

# 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 Winners 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."

# Senator Obama, Statement to the American Antitrust Institute, 2007

- “the current administration has what may be the weakest record of antitrust enforcement of any administration in the last half century”

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

- What Are the Appropriate Criteria for Evaluation?
- By What Techniques 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
  - Firms
  - Consumers
  - 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

# Problems with Case Counts

- Boosting Totals with “Cheap” Matters
- Accounting for Difficulty
- Measuring Actual Impact
  - Legal doctrine
  - Economic effects

# 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
  - Robinson Patman: 500 cases (1960s) to 1 (1990s)
  - Mergers: 4.49 for horizontals, 2.0 for verticals in 1960s, and efficiencies count against you

# 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 Competition Network
- Consider: Where Would the ICN Be Today Without the Contributions of Canada?
  - How much credit do Konrad and Sheridan get for this?

# 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

# 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