Anticompetitive Overbuying

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FTC Hearings
June 21, 2006

Anticompetitive Exclusion

- Two distinct exclusion paradigms
  - Predatory pricing (on seller side)
  - Raising rivals' costs ("RRC") *(non-price predation)*

- RRC raises greater antitrust concerns

  <u>More likely to succeed and harm consumers</u>
  - No need to induce competitors to exit
  - No need for short-run profit sacrifice
  - No inherent short-run consumer benefit
    - *RRC can cause immediate consumer harm*

Anticompetitive Overbuying

- Two distinct overbuying allegations
  - Predatory overbuying *(predatory bidding)*
  - Raising rivals' costs *("RRC")* overbuying

- Allegations correspond analytically to the two anticompetitive paradigms

Antitrust Evaluation: Predatory Overbuyinig

- Goal: Buyer-side mkt power in input (upstream) market
- 4-step legal standard
  - Buyer power and artificially inflated input purchasing
    - Is increased purchasing "artificial"
    - "Warehousing" inputs raises greatest concerns
    - Require proof of purchasing to point where output price below-cost *(i.e., MRP < input price)* (*Brooke Group)*
  - Exit or permanent capacity reduction by input market competitors
  - Recoupment thru buyer-side monopsony power in input market
  - Net consumer harm on balance over entire time frame *(predatory + recoupment periods*)

Antitrust Evaluation: RRC Overbuying

- Goal: Seller-side mkt power in output (downstream) market
- 4-step legal standard
  - Buyer power and artificially inflated input purchasing
    - Is increased purchasing "artificial"
    - "Naked" purchasing and "Warehousing" inputs raise greatest concerns
    - ***Do not require*** proof of purchasing to point where output price below-cost *(i.e., MRP < input price)*
  - Raising rivals costs *(harm to competitors)*
  - Downstream mkt power over price *(harm to competition)*
  - Net consumer harm: Benefits to consumers from procompetitive benefits do not outweigh consumer harms from market power
- Step-1 standard for RRC overbuying is more interventionist because of greater competitive concerns than for predatory overbuying
- "Consumer harm" means *true* consumer welfare standard

Economic Welfare Standards

- True consumer welfare standard
  - *Consumer surplus*

- Total welfare standard
  - *Total surplus*
  - Bork's deception? or just confusion?

- Why use true consumer welfare standard?
  - Does not permit *competitor injury* to trump *consumer benefits*
    - ***But, total welfare standard does -- Did Bork know?***

  - Consistent with precedent

  - Simpler to evaluate *(price and output)*

  - Induces efficient conduct
    - Firm can marginally restructure transaction in efficient way to eliminate consumer harm
    - Offsets inability of courts/agencies to rigorously apply less restrictive alternative std or gain full information about potential alternatives, thereby preventing inefficiencies

  - Supports innovation

Innovation Incentives

Consider impact on innovation incentives when standards focus on short-run effects

- Consumer welfare standard supports greater overall innovation incentives
  - TW std allows dominant firm to destroy higher cost rivals that would innovate, thereby reducing innovation
  - TW std allows mergers that eliminate competition, leading merged firm to have less incentive to innovate
  - These harms likely are larger than any efficiency benefits from allowing mergers or exclusionary conduct that modestly reduce costs, while leading to higher prices to consumers
- Thus, using the consumer welfare std leads to higher *long-run* total welfare, plus higher *long-run* consumer welfare.