

Toward a Domestic Competition Network

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I. Introduction

Modern discussions about pursuing convergence among dissimilar competition policy systems focus mainly on differences among national or multinational jurisdictions. Efforts to address the divergence across nations in antitrust procedures, substantive standards, and implementation capabilities typically assumes that individual jurisdictions have achieved harmony within their own borders. For example, when we speak of attaining convergence of competition policy between the United States and European Union (EU), we tend to overlook the question of whether each jurisdiction has developed internally consistent analytical principles and coherent mechanisms for making competition policy within its own borders.

In many countries, national competition agencies share power to enforce antitrust commands and shape competition policy with other government bodies and private actors.¹ In the United States, the degree of decentralization is extraordinary and unsurpassed. Authority to prosecute antitrust claims is vested in two federal antitrust agencies, the governments of the individual states, and private parties. For mergers in some industries, sectoral regulators such as the Federal Communications Commission and state public utility commissions also exercise power to perform competition policy reviews.

The decentralization of authority can generate the same tensions and divergent policy outcomes within any single jurisdiction that we observe internationally. The energy devoted to addressing cross-border phenomena tends to deflect attention away from consideration of the consequences of decentralized authority and institutional multiplicity within individual jurisdictions.

This paper makes the case for using convergence techniques from the international policy field to improve the development and implementation of U.S. competition policy. No jurisdiction has more to learn from competition policy experience with international multiplicity and the

¹ The decentralization of authority in the United States is described in William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 St. John's L. Rev. 361, 375-83 (2000). The increasing role of private enforcement in other Argentina, Canada, the European Union, and the United Kingdom is examined in Symposium, *Private Enforcement of Competition Laws*, 31 Int'l Bus. Law. 149 (Aug. 2003).

management of conflicts than the United States.² In particular, the paper argues that the establishment of a Domestic Competition Network (DCN) – a measured modeled roughly on the International Competition Network, in which the U.S. antitrust agencies participate actively³ – would help the United States exploit the benefits of decentralized decision making while reducing the costs associated with distributing enforcement and other policy making responsibilities across a large number of actors.

The paper treats the topic in three parts. It sketches the institutional arrangements for making competition policy in the United States, describes the advantages and disadvantages of the decentralization of policymaking, and offers a proposal for establishing a domestic competition network.

II. The U.S. Competition Policy System

“Competition policy” is the sum of various means by which government bodies influence the amount and type of business rivalry in the economy.⁴ In the United States, a complex collection of policy instruments and institutions shapes the rules of the competitive process. This section describes these policy tools and institutional arrangements, focusing first on the mechanism for enforcing antitrust statutes and then reviewing other regulatory regimes that, directly or indirectly, play a major role in competition policy making.

A. The U.S. Antitrust Enforcement System

To speak of competition policy usually is to conjure images of antitrust rules that prohibit

² I am grateful to Michael Greve for focusing my attention on this feature of the modern competition policy environment.

³ The origins of and rationale for the International Competition Network are reviewed in William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 ASIL Proc. 309 (2003).

⁴ See William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 Chi.-Kent L. Rev. 265, 281-86 (discussing concept of “competition policy”); Timothy J. Muris, Chairman, Federal Trade Commission, *State Intervention/State Action – A U.S. Perspective*, Remarks before the Fordham Annual Conference in International Antitrust Law & Policy, New York, New York (Oct. 24, 2003) (same), available at <<http://www.ftc.gov/speeches/muris/fordham031024.pdf>>.

certain business practices, such as agreements among direct competitors to fix prices.⁵ The United States decentralizes the decision to enforce antitrust rules to an unequalled degree.⁶ By statute and judicial decision, a number of public institutions and private entities enjoy power to enforce antitrust commands governing such behavior as abuse of dominance, horizontal price fixing, mergers, and vertical contractual restraints.

Merger enforcement provides an example. In the typical merger case, several entities have power to challenge a transaction. Two federal agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), share authority to review mergers and establish policy guidelines. Since the late 1940s, the federal competition authorities have coordinated merger enforcement through a liaison arrangement that determines which agency will review a specific transaction.⁷

Since the mid-1980s, the state attorneys general have emerged as a second significant public institution for antitrust merger control. Acting under the federal antitrust laws or, in rare cases, under state antimerger laws, the states have conducted antitrust reviews of mergers and have sued to challenge a number of transactions. The states and the federal antitrust agencies have developed agreements that promote cooperation in reviewing transactions of common interest.

In addition to public enforcement, the U.S. competition policy system gives private entities the power to challenge antitrust violations, including anticompetitive mergers. Eligible private candidates include competitors, customers, and suppliers of the merging parties. Although Supreme Court decisions since the late 1970s have placed formidable hurdles in the path of competitors,

⁵ For a discussion of the rationale for enacting antitrust laws and of common elements of the world's antitrust statutes, see Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* 22-69 (2002).

⁶ See William E. Kovacic, *The Influence of Economics on Antitrust Law*, 30 *Econ. Inquiry* 294, 295 (1992) (describing decentralization of prosecutorial power under US antitrust laws).

⁷ The "clearance" mechanism by which the DOJ and the FTC decide which agency will treat matters over which both share jurisdiction is described in ABA Section of Antitrust Law, *The Merger Review Process* 133-34 (2d ed.; Eileen K. Gotts, ed. 2001).

private actions brought by rivals of the merging parties remain possible.⁸

The possibility of enforcement by entities other than the federal antitrust agencies focuses attention on an important anomaly in U.S. antitrust doctrine. Policies reflected in merger guidelines issued by the DOJ and the FTC are less restrictive than Supreme Court decisions that, in the 1960s and early 1970s, imposed stringent limits on horizontal and vertical transactions.⁹ The Supreme Court has not issued an antitrust merger decision dealing with liability standards since 1975, and the Court has not repudiated the pillars of its merger jurisprudence of the 1960s. Non-federal government plaintiffs can invoke (and occasionally have relied upon) the more restrictive Supreme Court precedents. This underscores a vital feature of the U.S. antitrust system: intervention by non-federal government entities diminishes the capacity of federal antitrust authorities unilaterally to use prosecutorial discretion to adjust the boundaries of merger control or other elements of antitrust policy.¹⁰

B. Enforcement of Competition Rules by Special Sectoral Agencies

In a number of sectors, antitrust agencies share responsibility for formulating and implementing competition rules, including merger standards, with other government agencies. Shared authority is common in industries that are or have been the subject of comprehensive regulatory controls upon entry, exit, and rate making. Prominent illustrations include:

Airlines. The Department of Transportation (DOT) has exclusive authority to approve certain agreements between U.S. airlines and foreign carriers¹¹ and to grant antitrust immunity for

⁸ See ABA Section of Antitrust Law, *Antitrust Law Developments* 838-69 (5th ed. 2002) (discussing standing requirements that private plaintiffs must satisfy in antitrust cases).

⁹ The disparities between existing Supreme Court merger jurisprudence and the current federal merger guidelines are noted in William Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 *Antitrust L.J.* 5 (2000).

¹⁰ For a discussion of how the decentralization of prosecutorial power eliminates the ability of any single enforcer to adjust the impact of a statutory command through the exercise of discretion, see William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 *Geo. Wash. L. Rev.* 766, 781 (2001).

¹¹ 49 U.S.C. app. § 41308 (1994).

such agreements.¹² In these matters, DOJ plays an advisory role exclusively.

Electric Power. Transactions involving energy companies are subject to competition policy review or challenge by the DOJ or the FTC, the Federal Energy Regulatory Commission (FERC),¹³ the public service commission (PSC) of each state in which the parties do business, and, for some transactions, the Securities and Exchange Commission (exercising powers granted by the Public Utility Holding Company Act).¹⁴

Financial Services. DOJ shares competition policy jurisdiction over mergers involving banks with three federal banking regulators: The Office of the Comptroller General, which reviews transactions involving national banks; the Federal Deposit Insurance Corporation, which reviews transactions involving federally-insured, state-chartered banks that are not members of the Federal Reserve System; and the Board of Governors of the Federal Reserve System, which reviews transactions involving banks that create a state-chartered bank that is a member of the Federal Reserve System.¹⁵ In general, the banking regulators apply standards similar to those established under § 7 of the Clayton Act and must consider a report filed by DOJ before completing their own assessment of a transaction.

Railroads. Jurisdiction over mergers involving railroads resides solely in the Surface Transportation Board (STB).¹⁶ The DOJ provides nonbinding advice to the STB, which must consider, but need not heed, DOJ's recommendations.

Telecommunications. Mergers involving telecommunications service providers usually are subject to competition policy review or challenge by the federal antitrust agencies (DOJ ordinarily reviews mergers involving telephone companies, and the FTC has reviewed mergers involving cable

¹² *Id.*

¹³ 16 U.S.C. §§ 791a-828c (1994).

¹⁴ 15 U.S.C. §§ 79i, 79j (1994).

¹⁵ See ABA Antitrust Section, *Antitrust Law Developments*, at 1317-22.

¹⁶ 49 U.S.C. § 11321 (Supp. 1999).

television firms), the Federal Communications Commission (FCC),¹⁷ and the PSC of each state in which the parties do business.

In most of the cases described above (e.g., energy and telecommunications), review by any one authority is concurrent and non-exclusive. In such matters, acquiescence in a transaction by any one government usually does not preclude a separate challenge by any of the other entity. Approval of a transaction by one government body subject to one set of concessions does not preclude another regulatory gatekeeper from insisting upon further concessions.

C. Noteworthy Collateral Institutions

All of the institutions mentioned to this point have authority to enforce competition rules in the form of either antitrust statutes or sector-specific statutes containing provisions modeled in various degrees on the antitrust laws. A variety of other government agencies devise regulations or enforce statutes that influence the competitive process by, for example, determining the ability of firms to enter specific markets or expand production in existing lines of business. Notable examples include regulation of advertising and entry by producers of food and pharmaceuticals; the administration of processes that grant intellectual property rights, such as patents; and rules and policies that govern public procurement.

There is growing awareness among academics, policymakers, and practitioners that the decisions of bodies such as the Food and Drug Administration, the Patent and Trademark Office, and the Department of Defense affect business rivalry substantially in a variety of circumstances – perhaps as much as the enforcement of traditional antitrust rules.¹⁸ A significant part of the work of public antitrust agencies today takes place at the intersection of regulatory regimes such as

¹⁷ See ABA Antitrust Section, *Antitrust Law Developments*, at 1271-73 (describing allocation of authority established by the 1996 Telecommunications Act).

¹⁸ See, e.g., Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Oct. 2003) (discussing how behavior of institutions responsible for granting intellectual property rights can affect competitive process), available at <<http://www.ftc.gov/os/2003/10/innovationrpt.pdf>>; William E. Kovacic, *Competition Policy in the Postconsolidation Defense Industry*, 45 *Antitrust Bull.* 421 (1999) (examining how policy choices made by U.S. Department of Defense affect competition among suppliers of weapon systems).

intellectual property and procurement. It is impossible to discuss the major determinants of U.S. competition policy without expanding the focus beyond antitrust enforcement to account for institutions that implement these and other systems of regulation.

III. The Consequences of Decentralization and Institutional Multiplicity¹⁹

The effect of duplicating government functions has been a subject of considerable scholarly concern for roughly a half-century.²⁰ Three basic rationales can support a decision to give two or more government institutions identical or overlapping duties: competition, diversification, and institutional comparative advantage.

A. The Competition Rationale

A monopolist supplier of a government service might behave in ways that resemble the performance of a monopolist supplier of goods or services in a private market. The government monopolist might produce quantities below optimal levels, exert too little effort to reduce costs, or fail to innovate in carrying out its functions.²¹ One reason to have two or more agencies perform the same government function is to foster inter-agency competition that increases the output and improves the quality of the product that the agencies are intended to supply.

Congress can create inter-agency competition in several ways: by giving the two agencies identical enforcement duties, by establishing overlapping but nonidentical enforcement mandates, or even by assigning two entities dissimilar responsibilities in the same general field of policy. In the last two cases (creating overlapping or dissimilar mandates), Congress can make the enforcement terrain of either agency somewhat contestable by indicating that future allocations of enforcement

¹⁹ Segments of this section are adapted from William E. Kovacic, *Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?*, 41 *Antitrust Bull.* 505 (1996).

²⁰ Charles Tiebout's formative study in the 1950s of interjurisdictional relationships in the 1950s provided a key stimulus for this line of inquiry. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416 (1956).

²¹ Cf. William A. Niskanen, *Nonmarket Decision making: The Peculiar Economics of Bureaucracy*, 58 *Am. Econ. Rev.* 293, 300-01 (1968) ("the passion of reformers to consolidate bureaus with similar output ... seems diabolically designed to ... increase the inefficiency (and, not incidentally, the budget) of the bureaucracy").

powers and resources will depend on how each agency executes its existing duties. Without a substantial expenditure of resources to evaluating the results of each agency's activities, it may be difficult for Congress or any other monitoring body to determine which agency is worthy of receiving a larger budget or greater authority.²²

Modern experience with bid protests in the U.S. federal procurement system shows how new entry can change the behavior of a government agency monopolist. In the 1980s, Congress thought the General Accounting Office (GAO), then the sole government administrative forum for resolving contract award disputes, had been too hostile to complaints by disappointed offerors. In 1984 Congress gave overlapping protest jurisdiction to the General Services Board of Contract Appeals (GSBCA), which proceeded to treat protesters more favorably. Rivalry between GAO and the GSBCA increased protester success rates and spurred procedural innovations by both bodies that bolstered the ability of protesters to collect information useful in overturning purchasing agency decisions.²³

It is important to underscore one aspect of the relationship between GAO and the GSBCA that forced each entity to account for, and respond to, the behavior of its counterpart. GAO and GSBCA had concurrent jurisdiction over protests involving computers and telecommunications equipment and services. A disappointed offeror could file a protest with either body. Forum self-selection by protesters was a crucial motivating tool for the GAO and the GSBCA. Each protest forum knew that the demand for its services was elastic, and that users chose a forum based on a mix

²² The importance of and difficulties associated with assessing the consequences of public antitrust enforcement are addressed in William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 Geo. Mason L. Rev. 843 (2001).

²³ See William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 Admin. L.J. Am. U. 461 (1995). Concluding that the protest reforms of the 1980s elicited excessive scrutiny of purchasing agency decisions, Congress ended this experiment in 1996 by eliminating the GSBCA's protest authority.

of "price" and quality factors.²⁴ The forum that provided the superior price-quality package took adjudication business away from its rival.

The U.S. antitrust system contains major limits on how strongly interagency competition can shape enforcement agency behavior. Unlike the bid protest process, firms cannot self-select which antitrust agency will review conduct for which jurisdiction is shared. For example, at the federal level, parties to a proposed merger cannot determine which agency will investigate the transaction by filing a premerger notice with a favored agency. Because the DOJ and the FTC allocate merger enforcement matters between them, the volume of merger "business" flowing to each agency is largely insensitive to the substantive quality of each agency's analysis or the cost of information demands that each agency imposes.

The lack of self-selection in merger control means that the equilibrium of enforcement policy and transaction planning might be set by the enforcement agency with the strongest preferences for intervention. An agency unilaterally can impose a more interventionist policy, because parties to a merger must assume that the more interventionist agency could receive their transaction in the clearance process. A loosening of government enforcement standards, however, requires the consent of all potential government prosecutors. One agency can defeat the other agency's move toward greater permissiveness simply by adhering to the status quo.

B. The Diversification Rationale

The diversification rationale has several elements. The first deals with the difficulty of identifying an optimal approach for accomplishing a government policy objective amid conditions of limited information and uncertainty. When the United States embarked on a new scheme of

²⁴ The "price" of pursuing a protest is chiefly a function of the cost of adjudicating a claim before the forum. GSBCA protests generally were more expensive than GAO protests because GSBCA used discovery processes (such as depositions) whose use often gave the protestor valuable information but raised the cost of challenging the purchasing agency's decisions. Successful protesters were permitted to recover reasonable attorneys fees. For a protester, the "quality" of a protest forum is a function of the likelihood of obtaining a favorable ruling and the form of remedy that the protest forum is likely to provide. The GSBCA generally offered protesters a higher quality "product" because it ruled against the government more often than the GAO and often ordered more expansive relief.

economic regulation (antitrust) in the late 19th Century and early 20th Century, there was uncertainty and disagreement about the best way to implement competition policy commands. Congress decided to endorse three implementation options: enforcement by private parties in the courts, enforcement by DOJ in the courts, and enforcement by an administrative tribunal (the FTC) akin to the recently (1887) established Interstate Commerce Commission.²⁵

One way to test the merits of different implementation options is to conduct a natural experiment with more than one technique. Experimentation generates an empirical basis for determining what the long-term enforcement system should be. Actual experience provides insights for adjusting the mix of enforcement institutions by revealing which techniques are successful and which are not.

A second diversification rationale is to insure against the possibility that any single enforcement entity may fail to execute its responsibilities (for example, through sloth, corruption, or flawed institutional design), leaving an important public policy goal unfulfilled. Redundancy creates alternative paths for implementation if any single approach fails. The more vital the government function, the stronger the case for diversifying sources for supplying it. For example, one reason to maintain the Air Force, the Army, and the Navy as distinct bodies (rather than establish a single Armed Service) is to provide multiple independent centers for developing new tactics and weapon systems.²⁶ An integrated Armed Service might suppress or ignore meritorious ideas about tactics or weapons that threaten established ways of doing things.

C. Institutional Comparative Advantage Rationale

The solution to competitive concerns arising from mergers in network industries sometimes involves orders than mandate access to essential facilities or impose nondiscrimination requirements

²⁵ For an important recent interpretation of the origins of the U.S. antitrust system at the turn of the 20th century, including the decision to diversify the enforcement system by creating the Federal Trade Commission, see Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1 (2003).

²⁶ See Thomas L. McNaugher, *New Weapons, Old Politics: America's Military Procurement Muddle* 38-48 (1989).

on the owner on such facilities. The design and implementation of mandatory access and nondiscrimination requirements can confront antitrust agencies with oversight tasks, such as the review of tariffs, that are better suited for traditional regulatory agencies. Collaboration between the antitrust agency and the sectoral regulator might be necessary to produce the best result. For example, one might assign primary responsibility for reviewing a merger's competitive effects and conceiving a remedy to an antitrust authority and give a sectoral regulator responsibility for routine monitoring of the remedy.

D. Potential Costs of Decentralization and Multiplicity

The multiplicity of competition policy agents complicates efforts by any single agent to establish consistent enforcement policies. Unless Congress or the courts establish binding rules that apply to all prosecutorial agents, policy adjustments undertaken by any one agent can be undermined by the decisions of other agents. Business operators must take seriously the preferences of the most intervention-minded enforcement agent.

1. Coordination and Administrative Costs

Achieving competition and diversification in the supply of services by government bodies entails a number of costs. The first is greater expenditures for institutional overhead associated with duplicating central administrative and management functions. If the consolidation of antitrust enforcement authority would occur by having one entity absorb all or most of the other entities' antitrust professionals and support staff, the main financial saving from consolidation would be to eliminate some overhead resources consumed by the disappearing entities. Such savings would be modest. A unification of competition policymaking authority that only eliminated duplicative overhead would generate relatively small cuts in public expenditures.

A second cost consists of resources that the agencies spend to coordinate conduct where purely independent decision making could be harmful. One form of coordination involves the allocation of potential cases and investigations. As mentioned above, the DOJ and the FTC have devised an inter-agency clearance mechanism to ensure that both entities do not simultaneously

review the same antitrust matter or sue the same defendant for identical conduct. In general terms, the operation of the clearance process can generate significant inter-agency friction and raise the costs of routine cooperation. Perhaps the most serious cost stems from measures the agencies take from time to time to position themselves to claim priority over new matters. Each agency invests strategically in at least some investigative activity for the purpose of accumulating experience that the agency can assert as a rationale for handling related matters in the same industry sector in the future.

Interagency coordination also involves preparing enforcement guidelines. For areas in which different competition agencies have active enforcement programs, it is not unusual for each agency to adopt a somewhat distinctive analytical approach. Devising joint guidelines involves extensive negotiations to harmonize analytical methods and resolve disagreements. Consolidating enforcement authority in a single institution would reduce the cost, and therefore might increase the output, of such guidance.

A third cost consists of additional resources that companies spend to inform themselves about the decision making tendencies of multiple institutions rather than one. Regulatory outcomes can depend heavily on how individual regulators exercise their discretion. The importance of discretion in policymaking causes regulated firms to spend substantial sums to identify the tastes and idiosyncracies of incumbent regulatory decision makers. The cost of learning and monitoring the habits and preferences of multiple bureaus exceeds the cost of mastering the traits of a single institution.

When two or more agencies enforce the same laws, differences in law enforcement approaches may emerge. If agencies apply dissimilar analytical techniques or standards, a fourth cost of competition and redundancy is the expense that businesses incur to evaluate commercial plans and strategies under different enforcement approaches. Accounting for what they learn in studying formal acts and informal signals of policymakers, firms must evaluate contemplated moves in light of how different regulators with similar enforcement portfolios might evaluate their

behavior.

E. National Multiplicity and the Process of International Convergence

Complex, overlapping competition policy regimes exist in countries other than the United States. Foreign competition policy systems feature conflicts that arise between:

- * Multinational regional competition policy regimes and the antitrust laws of individual member states.²⁷
- * The operation of national competition regimes and sectoral regulatory frameworks.²⁸
- * Decisions by national competition authorities and competition policy bodies of political subdivisions.²⁹
- * National competition authorities which share power to review mergers.³⁰

Each condition inhibits the ability of national governments to establish common policies and procedures with their foreign counterparts.

From the perspective of the United States, the existing design of domestic institutions for making competition policy could inhibit progress toward international convergence on competition

²⁷ This is a continuing issue in the relationship between the competition policy apparatus of the European Commission and the competition agencies of the member states of the European Union.

²⁸ In recent years, Germany has liberalized its postal services and telecommunications sectors and has created a new institution to perform residual regulatory tasks (such as setting access prices for bottleneck facilities). The legislation creating the new independent regulatory body did not clearly define the respective competition policy roles of the German Cartel Office and the independent regulator. This ambiguity has led to disputes between the Cartel Office and the regulator concerning a variety of competition policy issues.

²⁹ See Roger Alan Boner & William E. Kovacic, *Antitrust Policy in Ukraine*, 31 Geo. Wash. J. Int'l L. 1, 8-10 (1997) (describing broad distribution of decision making power among national and regional competition officials in Ukraine).

³⁰ See Michael G. Cowie & Cesar Costa Alves de Mattos, *Antitrust Review of Mergers, Acquisitions, and Joint Ventures in Brazil*, 67 Antitrust L.J. 113 (1999) (describing difficulties that arise from the distribution of antitrust merger oversight authority across three institutions of the national government in Brazil).

policy processes and substantive standards. Decentralization and multiplicity in U.S. competition policy making complicates the attainment of a nationwide consensus about the appropriate content of procedures and substantive requirements. This is evident where two or more independent institutions exercise overlapping authority in the absence of a hierarchy of authority that makes the decision of one actor binding on another institutions. The DOJ and the FTC may be seen as lacking the ability to speak authoritatively to foreign governments about U.S. competition policy because their pronouncements do not bind other institutions, such as sectoral regulators and state attorneys general, which independently exercise policymaking power over a wide range of business activity.

Coordination of competition policy making for individual transactions among foreign competition authorities becomes more costly where the preferences of several domestic agencies, rather than one institution, are relevant to the policy outcome. For example, a foreign competition authority can negotiate common terms with its competition policy counterparts, but it must also await the outcome of proceedings before a sectoral regulator in the same matter. Competition authorities may lack mechanisms for sharing information and views with the sectoral regulators in the same way that they share information and views with their antitrust counterparts.

F. Summary: Ensuring the Selection of Superior Implementation Approaches

The rationales favoring a multiplicity of enforcement bodies run into difficulty if the jurisdiction in question lacks mechanisms for ensuring that the most efficiency enforcement instrumentalities or policies ultimately prevail.³¹ To some extent, the litigation of cases before the federal courts provides a vehicle for establishing doctrinal principles that constrain all potential enforcement agents. Analytically flawed efforts to continually expand the zone of antitrust enforcement concerning any single form of behavior eventually would be subject to control by judicial interpretations that delineate substantive standards and procedural requirements. One presumes that liability theories that are truly perverse in their efficiency consequences ultimately would be subject to litigation and rejection in the courts.

³¹ I am grateful to Richard Epstein for focusing my attention on this concern.

Yet not all poorly conceived enforcement measures, public or private, result in full litigation on the merits and the publication of judicial opinions. Nor is litigation necessarily an available or effective means to correct errors in policymaking – for example, the issuance of guidelines – that take forms other than litigation. It may be necessary to consider other devices by which superior norms are identified and by which various enforcement agents are persuaded to accept the superior norms.

IV. Toward a Domestic Competition Initiative

The existing distribution of competition policy authority may prove to be an enduring condition of the U.S. legal system. It is possible that Congress and other policymakers will reassess the rationality of the U.S. antitrust enforcement system and undertake significant adjustments, including the withdrawal of prosecutorial power from selected public authorities or private entities that currently exercise important competition policy functions.. I make two assumptions in concluding that such changes are unlikely. First, I cannot readily imagine the institutions or entities that now enjoy prosecutorial power will volunteer to surrender it or acquiesce in measures to curb their authority. Second, I doubt that legislative committees that have vested enforcement power in institutions subject to their oversight will choose to curtail the responsibilities of such bodies. For these reasons, I regard the existing decentralization of competition policy authority to be largely impervious to significant change.

Recent experience with international efforts to promote competition policy convergence suggests other paths that the United States might take to realize the benefits of decentralization while reducing its costs. The development of competition law internationally indicates that progress toward widely-accepted norms regarding substantive standards, procedures, and institutional capacity might occur in three steps:³² decentralized experimentation at the national or regional level,

³² This discussion uses the model of convergence presented in Timothy J. Muris, *Competition Agencies in a Market-Based Global Economy* (Brussels, Belgium, July 23, 2002) (Prepared remarks at the Annual Lecture of the European Foreign Affairs Review), *available at* <<http://www.ftc.gov/speeches/muris/020723/brussels>>.

the identification of best practices or techniques, and opting-in to superior norms by individual jurisdictions. Of the international institutions that are facilitating the process of convergence, the most intriguing institution for U.S. domestic purposes is the International Competition Network (ICN).

Created in the Fall of 2001, the ICN is a virtual network of competition agencies representing over 80 jurisdictions. The ICN operates through working groups consisting of government officials and representatives from academia, consumer groups, legal societies, and trade associations. One group has focused on merger control and has prepared a widely-praised body of guiding principles and best practices for notification practices and procedures. Other working groups have addressed competition advocacy and capacity building in emerging markets. ICN has considerable promise to promote the development of an intellectual consensus about competition policy norms.³³

A domestic equivalent to ICN could serve similar ends in identifying best practices that have emerged through experience with decentralized policymaking and promoting the adoption of such practices. A DCN could pursue a variety of "soft" convergence strategies to achieve greater consistency and simplicity in competition policy. These strategies generally involve encouraging the adoption of superior analytical techniques and procedures. Possibilities for a DCN would include:

- * Creating working groups of representatives of public institutions that share competition policy authority for various matters, such as reviewing mergers;
- * Holding conferences to address policy questions of common interest;
- * Engaging government bodies that lack a formal antitrust portfolio (e.g., FDA and government procurement authorities) in discussions about how their choice of policies and implementation techniques affects the competitive

³³ The ICN is not the only instrument for developing global competition policy norms. The World Trade Organization and the Organization for Economic Cooperation and Development are but two of the global and regional networks that are devoting significant effort to competition policy convergence issues.

process;

- * Promoting the allocation of competition agency resources to conduct retrospective assessments of the effects of past policies;
- * Encouraging public bodies to issue guidelines that delineate their enforcement intentions; and
- * Development of interagency protocols that clarify substantive standards and procedures.

These measures would serve to make enforcement processes and substantive standards more transparent. Where significant differences across agencies become apparent, the identification of the differences can provoke discussion and criticism and may stimulate adjustments. A DCN could become a platform for a continuing assessment of the sensibility of U.S. competition policymaking institutions.

V. Conclusion: Conditions for Leadership Amid Institutional Multiplicity

The development of a Domestic Competition Network also would highlight an important condition of leadership in a world of multiple decision makers. Success in guiding the refinement and acceptance of competition policy norms is likely to come to agencies that generate the best ideas. Achieving intellectual leadership requires competition agencies to spend resources on what FTC Chairman Timothy Muris has called “competition policy research and development.”³⁴ A strong research agenda and commitment to policy analysis are necessary to identify superior norms and persuade other authorities to opt in. Progress toward widely accepted norms is likely to be gradual, and a patient investment in long-run engagement promises to yield the greatest rewards. In today’s environment, the continuing reevaluation of the intellectual foundations and institutions of competition policy becomes increasingly important to what antitrust agencies must do.

³⁴ See Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy* (New York, N.Y., Dec. 10, 2002) (Remarks for the Milton Handler Annual Antitrust Review), available at <<http://www.ftc.gov/speeches/muris/handler>>.