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The Wrong Questions: Addressing Executive Testimony in Merger Review Trials

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Nick Jacobson
Sahil Alim

Recent antitrust merger trials have exposed a problem with the way the American legal system approaches merger review. In this paper, we focus on one pressing issue: the influence of executive testimony at merger trials improperly oriented around predicting the post-merger world. We argue that analyzing mergers to protect competition—which necessarily involves uncertainty—relieves courts of the self-imposed burden to predict the exact outcome of a merger. Furthermore, we argue that trials should recenter attention to questions about future incentives, rather than future facts. That is, trials currently boil down to questions about "facts," such as what the new price point will be post-merger. We, instead, advocate for a different paradigm; for example, courts should ask, "does the incentive of the firm to compete on price lessen after the merger?" Reframing the focus to incentives will, in turn, demonstrate limitations to executive testimony: executives are experts on their business, but they are not experts on incentives.

I. Recent Merger Trials Demonstrate that Courts Give Undue Weight to Executive Testimony

Recent merger trials illustrate the problem of executive testimony in some of the most important modern markets and reveal the role corporate executives play in persuading courts to accept them.

A. AT&T Time Warner Merger

In 2016, AT&T announced plans to acquire Time Warner, the entertainment conglomerate that controlled major brands such as TNT, HBO, and CNN (Reiff). AT&T sought to expand its foothold in the industry by using Time-Warner to deliver "innovative video content and advertising offerings" to its "many video and wireless customers" (AT&T-Time Warner, 3). In its challenge to the merger, the Department of Justice argued that AT&T's control over Time-Warner would allow "AT&T to use Time Warner's 'must have' television content to either raise its rivals' video programming costs" or "drive those same rivals' customers" to DirecTV, AT&T's subsidiary (AT&T-Time Warner, 1). The DOJ's economists relied on Nash bargaining theory and Time-Warner's ability to withhold content to posit that a change in incentives would lead to higher prices, as a merger would significantly increase Time-Warner's bargaining position with affiliates (AT&T-Time Warner, 72-73). That is, Time-Warner would no longer face the "downside" of failing to strike a deal because "some of those losses would be offset" by access to "AT&T's video distribution companies" (AT&T-Time Warner, 73). In one of the 2018 trial's hot-button debates, Judge Leon rejected the DOJ's contention that AT&T would limit competitors' access to Time Warner content even to the point of blackouts as "a gossamer thin claim" (166). He cited Time Warner and AT&T executives who, on the stand, dismissed the theory as "ridiculous" (Kang). No withholding of content, according to the executives, meant there would be no change in price. Six months after the merger concluded, AT&T did black out HBO content from Dish and the black out lasted for almost three years (the first blackout in HBO's existence). As Principal Deputy Assistant Attorney General for Antitrust Doha Mekki cited, it was "one of the longest-running carriage disputes in TV history" (Mekki). AT&T also pulled subscription offers for HBO from Amazon, Hulu, and Apple and removed Warner movies and television from competitors like Netflix (Stewart). As a result of the merger, millions of people lost access to Time Warner content behind new paywalls that profited AT&T.

B. Sprint T-Mobile Merger

In another merger trial, Sprint T-Mobile, the court also relied on executive testimony to reject theories of harm posited by plaintiffs that were proved correct in the post-merger world. T-Mobile and Sprint announced plans to merge, with the aim of synthesizing “their spectrum holdings” to compete with their “two largest competitors, AT&T and Verizon” (Sprint T-Mobile, 29). Sprint believed “a merger with T-Mobile was a more strategically sound path forward” than operating alone or “merging with an alternative” competitor (Sprint T-Mobile, 29). Multiple states challenged the merger as a violation of Section 7 of the Clayton Act (Sprint T-Mobile, 1). The plaintiffs argued that propping up Dish as a new fourth competitor to replace Sprint in the nationwide wireless business would fail to preserve competition in the market and harm consumers, particularly budget-sensitive ones who benefited from competition between Sprint and T-Mobile for phone lines. Specifically, expert witnesses for the plaintiff states relied on a structural presumption: less head-to-head competition meant a greater incentive for the merged firm to charge higher prices, as Dish, being a small competitor, would not shift the new firm’s incentives. Executives, on the other hand, argued that they would keep competing and that Dish would be a lofty new entrant. On the stand, Thorsten Langheim, a member of the Deutsche Telekom Board of Management who oversees USA development including T-Mobile, testified, “I 100 percent believe . . . that the economic impact [of Dish as a new competitor] on us, on new T-Mobile U.S., is substantial. And so I believe this company [Dish] will be very successful.” (365). Ergen himself, CEO of Dish, promised to “compete from day one” (1562). “We'll be ready in probably 30 days to enter the marketplace from the time this decision is made,” he testified (1563). In his opinion in favor of the merging parties, Judge Marrero alluded to such testimony as persuasive evidence that Dish would take Sprint’s place in the market. He wrote, “DISH's statements at trial persuade the Court that the new firm will take advantage of its opportunity, aggressively competing in the RMWTS Markets to the benefit of price-conscious consumers and opening for consumer use a broad range of spectrum that had heretofore remained fallow” (169).

Contrary to the expectations of the court, but in line with expectations in the marketplace, delays and missed deadlines have plagued the Dish wireless rollout from its inception. Matt Kapko of SDxCentral reported on December 29, 2021, “Dish missed every 5G commitment it made in 2021.” Though Dish did meet an FCC deadline to offer its network to 20 percent of the U.S. population by June 14, 2022, reviews reflect a slow network with spotty coverage, and users must purchase a phone configured to work with the network (Segan). As of April 16, 2023, only two handset types worked with the service, and the company listed under 9 million customers, slightly fewer than the number it had bought from New T-Mobile in 2020. By comparison, Sprint had over 54 million customers when it merged with T-Mobile (Nasdaq).

II. Antitrust Trials Problematically Center Executive Predictions

A. Focus on Specific Business Decisions

As illustrated in the above cases, merger cases have recently focused on the most detailed, granular analysis of future business decisions of the merged firm. The debate in AT&T Time Warner referenced above centered on a particular business strategy—blackouts—and whether or not the merged company would use the strategy in its contract negotiations. The DOJ–pointing to previous blackouts and the threat of blackouts–claimed the strategy would be reasonable, and the company's called it unprecedented and "ridiculous." In Sprint T-Mobile, Judge Marrero felt compelled to "assess whether consumers would receive high-definition Netflix in 2020 or 2021" in order to evaluate the testimony of Carl Shapiro, the DOJ's expert, with regard to the cost to consumers, a task which, Judge Marrero added, "only compounds the necessarily speculative quality of this inquiry" (141). Analysis to this level of detail demands an impossible task of a judge. No one—especially not someone with intimate familiarity with the industry—can make the kinds of predictions that Judge Marrero describes, such as the availability of HD Netflix a few years out.

B. Advantaging Executives' Character as Firm Behavior

Given the impossible task, the overall effect of focusing on specific business decisions and their likely manifestations post-merger is weighting the inquiry from the start of the trial in the favor of the executives. Of the four occupations in the courtroom (the judge, the lawyers, the economists, and the corporate executives), the executives emerge as the party with the most experience in the business at hand. It seems obvious that the executive should know: Who could better predict how pricing decisions will be made than the person who makes them? Or how contracts will be negotiated? Or how the business at large will be run? However, this perspective conflates detailed knowledge of past decisions with the ability to predict how the competitive environment in which those decisions are made will change.

Courts, however, focus on evidence, which are past managerial decisions, and therefore organize their decisions in deference to executives' claims about the companies they manage. Judge Victor Marrero in the Sprint T-Mobile case stated that the most "relevant and compelling" aspect of "the evidentiary record" was the "plausibility and persuasiveness of particular witnesses' trial presentations" in the Sprint T-Mobile merger (Sprint T-Mobile, 188 on Westlaw Download).

In the above cases, focusing on witnesses led the judge to conflate the executive with the firm and to personalize the firm's behavior. In essence, the executive *becomes* the firm. In the Sprint T-Mobile case, Judge Marrero described executives leading the firm not as responding to the competitive landscape but as making a choice based on personal preferences or taste. Based on the testimony of John Legere (the then-President & CEO of T-Mobile), Judge Marrero asked a plaintiff economist, "[y]ou're concerned that in the post-merger world, that T-mobile will sort of … 'pull their punches'…. Is it also possible that rather than pulling their punches, they may go out in the ring, like Rocky, and say: [c]ome on out?" (transcript, 2297). This agential description of the firm imputes its behavior to the executives. Under some management, the firm might decide not to fight, but under others (that is, under people like John Legere) the firm will compete.

In this kind of analysis, character plays a major role. In his opinion, Judge Marrero decided to accept the executives' version of the Sprint T-Mobile merger by an analysis of their character. "During the two-week trial of this action the Court had ample occasion to observe the witnesses and assess their credibility and demeanor on the witness stand," he wrote (8). The implication is that trustworthy executives (and thus firms) should be allowed to merge, while poor character is the sign of a bad merger.

Executives themselves encourage this conflation. At trial, they like to talk about the past decisions the company (or they themselves) have made as if the executive has built an unshakable identity for a company, regardless of the changes it undergoes. Legere's statements at trial seamlessly transition between "we have," "we are," and "we will," ignoring that the "we" in question will be almost 50 percent new in the future and that it will no longer include Legere himself. Similarly, Mike Sievert, the incoming CEO of New T-Mobile, dismissed economists' predictions about pricing in the post-merger world on the grounds of the personality of the firm: "I don't know how these people [economists] come up with what they come up with [a model showing higher than competitive prices], but in the real world, I've spent the last -- we have spent the last seven years attracting tens of millions of customers who have an expectation now, and an implied promise from us, and an ongoing relationship." Sievert suggested that T-Mobile's customers would not let them raise prices because they had come to expect low prices from T-Mobile.

Yet this approach—centering executives' characters and their everyday firm decisions—leads to bad decisions, specifically to consummating anticompetitive mergers. Executives in Sprint T-Mobile and AT&T Time Warner did not follow through on the promises they made, and the judges that trusted them have seen that trust violated. In his ruling, Judge Marrero himself offered a troubling comparison to how he understood his job at trial, that "tried and tested version of peering into a crystal ball" (6). As we discuss below, the premise of evaluating mergers based on specific business decisions and the executives that make them to predict the "most likely outcome" of a merger is fundamentally flawed (Mekki).

III. Executives Have a Material Interest in the Trial Outcome Independent of Protecting the Free Market

The first problem with executive testimony is that corporate executives have a large incentive to get mergers done. Bewkes's payout from the AT&T Time Warner merger hovered around $200 million (a large figure in part because Bewkes was retiring from the merged company) (Johnson). On the AT&T side, Stankey received a $2 million bonus and general counsel David McAtee, architect of the merger legal strategy, received $5 million (O'Donnell). In Sprint T-Mobile, exiting T-Mobile CEO John Legere received $137 million and other executives earned double-digit millions in bonuses (FitzGerald). Though economists debate the reasons motivating huge executive payouts after mergers, the literature agrees [MOU2] that they occur even when the promised benefits of a merger never appear (Harford and Li; Bugeja, et al; Grinstein and Hribar; Wallenstein and Johnson). Executives thus walk into the courtroom with the strongest personal and corporate incentives to push through mergers independent of their utility or legality. Even after the collapse of the AT&T Time Warner merger and the billions of dollars lost in the process, Jeff Bewkes said he had no regrets because it made money for the original Time Warner shareholders (Stewart).

Further, firms strategize how to keep executives away from material that might suggest they are aware of any anticompetitive consequences of the merger. This strategy is of course unsurprising, unexceptional, and unpreventable. Although the strategies firms use to advance this effort are numerous and beyond the scope of this paper, one worth mentioning is the use of outside consulting firms to prepare materials to study the merger's effects (including anticompetitive ones) that executives can then view and discuss without taking legal responsibility for the materials. In the Sprint T-Mobile merger, the company's lawyers repeatedly objected when lawyers for the plaintiff states attempted to question executives about documents prepared by McKinsey & Company. The lawyers' objections (often sustained) were made on the basis that the materials were "not our documents." By outsourcing analysis of a merger's effects, firms can thus free their executives from having to comment on harms to competition as a result of the merger, adding structural support for executives even in cross examination in addition to their personal motivations to get a merger done.

Given the incentives they face and the structure of their testimony, executives will always praise competition and their merger in the courtroom. During the Sprint T-Mobile trial, executives offered lofty statements about their commitment to competition, good corporate management, and business reputation. When asked "Have you been unrelenting?" CEO Legere testified, "We have, and we'll continue to be" (889). Some minutes later he repeated, "We are the uncarrier, that's who we are, that's what we're about, and we will continue to be" (898). And then again: "I have always believed very strongly that a procompetitive, proconsumer, highly innovative process of giving customers more, asking less from them, retaining the value, expanding the relationship with your customers is you can have lowering price and increasing revenue and profitability and cash flow" (914).

These statements and those like them are all reward and no risk for companies at trial. If they help convince a judge to grant a merger (which they did), they are worth millions of dollars. Since they are almost impossible to disprove and make no legal commitments, executives and their companies cannot be held accountable for any false impressions they might give. If T-Mobile announced tomorrow that it was abandoning the Uncarrier brand and raising prices, John Legere would still almost certainly face no repercussions for his above statements. Bewkes faced no trouble for dismissing the prospect of HBO blackouts after the AT&T Time Warner merger as "ridiculous," though, as it turned out, the blackouts were rational. Although DISH is under federal enforcement if it fails to build out a wireless network, Ergen's now-preposterous promise of a 30-day turnaround also produced no consequences.

The result of material incentives to complete mergers independent of their utility and the lack of consequences for executives making predictions at trial is that executives project complete confidence in their mergers at trial—regardless of their consequences. Unlike expert witnesses whose reputations depend on accuracy, corporate executives are rewarded for winning, not for accuracy. In its coverage of AT&T Time Warner, *The New York Times* described Time Warner CEO Jeff Bewkes's testimony:

> Confident and congenial, Mr. Bewkes engaged directly with Judge Leon, leaning forward in his chair and making eye contact as he explained how the media industry is being challenged by Apple, Amazon, Facebook, Google and Netflix. He described the Justice Department's theory that the merged company would threaten to withhold Time Warner content from rival cable operators as "ridiculous." (Kang)

Of course, the economics argument from the theory of bargaining was not "ridiculous." Blackouts happened. In a moment of paradoxical self-reflection and assertion, Randall Stephenson responded to Judge Leon's question, "Where do you think this ecosystem will be seven years from now?" by saying that "if you had asked him seven years ago he would've been off in his prediction. But he predicts that content creators 'will have direct and immediate access to consumers -- we've seen an explosion of that'" (Kludt & Gold). In one breath Stephenson acknowledged woeful error in his predictions, and yet offered one anyway. Thus, when judges take executives at their word in trials about the effects of a merger, they expose the market to bad mergers.

IV. Even if the Executive is Perfectly Virtuous, Merger Trials Should Focus on Incentives, not Character or Predictions

A. Firms Act to Make Money

Beyond the problematic motivations that drive executive testimony at trial, focusing on executives and their decisions overlooks how firms actually make decisions. For decades, people have studied firm behavior and motivations in the field of corporate governance. The literature takes the thesis that modern corporations will act to serve the interests of its members (shareholders) as a bedrock principle (Hart; Hart & Zingales). The most basic focus for shareholders is profit. Shareholders expect management to act in ways that will increase the firm's profits. In this respect, the individual executives in the company are not as significant as the incentives firms face seeking profit. Replacing an executive might change a firm's behavior, but changing its profit structure will influence much more in the long term. Though executives at trial offer a plethora of reasons that firms make decisions (e.g., culture, tradition, reputation, ferocity, relentlessness, leadership), none of them are more influential than profit. A prime example is Time Warner itself, which gave up its corporate strategy, culture, and its very "identity" as the "Switzerland" of companies (meaning that it would do business with anyone on equal terms) when it merged with AT&T (Stewart). Former CEO Bewkes lamented the loss, but did not regret it, as it was the right decision to make money.

To take a hypothetical case, suppose an executive makes a promise to a judge keep competing, wins at trial, and in doing so, secures for the merged firm a sort of court-sanctioned market power. If that executive "keeps competing," he or she is leaving money on the table and failing to maximize profits. At that point, it would be perfectly legal for the firm to raise prices, and the firm's shareholders legitimately expect management to make such a move. Shareholders are interested in profit-maximization and, through the board, will replace any CEO who pursues some other objective. If the job of the CEO is to maximize profits (while obeying all laws), then he or she will likely choose to renege on his or her promise to the court which, as we have shown, is common. The only alternative for the CEO is to not maximize profit and be replaced.

A body of finance literature explains the economics of what is termed the "market for corporate control" and indicates that our hypothetical reflects reality (Fama and Jensen; Morck et al; Macey; Moats and DeNicola). The relevant take-away from that literature is that corporate boards are quick to swap out CEOs who fail to maintain or improve stock price (Macey). A low stock price relative to a company's perceived potential value suggests inefficient management and marks the company as a good takeover target. To prevent the company from being so targeted by potential buyers, boards have an incentive to quickly replace a CEO whose leadership has failed to raise the company's stock price. In this way, the "market for corporate control" serves shareholder interests by ensuring that CEOs manage to maximize profit and by incentivizing boards to replace them if they don't. with their obligation to maximize shareholder.

In light of the dynamics described in this literature, it is not realistic for a court to give substantial weight to an executive's pre-merger promise to behave post-merger in manner that conflicts with her post-merger incentives. That person may be perfectly credible, but if she behaves in such a counterintuitive manner, she will be fired and replaced. Thus, it is more likely that she will break her promise, even if she believes while testifying that she will not, else she is likely to lose her job and any claim she might have to bonuses and other contingent compensation.

This analysis does not force a court to assume or to conclude that an executive is lying or untrustworthy in order to arrive at a result that gives the executive's predictions little weight. Rather, the court accept that, regardless of what an executive might say on the stand or how persuasively she says it, (1) the legal obligation to maximize shareholder value applies to the merged firm just as it does to any other for-profit corporation; (2) the executive in charge of the merged firm quickly will be shown the door if she manages the business in a way that puts her promises before profit, or if she fails to use every profit maximizing tool and competitive advantage at her disposal, including those generated by the merger itself; and (3) if the first CEO doesn't exercise the full powers of the merged firm to earn a profit and shore up its stock price, the next one surely will.

B. Executives Are Not Firms

Executive decisions, then, cannot simply stand in for the firm. Individual executives have visions for their firms, and work to show that their vision is a profitable one. But if it is not, or if the firm changes, then the character and vision of the executive will bow to the new profit incentives. T-Mobile under John Legere achieved incredible success, but it will follow his vision for the company and the uncarrier branding only as long as it continues to be profitable to do so, and not any longer. Legere led a company in fierce competition with bigger rivals and a direct intramarket competitor in Sprint. Now, T-Mobile has America's largest 5G network and is only slightly smaller than Verizon. As its new CEO Mike Sievert noted in a recent shareholders meeting, the company has changed. "We've competed mostly on price in the past if we're honest. And now we have a premium product that's increasingly the catalyst for our wins," he said. A premium product comes with premium prices, demonstrating the change in T-Mobile's strategy as a result of changes in the competitive landscape and the best way to make a profit.

The reasons executives posit to counter economists' predictions–such as certain actions being contrary to the firm's "identity"–are, in fact, rooted in economic theory, particularly profit-maximization. T-Mobile was the "uncarrier" brand precisely because it was a *rational* business decision that maximized T-Mobile's ability to retain customers and garner revenue relative to its competitors. CEOs who make decisions that neglect profit incentives will likely be replaced if they are not serving the interests of shareholders by way of value-maximization. Thus, when Judge Marrero implied that the culture of New T-Mobile would affect its disposition to competition (whether it would "come out swinging"), he missed the essential question. What matters is not who makes the decision, but rather where the money lies.

C. The Right Focus Is on Incentives

We thus argue that the bedrock of merger analysis must be the incentives that a company faces in the market. Rather than examine individuals, courts should examine what drives individuals' decisions in leading a corporation, and how those drivers will change as a result of a merger. Incentives matter more than character because in a world of good actors, decisions will not emerge from the principles or beliefs of individuals but rather from the incentives they face.

D. Character is Admirable but Irrelevant to Merger Review

Character, then, has a much smaller role to play in merger analysis than some judges grant it. Good character is no guarantee of good results, because morality and trustworthiness do not determine that way a company will make a profit. After a merger is consummated, most anticompetitive effects of it are unlikely to be proven to be illegal or immoral. The blackouts that followed the AT&T T-Mobile merger were not the product of criminal or backhanded dealing. They were sound business decisions that the most upright character could make. In fact, if AT&T had hired any of the economists who had testified against the merger at trial, the economists would have told them to do everything they mentioned in their testimony, precisely because it was a way to make profit. (Of course, the profit comes at the expense of consumer welfare, which is why the economists called it anticompetitive, but no CEO tries to keep the whole economy healthy, only her own company.) Similarly, T-Mobile's moves to impede the growth of Dish Wireless are nothing more or less than sound business decisions. Judge Marrero might not have been wrong to admire the "credibility and demeanor" of the executives who testified. However, credibility and demeanor do not determine the ideal market solution. (Of course, they are not utterly irrelevant, as some anticompetitive actions are also criminal, such as forming a cartel or price fixing.)

Notably, the lesser importance of character in merger litigation stands in contrast to much of the litigation over which judges usually preside. After using his positive assessment of executive character in his decision, Judge Marrero noted:

> The considerations the Court references here [executive credibility and demeanor] as supplying persuasive guidance also figure as judicial stock-in-trade, encompassing things courts commonly weigh in rendering predictive rulings such as, for instance, the judgment calls they routinely make in determining whether a rational person would or would not behave in a particular way, or whether to grant or deny bail, or to impose a custodial sentence, where in each case the likelihood of the defendant's reoffending if released comes into question. (9)

This “judicial stock-in-trade” analysis is crucial in the scenarios Judge Marrero discusses, the ones that comprise the great majority of cases a judge might hear. Yet what matters is not that they are often relevant, but why they are often relevant. When cases hinge on promises individuals make, or responsibilities they undertake with the approval of the court, the character of the litigants is essential. Merger trials do not involve either of these scenarios. They do not ask whether the merging parties are good, trustworthy, or responsible people; rather, they ask how good, trustworthy, responsible people will have their decisions changed as a result of consummation. In merger trials, then, the trustworthiness of witnesses is the prerequisite to evaluating a merger, not a reason to accept any testimony about it.

V. Instead of the Future of the Market, Trials Should Evaluate the Changes in the Market

A. Market Predictions Are Not the Goal

Even though in merger trials, much testimony considers the future of the market, predictions about what will happen years down the road are the wrong focus for analysis. The value of a prediction is that it offers some specific potential realization of a set of incentives, not that it guarantees a certain outcome. Blackouts, for example, in the AT&T Time Warner case were the product of incentives that the combined firm would face to increase its profits by extracting more money from companies looking to show Time Warner content to their consumers or encouraging consumers to switch to AT&T if their firm refused to pay the higher price for Time Warner content. The significant claim was not that blackouts would or would not happen, but that the firm would raise costs for consumers. By focusing on the blackouts, which corporate executives dismissed, Judge Leon tried to predict the specific outcome of the merger rather than concentrate on the drivers of any number of potential outcomes. Even had there not been blackouts, the merger could (would) still have raised costs for consumers—through price increases and contract negotiations that resolved instead of collapsing.

B. *Assessing Competitive Landscapes*

In order to assess a merger, judges need not evaluate predictions at all. Rather, they should look to understand how competition works in a marketplace. Who deals with whom? How do the merging parties interact with each other? What are the dimensions of competition? How do companies lose customers? And how do they interact with their competitors? This last question is particularly overlooked in trials focused on the corporate executives in merging parties. In AT&T Time Warner, Judge Leon focused on whether or not blackouts *would* happen, weighing the testimony of the executives against the plaintiff's economists. Yet in the detailed examination of blackouts themselves, the broader discussion disappeared: Time Warner was the "Switzerland" and it dealt on equal terms with everyone. AT&T was not "Switzerland," competing with Comcast and Dish. By allowing AT&T to acquire Time Warner, the market lost a player whose incentive was to provide as much content as possible to as many consumers as possible, wherever those customers got their internet or media. In the post-merger world, consumers lost access to content for years (or else they switched to AT&T services and left the plan they otherwise liked to get back the content they lost, which is why the blackouts made economic sense). In either case, consumers suffered from the harm to competition that was visible from the outset; no predictions were necessary.

Instead of trying to predict market outcomes, courts should try to preserve free market competition. Centering competition in merger review shifts the discussion from questions of outcomes to questions of incentives and structure. These evaluations do not require a crystal ball because they examine the market as it currently functions. Apart from the merger itself, most aspects of the market—the product, demand curve, consumers, etc.—remain unchanged. Clarifying how competition works in the present market illuminates how a merger will change it, either for the benefit or the detriment of consumer welfare. Thus, incentives and structure are the fundamental basepoint under which mergers should be evaluated. Of course, some forward-looking is and always will be necessary in merger evaluations, but the relevant questions are not firms' individual business decisions (which should ideally respond to a dynamic, surprising, and evolving market) but how firms relate to each other, where innovation arises in the market, and what drives improvements in consumer welfare.

VI. Changes in Incentives are More Certain than Outcomes

A. *Incentives to Compete Are the Best Stimulants to Ensure Competition*

If competition is about anything, it is about making markets unpredictable. Uncertainty in the market is a good thing: it is what makes it free. Perhaps the ultimate mistake courts make in merger litigation is the implication not only that a person ever could eliminate uncertainty in predicting a future market, but that anyone would ever think it right to do so. The judge who resorts to predicting the future of a market has already moved past preserving competition in its pure form. The most successful merger enforcement leads to competition in ways no one could ever have predicted at the time of the merger. For example, in 2011, when AT&T and T-Mobile abandoned their proposed merger in face of legislative and regulatory criticism, T-Mobile launched its "uncarrier" strategy under a new CEO (John Legere) and transformed the market with unlimited plans, video streaming, and international data roaming, none of which were even contemplated during the merger review process (Frommer).

B. Incentives Matter Even More in Technology Markets

For a merger trial process that focuses on decreasing uncertainty—the crystal ball method critiqued in this paper— complexity inappropriately leads to concessions to executive testimony. Of course, uncertainty in outcomes means that it would be possible for many different, unpredicted outcomes. Judge Marrero, unfortunately, understood this uncertainty to mean he should lean on the "deeply embedded pattern of commercial conduct" of competition at T-Mobile; that is, that he should defer to executive predictions of the future and set aside the economists' concerns as only a possibility (judicial opinion, 8).

Contrary to this perspective, however, we believe uncertainty augments the importance of antitrust enforcement. We emphasize the need to look at firm incentives, as well as remind the judge which witness is able to testify *accurately* about those incentives. Therefore, the central focus should be on the *firm's* incentives in the "new world," as focusing on such is the best predictor of behavior in an inherently uncertain market. Furthermore, judges–and regulators–might need to pay close attention to what the witness is qualified to testify about. Often, the executive is *not* an authorized expert. Thus, his or her testimony should be limited to facts (e.g., documents, the environment, potentially future trends) and not predictions or opinions about how the firm will act in the future. Potentially objecting to certain portions of testimony might accomplish this goal. We do also recognize that executives, with their general experience in the industry and at a firm, might have credibility in the eyes of a judge. However, specific predictions and promises by executives about the future are problematic: no one knows what the exact future will look like, especially CEOs. Executives may come and go quickly–as discussed above, particularly if their prediction is wrong, leaving the firm under new management no judge has ever evaluated. Furthermore, as we discussed in previous sections, shareholder primacy and corporate governance often mean that an executive not acting in the best interest of the firm—in the way of profit-maximization—can and will be replaced. Emphasis on such issues may help tip the balance away from the executive's testimony.

Detailing the consequences of the structural changes in a market as a result of a merger is the exact responsibility of expert economist witnesses. While executives illuminate the specifics of the industry in which they work, economists examine how changed incentives change profit maximization strategies for rational actors. While economists can describe the consequences of their analyses as predictions (e.g., "there will be blackouts"), the underlying analysis is structural, not speculative. In a courtroom with millions or billions of dollars at stake, structural analysis is the most accurate tool regulators and judges have to evaluate a merger's long-term outcomes, not just the immediate benefits and promises merging parties make.

C. *Beyond Regulating: Contractual Penalties*

Of course, another way to address executives making misleading promises at trials is to sign contracts about those promises. When a company has agreed to provide a service or avoid an anticompetitive harm by signing a binding settlement supervised usually by the federal government, consumers should be safe from that particular harm. But this kind of solution is often cumbersome. As Kwoka and Moss write, "a great many economic studies have demonstrated the practical problems inherent in any effort to constrain normal profit-maximizing behavior by use of rules and oversight" that make "regulation-like remedies a questionable model for effective merger control" (23).

During the Sprint T-Mobile trial, Charles Ergen (CEO of Dish) endorsed another such legally-binding promise to allow Dish to become a competitor, stating, "T-mobile isn't going to cause mischief. They normally…but it would be very difficult because of the court monitor" (transcript, 1593). Judge Marrero relied on the same legal agreements in approving the merger (judicial opinion, 113) (citing to Ergen's testimony). But in 2021, T-mobile notified Dish that it was going to close T-Mobile's CDMA network, roughly one and a half years earlier than planned, a move that targeted the prepaid customers T-Mobile sold to Dish to jumpstart its wireless business; thus, T-Mobile attempted to keep Dish from effectively competing (Alleven). The move was perfectly legal (though anticompetitive), and the intricate legal system approved by Judge Marrero and Ergen was powerless to stop it. In all fairness, beyond these examples, these contracts are sometimes the best solution, but regardless, they almost always attempt to compensate for a lack of competition with mandates that constrain the market.

D. *Law Embraces Uncertainty in Outcomes*

Allowing uncertainty of outcomes in the market through the merger review process is not only good economics, but also good law. Uncertainty is also embedded in antitrust statutes. Section 7 of the Clayton Act enshrined the notion that certainty is not the goal of antitrust policy. Specifically, the most relevant language of the statute is as follows: "…*may be substantially* to less competition, or *to tend* to create a monopoly." Judicial precedent indicates an assumption that uncertainty is endogenous to both markets and antitrust enforcement.

Judicial interpretations of antitrust statutes demonstrate an acceptance that uncertainty inheres the economic competitive landscape. The Supreme Court has held that "Congress used the words 'may be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties." And other federal courts have continued to apply a similar interpretation. For example, the District Court for the District of Columbia has articulated, "[a]s the statutory text makes clear, Section 7 does not require the government to prove that a merger is certain to cause competitive harm." In fact, "after all, Section 7 is a prophylactic measure that seeks to arrest restraints of trade in their incipiency." Various Circuit Courts have affirmed this understanding. According to the D.C. Circuit Court of Appeals, "[a]lthough Section 7 requires more than a 'mere possibility' of competitive harm, it does not require proof of certain harm." The Third Circuit has also invoked a "probabilities" understanding of the Clayton Act.

What appears clear, then, is a consistent recognition that Section 7 is not meant to proscribe mergers that will *definitively* lead to anticompetitive behavior. Rather, uncertainty has always been a feature of antitrust enforcement.

VII. Concluding Suggestions for Executives and Regulators in Merger Trials

A. Executives in the Courtroom and Advice for Regulators: Methods of Reframing the Issue

Courts need executives at merger trials: no one else understands their businesses or industries as well as they do. However, the current problems with the undue weight judges place on executive testimony stem from distorted incentives. We explained why executives have a monetary incentive to get the merger approved; we demonstrated why courts should discount executive testimony that does not align with a rational firm's profit-maximizing behavior; and we argued that CEOs have little legal incentive to follow through on promises. Importantly, executives are in their position because they are charismatic and know how to be convincing. When weighing evidence, courts should rely on executives to explain their businesses and how they work. But if executive promises or predictions about future firm behavior countermand profit incentives as established in robust economics literature, judges should not accept that a firm will choose any strategy other than the most profitable one—regardless of individual promises—in the long run.

Predicting the details of future outcomes, looking through the crystal ball, is an impossible task, and one that courts need not and should not attempt. The important question in a merger trial is not what will happen but what is changing. Relative analysis, which compares the present competitive landscape to the post-merger one offers insight that absolute analysis (predicting a certain future) overlooks. Incentives are critical in such an analysis and understanding firm incentives in the "new world" is the purview of economists.

Although judges have a major role to play in shaping merger review, regulators can also change their approach to litigation to diminish the impact of executive predictions or character and emphasize competition. The first step is to ensure that the court is aware of the groundwork of the economic literature on corporate governance and shareholder value theory. A number of options present themselves. The government could ensure its expert consults the literature while formulating her opinions and then ask about its influence on her opinions on direct. The government also could use the literature as a basis for cross-examining defense experts, or to elevate the principles in the context of a trial brief when the judge is the fact finder or while hashing out jury instructions when the case is to be tried by jury. Focusing on the early stage of the trial to lay this groundwork will be essential to informing the court's perspective before the testimony itself begins.

Turning to broader questions and aims of witness examination and argument, it is critical for regulators to focus on asking the right questions in relation to incentives. Specifically, how *might* a changed competitive landscape lessen competition? As discussed above, when challenging the AT&T-Time Warner merger, prosecutors may have been better not debating "black-outs," as the CEO's promise will likely (in the viewpoint of a judge) outweigh an economist's analysis. A battle about what *will* happen, in a courtroom of uncertainty, is one that an executive is well-equipped. Rather, regulators should focus on why certain behaviors like risking blackouts make financial sense, and ask: would those behaviors make more financial sense after the merger? What does Time Warner add to the market, and what is the risk without it being a neutral actor?

In trials, this practice might involve asking executives questions that seem simple. Do you attempt to maximize profit? If you concluded that your present strategy was not the most profitable one, would you change it? Are you legally obligated to maximize shareholder value? These questions are basic, but they also orient the trial around the critical questions we discuss above. To the expert witnesses, one might ask what they would advise the merging firms to do in the event that the merger goes through.

Regulators might also turn to a broader set of views on the market in question. Bringing competitors and complementary businesses into the courtroom to enrich a judge's understanding of the market could be a helpful strategy to diminish the significance of a single charismatic executive. Additionally, it might be worthwhile to consider bringing in consultants that companies hire to testify about the documents they make for their clients. As discussed above, in Sprint T-Mobile, McKinsey and Company prepared documents that T-Mobile executives did not have to testify about, but that exposed potential sources of anticompetitive consequences from the merger. Introducing those documents could have bolstered the regulator's claims about the merger's consequences.

VIII. Conclusion

Much of this paper is nothing new. The outcomes of the mergers we discuss are plainly visible, as are the broken promises and false claims. Our solution, too, we hope, is nothing new. Competition is the economic and legal bedrock of our free market. Analyzing it should be the bedrock of merger trials.

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