Rating the Competition Agencies: What Is Good Performance?

William E. Kovacic

U.S. Federal Trade Commission

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Global Competition Review 2007, 2008: Competition Agency Rankings

- 40 Agencies Rated
- "Elite, Five Star" Authorities
  - "a five star rating simply indicates that an authority is at the top of its game"
- The Five Star Agencies for 2007 and 2008 Are:
  - European Commission, DG Competition
  - UK Competition Commission
  - US Federal Trade Commission

Holman Jenkins, Wall Street Journal, June 2007

- On the FTC's Decision to Challenge the Whole Foods/Wild Oats Merger:

- "Some agency must qualify as the federal government's most squalid and disreputable. The FTC in recent years has been a catalog of bureaucratic pathology to inspire a modern day Gogol."

President-Elect Obama as Candidate (2007)

- "[T]he current administration has what may be the weakest record of antitrust enforcement of any administration in the last half century"

Are These People Talking About the Same Agency?

- "Elite"
- "Squalid"
- "Weakest"

What is Good Performance by a Competition Authority (CA)?

- By What Criteria Should We Evaluate?
- By What Means Should We Measure Success or Failure in Satisfying the Evaluative Criteria?

Why Care?

- Importance to Future Policy Choices
    - Amount and allocation of CA resources
    - Design of CA and statutes
- Impact on CA and Perceptions of Courts, Companies, Consumers, Legislators, CA Employees and Potential Recruits

Overview

- Definition of Goals

- Conventional Report Card

- Alternative Evaluative Criteria: Emphasis on Building Institutional Capability

- Main Examples: US FTC

- Caveat: Personal Views

Themes

- Institutional Design and Capability Shape Policy Results

- Promote Acceptance of Norms that Emphasize Need for Incumbent Leadership to Make Capital Investments in Institutional Capacity

What Is a Good CA? Broad Normative Criteria

- Central Question: Does the CA Improve Economic Performance/Social Welfare?
- Subsidiary Concern: Does the CA Use Sound Methods of Public Administration?
  - Internal quality control
  - Transparency and accountability
  - Minimization of compliance costs
  - Adaptation, reassessment, improvement

Complications

- Welfare Effects Hard to Measure Directly
- Effect of Specific Matters Can Be Hard to Trace
- Systems Can Have Multiple, Inconsistent Aims
- Competition Policy Is Evolutionary
  - Changes in theory and empirical knowledge
  - Was CA policy seen as good at the time?
  - What are the durable CA contributions?

Conventional CA Report Card: What Matters?

- Initiation of New Cases ("Enforcement"): You Are Whom You Sue
  - Rate of Activity: Total case counts
  - Extra credit: High profile matters
  - Little credit: small cases (that can make big law)
- Few or No Points: Non-Litigation Activities

Attaining an Accurate Profile of Activity

- Doug Melamed, *Antitrust Magazine* (2008)
  - "It's especially important that the agencies engage in the civil nonmerger area, where for the most part, except for the standard setting and intellectual property settlement agenda of the FTC, the agencies have been AWOL."
- FTC Civil Nonmerger Litigation in US Courts
  - 1990 through 2000: 4 Cases
  - 2001-08: 9 Cases (4 standards/settlement cases)

Characterization of Activity

- Bob Pitofsky, *Antitrust Magazine* (2008)
  - "The FTC has brought some cases that parade under the Section 2 label, but these cases are not comparable to the cases against Microsoft, Intel, AT&T, Xerox, and Kodak."
- Not Comparable? On What Basis?
  - Economic effect? Unocal ($500M/yr), BMS ($3-5B)
  - Doctrine? Rambus

Problems with Case Counts

- Boosting Totals with "Cheap" Matters
- Accounting for Difficulty
- Measuring Actual Impact
  - Legal doctrine
  - Economic effects
    - Comparisons across time: Which agency decisions posed greater risks to competition?
      - DOJ decisions in Maytag-Whirlpool and XM Sirius, or
      - FTC decisions in Boeing-MD and the oil mergers of the 1990s?

Dealing with Changing Views of Good Substantive Policy

- Competition Law: Inherently Evolutionary
  - Good policy sometimes means backing off from status quo, going past status quo, or staying put
- New Learning and Past Experience Call for Repeal or Retreat from Existing Statutes or Judicial Interpretations
  - FTC & RP Act: >500 cases (1960s) to 1 (1990-08)
    - Is that a trend from "strength" to "weakness"?

Case Centric Report Card: Incentives for CA Leadership

- Focus on Inputs Rather than Outcomes
  - Take-offs vs. landings
- Non-Litigation Strategies Deemphasized
  - Advocacy, reports, studies
- Underinvestment in CA Capability
  - Building knowledge
  - Improving Infrastructure of CA relationships
  - 1960s and 1970s: Changes ultimately forced by courts, not internally driven

Value of Non-Litigation Programs: Advocacy and Reports

- FTC, To Promote Innovation (2003)
  - First best solution: Improve patent system
  - Supreme Court citations
- FTC, Internet Sales of Wine (2004)
  - State restrictions on competition: substitutes for private restraints
  - Supreme Court citations in *Granholm*

Importance of Building the Competition Policy Infrastructure

- Enhancing Institutional Framework

- Example: International Networks

- Prerequisite: Personnel
  - No rookies
  - Sense of time, place, and manner

- Consider: Where Would the ICN Be Today Without the Contributions of Randy Tritell and His OIA Team?

Adverse Consequences of the Case Centric Focus

- Commitments/Capabilities Mismatches
- Root Causes of Problems Overlooked
- Short-Term Credit Claiming Impulses: Too Little Investment in Longer Term
  - Good results often stem from cumulative, sustained effort/learning: e.g., FTC and standards
  - "Pick the low hanging fruit": What about planting trees?

Institutional Lessons

- Cumulative Nature of Policy Development
- Curb Capability/Commitment Mismatches
- Value of Investment in Capability/Knowledge
  - Avoid being trapped in wrong model
  - Respond to new learning/industry developments
  - Assess wisdom of regulatory status quo

Suggested CA Report Card

- Clearly Articulated Goals and Strategy?

- Number and Types of Cases and Outcomes?

- Non-Litigation Initiatives and Outcomes?

- Investments in Capability (Knowledge)?

- Investments in Infrastructure (Networks)?

- Revelation of Information (e.g., Good Data Sets)?

- Conscious Assessment and Adaptation?

- Consistency with Current and Long-Term Views?

Conclusion: Good Leadership

- Maximize Positive Externalities for Agency and Future Leadership
- Engage in Self-Assessment
  - Operations
  - Ex post evaluation of past interventions
- Continue Pursuit of Better Practices