation
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Concentration $\rightarrow$ Harms Competition $\rightarrow$ Lowers Welfare

(as evidenced by prices)
2. Making Sense of Innovation

But also . . .

Concentration → Harms Competition → Lowers Welfare

(as evidenced by prices)

→ Enables Innovation → Raises Welfare
2. Making Sense of Innovation

So,

Concentration $\rightarrow$ May Harm Competition $\rightarrow$ Enable Innovation

BUT MAY ALSO $\rightarrow$ Enable Innovation

(Williamson tradeoff)

Michael Katz & Howard Shelanski, *Mergers and Innovation*, 74 Antitrust L.J. 1 (2007);
2. Making Sense of Innovation

In sum:
Antitrust authorities’ current analysis of mergers lacks a framework for interpreting – much less predicting – the incidence and magnitude of dynamic efficiencies

Concentration → May Harm Competition (the Williamson tradeoff)
BUT MAY ALSO → Enable Innovation

Jamie Henikoff Moffitt, Merging in the Shadow of the Law: The Case for Consistent Judicial Efficiency Analysis, 63 VAND. L. REV. 1697, 1708-1722 (2011);
Michael Katz & Howard Shelanski, Mergers and Innovation, 74 ANTITRUST L.J. 1 (2007);
2. Making Sense of Innovation

Concentration $\rightarrow$ May Harm Competition

BUT MAY ALSO $\rightarrow$ Enable Innovation

RESULT (Enforcement Bias):

General distrust of efficiency claims

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Michael Katz & Howard Shelanski, *Mergers and Innovation*, 74 Antitrust L.J. 1 (2007);

3. What Do We Know About Errors?

- **Predicted**
  - True
    - **Type II** False Negative
      - Bad merger authorized
  - False
    - **Type I** False Positive
      - Good merger blocked

- **Actual**
  - True
  - False
3. What Do We Know About Errors?

- They’re unavoidable

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<tr>
<th>Predicted</th>
<th>Actual</th>
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- They’re unavoidable
- Agencies can monitor and revisit a possible Type II error
- **There is no corrective for a Type I error**

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Some Observations

- Antitrust enforcement should reflect that
  - Type I errors can’t really be corrected
  - There are/may be mechanisms to hold parties to account for their efficiencies claims