

Rating the Competition Agencies: What Is Good Performance?

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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."

Editorial, New York Times, June 2008

- Regarding FTC Inquiry of Intel:
- “We are also hopeful that the decision means the FTC, which has shown little appetite for antitrust regulation under the Bush Administration, is finally ready to do its job. ... Whether the issue is tainted food or the mortgage crisis, this White House’s hostility to regulation and coddling of big business has proved very costly to Americans. The next president will have to do a lot better.”

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
 - Allocation of agency resources
 - Assessment of competition policy system and powers entrusted to the competition agency
- 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
 - Reports
 - Advocacy
 - Infrastructure

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 beyond status quo, or staying put
- Commentators Call for Repeal or Retreat from Nominal Legal Commands or Existing Judicial Interpretations
 - New theory
 - Empirical study
 - Example: Is the FTC's enforcement program "weaker" or "stronger" than before?

Illustration: FTC Robinson Patman Cases: 1961 to Present

- 1961-1968: 134 (518)
- 1969-1976: 41
- 1977-1980: 8
- 1981-1988: 5
- 1989-1992: 0
- 1993-2000: 1
- 2000-Present: 0

Illustration: FTC Abuse of Dominance Matters 1970-1976

- Shared Monopoly, Maintenance of a Non-Competitive Market Structure, Predation
 - Cereal, Petroleum, Photocopiers, Automobiles, Bread, Instant Coffee, Lemon Juice, Citrus Fruit
- Concerns:
 - Capabilities vs. commitments
 - Change in learning

Illustration: FTC Merger Policy 1960s

- Low Concentration Thresholds
- Emphasis on Vertical and Conglomerate Transactions
- Indifference or Hostility to Efficiencies
- Contemporary View: Farsighted
- Today: Discredited

Illustration: FTC Vertical Restraints Policy in 1960s

- Vertical Cases Replace Robinson-Patman Act
- Emphasis on Non-price Matters
 - Example: Brown Shoe and Exclusive Dealing
 - 80,000 total US footwear retailers
 - Brown Shoe had 5% of US shoe production
 - Brown Shoe had exclusive dealing contracts with 800 retailers
 - Contracts were terminable at will
 - Retailers' testimony: we liked the 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
- 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

- 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*
- FTC Merger Retrospectives

Adverse Consequences

- 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

Ex Post Assessment

- Focal Points: Process and Outputs
- Means
 - CA self assessment
 - Peer review and benchmarking
 - External observers
 - Combination of methods

Illustration: Mergers

- Compare Prior Assumptions to Actual Results
- Examine Implementation of Chosen Remedies
- Note Difficulty of Identifying Systematic Deficiencies in Enforcement

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 and Promote Public Debate
- Continue Pursuit of Better Practices