

The Future of U.S. Competition Policy at Home and Abroad

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Why Should Europeans Care?

- Counseling Clients Who Do Business in North America
- Global Market for Competition Policy Systems
 - Institutional Framework: “Operating Systems” Based on Common Law, Civil Law, and Hybrids
 - Policies: “Applications”
 - Cartels and other horizontal agreements
 - Dominant firm conduct
 - Mergers
 - Vertical restraints
 - Intervention in the economy by public bodies

Overview

- Presidential Transitions in the US: General Observations
- Likely Trends in the United States: Imperative to “Do More”
- How Much “More”: Role of the Courts and Congress
- What Could be Lost: Investments in Building Institutions
- Themes
 - Need for a rethink about what constitutes “good performance”
 - Importance of capital investments in institutional capacity
 - Observations from FTC at 100 self study

Transitions Across Administrations in the US:

- Foundations of Good Policy
 - Acknowledge cumulative nature of policy development
- Harmful Tendencies
 - Diminish positive contributions of predecessors
 - Exaggerate weaknesses
 - Emphasize own-period visible accomplishments at cost of long-term policy improvements
- Useful Model: Pitofsky/Muris Transition at FTC in 2001
 - Muris's first speech as FTC Chairman: June 2001
 - The Muris prime directives to top management

the Federal Competition Agencies

- New Leadership
 - Jon Leibowitz: Federal Trade Commission
 - Christine Varney: Antitrust Division, Department Of Justice
- The Power of Perceptions and Expectations
 - The Obama Campaign and the Bush-Era Regulatory State
 - Depiction of the U.S. Competition Agencies' Performance: Who Was Attacked Most Severely?
 - The Railway station and the cathedral

Illustrative Campaign

Commentary: DOJ and the FTC

- Portrayal of DOJ and FTC Performance
- Samples of Observations for the FTC
- Influence on Setting Expectations for New Leadership

Is the FTC a Good Agency? Views from the Global Competition Review

- 40 Agencies Rated in 2007 and 2008
- “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

The Obama Campaign: 2007-2008

- The Candidate
 - “[T]he current administration has what may be the weakest record of antitrust enforcement of any administration in the last half century”
 - Commitment to “revitalize” federal antitrust enforcement
- The Candidate’s Supporters
 - Almost nothing happened
 - What happened was routine (DOJ and cartels) or insignificant (FTC nonmerger enforcement program)
- No Points for Non-Litigation Programs

Almost Nothing Happened

- Example: FTC Nonmerger Civil Litigation
- Doug Melamed, *Antitrust* (Summer 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.”

the US Courts: 2001 through 2008

- 1990 through 2000: 4 matters
 - Abbott Labs, California Dental, Toys R Us, Mylan
- 2001 through 2008: 8 matters
 - 4 “except for” standards and settlement cases: Schering, Rambus, Cephalon, Warner-Chilcott
 - 2 state action cases: Kentucky Movers, SC Dentists
 - 2 Section 1 cases: Polygram, N. Texas Physicians

Almost Nothing Happened: Reprise

- Example: Dominant Firm Behavior
- Harvey Goldschmid, Chicago Overshot the Mark (2008)
 - “I suspect that *Trinko*’s dictum and general Chicago School scholarship have lulled antitrust enforcement agencies and our lower courts into a false sense of complacency about dominant firms. Almost nothing is happening at the Antitrust Division, at the FTC, or in the courts in the Section 2 area.”

FTC Cases Involving Dominant Firm Conduct: 2001-2008

- By Numbers of Matters
 - Seven matters total: Unocal, Rambus, Cephalon, Valassis, NData, Biovail, Bristol Myers Squibb
 - Rate of FTC Activity for 2001-2008 exceeds any period since 1970-1976
 - Compare Muris with Pitofsky

What Happened Was Insignificant

- Example: Dominant Firm Behavior
- Bob Pitofsky, *Antitrust* (Summer 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” (italics added)
- “Not Comparable” : By What Criterion?
 - Economic effects: Unocal (\$500M/yr), BMS (\$3-5B of benefits and counting)
 - Doctrinal stakes: Rambus and FTC monopolization jurisprudence

Expectations for New Leadership

- The Power of Perceptions to Shape Expectations
- What Will New Competition Agency Leadership Feel Compelled to Do if:
 - Almost nothing happened in 2001-2008?
 - What happened was insignificant?
- Likely Answer: “Visibly More”
 - Increase activity
 - Apply a new scoring system
 - Strive for sixes

How Much More?

- Constraining Influence of the Courts
- Expansive Influence of the Legislature
- Uncertain Influence of the Economic Crisis

Zone of Intervention: 1960s- Present

- Horizontal Mergers
 - 1960s: 11 to 10 presumed illegal and efficiencies do not count
 - Today: Presumption may work at 4 to 3 and efficiencies count
- Vertical Restraints
 - 1960s: all (except exclusive dealing) are per se illegal
 - Today: all (except some tying) are governed by rule of reason
- Abuse of Dominance and Pricing
 - Main cases: Alcoa, Utah Pie
 - Main cases: Brooke Group, Weyerhaeuser, linkLine

Chicago School Hijacked US Antitrust Law

- Bob Pitofsky, *How Chicago Overshot the Mark* (2008):
 - From 1993-2004, “there was an effort to find a middle ground between overenforcement of the 1960s and underenforcement of the 1980s, but that came to an end with the appointment during President Bush’s second term of some agency enforcement officials, lower court judges, and, most important, the confirmation of two conservative justices to the Supreme Court”

Why Did This Happen: Another Perspective

- The Chicago-Harvard Double Helix
- Modern Harvard School: Areeda, Turner, Breyer
- Abuse of Dominance Themes
 - Too much intervention poses greater risks than too little
 - Rules must account for limitations of courts and enforcement agencies to implement them:
“Administrability”
 - US System of private treble damage enforcement (mandatory trebling, jury trials, class actions) overdeters
 - Consequence: Raise the liability bar

Why Does the Diagnosis Matter?

- Bringing More Cases that Replace “Chicago” Ideas with Non-Chicago Ideas Overlooks Perceived Problems With:
 - Private rights of action
 - Administrability and institutional capacity
- Can the US Government Agencies Distinguish Themselves from Private Litigants?
 - Section 2
 - Section 5 of the FTC Act: Real or illusory differentiation?

Expansive Influence of Congress and the Uncertain Effect of Crisis

- Perception of 2001-2008 Enforcement
- Vertical Restraints
- Price Caps
- Jurisdictional Limitations
- Impact of Financial Crisis?
 - Exemptions
 - Subsidies
 - Procurement
 - Protection

What Could Be Lost?

- **Emphasis on Institution-Building**
 - Institutional arrangements shape substantive results (Muris)
 - Investment vs. consumption
- **Reconsideration of Criteria for Defining Good Performance**
- **Growing Focus on Evaluation**

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 Report Card Criteria

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

Problems with Case Counts

- Boosting Totals with “Cheap” Matters
- Accounting for Difficulty
- Measuring Actual Effects: Doctrine, Economy
- Devising Common Baseline for Assessing Risk
 - Merger control and the case study: where did the agencies take bigger risks?
 - Maytag-Whirlpool and XM-Sirius in this decade or Boeing/McDonnell Douglas and the petroleum sector 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
- Illustration of Need for Adjustments: FTC Robinson-Patman Enforcement
 - 500 cases (1960s)
 - 1 case (1990-2008)
 - Which is the “weaker” or “stronger” program?

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
 - Analysis of doctrinal links: e.g., cartels and abuse conduct
- Underinvestment in CA Capability
 - Building knowledge
 - Improving the infrastructure of CA relationships

Value of Non-Litigation Programs: Advocacy and Reports

- FTC, To Promote Innovation (2003)
 - First best solution: Improve patent system
 - Supreme Court citations
- Advocacy and the Financial Crisis
 - Legislation
 - Subsidies
 - Procurement

Importance of Building the Competition Policy Infrastructure

- Enhancing Institutional Framework
- Example: International Networks
 - Prerequisite: Personnel
 - No children, no rookies, no going loud
 - Sense of time, place, and manner
- Consider: Where Would the ICN Be Today Without FTC Investments?
 - E.g., merger process (R. Tritell), funding, structure

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”

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

FTC at 100 Self-Study: Suggested CA Report Card

- Clearly Articulated Goals?
- Approach for Formulating Strategy?
- Problem-Solving Orientation?
- Capital Investments in Capability (Knowledge) and Institutional Infrastructure (e.g., Networks)?
- Internal Quality Control?
- Evaluation?
- Commitment to Continuous Improvement

Influence in International Affairs in Multicentric Environment

- Investments in Applications as Source of Influence
- Improvements in Bilateral Arrangements
- Participation in International Organizations
- Improvements in Domestic Framework

Conclusion: Good Leadership

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