Future Competition Analysis in Antitrust Cases

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Fundamental Questions

- **What is the conduct we are concerned about?**
  - Current market participant is seeking to acquire or impede a potential entrant that would increase competition but-for the merger
  - Current market participant engages in practices that make it more difficult for entrants to come in and improve competitive conditions
- **Market Definition**
  - Always a good place to start is to assess the boundaries of the relevant market
  - Key question the extent the to which entrant would compete with acquirer or dominant firm
- **Market Concentration**
  - Market concentration is a proxy for assessing how competitive the market is today and how the entrant would affect competition
  - Market concentration in future competition cases also requires an assessment of the market concentration/performance when the independent entry at issue would occur
- **Conditions of Entry**
  - Need to determine whether the entry barriers are so substantial that entry by others (either non-merging parties or firms not excluded) would likely avert anticompetitive effects

Potential Competition Generally

- When looking at a potential (future) competition matter, need to consider:
  - **Likelihood** of entry by the affected parties (the parties being foreclosed or the target(s) of the acquisition)
  - **Timing** for entry by the affected parties
  - **Entry** advantages of target/affected firms
  - **Effect** that successful entry would have on the market but for the conduct of the incumbent acquirer/excluding party
- Also look at competition-enhancing aspects of transaction/conduct

Potential Competition Mergers

- **Competitive Concern:**
  - But-for the merger, the market will be substantially less competitive than it otherwise would have been

- **Elements:**
  - Market not fully competitive today (e.g. highly concentrated)
  - Independent entry by the target is sufficiently likely to be successful
  - Entry by the target would have a significant procompetitive effect (would provide important constraint on acquirer or would significantly deconcentrate market)
  - The market is otherwise insulated from entry –OR– the target has significant entry advantages

Potential Competition Exclusionary Conduct

- Similar to mergers, the concern in exclusionary conduct cases is that but for the foreclosure, **the market would become more competitive** than it is today
  - Can be of greater concern than mergers because conduct can affect many/all potential rivals

- **Prerequisites:**
  - Significant market participant is engaging in the conduct
  - Conduct has a significant impact on potential entrant's ability to compete
  - Legitimate business justifications are non-existent or are outweighed by anticompetitive effect

Examples of Exclusionary Conduct that Harms Future Competition

- **Customer Foreclosure:** Locking substantial portion of customers (or key customers) in long-term exclusive contracts that deny potential entrants the sales opportunities they need to be viable

- **Input Foreclosure:** Tying up key input providers into exclusive supply arrangements that deny potential entrants access to the inputs they need to successfully compete

- **Other conduct:** below-cost pricing, anticompetitive bundling/tying, foreclosure by standard setting or other rules

Key Issues in Potential Competition Cases

- **Probability of successful entry**
  - How likely is the entry to occur? How likely does it have to be to merit protection?
  - What is the timing of the entry? Is it sufficiently soon that it is
- **Competitive impact of the entry**
  - How would entry affect (if successful) impact competition in the market?
- **Significance of entry advantages over others potential entrants**
  - Are other firms equally likely to have a similar competitive impact?
  - Are other firms likely to enter later?
- **Procompetitive effects and business justifications**
  - **For mergers,** will the merger allow the entrant's products to get to market more quickly or use the entrant's technology to improve its own products?
  - **For exclusionary conduct,** the easy cases are where the conduct has no purpose other than to exclude potential competition, the harder cases are when the conduct enhances economic efficiency or is vigorous competition that is also exclusionary

Special Focus on Probability

- **How likely does the entry have to be in order to raise competitive concerns?**
  - In many jurisdictions, it must be “probable” or “likely,” suggesting that it would have to be at least more likely than not
  - Economically, the competitive significance of the entry is a combination of the probability and the competitive impact if successful

- **How to decide whether it is sufficiently likely?**
  - What is the intent or plans of the potential entrant?
  - What are the risks that it would not be successful?
  - Does entry make economic sense for the firm (does it have entry advantages that make it well positioned to enter)?