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2009

## Rating the Competition Agencies: What Constitutes Good Performance?

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### Recommended Citation

William E. Kovacic, Rating the Competition Agencies: What Constitutes Good Performance?, 16 *Geo. Mason L. Rev.* 903 (2009).

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## RATING THE COMPETITION AGENCIES: WHAT CONSTITUTES GOOD PERFORMANCE?

*William E. Kovacic\**

### INTRODUCTION

What is a good competition agency? Among competition policy specialists, this topic often emerges in casual conversation and scholarly debate. For all the attention the subject receives, discussions about agency quality rarely focus carefully on what constitutes good performance. In sport, we use clear, generally accepted scoring rules to determine which side is ahead in an individual contest and to sort out good teams from the bad. The field of competition policy lacks such standards, yet the absence of well-defined, generally accepted scoring rules does not inhibit commentators from providing confident assessments of how well specific competition agencies are doing their jobs.

The quality of performance by the Department of Justice Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC” or “the Commission”) attracted much attention within the U.S. competition policy community during the run up to the 2008 national elections and in the months before Barack Obama’s inauguration as president. Assessments of the DOJ and the FTC figured prominently in the popular press, academic papers, and in the comments of the victorious candidate for the presidency.

Academics, journalists, practitioners, and candidates generally have portrayed the Bush administration competition agencies in gloomy terms. Speaking at a conference in June 2008, Professor Robert Pitofsky observed that “over the last decade, there have been some awfully lean years for anti-trust enforcement. It hasn’t been asleep but it’s been dozing in my view.” In his book published later the same year, Pitofsky said incumbent DOJ and FTC leaders were given to “extreme interpretations and misinterpretations of conservative economic theory (and constant disregard of the facts).”<sup>1</sup>

In a statement issued in February 2008, then U.S. senator Barack Obama said that “the current administration has what may be the weakest record of antitrust enforcement of any administration in the last half cen-

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\* Commissioner, U.S. Federal Trade Commission. Remarks presented at the George Mason Law Review Twelfth Annual Symposium on Antitrust, Washington, D.C., Dec. 4, 2008. On Leave: George Washington University Law School. From March 31, 2008, to March 1, 2009, the author served as Chairman of the Federal Trade Commission. The views expressed here are the author’s alone.

<sup>1</sup> Robert Pitofsky, *Introduction: Setting the Stage*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 3, 6 (Robert Pitofsky ed., 2008).

ture.”<sup>2</sup> One Obama appointee to the federal antitrust agencies later claimed that “inadequate antitrust oversight” contributed to the economic crisis in the United States.<sup>3</sup> Candidate Obama pledged his administration “to reinvigorate antitrust enforcement,”<sup>4</sup> a phrase that his supporters repeated frequently in subsequent commentary.

DOJ provided the chief target for opprobrium. Many commentators said, at least in private conversations, that they meant to aim their criticism at the Antitrust Division. The results were not so precise. Bush administration critics may have been trying to hit the DOJ on Tenth and Constitution in Washington, D.C., but more than a few blows landed upon the FTC two blocks away. Those who professed greater respect for the FTC’s program from 2001-2008 rarely summoned more than a reluctant acknowledgment that the FTC in some sense acted as it should have.

Debates about the U.S. federal competition agencies have revealed a serious need to return to the basic question of what is good performance. Debate about the Bush administration competition program displayed three acute problems with modern assessments of the work of the federal agencies. There is strikingly limited knowledge of what the federal agencies have done, there is no widely-accepted understanding of what competition agencies ought to do, and, even where criteria are expressly identified and applied, they tend to be unacceptably incomplete or to equate activity with accomplishment.

A sampling of modern commentary shows the need for better performance standards. Since 2007, the Global Competition Review (“GCR”) has published an annual ranking of forty of the world’s competition agencies. To assemble the rankings, the GCR supplements its own examination of the agencies’ work with interviews and questionnaires that elicit views of practitioners and of the agencies themselves. GCR does not claim scientific precision. It tries to provide a rough idea of where the agencies stand.

The top of the GCR rating system is an “elite five star category.” In the ratings for 2007 and 2008, three authorities received the elite five star rating: the European Commission’s Competition Directorate, the United Kingdom’s Competition Commission (“CC”), and the FTC. In both years, DOJ was one rung down with four and one-half stars. For 2009, the five star elite institutions were DOJ, the CC, and the FTC. Inclusion in the five-star category “simply indicates that an authority is at the top of its game.”

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<sup>2</sup> Senator Barack Obama, Statement for the American Antitrust Institute (Feb. 20, 2008), *available at* <http://www.antitrustinstitute.org/Archives/obama2.ashx> (follow “Read Senator Obama’s Statement on Antitrust here” hyperlink) [hereinafter “Obama Campaign Statement”].

<sup>3</sup> Christine A. Varney, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *Vigorous Antitrust Enforcement in This Challenging Era* 4-5 (May 12, 2009), *available at* <http://www.usdoj.gov/atr/public/speeches/245777.pdf>.

<sup>4</sup> Obama Campaign Statement, *supra* note 2.

From these results, one might conclude that the U.S. federal agencies in this decade have performed in a satisfactory manner, if not well above average. This is not the perspective of commentators noted above, including the current president of the United States. The Obama campaign statement contained no suggestion that the Bush administration antitrust agencies might be deemed “elite.” Rather, the presidential candidate said the Bush administration antitrust enforcement program “may be the weakest” of any presidential administration since the late 1950s.<sup>5</sup> As indicated above, many others offered similarly unflattering assessments.

Could all of these observers have been talking about the same federal agencies? Has the FTC been an “elite five-star” agency, or is it part of the weakest antitrust program of the past half-century? Has the Commission performed at the top of its game during the Bush administration, or has it been dozing under the guidance of leaders whose ideological rigidity induces them to disregard facts constantly?

The modern commentary about the quality of U.S. competition policy begs for answers to two basic questions. First, by what criteria should the performance of competition agencies be judged? The lack of widely-accepted, consistently applied standards for assessing the quality of agency performance has afflicted the field of competition policy throughout its history, and the absence of such standards is a major impediment today to achieving consensus on what competition authorities ought to do.

Second, once the criteria for the agency report card have been set, how should they be applied in order to determine the grades? It is impossible to have a constructive conversation about agency performance without a common view about how to answer these questions. Without a common framework, there is no meaningful way to score agency performance in any one period or across time. U.S. competition policy is in serious trouble today if we cannot agree, as then candidate Obama suggested we cannot, that federal competition policy in this decade is at least as good as it was, for example, in the 1960s. Do commentators sincerely advance the view that the FTC of this decade does not surpass the agency of the 1950s and 1960s—an agency damned by many observers as gravely deficient?

Why care about the establishment and application of meaningful standards? Assessments of agency performance are important for several reasons. Agency reputations can be likened to brands, and having a well-respected brand is an extremely valuable asset. Current perceptions of agency quality influence legislative decisions about budgets and additions to the agency’s statutory authority, judicial decisions about whether to defer to an agency’s positions, judgments by company officials about whether to comply with mandates subject to the agency’s supervision, the level of morale of existing agency employees, and the agency’s success in recruiting

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<sup>5</sup> Obama Campaign Statement, *supra* note 2.

new staff. A broadly held view that an agency is fulfilling its duties capably also contributes to citizen confidence in public governance and thereby strengthens the legitimacy of public administration.

A great deal of good policy is the result of cumulative, incremental improvements over time.<sup>6</sup> These improvements progressively enhance the agency's brand. The development of a strong brand is a slow growth that requires sustained contributions by agency leadership over time. The characterization of an agency's work as severely deficient in any one period not only can diminish hard-earned reputational capital, but also can induce incumbent leadership to disregard positive developments in an era that incorrectly is said to be deficient. If a period of public administration is said to be mediocre, new leadership might be inclined to indiscriminately write off initiatives pursued in that period and to devise new programs from scratch.

This presentation discusses the assessment of agency performance in two parts. It first discusses what the criteria for evaluating a competition agency should be. It then considers how the report card should be applied in practice. In setting out the design and application of evaluative criteria, the presentation emphasizes investments in achieving superior institutional design and enhancing agency capability. These are long-term capital investments that provide the foundation for the identification and execution of successful programs. The returns to such capital investments tend not to be appropriable in the one period of any single leader's tenure, and the U.S. system of public administration provides relatively weak incentives for incumbent leaders to make them.

A central theme of this presentation is that the standards for evaluating competition agencies should press incumbent leaders to invest substantially in activities that improve the capacity of their agencies over the long term. Fred Hilmer, whose report in the 1990s led to the reformulation of Australia's competition system, makes this point when teaching executive education courses for business officials. He tells his students that the good things happening in their companies today probably result from investments their predecessors made five to ten years ago. He tells his students to ask themselves the following: What are you doing today to make sure that your successors will prosper five or ten years hence?<sup>7</sup> That is the norm that the criteria for evaluation should establish and promote inside a competition agency.

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<sup>6</sup> On the cumulative, evolutionary nature of policy development in the field of competition law, see William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003) [hereinafter "Kovacic, *Antitrust Norms*"].

<sup>7</sup> I am grateful to Professor Hilmer for sharing this point with me.

## I. SUGGESTED NORMATIVE CRITERIA: THE AGENCY REPORT CARD

What is good agency performance? The first criterion deals with substantive results. An agency is performing its duties capably if it improves economic performance and social welfare. Among other steps, it does so by stimulating improvements in quality, reductions in cost, and increases in innovation.

The second criterion deals with process. Good agency performance consists of using superior administrative techniques to achieve good substantive results and to facilitate improvements in its operations. Among other characteristics, good agency process includes the establishment of effective internal quality control mechanisms, the adoption of transparency and accountability tools to increase public understanding of its activities, and a commitment to seek continuing improvements in its operations and in its substantive programs. The latter approach abides by the aphorism that it is what you learn after you know it all that really counts. "Reinvigoration" is not a quadrennial pursuit tied to electoral cycles. A good agency is always engaged in a process of improvement.

The emphasis on achieving superior administrative practice assumes that good technique ultimately improves substantive results. In golf, the logic of hiring a good swing coach is that improving swing technique increases the likelihood that the player will become more proficient in directing the ball in the desired direction.

These general criteria can be difficult to apply in practice. This is especially true of the first. Economic welfare effects of competition policy can be difficult to measure directly. It can be hard to trace the immediate economic effect of specific matters, much less to gauge the larger impact of measures upon the willingness of firms to comply with the law. Moreover, the life cycle of a competition policy system may feature a variety of different objectives at any one time. Numerous aims motivated the formation of the U.S. competition policy system in the late nineteenth and early twentieth centuries.<sup>8</sup> Experience over time has revealed tension among goals that Congress initially believed to be harmonious. Modern jurisprudence and enforcement policy have wrung some of the inconsistency out of this configuration of goals, but the possibility remains for differences in emphasis that can yield varied substantive results.

A further complication is that the U.S. competition policy system is deliberately and inherently evolutionary. Congress cast the U.S. statutes in relatively open-ended terms with the expectation that judicial interpretation and public enforcement would change over time in accord with advances in

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<sup>8</sup> This history is summarized in ERNEST GELLHORN ET AL., *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 23-25 (5th ed. 2004).

theory and empirical knowledge.<sup>9</sup> What seems to be wisely conceived policy in one era might be proven to be unwise in a later period. This suggests that competition agencies should be given two grades. The first grade depends upon whether the agency's policies were consistent with the state of knowledge at the time. This measure heeds the admonition of Thomas McCraw that regulatory policy should be judged by a standard true to the time in which policies were adopted. Are the policies of the moment consistent with consensus views about what constitutes good policy?

Consistency with contemporary views of superior policy should be supplemented with a standard that takes a longer term view. Because competition policy is a dynamic field, one also wants to measure the agency's success in any single period in making durable positive contributions to the body of competition policy. How good an eye does the agency have to spot policies that turn out to be durable and are seen as beneficial? In this sense, part of the agency's grade in any one period is an "incomplete." The final grade is not calculated until years later when commentators assess whether earlier measures that were thought at the time to be sensible have remained sound in light of developments in learning.

The conventional report card used to grade competition agencies is not so discriminating. The central and most heavily weighted criterion is the initiation of new cases. You are whom you sue. This criterion generally equates activity with accomplishment.<sup>10</sup> By this calculus, total case counts and trends in case counts become the measure of an agency's worth. In this framework, there is extra credit for high profile matters. Matters reported on the front page of the leading news organizations or at the top of the business section receive the heaviest weight.

The case-driven, activity-oriented calculus suffers from two major weaknesses. First, the scoring system accords little credit for smaller cases, including the seemingly insignificant matter that makes big law. When the Justice Department initiated the case of *Otter Tail Power Co. v. United States*<sup>11</sup> in 1969, how many observers said the case would transform the application of antitrust to traditionally regulated industries and pave the way for the government's monopolization suit against AT&T in the 1970s? Most would have said the most important government action in 1969 was the filing of the monopolization case against IBM. *Otter Tail* unexpectedly had the greater doctrinal impact and laid a vital foundation for the case against AT&T. *Otter Tail* was the small case that made big law.

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<sup>9</sup> See Kovacic, *Antitrust Norms*, *supra* note 6, at 400-02 (discussing deliberately evolutionary design of U.S. competition regime).

<sup>10</sup> For example, this is the implicit logic of the Obama Campaign Statement, *supra* note 2, which determines the "strength" or "weakness" of federal antitrust enforcement according to the number of cases filed. The same can be said of recent assessments of merger enforcement that equate the quality of federal policy with activity levels.

<sup>11</sup> 410 U.S. 366 (1973).

The second weakness with case-driven activity measures is that they ignore non-litigation activities. For example, case-related activity measures overlook the significance of the FTC study, *To Promote Innovation*,<sup>12</sup> which examined the relationship between the rights granting process and competition policy. The impact of this study on the development of the intellectual property rights granting process in the United States and abroad could prove to be as great as any case the FTC has brought in its nearly 100-year history.

A scoring system that focuses on the initiation of cases also can diminish the incentives of incumbent leadership to invest in activity that facilitates the development of better cases in the future. Consider what would happen in sports such as basketball, hockey, or soccer if one did not track assists. Measurement systems are valuable only if they measure what matters,<sup>13</sup> and a system that overlooks non-litigation policy initiatives misses a vital dimension of policy development.

## II. LACK OF CONSENSUS ABOUT WHAT CASES WERE PROSECUTED

Even if one accepts a case-related activity as the chief index of an agency's worth, there must be shared understanding about past experience. There cannot be an informative conversation about the significance of activity levels if there is no agreement about what those levels have been. In baseball terms, there at least must be common agreement on whether a pitch was thrown before moving to a consideration about whether the pitch was a ball or a strike.

The debate associated with Bush administration competition policy shows that the competition policy community has a long way to go to achieve a common understanding about past experience. U.S. competition policy specialists ought to be greatly concerned over the pervasiveness of apparent disagreement over what transpired earlier in this decade. Consider the example of federal agency civil nonmerger enforcement during the Bush administration. At a conference in 2008, Douglas Melamed offered this assessment of the Bush administration program: "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."

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<sup>12</sup> FED. TRADE COMM'N, *TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY* (2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf> [hereinafter "FTC, TO PROMOTE INNOVATION"].

<sup>13</sup> See William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 ANTITRUST L.J. 861 (2005) (discussing importance of establishing correct evaluative criteria).



It is not evident why the FTC's cases involving standard setting and settlements between producers of branded and generic pharmaceutical products would fall into an "except for" category and would not be relevant to an examination of the FTC's nonmerger antitrust enforcement program. These matters have considerable economic significance and raise important issues of competition policy. No sensible scoring principle would fail to treat these enforcement initiatives as noteworthy and important. To exclude them makes as much sense as saying that, except for Apollo 11, Neil Armstrong never set foot on the moon.

Even if one casts aside the standards and settlement cases, the proposition about the intensity of FTC civil nonmerger enforcement in this decade is unsupported. We can test the observation by studying actual levels of activity in federal court litigation in the 1990s and in this decade. From the 1990s to 2000, the FTC had four civil nonmerger matters in the federal courts. These are *FTC v. Abbott Laboratories*,<sup>14</sup> *California Dental Ass'n v. FTC*,<sup>15</sup> *Toys "R" Us, Inc. v. FTC*,<sup>16</sup> and *FTC v. Mylan Laboratories, Inc.*<sup>17</sup> From 2001 through 2008, the FTC has litigated eight nonmerger matters in the federal courts. Four of these involved either standard setting (*Rambus Inc. v. FTC*<sup>18</sup>) or settlement issues (*Schering-Plough Corp. v. FTC*,<sup>19</sup> *FTC v. Cephalon, Inc.*,<sup>20</sup> and *FTC v. Warner Chilcott Holdings Co.*<sup>21</sup>). Two matters, *In re Kentucky Household Goods Carriers Ass'n*<sup>22</sup> and *In re South Carolina State Board of Dentistry*,<sup>23</sup> involved state action questions and yielded court of appeals decisions that favored the FTC. The other two, *Polygram Holding, Inc. v. FTC*<sup>24</sup> and *North Texas Specialty Physicians v. FTC*,<sup>25</sup> involved the structure and application of the rule of reason to horizontal restraints.

The total of eight FTC nonmerger cases litigated in federal court in this decade is twice the number of matters the FTC litigated in federal court in the 1990s. The number of cases other than matters involving standards and pharmaceutical settlements (four) equals the total number of nonmerger matters the FTC litigated in the federal courts in the 1990s. If the FTC that has litigated eight nonmerger cases in federal court in this decade can be said to have gone "AWOL," the FTC that litigated four such cases in the 1990s never enlisted.

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<sup>14</sup> 853 F. Supp. 526 (D.D.C. 1994).

<sup>15</sup> 526 U.S. 756 (1999).

<sup>16</sup> 221 F.3d 928 (7th Cir. 2000).

<sup>17</sup> 99 F. Supp. 2d 1 (D.D.C. 1999).

<sup>18</sup> 522 F.3d 456 (D.C. Cir. 2008).

<sup>19</sup> 402 F.3d 1056 (D.C. Cir. 2005).

<sup>20</sup> 551 F. Supp. 2d 21 (D.D.C. 2008).

<sup>21</sup> No. 1:05-CV-02179-CKK, 2006 WL 3302862 (D.D.C. Oct. 23, 2006).

<sup>22</sup> 139 F.T.C. 14 (2005).

<sup>23</sup> No. 9311, 2007 WL 2763994 (F.T.C. Sept. 11, 2007).

<sup>24</sup> 416 F.3d 29 (D.C. Cir. 2005).

<sup>25</sup> 528 F.3d 346 (5th Cir. 2008).

Doug Melamed's characterization of FTC nonmerger federal court litigation since 2001 is not the only sign that the antitrust community is wanting for basic agreement about what enforcement took place. In an essay published in 2008, Professor Harvey Goldschmid offered the following assessment of Bush administration enforcement involving dominant firm conduct: "I suspect that *Trinko*'s dictum and general Chicago School scholarship have lulled antitrust agencies and our lower courts into a false sense of complacency about dominant firms. Almost nothing is happening in the Antitrust Division, at the FTC, or in the courts in the Section 2 area."<sup>26</sup> At a bar association event in March 2009, Professor Goldschmid put things still more emphatically and dropped the "almost" qualification from his earlier essay. Since 2000, he observed, the DOJ and the FTC had done "nothing" involving dominant firm conduct in this decade.

Professor Goldschmid seems to have been referring to the prosecution of new cases. If so, his description of the Antitrust Division's record is correct. The DOJ has initiated no cases involving monopolization or attempted monopolization since 1999. Yet Professor Goldschmid's characterization of the FTC's record is inexplicable. Since June 2001, the FTC has initiated seven cases involving claims that firms used improper means to acquire, maintain, or exercise monopoly power. Five cases were premised directly on Sherman Act section 2 theories—*In re Union Oil Co. (Unocal)*,<sup>27</sup> *Rambus Inc. v. FTC*,<sup>28</sup> *FTC v. Cephalon, Inc.*,<sup>29</sup> *In re Bristol-Myers Squibb Co.*,<sup>30</sup> and *In re Biovail Corp.*<sup>31</sup> Two others relied exclusively on the prohibition against unfair methods of competition found in section 5 of the FTC Act. One matter (*In re Valassis Communications, Inc.*<sup>32</sup>) involved an invitation to collude, and the other (*In re Negotiated Data Solutions, LLC*<sup>33</sup>) concerned allegations that a firm had wrongly exploited monopoly power by renegeing on licensing commitments made as part of a standard setting process.

The actual pace of FTC activity also comes more clearly into view when the current decade is compared to earlier eras. The total of seven new cases in eight years (2001-2008) exceeds the FTC's rate of activity for any comparable period since 1969-1976. The FTC during the presidency of George W. Bush brought abuse of dominance cases at a faster annual rate than either the Carter administration or the Clinton administration. Timothy

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<sup>26</sup> Harvey J. Goldschmid, *Comment on Herbert Hovenkamp and the Dominant Firm: The Chicago School Has Made Us Too Cautious About False Positives and the Use of Section 2 of the Sherman Act*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 1, at 123, 127.

<sup>27</sup> 140 F.T.C. 123 (2005).

<sup>28</sup> 522 F.3d 456 (D.C. Cir. 2008).

<sup>29</sup> 551 F. Supp. 2d 21 (D.D.C. 2008).

<sup>30</sup> 135 F.T.C. 444 (2003).

<sup>31</sup> 134 F.T.C. 407 (2002).

<sup>32</sup> No. C-4160, 2006 WL 1367833, (F.T.C. Apr. 19, 2006).

<sup>33</sup> No. C-4234, 2006 WL 4407246, (F.T.C. Sept. 22, 2008).

J. Muris, the FTC chairman from June 2001 to August 2004, brought abuse of dominance cases at a faster annual rate (four) than Michael Pertschuk (three), who chaired the FTC during the Carter administration, and initiated a larger total of abuse of dominance cases (four) than Robert Pitofsky (three), who served as FTC chairman from April 1995 through March 2001.

The effort to determine what constitutes a sound competition policy program requires a shared understanding of what actually took place. Before one even gets to an assessment of the quality of activity, there must be agreement that there was activity. It is one thing to quarrel over whether a thrown pitch ought to be called a ball or a strike. It is another to say that the pitcher never delivered the ball toward the plate. The comments examined above are akin to saying that the ball in this decade rarely (Melamed) or never (Goldschmid) left the pitcher's hand.

### III. LACK OF CONSENSUS ABOUT WHAT IS SIGNIFICANT

Some critics of the Bush administration's antitrust enforcement program acknowledge the fact of activity but dismiss it as qualitatively insignificant. Professor Pitofsky offered a representative assessment of this type at a conference in 2008, when he said: "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*, *Kodak*." Here the FTC's initiation of new matters is acknowledged but dismissed as insignificant or contrived. Like animals in a circus, the Commission "parades" its inventory of dominant firm matters before an audience that presumably knows better than to regard them as noteworthy.

To say that matters are insignificant or unimportant begs for a specification of criteria for importance or significance. By what measure are matters such as *Bristol-Myers*, *Rambus*, and *Unocal* "not comparable" to *Microsoft*, *Intel*, *AT&T*, *Xerox*, and *Kodak*? What is a "major" abuse of dominance case? Professor Pitofsky seems to suggest that a crucial measure is the ability of the case to capture news headlines. It is a grim day for competition law, or public policy generally, if the measure of what an agency does is the prominent placement of its matters in the media. In the late 1960s and early 1970s the federal agencies initiated abuse of dominance cases against IBM, the four leading producers of breakfast cereal, and the eight leading refiners of petroleum products.<sup>34</sup> Throughout their lives, these cases attracted lavish coverage from the press. All three matters ended in failure and became symbols of poor prosecutorial judgment. By contrast, the filing of cases such as *Lorain Journal Co. v. United States*<sup>35</sup> and *Otter Tail at-*

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<sup>34</sup> William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1106-09 (1989).

<sup>35</sup> 342 U.S. 143 (1951).

tracted little attention at the time of their commencement, yet these cases yielded doctrinal results that have influenced the future course of competition policy.

There must be standards of significance that are better—much better—than media attention. Two suitable criteria would be economic impact and doctrinal significance. How did the case improve the economic well-being of consumers? Did the case address issues important to the development of antitrust law?

We can examine the FTC's program during the Bush administration in light of both criteria. How do the Commission's abuse of dominance cases since 2001 compare to earlier matters in terms of economic effects?<sup>36</sup> The settlement achieved by the FTC in 2005 in *Unocal* has been worth approximately \$500 million per year to consumers of gasoline in California. That is the most substantial measurable pay-off from an FTC abuse of dominance case since Congress established the agency in 1914. Since the settlement that resolved the matter in 2003, the *Bristol-Myers* case has yielded at least \$3 billion to \$5 billion in benefits, and the amount is growing. Gauged by observable economic effects, *Unocal* and *Bristol-Myers* belong on the list of the five most important abuse of dominance cases in the Commission's history.

Doctrinal significance is a separate test of the FTC's program since 2001. Three of the FTC's abuse cases (*Negotiated Data Solutions*, *Rambus*, *Unocal*) dealt with the operation of standard setting bodies. Three (*Bristol-Myers*, *Biovail*, *Unocal*) dealt with misuse of government regulatory processes. One (*Valassis*) concerned an invitation to collude, and another dealt with the use of patent settlements as instruments of improper exclusion. In what sense could these be said to be unimportant matters of antitrust policy or doctrine?

The significance of the doctrinal stakes is perhaps most evident in *Rambus*. In *Rambus*, the Commission failed to sustain its finding of liability, and the Supreme Court declined to take certiorari. In historical context, the doctrinal importance of *Rambus* stands out. Before *Rambus*, the FTC's most recent appearance before the appellate courts in an abuse case was *Borden, Inc. v. FTC (ReaLemon)*<sup>37</sup> in 1982. None of the agency's abuse of dominance cases in the 1990s was litigated to a decision on the merits. All settled. The Commission's remedy in *Rambus* included compulsory licensing of a patent, and the most recent appellate endorsement of compulsory licensing or any other form of structural remedy took place in the 1960s. The Commission has never prevailed in an abuse of dominance case before

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<sup>36</sup> See William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property*, 30 SEATTLE U. L. REV. 319, 324-26 (2007).

<sup>37</sup> 674 F.2d 498 (6th Cir. 1982), *vacated*, 461 U.S. 940 (1983).

the Supreme Court. *Rambus* was not a litigation success for the FTC. But it presented doctrinal issues of the highest order.

The depiction of the FTC's abuse of dominance program since 2001 as either nonexistent (the Goldschmid critique) or substantively insignificant (the Pitofsky critique) is more than cheap talk spoken amid an election campaign or a presidential transition. It has the capacity to set expectations for the FTC leaders who will guide the agency during the Obama administration. If prominent advisors to the Obama campaign belittle the FTC's program during the Bush administration as null in activity or insignificant in substance, what type of program must new management pursue to be seen as sufficiently active and influential? What sorts of matters must agency managers initiate to surpass the economic results of *Unocal* or *Bristol-Myers*, or to exceed the doctrinal content of *Polygram* or *Rambus*? If the Bush administration matters count for little or "nothing," there could be a perceived imperative for Obama appointees to swing for the enforcement equivalent of 800-foot home runs. Striving to achieve visibly superior results and, dangerously, to get the story on the front page can warp the agency's choice of cases and impose grave long-term costs upon the institution.

#### IV. RARITY OF INTER-TEMPORAL BENCHMARKS AND CASE STUDY COMPARISONS

As the discussion above suggests, assertions about the amount or quality of activity in any single period invites comparisons. One can claim that a given decision to prosecute or not to prosecute was wise or improvident. A useful response is to ask: compared to what? Have similar matters been treated similarly or differently across administrations? With respect to comparable enforcement matters, how did different administrations assess the relative risks associated with intervening too vigorously or intervening too weakly?

Merger policy provides a useful context in which to consider the importance of comparisons across time. Enforcement agency decisions concerning proposed mergers often involve difficult predictions about how competition will evolve if the merger is allowed to proceed as proposed, with or without conditions, or is blocked. In making the predictions associated with merger control, agencies face two basic types of risks. They improvidently may forbid a transaction that, if allowed to go forward, would improve economic performance, or they may fail to prohibit or amend a combination that will damage rivalry with respect to price, quality, or innovation.

Risks associated with merger review emerge most vividly when an agency contemplates approving a transaction in a highly concentrated industry. In these deals, observers outside the merging parties and the government enforcement agencies can readily see that such transactions will

reduce the already small number of industry participants. In the hardest cases, the agency confronts arguments—for example, involving diminished competitive capability, new entry, or technological change—that weigh against reliance on presumptions that ordinarily would shape the disposition of say, a three-to-two merger. What the agencies do, and why they do it, in these problematic matters is an interesting point of comparison over time.

In a recent paper that criticizes federal merger policy (especially DOJ enforcement) during the Bush administration, Jonathan Baker and Carl Shapiro offer the Justice Department's decision to permit Whirlpool to purchase Maytag as an example of inappropriately permissive merger control.<sup>38</sup> The two scholars conclude that, among other points, DOJ gave too much credence to the parties' arguments about entry and expansion from overseas suppliers in deciding to allow the combination to take place. Other commentators have pointed to DOJ's approval of the XM-Sirius satellite radio merger, and its reliance on efficiency justifications, as a further exemplar of lax merger oversight.

The government's decisions in Maytag-Whirlpool and XM-Sirius involved difficult judgments about entry and efficiency. In some sense, DOJ took risks about the soundness of arguments raised to mitigate competitive concerns associated with the transactions' structural features. Were those risks excessive? Did Thomas Barnett, the Assistant Attorney General for Antitrust and his Antitrust Division colleagues take chances with future competition in the affected markets in ways that previous administrations would not have contemplated?

One way to assess the risks taken by DOJ from 2001-2008 is to consider the types of risks the federal agencies took in previous administrations. Informative comparisons can be drawn from examining the FTC's review during the Clinton administration of Boeing's acquisition of McDonnell-Douglas and of various noteworthy mergers, such as Exxon's purchase of Mobil, in the petroleum sector. I preface this discussion by saying I believe the FTC made correct choices in the aerospace and petroleum transactions. I was personally involved as a consultant for McDonnell Douglas in the Boeing merger, and I thought then, as I do now, that the Commission's conclusions were well reasoned.

Though I believe the FTC acted wisely, I also view the competitive risks taken by the FTC in Boeing-McDonnell Douglas and in many petroleum mergers of the 1990s as being at least as grave as the risks that DOJ took in Whirlpool-Maytag and XM-Sirius. In Boeing-McDonnell Douglas, the consideration that swayed the Commission to approve the deal without conditions was McDonnell Douglas's argument that it had lost the capacity to compete effectively for future sales of large commercial aircraft. Consistent with the approach endorsed by the Supreme Court in General Dynam-

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<sup>38</sup> See Jonathon B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 1.

ics, McDonnell Douglas's share of current sales overstated its competitive significance. The merger was not a three-to-two combination; it was two-to-two, with Airbus and Boeing remaining as the only credible supply sources in the eyes of the major customers—the commercial airlines and aircraft leasing companies.

One can spin out an intriguing, plausible counterfactual. If the FTC had said no and put the back of McDonnell Douglas to the wall, might the company have found a way to survive and ultimately prosper in the commercial aircraft segment of the aerospace market? Perhaps the company could have repositioned itself to succeed in what would become the burgeoning regional jet market and use this experience base gradually to migrate into larger aircraft designs. Perhaps the Air Force would have delivered on preliminary suggestions that it would support the development of a commercial freighter variant of the C-17 transport—giving McDonnell Douglas an important means to continue design and production operations for the largest types of commercial airframes.

Nor was the FTC's examination of defense-related features of the merger free from doubt. For all of its problems in commercial aircraft production, McDonnell Douglas remained a formidable designer and producer of major weapon systems. In a number of defense-related market segments, the merger with Boeing removed McDonnell Douglas as an independent center of design, development, and production activity. The Commission (and the Department of Defense) chose to downplay concerns associated with reduced competition for new weapon systems. These innovation-related concerns later motivated the Justice Department's successful effort to block Lockheed Martin from buying Northrop Grumman. The dangers to defense innovation markets posed by the Boeing-McDonnell Douglas merger arguably were no weaker than the concerns that guided DOJ to stop the Lockheed Martin-Northrop Grumman transaction.

Last and perhaps most interesting in light of current events was the merger's effect upon the ability of the U.S. Air Force to use competition to obtain the next generation of aerial refueling tankers. Boeing's purchase of McDonnell Douglas combined the only two U.S. producers of refueling tankers. From a competition policy perspective, the decision to allow the transaction to proceed made sense only upon the assumption that, when the time came to replace the existing generation of tankers, the Air Force would be able to turn to Airbus as a credible alternative to Boeing. That assumption will prove to be unwise if Congress pressures the Department of Defense to satisfy its needs from a firm whose headquarters and principal production facilities are located in the United States. Maybe Congress eventually will permit the Department of Defense to award all or part of the replacement contracts to Airbus. In light of the powerful protectionist pressures that surround military procurement—especially for big-ticket programs worth tens of billions of dollars—the FTC took a risky leap of faith.

The petroleum mergers of the 1990s provide a second useful view of risk-taking during the Clinton administration. In 2004, the Government Accountability Office (“GAO”) issued a report that studied seven petroleum sector mergers reviewed by the FTC from 1995-2000. The report concluded that, notwithstanding remedies obtained by the Commission in some transactions, five of the seven mergers resulted in substantial price increases. The GAO found that the Exxon-Mobil merger caused gasoline prices on the East Coast to rise by five to seven cents per gallon. Another transaction, Unocal’s combination with Tosco, was found to have increased gasoline prices in California by five cents per gallon. I do not regard the GAO study as sound work, and I have spent many occasions before congressional committees explaining why I believe the FTC’s analysis of the mergers in question was sound. One must note, however, that other researchers have raised questions about the results reached by the Commission in the relevant transactions.

It is difficult to recount the full sum of opprobrium that legislators have visited upon the FTC in this decade as a consequence of the GAO study and related commentary. No issue has consumed more attention during my time at the FTC in this decade as General Counsel and as a member of the Commission. During my interviews with the Senate Commerce Committee in 2005 as part of the process to be confirmed as an FTC commissioner, one prominent legislator attacked the FTC’s merger enforcement record generally and focused particularly on its treatment of petroleum mergers in the 1990s. The Senator asserted that the FTC “never stopped mergers.” I began to offer the Commission’s famous challenge to the Staples-Office Depot merger in the agency’s defense. He cut me off and said “The Staples case? So you protected my right to buy cheap Post-It notes, but you gave away the oil industry. Congratulations.” I know of one instance in which an official who reviewed the controversial petroleum deals of the 1990s and mounted a substantial public defense of their decisions during debates about energy prices in this decade.<sup>39</sup>

When you put your head on the pillow at night and think about the risks taken in merger review, what worries you more? The possible loss of competition in washing machines and satellite radio, or a possible loss of competition in the commercial and defense aerospace sectors and in the petroleum industry? Whatever risks Thomas Barnett may have taken in Whirlpool-Maytag and XM-Sirius, they are no greater than the risks that Robert Pitofsky and his FTC colleagues took in approving Boeing-McDonnell-Douglas without a scratch or permitting combinations such as

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<sup>39</sup> See TIMOTHY J. MURIS & RICHARD G. PARKER, U.S. CHAMBER OF COMMERCE, A DOZEN FACTS YOU SHOULD KNOW ABOUT ANTITRUST AND THE U.S. OIL INDUSTRY (2007), available at [http://www.uschamber.com/publications/reports/0706oil\\_antitrust.htm](http://www.uschamber.com/publications/reports/0706oil_antitrust.htm) (follow “Read the full report” hyperlink).



Exxon-Mobil, Shell-Texaco, BP-Amoco, and BP-Amoco/Arco, albeit with substantial divestitures.

Recent debates about merger enforcement policy ordinarily do not perform this type of comparison of cases across time. Commentators typically provide case studies in isolation without considering whether the agency in one period took risks that were outside a zone of acceptable practice established in earlier periods of public enforcement. This form of inter-temporal comparison would supply an important, necessary source of perspective about the quality of decision-making in any single era.

#### V. UNCRITICAL ACCEPTANCE OF ACTIVITY-BASED MEASURES OF ACCOMPLISHMENT

As noted earlier, commentary on U.S. competition policy tends to attach decisive weight to levels of enforcement activity as the measure of the worth of the federal competition agencies. Perhaps the most memorable example of this approach is the Obama campaign statement that “the Bush administration may have the weakest enforcement program in the past half century.”<sup>40</sup> This deplorable slogan assumes that activity levels are the appropriate benchmark of policy quality. As used in the statement, “weakest” means fewest cases.

Taken on its own terms, the Obama statement is unsupportable, although the candidate provided no table of cases that would permit a more confident testing of his claims. If case counts are the measure of agency effectiveness, then the Bush administration program surpasses activity rates of previous administrations in a number of key areas. Enforcement matters can be grouped in six categories: criminal prosecution of cartels, civil horizontal restraints, distribution practices (including challenges to vertical agreements and Robinson-Patman violations), mergers, abuse of dominance, and challenges doctrines or statements that immunize behavior as a result of state involvement. The Obama statement contains no supporting tables of cases, and it is not apparent that the candidate’s advisors undertook the laborious process of examining case filings by year going back to the late 1950s and further traced changes in activity levels by category of enforcement activity. The “may be the weakest” hedging in the Obama statement is a certifying indication that hunch and intuition were no less important than data in preparing the conclusions.

A quick survey of studies that have undertaken the laborious task of counting and classifying cases over the past fifty years underscores the frail factual basis for the Obama statement’s claim of ineffectiveness.<sup>41</sup> For example, the DOJ’s criminal enforcement program against cartels in this dec-

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<sup>40</sup> Obama Campaign Statement, *supra* note 2.

<sup>41</sup> Kovacic, *Antitrust Norms*, *supra* note 6.

ade dwarfs, in number of cases, the Antitrust Division's program in the 1950s, 1960s, and 1970s. The combined DOJ/FTC output of abuse of dominance cases in this decade exceeds the output of the Reagan Administration. The total DOJ/FTC output of civil horizontal restraints matters in this decade surpasses the government's output of such cases in the 1950s, 1960s, and 1970s. Immunity and exemption cases filed in this decade match or exceed levels from the 1950s, 1960s, and 1990s. A more detailed examination would identify other examples of how a cases-count-for-everything measure places the Bush administration higher on the ladder of activity than its predecessors in key areas of activity.

More fundamentally, there are good reasons to reject the Obama statement's suggestion that case counts are the best way to measure the strength or weakness of an antitrust program. One of the most important reasons to distrust measures of effectiveness that rest solely on case counts is that views of what constitutes good policy change over time. Owing to its grounding in industrial organization economics, competition law is inherently evolutionary. That is why a properly designed report card marks performance with two grades. One grade measures the agency's work by contemporary standards. The second grade assesses the agency's contribution, in any one period, of policies, doctrinal developments, or analytical concepts that prove to be durable and respected over the long term. The second grade inevitably typically gets filled in only after extensive experience with a contribution provided during a specific period.

Because the development of a competition system is cumulative and evolutionary, "good policy" in any one period may consist of taking different measures in light of trends in the state of current knowledge concerning theory and empirical study. The design of law enforcement programs illustrates the point. Good policy sometimes consists of backing away from existing enforcement frontiers, sometimes pushing enforcement outward, and sometimes sustaining the status quo. A characteristic of good practice is that an agency regularly rethinks what it is doing and considers adjustments that expand or contract enforcement with respect to specific practices.

Another difficulty with relying upon a case-centric report card is the temptation it creates for enforcement officials to focus on inputs rather than outcomes. A norm that emphasizes the initiation of matters—especially headline grabbing cases—deflects needed attention away from the actual economic effects of each matter. This is akin to measuring the effectiveness of commercial airlines solely by the number of departures. Imagine going to an airport and seeing a series of screens, all of which are labeled "Departures." When the passengers ask about arrivals, the airlines reply that they do not track those events. Nobody runs a commercial airline company in this manner. For competition policy, we should be concerned not only with how many cases an agency launches, but also with where and how they come to earth.

Case centrism also has the adverse effect of leading an agency to ignore investments in valuable non-litigation activities. Successful competition authorities employ a wide range of policy instruments that include, but are not limited to, the prosecution of cases. These include advocacy before other public agencies, the preparation of reports, outlays for competition policy research and development that increase agency capability, and the creation of interagency networks that strengthen the infrastructure of policymaking within and across jurisdictions.

One reason to invest in non-litigation work is to ensure that the agency is attuned to changes in the state of the art of industrial organization knowledge that dictate adjustments in its mix of enforcement initiatives. The field of distribution practices shows what can happen when an agency is not reflecting upon its work in light of new knowledge. In the 1960s, for example, the FTC made huge commitments to Robinson-Patman Act enforcement without a research agenda or program of public consultation that may have pointed to a reallocation of antitrust resources. It took an exogenous shock—mainly in the form of critical commentaries by outside observers—to induce the Commission to rethink its enforcement priorities. Similarly, the Commission did not consider, in the years following cases such as *United States v. Arnold, Schwinn & Co.*<sup>42</sup> and *Albrecht v. Herald Co.*<sup>43</sup> in the late 1960s, whether categorical condemnation of various price and non-price restraints took proper account of an emerging literature that called for a more discriminating assessment of the conduct at issue. Here, also, the force for change was an exogenous shock (the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*<sup>44</sup> in 1977) that caused the Commission to adjust its enforcement program, not an internally generated program of research or analysis. The FTC followed policy developments and did not lead them.

Non-litigation programs also can provide superior policy solutions to problems that an agency otherwise might choose to address through law enforcement. The FTC's report, *To Promote Innovation*,<sup>45</sup> makes the point. Published in 2003 after extensive public hearings conducted by the DOJ and the Commission, the FTC report suggested how improvements in the processes for granting patent rights could help realize important competition policy goals. Among other observations, the Report recognized that antitrust litigation sometimes sought to address problems arising from a failure of rights granting authorities to apply criteria of patentability in a rigorous manner. Enforcement agencies and courts would use antitrust doctrine to correct, in a rough second-best manner, improvident grants of patent rights. The *To Promote Innovation* proceedings and Report recom-

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<sup>42</sup> 388 U.S. 365 (1967).

<sup>43</sup> 390 U.S. 145, 147 (1968), *overruled by* *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997).

<sup>44</sup> 433 U.S. 36 (1977).

<sup>45</sup> FTC, *TO PROMOTE INNOVATION*, *supra* note 12.

mended a first best solution in the form of patent reform measures that would address the problem at its source. The report has influenced the thinking of the Supreme Court on patent issues and has inspired a global re-examination of the links between these two areas of activity.

The preparation of the Report and the proceedings on which it rested required a major investment of the FTC's best resources. This type of investment does not appear in the box score of competition agency work if law enforcement is the only activity recorded. Non-litigation initiatives should be viewed as proper elements of the solution set. In some instances, they are compliments to litigation. In others, they are substitutes. Non-litigation matters involve what may be seen, *ex ante*, as indeterminate returns, but no more so than many litigation matters. The FTC's report on internet sales of wine, published in 2004, is an example. There was no guarantee that it would motivate courts or legislators to reexamine restrictions on interstate sales of wine via the internet. Yet the Supreme Court took careful account of the report in writing its opinion in *Granholm v. Heald*<sup>46</sup> and cited the report more than twenty times. The report provided a major basis for the Court's view that the justification asserted by the states to support restrictions on internet sales matched poorly with the protective measures the states had adopted. The FTC report was integral to the Court's conclusion that the state restrictions transgressed the Commerce Clause. As such, the FTC report indirectly achieved the results that the agency might have pursued by bringing its own case.

To this point, the discussion of effectiveness criteria has focused on what the competition agency does in its own capacity. It is increasingly apparent that competition agencies, acting alone, cannot fulfill their responsibilities adequately. Cooperation through networks of authorities within and across jurisdictions will be necessary to formulate and execute effective competition policies. A case-centric evaluation metric accords no credit to an agency's efforts to build an infrastructure of relationships among authorities with related responsibilities inside a single jurisdiction or to form links to public institutions in other countries. If agency leaders see that cases are all that count, there will be few incentives to make what are essentially long-term capital investments in the infrastructure of cooperative relationships.

An important example involves modern efforts by the DOJ and FTC to develop networks for more effective cooperation with agencies outside the United States. Among other initiatives, the U.S. agencies played a formative role in the creation of the International Competition Network ("ICN") in October 2001 and have dedicated substantial resources to its substantive programs and operational management. Building this network or establishing other mechanisms for international cooperation cannot be done on the

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<sup>46</sup> 544 U.S. 460 (2005).

cheap. An agency must put its best people in the field to do this well: there is no room for children or rookies. Nor is it enough to have keen technical skills and experience. To command respect and make positive contributions, an agency's representatives must have good judgment. An essential element of the requisite judgment is to know the correct time, place, and manner to speak.

The ICN thrives today only because a number of its members have made the necessary capital investment whose returns will occur largely after the terms of those who founded the network have come to an end. The FTC's work is illustrative. Randy Tritell's work on merger process reforms in the ICN's first years provided the policy equivalent of a movie blockbuster that a studio needs to thrive and to obtain the funds to produce smaller "indie" films that have less immediate audience appeal but also improve the state of the art. The FTC also was instrumental in leading the committee that raised funds to enable members from less affluent countries to attend meetings. Where would the ICN be today without those and similar investments? We would have passed the fifth anniversary of its demise. It flourishes today only because of capital investments that a case-centric effectiveness metric ignores.

This highlights the chief vice of a case-centric evaluation system. It accords no credit to long-term capital investments. It gives decisive weight to the initiation of new cases. This incentive system can warp the judgment of incumbent political appointees who typically serve terms of only a few years. The perceived imperative to create new cases can create a serious mismatch between commitments and capabilities, as the sirens of credit-claiming beckon today's manager to overlook the costs that improvident case selection might impose on the agency in the future, well after the incumbent manager has departed. It is a common aphorism in Washington that agency leaders should begin by picking the low-hanging fruit. One has an image of gangs of fruit gatherers with baskets roaming about the Mall in search of the accessible fruit. What is missing in the lexicon of Washington policymaking is an exhortation to plant the trees that, in future years, yield the fruit.

Investments in knowledge have long-term capital qualities. Investments in activities—research, workshops, partnerships with academia—that build knowledge help ensure that the agency stays abreast of important developments in economic theory, empirical study, and legal analysis. Among other applications, this knowledge-building is a crucial element of effective case selection. A superior knowledge base increases the agency's ability to attempt more complex and demanding matters, helps the agency ground its cases in the best possible conceptual and empirical foundations, and provides assurance that the agency will not find itself trapped in the wrong analytical model.

The FTC's experience with dominant firm behavior in the 1970s shows what happens when this type of investment is lacking. In that decade

the FTC brought a striking collection of cases predicated on theories of attempted monopolization, monopolization, and shared dominance. Commentators often depict this program of FTC enforcement as being almost irrational in its tendency to overlook sound contemporary views of good policy. This interpretation overlooks the most serious avoidable errors of policymaking. The Commission's dominance cases were grounded in widely-accepted economic theories, but modern developments in theory and empirical research had begun to raise serious doubts about these theories. The intellectual framework was changing, and the Commission missed the adjustment. Not only did it sustain existing matters, it commenced new cases based on the same ideas.

The second avoidable error was a failure to match commitments to agency capabilities. One could understand a decision to bring one innovating and potentially pathbreaking shared monopolization case, but it was improvident to bring two. One could imagine a decision to bring one or two predatory pricing cases, but it overtaxed the agency's capacity to do three at once. To do four significant dominance cases at one time might have been manageable. To do eight was unwise. Incumbent leadership began new matters without asking difficult questions about how the agency would bring them to a successful end. Departures counted for everything, and arrivals were an afterthought.

## VI. TOWARD A SUPERIOR EFFECTIVENESS REPORT CARD

In 2008, the FTC conducted a self-study to identify what the agency must do to fulfill the role that Congress assigned it in 1914. The exercise, *The FTC at 100*,<sup>47</sup> focused on steps the agency should take to ensure that, by the time of Commission's centenary in 2014, the FTC comes as close as possible to realizing the vision that motivated its creation. The self-study supplied a number of useful insights about what constitutes good agency performance. Here is a summary of the effectiveness criteria that the self-study would place on the report card for a competition agency.

First, how clearly and coherently has the agency stated its objectives? Everything an agency does flows from how it defines its purposes and objectives. A clear statement of aims is essential to guide the agency's own personnel and to permit outsiders to understand and debate the institution's choice of goals.

Second, does the agency have a conscious process for setting a strategy and selecting programs that will fulfill its stated goals? There can be a tendency for agencies to choose new projects based on past patterns of be-

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<sup>47</sup> FED. TRADE COMM'N, *THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY* (2009), available at <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf>.

havior alone, or simply in response to demands by other government institutions.

Third, does the agency have a problem-solving orientation? This orientation looks to a broad and flexible array of policy tools to address problems. Litigation is one important dimension of policymaking, but it is not the exclusive focus of attention. The agency should be judged by its capacity to select the correct policy tool or combination of tools.

Fourth, is the agency making adequate investments in acquiring and retaining the human capital it needs to perform its chosen projects? It is impossible to decide what compositions an orchestra should perform without accounting for the skills of the players. So it is for competition policy.

Fifth, is the agency making regular, substantial investments to improve its base of knowledge? An agency's proficiency is closely tied to its knowledge of economic phenomena and its command of the state of the art in economic theory and legal analysis. Each budget cycle must include a significant component for the policy research and development that makes the agency smarter.

Sixth, has the agency developed internal quality control procedures to ensure that theories and facts are tested rigorously before cases are initiated?

Seventh, is the agency making capital investments in the infrastructure of inter-agency networks, within its own jurisdiction and across borders, which build a framework of effective cooperation?

Eighth, does the agency have a mechanism for regularly evaluating the effects of its programs and processes? Is there a conscious, routine process for measuring performance and making adjustments based on what evaluation exercises have revealed? The point of policymaking is to deliver good outcomes for society. Good performance does not consist of achieving higher levels of activity but instead consists of delivering good results. Measuring program effectiveness is not an easy undertaking, but to say that it is difficult is not a good reason to ask outsiders to accept effectiveness as a matter of faith. Meaningful evaluation by agency insiders and outsiders requires the competition authority to take steps to reveal useful information about its work. This includes disclosing good data sets about its past activity. An important focus of the FTC's work in this decade has been to produce and disclose data sets on its merger enforcement work and to increase the frequency in which it provides explanations about decisions not to prosecute following an extensive investigation.

## CONCLUSION

What is a good competition agency? Good performance has two dimensions. One focuses on the output of initiatives—litigation and non-litigation activities—that improve economic performance. The second involves capital investments in long-term capability. Incumbent managers

should be graded on both dimensions. A major responsibility for incumbent leadership is to maximize positive externalities for the agency in the future. Means to this end include long-term capital investments in agency capacity, a continuous process of self-assessment, and a research agenda that asks how things are turning out. The aim is a continuous pursuit of better practices.

The focus on institution-building stems from the recognition that the establishment of successful policy over time is substantially a cumulative, incremental process. The discourse about competition law during the recent presidential campaign and in the run-up to President Obama's inauguration showed little awareness of this ingredient of institution-building and agency effectiveness. There appeared to be a perceived imperative to depict policymaking in this decade as contributing little if anything to the development of sound competition programs and institutions. The candidate and his supporters could not speak of making improvements to competition policy. Instead, it was said to be necessary to "reinvigorate" antitrust enforcement—a clear suggestion that it was sterile.

The danger in this vocabulary is how it sets expectations for new leadership. Echoing the Obama campaign themes, two commentators recommended that the FTC "should reinvigorate its approach, its enforcement agenda and empirical research to target any competitive conduct in key economic sectors such as health care, energy and technology."<sup>48</sup> The same commentators said it was time for the Commission to reinvigorate horizontal merger enforcement. How might one reinvigorate an FTC health care program that, in this decade, included noteworthy merger and nonmerger cases involving hospitals, physicians, and pharmaceutical companies? If the FTC's program of recent years is not vigorous, what would be? And what can we expect will go beyond the bounds of an energy program that has featured extensive merger and nonmerger cases, as well as extensive studies and a major rulemaking initiative? Not to mention technology-intensive cases such as *Rambus* and *Negotiated Data Solutions* and non-litigation projects such as the FTC's Report *To Promote Innovation*. Or to extend a merger enforcement program that featured a number of preliminary injunction actions in 2008 alone—a higher rate of activity than in any year since the modern merger review system was established in the 1970s—and elicited expansive judicial interpretations of the FTC's powers to block deals in federal district court. Is the FTC expected to go beyond what it achieved in *FTC v. Whole Foods Market, Inc.*<sup>49</sup> and later in *FTC v. CCC Holdings, Inc.*?<sup>50</sup>

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<sup>48</sup> See Joan Z. Bernstein & Ann Malester, *Federal Trade Commission: Consumer Protection and Competition for a 21st-Century Economy*, in CHANGE FOR AMERICA 413, 413-14 (Mark Green & Michele Jolin eds., 2009).

<sup>49</sup> 548 F.3d 1028 (D.C. Cir. 2008).

<sup>50</sup> No. 08-2043 (RMC), 2009 WL 774348 (D.D.C. Mar. 9, 2009).



This program usefully can undergo adjustments, refinements, and improvements. The same can be said of any program in any period. It does not demand “reinvigoration,” yet that is the demand that so many commentators have made. This tells new leadership that they will have failed unless they go dramatically beyond an FTC agenda that, by historical and contemporary measures, has been ambitious. It is one thing to exhort leaders to turn singles into doubles and doubles into triples. It is another to demand the equivalent of 800-foot home runs. Striving to do so generates lots of pop-ups, strike-outs, and double play balls and it is really hard to hit the ball that far.

In the first years of this decade, Timothy Muris and Robert Pitofsky identified the substantial common ground that linked their chairmanships of the FTC.<sup>51</sup> That dialogue promised to reinforce progression toward a durable consensus on what constitutes good policy. It featured an emphasis on litigation and non-litigation initiatives alike and underscored the importance of investments in institution building. The commentary so often featured in the 2008 presidential campaign will not achieve that end.

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<sup>51</sup> *More Than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773 (2005).