



Competition Law Analysis & The Role of Economics

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Two Modes of Analysis

1. **“Rule of Reason”** – where the Competition Act requires showing that the business practice under investigation “causes or is likely to cause an appreciable effect on competition.”
2. **“Per se” rule** – where the Competition Act “presume[s]” that the business practice under investigation has “an appreciable adverse effect on competition.”

What is the practical significance of this distinction, if any, for investigations?

The Rule of Reason

- Evaluates business practices case-by-case.
- Is typically very fact intensive.
- Requires an analysis of the practice's competitive effect in a relevant market.
- Takes into account the purposes and any justifications offered for the practice.

The Per Se Rule

- Proof of the prohibited conduct is sufficient to establish a violation.
- Thus no need to:
 - consider whether price is reasonable (?)
 - prove market power or effects (?)
 - assess efficiency justifications (?)
- Reasons for adopting a per se rule:
 - deters business practices known to pose competitive harm in most cases
 - gives businesses certainty about legal status of certain practices

The Role of Economics

- Provides important insights into market structures, business practices, and incentives, and the probable effects of those business practices.
- But even economists do not always agree about whether a given business practice is likely to harm competition in a given case.
- Nonetheless, it is widely agreed that the application of economics to competition law analysis can result in greater precision and predictability in the law's enforcement.

Applications of Economics

- Defining relevant markets
- Identifying and measuring market power
- Identifying and assessing barriers to entry
- Studying pricing patterns
- Analyzing competitive effects
- Quantifying economic harm or damages
- Assessing efficiencies

Some Lessons from Economics

- Companies tend to grow to the size at which they operate most efficiently.
- What is “efficient” can change with developments in technology, management practices, and other innovations.
- A market in which there are only a few producers, or even a single producer, may be the result of competition, rather than a sign of competitive problems.

Some Lessons from Economics

- There are few products for which the minimum efficient scale or scope of production does not leave room for several competitors to serve the market.
- Whenever competitors compete they intend to take business away from each other.
- Certain business practices once thought to almost always be anticompetitive – such as exclusive dealing, tying, and vertical and horizontal mergers – may in fact be efficiency enhancing under many circumstances.

Economic Models

- **Microeconomics** – the study of how individuals, firms, and industries behave. Starts with the basic models of competition, monopoly, and oligopoly.
- Other economic models influencing the development of competition law:
 - **Contestable markets hypothesis** – posits that even industries with only a few firms, or just one, can be competitive if there is easy entry and exit.
 - **Transaction costs analysis** – analyzes differences in the costs of dealing with others in addition to price, such as the cost of writing and enforcing contracts – to explain why firms organize as they do.
 - **Game theory** – analyzes strategies of conflict and cooperation between firms, and how those strategies determine a firm's output and price, while taking into account the likely responses of rivals.