Market as Mirage

Frederick M. Rowe†

The typical antitrust case is an almost impudent exercise in economic gerrymandering. . . . [T]he determination of markets has remained an undeveloped area of economic research at either the theoretical or empirical level.

George J. Stigler (1985)¹

I find much to endorse in Professor Areeda's magisterial presentation: (1) his description of the dubious role of juries as antitrust policymakers; (2) his recognition of the importance of clearly defining those anticompetitive "improprieties" that spell monopolization; and (3) his acknowledgement of the need for doctrines that do not chill innovative incentives or competitive vigor among even the most powerful enterprises.² I too join the growing consensus that regards reforms in private treble damage enforcement as timely, since such reforms would not only diminish the sway of juries, but would also avert other excesses that might otherwise warrant cutting substantive antitrust doctrines to the bone.

My main disagreement with Professor Areeda concerns the proper role of the market concept in monopolization and merger enforcement—particularly his belief that better market definitions will produce sounder antitrust results.³ In my view, the concept of "the market" is the weakest link in antimonopolization and antimerger law. Having eluded antitrust scholars for over a generation, the "correct" market remains a mirage. On the eve of antitrust's centennial celebration, waiting for the market is waiting for Godot.⁴

The antitrust-economic notion of the market was doomed from the start as a basis for predicting pro- or anticompetitive prospects. Designed to ensure antitrust certainty, planning, and administration, the market concept soon degenerated into manipulation, paradox, and num-

† Partner, Kirkland & Ellis, Washington, D.C.; Professor Adjunct of Law and Management, Yale School of Organization and Management. B.B.A. 1949, City College of New York; LL.B. 1952, Yale Law School.


³ See id. at 979-80.

bers games. Looking toward the next antitrust century, the market concept is no longer viable as a competitive predictor and will yield to doctrines dictating less antitrust intervention—more in the spirit of these times.

At birth, the idea of "the market" as an antitrust norm seemed promising and attractive. Over forty years ago, the Alcoa case coined the famous 30/60/90% market share test for measuring monopolists as candidates for dismantling. Antitrust-economic scholars of the 1950's translated that day's regnant oligopoly theory into formulas for measuring market concentration and market power indicative of anticompetitive malaise or abuse. The yen for a telltale number as the indicator of competitive distress found clear expression in 1968 when the Justice Department proclaimed its first Merger Guidelines. What was simpler for harried businessmen, lawyers, and judges than finding the market, dividing it among suppliers, and counting the score? Furthermore, the economic theory that markets of few sellers were prone to collusion also fit political fears of power in the hands of a few. In the hands of zealous enforcement officials cheered by antitrust-happy judges, those ideas propelled the last generation's ambitious antitrust crusades.

But the dream of objective market-based antitrust rules soon turned sour: Once market shares and concentration counts became dispositive of monopolization and merger cases, the manipulation of markets and the massaging of numbers debased antitrust law into farce. Since a firm's telltale market-share percentage was inverse to the size of the chosen market, the search for the relevant market became the focus of each case. Aided by eager economists, astute lawyers maneuvered to make the market look smaller or bigger, in order to bloat or to shrink the defendant's market share.

Among the Supreme Court's seminal merger decisions were DuPont and Grinnell. Conspicuously, DuPont escaped breakup by convincing the Court that it held not a monopolistic seventy-five percent share of the cellophane market, but only a modest twenty percent of the market for "flexible packaging materials" comprising other "reasonably interchangeable" products. But in Grinnell, the Court broke up the

5. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).
6. See C. Kayser & D. Turner, Antitrust Policy (1959); cf. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 348 (1960) ("[I]t seems quite likely that a variety of simple tests can be constructed and that some, at least, will have a greater significance than critics have commonly supposed in considering market shares or dollar amounts as touchstones of legality.").
7. See Rowe, supra note 4, at 1524-34.
8. Id. at 1544-46.
obscure Grinnell Companies, holding that they monopolized eighty-seven percent of the market of "accredited central station protective services" as distinct from other home or industrial alarms.12 Three years later, the Court revealed the market for championship boxing matches as distinct from that for other professional boxing matches.13 Most recently, the Court solemnly upheld a monopolization verdict in the downhill skiing market (or "submarket") in Aspen.14

As the antitrust annals filled with monopolization rulings based on high shares in spurious markets,15 antimerger enforcement sank into paradox and anomaly. Antimerger policy concentrated on zapping puny "horizontal" mergers that gained high shares in petty markets,16 while fostering large conglomerations that, by definition, did not alter preexisting market shares. Amid a binge of megamergers, the Justice Department hit piddling acquisitions for raising concentration in trivial markets,17 such as "artificial Christmas trees"18 or "vandal-resistant plumbing fixtures" used in prisons.19 Meanwhile, the Federal Trade Commission marched against mergers for raising concentration in other jejune markets,20 such as urological catheters21 and "knockdown casket parts."22 Recently, as corks popped at the $6.8 billion reunion of General Electric and RCA,23 the Justice Department broke up a $20 million combination in the condom market,24 and smote a petty acquisition concentrating the market for "ion exchange resins" used in water treatment

---

12. Grinnell, 384 U.S. at 567, 573. The dissent mocked the majority's market as a "red-haired, bearded, one-eyed man-with-a-limp classification." Id. at 591 (Fortas, J., dissenting).
15. See Rowe, supra note 4, at 1536 (citing cases). For further examples, see ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 111-15, 150-53 (2d ed. 1984) (describing relevant product markets).
16. See Rowe, supra note 4, at 1530-31 (Table I).
17. Id., at 1528 (citing cases).
20. Rowe, supra note 4, at 1528 (citing cases).
24. Division Threatens to Attack Merger of Australian, U.S. Condom Manufacturers, [July- Dec.] 47 Antitrust & Trade Reg. Rep. No. 1192, at 1006 (Nov. 29, 1984). According to the Justice Department, the merger would "substantially lessen competition in sales of condoms to U.S. consumers and to [the U.S. Agency for International Development]," where both merging firms were leading competitors. Id.
Similarly, the antitrust enforcement agencies devised Procrustean policies for clearing mergers by lopping off so-called "market overlaps." Acquisitions of firms whose product lines or distribution areas overlapped slightly with the acquiror's business were "cured" by a token divestiture as a painless offering for a cosmetic settlement decree.

In retrospect, such antitrust travesties are not altogether surprising. Indubitably, even the best antitrust standards "lead to senseless results unless markets and market power are correctly determined." Almost thirty years ago, then Professor Turner warned that without a "minimally reasonable definition of markets," quantitative antitrust standards become "whimsy." In 1980, he lamented that the "whole area" of market definition was "a bloody mess," and that "the courts have simply not come up with any articulated set of legal principles for defining markets."

But why blame courts for this analytic shambles? Economics Nobel laureate George Stigler has acknowledged that "the determination of markets has remained an undeveloped area of economic research at either the theoretical or empirical level." After all the hand-wringing, finger-pointing, and groaning, why not at last admit what is now so painfully obvious: Howsoever urgent the task of simplifying antitrust administration, the numerology of market shares and concentration counts as competitive predictors does not work.

Alas, there is no dearth of economic theories for defining the market. The trouble is that all are circular; none yields a magic formula for

---


26. See Rowe, supra note 4, at 1529.

27. Cf. Rogowsky, An Economic Study of Antimerger Remedies, 4, 70, 73, 98, 118-20, 122, 250, 256 (May 1982) (unpublished Ph.D. thesis, Dep't of Econ., Univ. of Va.). Rogowsky analyzed 104 Justice Department and FTC nonbank merger cases from 1968-1980. He found that the typical case "contributed little" and was "trivial"; average divestitures took over five years; 70% of divestitures were unsuccessful due to trivial scope, long delays, or wasting assets; and nearly three-fourths of challenged mergers lacked anti-competitive potential. Amid the welter of exegesis, Rogowsky's studies are the only comprehensive empirical assessment since 1969. See Elzinga, The Antimerger Law: Pyrrhic Victories?, 12 J.L. & Econ. 43 (1969) (earlier study on anti-merger remedies). Selected FTC antitrust cases are evaluated in Gellhorn, Regulatory Reform and the Federal Trade Commission's Antitrust Jurisdiction, 49 TENN. L. REV. 471, 477-96 (1982).

28. See Areeda, supra note 2, at 979.


31. G. STIGLER, supra note 1.

32. See, e.g., U.S. Dep't of Justice 1968 Merger Guidelines, ¶ 3 ("A market is any grouping of sales . . . in which each of the firms whose sales are included enjoys some advantage in competing with those firms whose sales are not included"); G. STIGLER, THE THEORY OF PRICE 86 (3d ed.
predicting competitive consequences in any actual, live case. As devised by Alfred Marshall, the founder of modern economic science, "the market" was an analytic construct, in suspended time, in which price brought supply and demand into gravitational balance—if nothing changed. But no timeless market can frame the flux of today's modern enterprise that deploys mobile resources into multiple product/service arrays of varying lifespans and infinite permutations. There, time is of the essence, change is the constant, and uncertainty reigns. So, still an "undeveloped area" baffling economic science, the market at the core of antitrust economics becomes a joker, a "bloody mess," an intellectual black hole.

By now, wise observers know that competition defines the market, not vice versa; that no market can contain competition among modern multi-product firms; that the market is a still snapshot in frozen time, unable to sense change or innovation; that the process of competition defies quantification; and hence that the concept of a finite, objectively defined market is an ever-receding mirage.

Obviously, I do not seek to exorcise "the market" from the antitrust lexicon; nor can I offer a magic monopoly meter or foolproof intervention index to take its place. Rather, my point is that the fetish of a finite, measurable market to serve as a competitive predictor is inherently delusive in application. As dramatized by a failed antimerger record of futility, paradox, and trivialization, the more a "correct" identification of the market becomes decisive for antitrust outcomes, the greater the premium for manipulation, and the higher the ratio of perversity.

If the central premise of the finite market is not a viable predictor of competition, then what next? At a time of foreign competitors making deep inroads and domestic firms crying for protection, aggressive


33. See Areeda, Market Definition and Horizontal Restraints, 52 ANTITRUST L.J. 553, 554-65 (1983) ("best indication" of market power is "that it has been exercised" in "persistent and grossly large" ways in "middle run," yet "questions seem endlessly circular").


35. Cf. Schmalensee, On the Use of Economic Models in Antitrust: The Realemon Case, 127 U. PA. L. REV. 994, 1010 (1979) (market definition "depends almost entirely on the question to be analyzed"); Areeda, supra note 33, at 583 (need for "best possible market definition," adjusted on the basis of "inferences to be drawn as the available information permits").

36. For elaboration and documentation, see Rowe, supra note 4, at 1545-47, 1563-65.
antimonopoly and antimerger campaigns to smite American producers are hardly in vogue. A Borked generation of judges and law clerks, steeped in Chicago efficiency economics, will be slow to cut up American businesses and lend a helping hand to Europeans or Japanese. So if doctrine distills reality, a stronger "ease of entry" concept may emerge as the new antitrust trump card to overcome big market shares or fat index numbers as criteria for presumptive illegality.37

Such an approach, with "ease of entry" shown by shifts among products or suppliers (actual or potential), would do more than just neutralize superficially big market-share numbers. By spotlighting mobility, it would also focus attention on issues of change and innovation, perhaps rescue antimerger and antimonopolization law from trivialization, and avert future fiascos like the IBM case—which the Antitrust Division dropped after thirteen years of wrangling because technological advance had made IBM's seventy-percent share delusive in markets becoming "outdated or amorphous."38 In short, dynamic mobility aspects rather than static market counts would become decisive in monopolization and merger contexts.

Above all, while a new generation of scholars develops better and timelier visions for antitrust's next century, the quixotic quest for the market at long last deserves a decent grave.

37. Pointing the way is the Second Circuit's Waste Management decision, which validated a horizontal merger that gained almost 50% of the market for commercial trash hauling in Dallas, holding that easy entry negated any anticompetitive effects inferable from the high market share alone. United States v. Waste Management, Inc., 743 F.2d 976, 983 (2d Cir. 1984) (Winter, J.) (turnabout of "potential competition" concept to widen "the market").