

Economics “Comes of Age” at the FTC

**David Scheffman
LECG**

Overview of Bureau of Economics Contributions

- *See*
<http://www.ftc.gov/be/workshops/directorsconference/index.htm>
- Law enforcement
- Policy reviews and statements/Guidelines
- Research and Reports
- Contributions to knowledge
- BE has the resources and track record to continue to make major contributions

Economics Matters

- In antitrust “everyone” (lawyers, judges, economists) tries to employ and apply economics
- Core economic *principles* are relied upon
 - ▶ Profit maximization
 - ▶ Theory of monopoly
- The “trick” is to *usefully* apply economics to the facts and institutions at hand

Economics is the Framework ... Not the "Answer"

- In most cases you are going to have competent economists on both sides
- The contribution of economics and economists is the use of sound economics and statistics applied to the specific facts and institutions:
 - ▶ Form Hypotheses
 - ▶ Choose facts/data
 - ▶ Perform Analyses
 - ▶ Make Conclusions
- The adversary system "works"
 - ▶ *But in mergers because of lack of discovery, paucity of litigated cases ...*

Economics Moves Forward

- New research brings new knowledge
- In Industrial Organization Economics, except in the “early” days, theoretical advances generally come substantially before empirical “testing”

Topics

- Economics in the 1970s/Early 1980s
 - ▶ Antitrust
 - Monopolization Cases
 - Vertical
 - Mergers
 - ▶ Consumer Protection
 - Rulemaking
 - Government “perfecting” information “markets”
 - ▶ The origins and development of economic consulting

1970s Monopolization Cases

- "TiO₂," "Coffee," "Cereals," *Ethyl*, "Oil," IBM
- In each case other than "Oil" there was a coherent economic theory often grounded in the new Strategic Industrial Organization
- But ...

1970s Monopolization Cases

- Were an important source of “new learning” by economists:
 - ▶ This came at just the “right time” – when the Structure/Conduct/Performance “paradigm” was widely viewed as faulty
 - ▶ Seldom see profitability/profit rates in Plaintiff arguments (IBM, and Cereals)
 - ▶ Much deeper understanding about the complexity of “real world” competition

Punchline

- Economic Theory, alone, can be “dangerous” when applied to policy without firm grounding in facts and institutions
 - ▶ Most important theoretical conclusions depend on assumptions that must fit the facts and institutions of the specific situation

Punchline

- This of course does not mean that economic theory is not useful
- Rather – economic theory is very important when *transparently* applied to the relevant facts and institutions (see Scheffman/Coleman on Best Practices and Werden/Froeb/Scheffman on Simulations)
- **Antitrust economics is fundamentally “tested” in litigation**
 - ▶ *BUT this process is “slow” in mergers*

Vertical Restraints

- Vertical restraints retrospectives
- Order modifications

Mergers

- “Absorbing” the Guidelines
- “Collusion Theory” – “Check List *Plus*”
- Growing appreciation for the use of “Natural Experiments”
- Data analysis, in a general sense, can be very useful, even without modeling or statistical analysis
- Because most mergers, particularly “tricky” ones are resolved in consents, litigation has been slow to catch up with agency analyses

Consumer Protection

- Reality *vs.* economic arguments about “first best”
 - ▶ Case and rule selection
 - ▶ Remedies

Economic Consulting

- The Economic Consulting industry has spread a tremendous amount of information of immeasurable value to economists and the state of knowledge in Economics about how real world competition “works”
- Consultants (and FTC and DOJ economists) have been important in developing and “pushing” *empirical* analyses
- But ...

Implications

- Economic Theory must be “tested”
- In antitrust, most of the *ultimate* “testing” is done in litigation
- As in the monopolization cases of the 1970s, the application of economic theory in specific contexts will be “tested” in litigation
- Latest examples are *Arch Coal* (market definition and competitive effects) and *Oracle* (market definition and competitive effects)