

Achieving Better Practices in the Design of Competition Policy Institutions

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Introduction

Efforts to promote convergence among the world's competition policy systems often urge the adoption of what we call "best practices." This is an unmistakably valuable endeavor. The experimentation inherent in the decentralization of competition policy authority across jurisdictions supplies a useful means to test different substantive commands, analytical techniques, and procedures. When experience in one jurisdiction illuminates superior approaches, such methods ought to become focal points for possible emulation by others. Without a conscious process to identify and adopt superior ideas, decentralization will not fulfill its promise as source of useful policy innovation.¹

Today I want to propose another way to describe the identification and pursuit of superior competition policy norms.² Rather than promoting "best" practices, it might be more accurate and informative to say we are seeking "better" practices. As Timothy Muris, Chairman of the U.S. Federal Trade Commission, observed in his presentation to this Seoul Competition Forum, the development of competition policy in any jurisdiction is a work in progress. To speak of "best" practices may suggest the existence of fixed objectives that, once attained, mark the end of the task.

¹Experience in other areas of public and private law suggests that global convergence in competition policy might take place in a three-step process: decentralized experimentation at the national or regional level, the identification of superior approaches, and the opting-in to superior approaches by individual jurisdictions. This model of convergence is 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>>.

²"Norms" are consensus views within a group about how members of the group ought to behave. For an application of the concept of norms to the development of competition policy, see William E. Kovacic, "The Modern Evolution of U.S. Competition Policy Norms," 71 *Antitrust Law Journal* 377 (2004).

Envisioning problems of substance or process as having well-defined, immutable solutions may neglect the imperfect state of our knowledge and obscure how competition authorities must work continuously to adapt to a fluid environment that features industrial dynamism, new transactional phenomena, and continuing change in collateral institutions vital to the implementation of competition policy.

Toward Better Institutions: Means

Perceiving our role as competition agency officials to be the pursuit of *better* practices can focus attention on the need for continuing improvement in our competition policy institutions. Such improvement demands a deliberate commitment to measures that help address the three questions that Chairman Muris has urged our agencies to ask routinely: Do we have the right statutes? Have we created the best means for implementation? Do our policies achieve good results? Let me propose several steps that each of our jurisdictions can take to answer these challenges.

Periodic Comprehensive Reviews. Every jurisdiction at regular intervals should undertake a basic evaluation of the effectiveness of its competition policy institutions. Key focal points for such inquiry ought to include the scope of coverage of the competition policy system, the adequacy of existing substantive rules and remedies, the type and consequences of public enforcement, the role of private rights of action, and the design and administration of public enforcement bodies. Such an assessment ought to involve participation of government officials, private parties, consumer groups, and academics. Given the continuing changes that confront competition agencies, I suggest that no system should undertake this comprehensive assessment less than once per decade. More frequent reviews, perhaps after every five years of operation, might be appropriate for systems in the earliest stages of development.

Ex Post Evaluation. Each competition authority routinely should evaluate its past policy interventions and the quality of its administrative processes.³ In every budget cycle, each authority should allocate some resources to the ex post study of law enforcement and advocacy outcomes. Beyond studying what it has achieved, a competition authority should choose selected elements of its enforcement process and methodology for assessment. Rather than treating ex post evaluation as a purely optional, luxury component of policy making, we must regard the analysis of past outcomes and practices as a natural and necessary element of responsible public administration. Even if definitive measurements are unattainable, there is considerable room for progress in determining whether actual experience bears out the assumptions that guide our acts.

Enhancement and Disclosure of Data Bases. Each competition agency should prepare and provide a full statistical profile of its enforcement activity. The maintenance and public disclosure of comprehensive, informative data bases on enforcement are distressingly uncommon in our field. Every authority should take the seemingly pedestrian but often neglected step of developing and making publicly available a data base that (a) reports each case initiated, (b) provides the subsequent procedural and decisional history of the case, and (c) assembles aggregate statistics each year by type of case. Each agency should develop and apply a classification scheme that permits its own staff and external observers to see how many matters of a given type the agency has initiated and to know the identity of specific matters included in category of enforcement activity. Among other ends, a current and historically complete enforcement data base would promote better understanding

³The potential contributions of ex post analysis of completed government interventions to the development of competition policy are examined in William E. Kovacic, "Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy," 9 *George Mason Law Review* 843 (2001).

and analysis, inside and outside the agency, of trends in enforcement activity.⁴ For example, access to such data bases would give competition agencies greater ability to benchmark their operations with their peers. For poorly funded institutions, this is an area in which regional or global organizations can make immediate, major contributions.

Explanation of Actions Taken and Not Taken. Competition agencies should take measures to progress toward a norm that favors explanations for all important decisions to prosecute or not to prosecute. One might define as “important” any matter in which a competition authority conducts an elaborate inquiry. The norm suggested here would dictate that the agency seek as often as possible to explain why it decided not to intervene following an extensive investigation.

Assessment of Human Capital. Continuous institutional improvement requires a competition agency to regularly evaluate its human capital. The capacity of an agency’s staff deeply influences what it can accomplish. An agency routinely must examine the fit between its activities and the expertise of its professionals. Has the agency developed a systematic training regimen for upgrading the skills of agency professionals? If the agency is active in areas such as intellectual property that require special expertise, has it acquired the requisite specialized skills – for example, by hiring some patent attorneys? Do government statutes and regulations that control public sector employment permit the agency to recruit needed expertise in a timely manner?

Investments in Competition Policy R & D. An essential element of continuous institutional improvement is the enhancement of the competition agency’s knowledge base. In many activities, particularly in conducting advocacy, the effectiveness of competition agencies depends on

⁴For a formative treatment of the value of good statistical records for the analysis of competition policy, see Richard A. Posner, “A Statistical Study of Antitrust Enforcement,” 13 *Journal of Law & Economics* 365 (1970).

establishing intellectual leadership. To generate good ideas and demonstrate the empirical soundness of specific policy recommendations, competition authorities must invest resources in what Tim Muris calls “competition policy research and development.”⁵ Regular outlays for research and analysis serve to address the recurring criticism that competition policy lags unacceptably in understanding the commercial phenomena it seeks to address.

Recognition of Policymaking Interdependencies. Efforts to formulate effective competition policy increasingly will require competition agencies to study more closely how other government institutions affect the competitive process. Many of our jurisdictions resemble a policymaking archipelago in which various government bodies other than the competition agency deeply influence the state of competition.⁶ Too often each policy island in the archipelago acts in relative isolation, with a terribly incomplete awareness of how its behavior affects the entire archipelago. It is ever more apparent that competition agencies must use non-litigation policy instruments to build the intellectual and policy infrastructure that connects the islands and engenders a government-wide ethic that promotes competition. To build this infrastructure requires competition authorities to make efforts to identify and understand the relevant interdependencies and to build relationships with other public instrumentalities. On the scorecard by which we measure competition agencies, we should count the suppression of harmful public intervention just as heavily as the prosecution

⁵The concept of “competition policy research and development” and its role in determining institutional capability are analyzed in 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>>.

⁶The dimensions and consequences of policymaking fragmentation within individual jurisdictions are analyzed in Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* (2002).

of a case that forestalls a private restraint.⁷

Benefits of Comparative Study. In all the measures described above, comparative study can play an enormously informative role. Let me state the proposition more strongly. It is malpractice for any jurisdiction to consider adjustments in its own institutions without examining experience abroad. Whatever the issue may be – for example, analytical methodology, investigative techniques, personnel policy, or advocacy – foreign practice frequently has much to teach any competition authority.⁸ The lessons are there for the taking.

Conclusion: Critical Self-Assessment, Institutional Improvement, and Legitimacy

There is a natural reluctance for any competition authority to commit itself to a regimen of critical self-assessment and transparency I have sketched here. If our apprehension in embracing this norm is that outsiders will misunderstand or misrepresent our work, the appropriate solution is that we devote greater effort to reveal and explain the basis for our decisions. If, instead, we fear that our ideas are too fragile to withstand close scrutiny, it may be time to develop better ideas.

Hard questions are being raised, and will continue to be raised, about the substance and administration of competition policy, whether or not we actively facilitate or participate in the debate. My theme today is that the legitimacy and quality of our competition policy programs will increase if we lead, rather than follow, the process. Ours is an inherently dynamic discipline. The

⁷Competition agencies must confront government restrictions on competition with the same commitment and determination with which they challenge private restraints. See Timothy J. Muris, “State Intervention/State Action – A U.S. Perspective” (New York, N.Y., Oct. 24, 2003) (remarks before the Fordham Annual Conference in International Antitrust Law & Policy), available at <<http://www.ftc.gov/speeches/muris/fordham031024.pdf>>.

⁸See, e.g., William E. Kovacic, “Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy,” 74 St. John’s Law Review 361 (2000).

consciously evolutionary system embodied in most competition laws has permitted analytical concepts to adapt effectively over time to reflect new learning.⁹ The institutions of competition policy need be no less adaptable. By striving for better practices, we can see more clearly how to renew our institutions.

So it is a privilege to participate in a competition forum in Korea. By a deliberate process of experimentation and refinement since 1981,¹⁰ Korea has underscored a universal insight about competition policy: Improvements in institutional design strengthen substantive results. No less than advances in analytical concepts, improvements in institutions demand conscious effort and the will to test fundamental assumptions regularly.¹¹ The *best* practice in competition policy is the relentless pursuit of *better* practices. Like the Chairman of my own Commission, I salute Korea for showing us the way.

⁹William E. Kovacic & Carl Shapiro, “Antitrust Policy: A Century of Economic and Legal Thinking,” 14 *Journal of Economic Perspectives* 43 (2000).

¹⁰The establishment and progressive enhancement of Korea’s competition policy system are documented in, Korea Fair Trade Commission, *A Journey toward Market Economy: KFTC’s 23 years of building transparent and fair market* (April 2004).

¹¹William E. Kovacic, “Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement,” 77 *Chicago-Kent Law Review* 265 (2001).