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# **Innovation Markets Analysis: When Should This Tool Come Out of the Shed?**

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# Overview

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- ***Innovation is an important dimension of rivalry and engine of progress.***
- ***Predictions of a merger's effect on innovation output are uncertain.***
- ***Legal and economic issues require showing of probable effect on output.***
  - **Genzyme: example of insufficient evidence of effect?**
- ***Practical application may be infrequent and more likely in certain industries.***



# Innovation markets are not easy to define with confidence

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- *Sources of innovation are difficult to identify*
- *Strength and significance of population of innovators are unclear*
- *Type of innovation may be relevant to confidence in market boundaries*



# Predicting competitive effects requires an assessment of merger's effect on innovation and output

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- ***Structure as a means of predicting performance***
  - Who is right, Schumpeter or Arrow?
  - The problem and necessity of case-specific evidence
- ***Innovation efforts and incentives***
  - Incremental v. revolutionary
  - Nature of competition between innovations
- ***Confidence that the reduction in innovation will lead to an output effect***
- ***Is the effect outweighed by innovation efficiencies?***



# Enough about economics. What about the law?

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- ***Does Section 7's focus on "line of commerce" of commerce doom innovation analysis?***
- ***Can a plaintiff prove a nonspeculative effect in a reasonable amount of time?***
- ***Burdens and do they really matter?***
  - Burden of proof always on plaintiff
  - *PNB/Baker Hughes*, burdens of production, and the *prima facie* case



# Problems of the investigator

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- ***Investigator has a duty to evaluate proposed transactions. If innovation is a key dimension of competition, then the investigator must deal with it.***
- ***The law – with the state of economic theory – requires the investigator to prove all aspects of the case, including:***
  - the innovation space in which the diminution will occur
  - the merger's likely effect on innovation
  - the manner in which output will be reduced
  - when the output effect will be felt
- ***The importance of empirical evidence from the merging parties and the market cannot be overstated.***



## Suggested mode of analysis

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- ***Is innovation an important dimension of rivalry?***
- ***Will innovation affect existing product market in a reasonable amount of time?***
  - competitive effects in a goods market
  - potential competition
- ***Can the boundaries of the innovation market be determined?***



## Suggested mode of analysis (cont.)

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- ***Does the merger lessen incentives to innovate?***
  - nature of competition between merging parties
  - nature of other downstream competition
  - efficiency analysis
- ***Can harm to an output market be demonstrated?***
  - future goods markets
  - future improvements to existing goods

