

## HOW DOES YOUR COMPETITION AGENCY MEASURE UP?

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### A. INTRODUCTION

Engineering is essentially the application of scientific discoveries to meet the needs of society. For scientific discoveries to improve social well-being, engineers must devise practical uses for theory—whether using Einstein’s Relativity Theory to slingshot spacecraft into the far reaches of our solar system, or applying concepts of metallurgy to design a toaster.

In competition policy, grounding theory in practice is effectively the daily work of competition agencies. In recent years, the global competition community has gained a deeper appreciation of what engineers have understood for ages: brilliant theory without skilful implementation is a bad match. Great ideas from economics, law or other disciplines require equally great implementing institutions to move a system of competition policy forward.<sup>1</sup> This awareness is apparent in the stronger emphasis that academic research centres,<sup>2</sup>

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<sup>1</sup> The tendency of policymakers to underestimate the importance of implementation matters is analysed in RW Roichau and L Lynn Jr, “The Implementation of Public Policy: Still the Missing Link” (2009) 37 *Policy Studies Journal* 21.

<sup>2</sup> Institutional design and its impact on policy implementation are two central features of the Global Administrative Law Project of the New York University School of Law. As part of this initiative, Eleanor Fox and Michael Trebilcock are co-chairs of a competition project that is performing detailed studies of institutional design and decision-making in eight individual jurisdictions and within multilateral organisations that deal with competition policy.

commentators,<sup>3</sup> competition agencies<sup>4</sup> and international organisations<sup>5</sup> today place upon institutional arrangements as determinants of agency performance.

One central focus of attention is the measurement of competition agency effectiveness. In engineering, the transformation of theoretical insights into applications of practical utility places a premium on the measurement of a specific design's effects. Improvements in measurement tools are indispensable to society's ability to create things of value.

The pursuit of superior measures of performance should be no less important for a competition agency. Contemporary discussions about competition policy suffer from the lack of well-defined, broadly accepted standards for determining how to evaluate a competition agency.<sup>6</sup> The lack of a suitable evaluation methodology has profound ramifications. Without consistent, meaningful performance measures, it is difficult to make sound judgements about agency quality and to compare agency performance across different time periods, or to benchmark agencies with their counterparts in other jurisdictions. This obstacle impedes the identification of useful improvements in agency design or operations, and frustrates efforts to assess the efficacy of any single reform.

Many commonly used techniques for evaluating agency performance have serious flaws. Counting the number of cases an agency has initiated in a given period frequently serves as a proxy for its contributions to a nation's economic performance. Because an agency is doing lots of a certain thing, it is assumed to be doing a good job—especially if its matters involve well-known business enterprises.

<sup>3</sup> Important modern exemplars of this trend in modern scholarship are D Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press, 2011); H Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Boston, MA, Harvard University Press, 2005). Other relevant papers include EM Fox, "Antitrust and Institutions: Design and Change" (2010) 41 *Loyola University Chicago Law Journal* 473; MJ Trebilcock and EM Iacobucci, "Designing Competition Law Institutions: Values, Structure, and Mandate" (2010) 41 *Loyola University Chicago Law Journal* 455; WE Kovacic, "The Digital Broadband Migration and the Federal Trade Commission: Building the Competition and Consumer Protection Agency of the Future" (2010) 8 *Journal on Telecommunications and High Technology Law* 1; D Sokol, "Antitrust, Institutions, and Merger Control" (2010) 17 *George Mason Law Review* 1055; PJ Weiser, Deputy Assistant Attorney General, Antitrust Division, US Department of Justice, "Toward an International Dialogue on the Institutional Side of Antitrust" (19 February 2010), available at <http://www.justice.gov/atr/public/speeches/255363.pdf> (all URLs accessed on 15 April 2011 unless otherwise stated).

<sup>4</sup> This subject was the focus of an extensive self-assessment performed by the Federal Trade Commission in 2008–09. See WE Kovacic, "The Federal Trade Commission at 100: Into our 2nd Century" (2009), available at <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf>.

<sup>5</sup> In recent years, the International Competition Network has established an Agency Effectiveness Working Group and conducted workshops on the issue of agency management and programme implementation. See International Competition Network, "Agency Effectiveness" (describing the Agency Effectiveness Working Group), available at <http://www.internationalcompetitionnetwork.org/working-groups/current/agency-effectiveness.aspx>.

<sup>6</sup> See WE Kovacic, "Rating the Competition Agencies: What Constitutes Good Performance?" (2009) 16 *George Mason Law Review* 903.

Compared to the difficult and necessary task of assessing the actual effects of an agency's activity, tracking the amount of an agency's outputs—for example, the number of cases the agency has begun—is a relatively easy way to measure performance. The ease and apparent clarity of this measure obscures its many limitations. The prosecution of a case (the take-off) does not always or regularly tell us much about the effect of the case on the economy (the landing). Nor does an aggregate tally of activity provide insight into the doctrinal significance of individual matters, especially “small” cases whose influence on jurisprudence exceeds their seemingly modest economic stakes.<sup>7</sup> A single-minded focus on prosecution events can also deflect the agency's attention away from the application of other policy instruments that might be better suited to solving a specific competition policy problem. For example, case counts will not capture, or credit, an agency's investment in preparing a report that focuses attention on needed changes in jurisprudence, regulations or statutes that are not immediately within the agency's control and cannot be realised through the prosecution of antitrust cases.<sup>8</sup>

We believe that competition agencies can use their participation in organisations such as the International Competition Network (ICN) to identify the institutional and performance characteristics of effective competition agencies and facilitate the development of common evaluation methodologies for both the institutional characteristics and performance of competition agencies worldwide. This will allow agencies to determine more effectively their success in implementing competition policies that improve economic performance and to adopt a sounder conception of which implementation approaches constitute superior practice. By committing themselves to this endeavour, competition agencies will set themselves on a trajectory of continuous improvement—an attribute of successful public and private institutions alike.

### B. AGENCY QUALITY: LONG-TERM NEEDS, SHORT-TERM LEADERSHIP

When asked how their agencies are performing, the heads of competition agencies often respond by describing how many things their institutions are

<sup>7</sup> “Small” US antitrust cases have provided vehicles through which the Supreme Court has made “big” law. Key illustrations include *Otter Tail Power Co v United States* 410 US 366 (1973); *United States v Lorain Journal* 342 US 143 (1951).

<sup>8</sup> For example, case counts do not reflect the work that the Federal Trade Commission has done over the past decade to promote procompetitive changes in patent law and jurisprudence. See Federal Trade Commission, “The Evolving IP Marketplace—Aligning Patent Notice and Remedies with Competition” (March 2011), available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>; Federal Trade Commission, “To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy” (2003), available at <http://www.ftc.gov/os/2003/10/innovationrept.pdf>.

doing. The phrase “we’ve been very busy” often finds its way into the speeches of the leadership team. To be busy is not the same thing as to be productive. A recitation of activities does not tell us whether an agency’s various policy interventions are making consumers better off. As Professors Richard Neustadt and Ernest May observe, the key questions about any proposed initiative are “Will it work? Will it stick? Will it help more than it hurts?”<sup>9</sup> In his inaugural address in 2009, President Barack Obama similarly observed that “[t]he question we ask today is not whether our government is too big or too small, but whether it works”.<sup>10</sup>

The creation of a competition agency that “works” by delivering good policy results for consumers typically occurs through a series of incremental improvements over time. An agency tests different approaches, evaluates consequences and makes refinements. This cycle operates effectively only if the agency routinely makes the public administration equivalent of long-term capital investments whose full value is realised over a long period of time. These investments include the accumulation and retention of high-quality administrative staff and professionals; outlays for endeavours—such as research and public consultations—that augment the agency’s base of knowledge; and evaluation exercises that determine the effectiveness of the agency’s policy choices, its structure and its operations.

Long-term investments in capability—in human talent, institutional knowledge and organisational infrastructure—increase the agency’s capacity to select and execute programmes that improve economic performance. They also play a crucial role in building a strong agency “brand” that signals quality to numerous audiences.<sup>11</sup> Perceptions of a competition agency’s quality directly influence judicial decisions about whether to defer to the agency’s positions, legislative decisions about the agency’s budget and statutory authority, the willingness of companies to comply with laws entrusted to the agency’s enforcement, and the agency’s ability to hire and retain capable staff.<sup>12</sup> A competition agency that enjoys an excellent brand is also likely to inspire citizen confidence in government by showing that public institutions truly “work”.

The law and culture of public administration do not routinely give top agency appointees—who often hold leadership positions for a few years only—strong incentives to make the long-term investments that yield cumulative, incremental improvements in institutional performance over time. An incumbent leader may feel a strong temptation to invest in activities that yield immediate (and appropriate) returns to the incumbent and to slight investments that bear fruit

<sup>9</sup> RE Neustadt and ER May, *Thinking in Time: The Uses of History for Decision-Makers* (New York, The Free Press, 1986), 270.

<sup>10</sup> Barack Obama, US Presidential Inaugural Address (2009), available at [http://media.washingtonpost.com/wp-srv/politics/documents/Obama\\_Inaugural\\_Address\\_012009.html](http://media.washingtonpost.com/wp-srv/politics/documents/Obama_Inaugural_Address_012009.html).

<sup>11</sup> Kovacic, *supra* n 6, 905.

<sup>12</sup> *Ibid.*

during the tenure of subsequent leaders. Among other effects, this discourages investments in data collection, research and evaluation that may yield few observable results during the term of the incumbent who sets the activities in motion. An incumbent might also bring cases whose initiation captures broad public acclaim without adequate regard for doctrinal or evidentiary frailties that may cause the case to collapse during a successor's term. In this circumstance, an incumbent may fail to internalise the costs associated with bringing improvident cases that look good when launched.

Incumbents with a strong taste for credit claiming also may magnify their own achievements to the detriment of the agency's long-term brand. The incumbent may decline to acknowledge how the efforts of prior leaders fostered current agency success, or may blame any lack of success on choices taken in the past (or in the future).<sup>13</sup> This dynamic can degrade the agency's brand. The credit claiming impulse can be particularly intense for political appointees, who feel an imperative to magnify the contributions of the political leaders who selected them for high office. Such appointees may be inclined to ignore the positive contributions to good agency performance made in prior administrations or to denigrate the work of previous political leadership. Such behaviour can only result in a poor public perception of agency performance, regardless of true performance, and diminish the agency's brand.

To ensure that an agency's brand is constantly strengthened, one needs to build incentives to ensure that agencies and their leaders make long-term investments that yield incremental improvements over time.<sup>14</sup> One way to do this is to gain acceptance—inside individual jurisdictions and globally through international networks such as the ICN—for a norm that applauds investments in long-term agency capability and defines successful stewardship in terms of an agency's strong performance over time. The agency leadership's emphasis needs to be refocused on the agency's overall reputation, not its reputation during a particular administration's term. To change this dynamic, the reputation and success of an agency need to be considered over a longer term than any single administration. A longer-term focus and a long-term method of evaluation need to be developed to encourage agency leadership to pay more attention to their agency's brand and development of future successes. To rec-

<sup>13</sup> See T Muris, "Principles for a Successful Competition Agency" (2005) 72 *University of Chicago Law Review* 165 ("An agency head garners great attention by beginning 'bold' initiatives and suing big companies. When the bill comes due for the hard work of turning initiatives into successful regulation and proving big cases in courts, these agency heads are often gone from the public stage. Their successors are left either to trim excessive proposals or even to default, with possible damage to agency reputation. The departed agency heads, if anyone in the Washington establishment now cares about their views, can always blame failure on faulty implementation by their successors").

<sup>14</sup> Kovacic, *supra* n 6, 906.

ognise the contributions of all, ribbon-cutting ceremonies need to be attended by the agency's leadership both past and present.<sup>15</sup>

### C. THE EVALUATION OF AGENCY PERFORMANCE

One task of public administration is to encourage incumbent agency leaders to make long-term investments in their agency's capability, even though such outlays may not generate observable results during the incumbent's tenure. A second challenge is to develop a set of criteria that measure a competition agency's performance accurately and consistently over time. The lack of widely accepted, consistently applied standards for assessing the quality of agency performance has beset the field of competition policy throughout its history. This absence severely impedes the achievement of consensus on what competition agencies ought to be doing. One cannot have an informative conversation about agency performance without a shared view about agency assessment standards.<sup>16</sup> Only once these criteria are determined is it possible to apply the criteria to determine how well agencies are doing, ie to devise an agency report card and assign grades. Such a framework facilitates the assessment of agency performance across different eras, and international acceptance of standards promotes a deeper understanding of individual systems and permits comparisons across jurisdictions.

Developing a set of criteria to evaluate agency performance is of crucial importance as they act as guides for agency policymaking, contributing to the success of an agency's mission as much as any agency strategy or the implementation of that strategy. We can know whether Don Quixote is tilting at windmills or at giants only if we agree on what distinguishes a giant from a windmill.

### D. WHAT IS GOOD AGENCY PERFORMANCE?

Before considering individual criteria for evaluating agencies, it is possible to divide such criteria into two basic categories: substantive results and processes.<sup>17</sup> A general indicator of substantive results is that an agency is performing its

<sup>15</sup> Fred Hilmer, who played a key role in the modern reformulation of Australia's competition system, shared this point with Kovacic, explaining that he tells his executive MBA students to ask themselves: what are you doing today to make sure that your successors will prosper five or ten years hence? Kovacic, *supra* n 4, 8–9. The shift in perspective from short-term aggrandisement to long-term improvements is the proper standard for judging the work of agency leadership and is a key characteristic of successful agencies.

<sup>16</sup> Kovacic, *supra* n 6, 905.

<sup>17</sup> *Ibid.*, 907.

duties capably if its activities improve economic performance and consumer well-being, for example, by reducing costs, raising productivity, depressing prices and stimulating innovation. Many forces affect economic performance and determine the various price, product and quality choices available to consumers. The contribution of a competition agency is to use a diversified portfolio of policy tools—law enforcement, advocacy, education and research—to achieve these ends.

A competition agency can improve its ability to attain these substantive ends by strengthening its process—the adoption of superior administrative techniques that assist in implementing programmes that generate good substantive results and facilitate continuing improvements over time. Below we describe specific characteristics of good agency process.<sup>18</sup>

### **1. Formulation and Clear Communication of Well-Specified Goals to Agency Staff and External Groups**

A clear statement of the agency's aims is essential to guide the agency's own personnel and inform outsiders about what the agency is trying to achieve. An agency's formulation of its goals bears directly on the question of what is the proper role for a competition agency. Competition policy in the US rests on the premise that open markets and competition are the best means to stimulate improvements in economic performance that benefit consumers.<sup>19</sup> Competition laws help ensure the efficient operation of markets and maintain effective competition by prohibiting conduct that unreasonably restricts markets. Competition agencies in the US and in many other countries exercise considerable discretion in deciding how to allocate resources across an array of possible applications that involve law enforcement and other policy tools.

As suggested above, the articulation of goals serves important aims beyond guiding the agency's staff and allocating resources to address the most serious obstacles to competition. The clear definition of goals increases transparency and facilitates public discussion about the agency's performance. By articulating its aims and supporting assumptions, the agency gives better guidance to external groups—for example, business managers—about its priorities, its understanding of the law and its decision-making processes. Such disclosure is likely to have a knock-on effect by allowing the agency to have influence in the market by means beyond enforcement actions alone. Policy studies and statements can further add to transparency and assist the agency's overall mission. Deliberate, systematic efforts by the agency's leadership to set out its aims also can increase public support for the agency's mandate and improve the agency's brand.

<sup>18</sup> For additional discussion, see Kovacic, *supra* n 4; Kovacic, *supra* n 6; Kovacic, *supra* n 3.

<sup>19</sup> Muris, *supra* n 13, 269.

## **2. Establishment and Refinement of Internal Planning Mechanisms that Devise a Strategy and Programmes to Accomplish Set Goals**

The allocation of an agency's resources should flow from a conscious strategy that identifies most serious distortions in the competitive process and identifies the best mix of policy solutions. Without an effective process to set strategy, a competition agency can become a purely reactive observer caught up in the unfolding of events and buffeted by demands for action by various external bodies, especially the legislature.

A good strategy does not consist of mechanically repeating what the agency has done before. Affected industry groups may develop countermeasures that blunt the effectiveness of existing agency tactics. New commercial phenomena may call for reconsideration of sectors or specific practices that have become traditional elements of the agency's programme. The process of reassessment must be an ongoing effort, its execution requiring an internal planning mechanism to devise and revise strategies. Means to this end include the formation of a long-term planning committee, recourse to internal policy review sessions through which the agency managers and staff discuss possible applications of resources, and consultations with external bodies—such as the non-executive board employed by the Office of Fair Trading. The specific form of internal planning mechanism chosen is less important than the maintenance of a continuing effort to reconsider priorities and realign the agency's strategies to address changing economic conditions.

## **3. Employing a Problem-solving Approach that Uses the Full Range of Policy Tools at the Agency's Disposal to Correct Apparent Market or Government Failures that Impede the Attainment of Competition and Consumer Protection Objectives**

Central to the formation of a strategy to implement the competition agency's priorities is the determination of the mix of policy tools whose application will best solve specific competition policy problems. Successful agencies have a diverse range of tools at their disposal: the prosecution of cases, the promulgation of secondary legislation, the issuance of guidelines, the preparation of studies and the convening of workshops, seminars and other forms of public consultations. In the 1990s, US Federal Trade Commission (FTC) Chairman Robert Pitofsky played a key role in encouraging the FTC to look beyond litigation to employ the full range of competition policy tools at its disposal.<sup>20</sup>

<sup>20</sup> Interview with Federal Trade Commission General Counsel Willard K Tom, ABA Federal Civil Enforcement Committee Newsletter (January–February 2010), available at <http://www.bingham.com/ExternalObjects/Docs/ABA%20FCE%20-%20HBW%20Author%27s%20Copy%20>

Pitofsky restored the FTC's intended role in using fact-finding hearings and workshops to identify future policies and to develop the agency's law enforcement and advocacy agenda.<sup>21</sup> Pitofsky's immediate successor, Timothy Muris, expressly embraced Pitofsky's approach and embedded this norm still more deeply in the FTC's culture by making expansive use of non-litigation tools. This has become the hallmark of FTC practice ever since.

#### **4. Emphasising the Recruitment and Retention of Skilled Administrative Staff, Attorneys and Economists**

The success of a competition agency in achieving its mission depends fundamentally on the capabilities of the managers and staff who implement the agency's programmes. As the staff's capability grows, the quality of the agency's performance is likely to improve, as well as its capacity to undertake more demanding tasks.

One necessary element of accumulating strong human capital is to achieve an appropriate mix of skills. Good antitrust policy is the synthesis of learning in economics and law. A strong staff will combine the skills of the attorneys and economists who will form the project teams that perform the agency's litigation and non-litigation projects. An equally strong need is for experienced managers who can lead major projects (such as major cases and research projects). A decision to focus on specific topics or sectors will also require the recruitment of specialists familiar with the issue at hand. For example, a decision to focus on questions at the boundary of competition law and intellectual property will ordinarily require the recruitment of attorneys skilled in patent law.<sup>22</sup>

#### **5. Regular and Substantial Capital Investments in Building Knowledge and, Where Appropriate, Collaborating with Other Public Agencies and Academic Research Centers Both at Home and Abroad**

No input to a competition agency's work is more important than knowledge. To maintain its proficiency, an agency must stay attuned to state-of-the-art developments in economic theory, empirical work, legal analysis, major economic trends and the implementation of superior techniques in other competition

of%20Will%20Tom%20interview\_(5295).pdf ("Probably the biggest "big-picture" contribution in [Chairman Pitofsky's] tenure was the revival of the Commission's intended role as an expert body—using workshops, hearings, and Section 6 authority to explore cutting edge issues, thus providing a much broader knowledge base for its own work as well as that of Congress, other agencies, and the business community").

<sup>21</sup> See Muris, *supra* n 13, 177.

<sup>22</sup> This point is developed in WE Kovacic and AP Reindl, "An Interdisciplinary Approach to Improving Competition Policy and Intellectual Property Policy" (2005) 28 *Fordham Journal of International Law* 1062.

agencies. This requires ongoing investments in competition policy research and development—outlays that make the agency smarter by ensuring that it sustains in-depth understanding about specific sectors, broader economic phenomena and advances in theory. By necessity, this means funds for training staff, interaction with academic research centres at home and abroad, data collection and research (including market studies), the evaluation of past agency initiatives and public consultations that examine current developments. A vital element of this process is the agency's publication of data sets and research that help illuminate important policy trends.<sup>23</sup>

A prime example of the integration of economic theory into practice in the US is merger review, especially the periodic upgrading of horizontal merger guidelines by the Antitrust Division of the US Department of Justice (DOJ) and the FTC. The DOJ promulgated the first set of US merger guidelines in 1968.<sup>24</sup> There have been successive updates over time, culminating in the release by the DOJ and the FTC of new horizontal merger guidelines in August 2010.<sup>25</sup> The new guidelines drew upon varied sources of insight, but they also reflected a direct infusion of knowledge from academia. The chief economists at the DOJ and the FTC, Carl Shapiro and Joseph Farrell respectively, had written extensively on merger policy—often as co-authors at the University of California-Berkeley—and brought their expertise to bear in the preparation of guidelines that, among other features, incorporate developments in economic theory.<sup>26</sup>

Multinational networks supply another source of knowledge and capacity for individual competition agencies. Prominent examples include the Organization for Economic Cooperation and Development (OECD), the Competition Law

<sup>23</sup> See, eg MB Coate and AJ Heimert, "Merger Efficiencies at the Federal Trade Commission", available at <http://www.ftc.gov/os/2009/02/0902mergerefficiencies.pdf>.

<sup>24</sup> US Department of Justice, Merger Guidelines (1968), reprinted in 4 Trade Reg Rep (CCH) ¶ 13,101.

<sup>25</sup> US Department of Justice, Merger Guidelines (1982), reprinted in 4 Trade Reg. Rep (CCH) ¶ 13,102; US Department of Justice, Merger Guidelines (1984), reprinted in 4 Trade Reg (CCH) ¶ 13,103; US Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992, rev. 1997), reprinted in 4 Trade Reg Rep (CCH) ¶ 13,104; US Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (2010), available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.

<sup>26</sup> See, eg J Farrell and C Shapiro, "How Strong Are Weak Patents?" (2008) 98 *American Economic Review* 1347; J Baker, J Farrell and C Shapiro, "Merger to Monopoly to Serve a Single Buyer" (2008) 75 *Antitrust Law Journal* 637; J Farrell and C Shapiro, "Improving Critical Loss Analysis" (2008) 7 *Antitrust Source*, available at <http://www.abanet.org/antitrust/at-source/08/02/Feb08-Farrell-Shapiro.pdf>; J Farrell, J Hayes, C Shapiro and T Sullivan, "Standard Setting, Patents, and Hold-Up" (2007) 74 *Antitrust Law Journal* 603; J Farrell and C Shapiro, "Scale Economies and Synergies in Horizontal Merger Analysis" (2001) 68 *Antitrust Law Journal* 685; J Farrell and C Shapiro, "Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition" (2010) 10 *BE Journal of Theoretical Economics*, available at <http://www.bepress.com/bejte/vol10/iss1/art9>; J Farrell and C Shapiro, "Recapture, Pass-Through, and Market Definition" (2010) 76 *Antitrust Law Journal* 585.

and Consumer Policies Branch of the United Nations Conference on Trade and Development (UNCTAD) and the ICN.<sup>27</sup> Each organisation has helped form international consensus about major competition policy issues, such as the establishment of antitrust programmes to combat cartels.<sup>28</sup>

The ICN bears special mention in this context. Unlike the case with the OECD and UNCTAD, the members of the ICN are competition agencies, not governments. This gives the ICN's member competition agencies relatively greater freedom to express their views. The direct participation of competition agencies has yielded a vast quantity of work product and learning, which is freely available on the ICN's website. This work product consists not only of training modules for agency staff on substantive competition law, but also offers detailed, practical materials to assist agency staff in their everyday jobs. The ICN's body of practical guidance includes recommended practices concerning the operation of competition agencies, case-handling and enforcement manuals, reports, legislation and rule templates, databases and toolkits.<sup>29</sup> The ICN also conveys the insights in these materials, along with know-how accumulated by individual ICN members, in workshops that focus on specific issues in competition policy.

Beyond accumulating and applying the experience of their members, the multinational competition networks have also taken steps to inject learning from institutions outside the competition agencies. For example, in November 2010, at UNCTAD's meeting in Geneva to review its set of principles on restrictive business practices, the organisation launched a new network of academic advisors to assist in identifying worthy projects and to provide comments on the existing UNCTAD competition agenda. This is the first systematic effort by a multinational network to engage academics in the formulation and implementation of a network's programme, thereby boosting UNCTAD's research and analysis capabilities that indirectly assist national competition agencies.

Compared to the other networks, the ICN relies more heavily upon the contributions of non-government advisors (NGAs) from academia, the business community, consumer groups and the private bar. NGAs participate directly in the deliberations of the ICN's working groups and in the network's conferences and workshops. The availability of outside experts to assist competition agencies in their work is an invaluable resource to help competition agencies formulate and carry out their programmes.

<sup>27</sup> The work of these networks in the field of competition policy is examined in HM Hollman and WE Kovacic, "The International Competition Network: Its Past, Current and Future Role" (2011) 20 *University of Minnesota International Law Review* (forthcoming).

<sup>28</sup> See OECD, "Recommendation Concerning Effective Action against Hard Core Cartels" (25 March 1998), available at [www.oecd.org/documentprint/0,3455,en\\_2649\\_34685\\_44942291\\_1\\_1\\_1\\_1.00.html](http://www.oecd.org/documentprint/0,3455,en_2649_34685_44942291_1_1_1_1.00.html).

<sup>29</sup> These materials are available on the ICN website, <http://www.internationalcompetitionnetwork.org/>.

## 6. Data Collection and Disclosure

The proper measure of agency performance is the delivery of good economic results, not simply the generation of higher activity levels. Ideally, agency performance would be measured by assessing how the agency affects economic performance through its law enforcement programme—such as cases involving cartels, mergers and monopolisation—and the application of non-litigation policy instruments such as policy advocacy. The development of effective techniques for measuring these effects can be difficult, and the realisation of a truly satisfying methodology for linking economic outcomes to the use of individual tools (or combinations of policy instruments) will be a daunting task. Nonetheless, in deciding how to assess the performance of a competition authority, we should not forget that our aim is to determine the agency's success in improving economic performance—or attaining any other policy goal that its statutory mandate has assigned to it. Agency heads who proclaim that they have been “very busy” should be pressed to show that they have been very effective.

Central to the assessment of an agency's contributions to improved economic performance is the evaluation of its work.<sup>30</sup> An important foundation for evaluation is the collection of data that recounts the agency's activities and measures their impact. Disclosure of this information is necessary to facilitate external review and comparative study.

In the discussion below we consider how an agency could collect and present information to realise more informative evaluations of its programmes, organisation and procedures to ensure that it is delivering the results it hopes to achieve.

### E. EVALUATION METHODS AND EFFECTIVENESS CRITERIA

There is currently an absence of well-defined, generally accepted scoring rules for evaluating competition agencies and their programmes. As noted above, a frequently used proxy for measuring agency performance is to track levels of activity—especially the initiation of cases—over time. Activity levels do not answer hard questions about an agency's effectiveness, but the reporting and tracking of activity levels supply necessary inputs into the assessment of agency performance. Such data provide a valuable means for understanding what an agency is doing and for identifying adjustments in resource allocation over time. As we suggest below, there are ways to improve the way that agencies report what they do.

<sup>30</sup> WE Kovacic, “Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities” (2006) 31 *Journal of Corporation Law* 503.

Our concern with commonly used assessment methodologies is that they often focus entirely on activity levels, especially trends in the initiation of new cases. We have previously identified some of the infirmities of a performance assessment methodology that measures the worth of an agency chiefly by counting cases and emphasising the initiation of matters involving prominent business enterprises. The scrutiny of activity levels can overlook the inherently evolutionary nature of competition policy. Enforcement programmes can, and should, change to account for learning in economics and law.<sup>31</sup> The study of activity levels can be interpreted properly only by placing the agency's work in historical context and by recognising that agencies progress through a life cycle in which, for various reasons, it emphasises different objectives in different eras.<sup>32</sup> For these and other reasons, views about what constitutes good policy change over time.

A final grade for an agency's programme in one era cannot ordinarily be calculated until years later, when commentators are able to assess whether earlier measures that were thought at the time to be eminently sensible have remained sound following developments in competition agency policy and learning. In this sense, part of an agency's grade is always going to be "incomplete" for any one period. A properly designed report card must, therefore, take into account the evolutionary nature of competition law over time and have two grades: one to measure the agency's work by contemporary standards and the second to assess the agency's contribution to policies, doctrinal developments or analytical concepts that prove to be durable and respected over a longer term. This second grade inevitably can only be filled in after extensive experience with an agency's contribution over a specific period of time.

The second, "long-term" grade is necessary because the evolutionary nature of competition law may require an agency to back away from existing enforcement frontiers or do the exact opposite and push enforcement further outward. There may also be times when maintaining the status quo is the better path. A characteristic of good practice, therefore, is that an agency rethinks its practices and considers adjustments that expand or contract enforcement with respect to specific practices.

As noted earlier, scoring systems that emphasise case counts and assign special credit for the prosecution of prominent enterprises overlook less visible matters that have a major impact on the development of law. When the DOJ initiated the *Otter Tail Power* case in 1969, few appreciated the changes that this case—which involved a relatively obscure electric utility serving the north cen-

<sup>31</sup> On the cumulative, evolutionary nature of policy development in the field of competition law, see W Kovacic, "The Modern Evolution of US Competition Policy Enforcement Norms" (2003) 71 *Antitrust Law Journal* 377.

<sup>32</sup> M Winerman and WE Kovacic, "Outpost Years for a Start-up Agency: The FTC from 1921–1925" (2010) 77 *Antitrust Law Journal* 145.

tral US—would bring to the application of antitrust to traditionally regulated industries. The seemingly small case (*Otter Tail*) paved the way for the initiation of the DOJ’s visibly big case in 1974 that led to the restructuring of AT&T in the 1980s.<sup>33</sup> Instead, observers at the time would have said that the most important government action filed in 1969 was not the *Otter Tail* complaint but the initiation of the monopolisation case against IBM.<sup>34</sup> *Otter Tail* was a small case that made big law.<sup>35</sup>

We have observed earlier that case-centric measures of performance tend to ignore a competition agency’s non-litigation activities. A single-minded focus on case-related activity would accord no significance to the FTC’s reports on the competition policy consequences of the US intellectual property regime. By stimulating a re-examination of the rights granting process for patents, the FTC’s report in 2003, “To Promote Innovation”, may prove to be more significant than any single case the FTC has filed in its 100 year history.<sup>36</sup> The compulsion to begin the next case can lead the agency to stop asking whether other applications of its resources might contribute more to the realisation of its economic policy goals.

We emphasise again how a scoring system that primarily focuses on the initiation of cases can warp the incentives of current leadership. By exaggerating the value of initiating new cases, the conventional scoring system creates temptations for enforcement officials to focus on inputs rather than outcomes. A norm that emphasises the initiation of matters—particular 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 labelled “departures”. When the passengers ask about arrivals, the airlines reply that they do not track those events. Nobody runs a commercial airline company this way. 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.

One needs to encourage acceptance of a norm that spurs incumbent agency leaders to invest in activity that facilitates the development of better agency programmes, including law enforcement, for the future. Consider, for example, what would happen in sports like basketball, hockey, soccer or rugby without assists and good passes. A good measurement system must measure what matters, and a system that overlooks non-litigation policy initiatives misses a vital

<sup>33</sup> *Otter Tail Power Co v United States*, 410 US 366 (US 1973); *United States v American Tel & Tel Co*, 552 F Supp 131 (DDC 1982).

<sup>34</sup> *United States v IBM Corp*, [1961–1970 Transfer Binder] Trade Reg Rep (CCH) ¶ 45,069 (SDNY filed 17 January 1969) (complaint alleging monopolisation and attempted monopolisation).

<sup>35</sup> Kovacic, *supra* n 6, 908.

<sup>36</sup> FTC, “To Promote Innovation”, *supra* n 8.

dimension of policy development.<sup>37</sup> When counting cases, it can be difficult to allocate responsibility across administration for a number of enforcement matters. A case filed by an incumbent antitrust official may have originated in an investigation commenced years earlier by the predecessor administration. This is most evident in the counting of cases filed soon after a new US president takes office but before the president appoints new leadership at the DOJ or FTC. This is also an issue in matters involving lengthy pre-complaint investigations that span two presidential administrations. A fully accurate profile of case-related activity would need to identify not only the date on which cases were filed but also the date on which the agency decided to initiate the inquiry that led to the decision to prosecute. Moreover, the litigation of a number of matters crosses administration boundaries. Several cases discussed in this article, like the DOJ prosecution of AT&T for illegal monopolisation, involved major contributions from several administrations.

For all of its deficiencies, the reporting of activity levels will remain an important benchmark of agency performance and a significant means for measuring agency effectiveness. In the discussion below, we focus on approaches for making the collection and reporting of data on agency activity more informative and more useful in making judgements about agency effectiveness.

#### F. EXPANDED RELIANCE ON PEER REVIEW

Peer review is an excellent way to balance out the negative aspects of counting cases. While neither method is perfect alone, these two methods complement each other and could provide a more effective and accurate picture of an agency's work. A peer-review method focused on outcomes also becomes necessary as, unlike agencies that produce a readily measurable output directly to consumers, the vast majority of competition agency actions are not aimed at consumers directly but, rather, toward parties—typically corporations and individuals—in an effort to stop conduct and mergers that threaten to harm consumers. Without directly applicable data, therefore, we must turn to consider outcomes. Apart from practical necessity, a peer review approach focusing on outcomes has other advantages. In particular, an outcome-focused policy perspective, as opposed to an activity-based approach, helps ensure that a competition agency's existing programmes are not simply a consequence of adhering to custom and that the agency remains alert to possibilities for improving results for consumers by adjusting the mix of its policy initiatives.

There are a number of other advantages associated with observing outcomes instead of activity levels. First, it can provide staff with information on

<sup>37</sup> Kovacic, *supra* n 6, 909.

how their actions affect achievement of the agency's goals while avoiding the bias of self-assessment. This allows value to be placed on deterrence, which the case-counting method does not recognise. The success (or lack thereof) of an agency initiative also suggests how the agency might improve its approach to choosing strategies for exercising its powers as well as how to strengthen its processes for implementing its programmes.

Not all outcomes are objectively measurable, which requires subjective judgement to assess success. The main issue with adopting a more subjective approach is, simply, that not everyone will agree. Accordingly, subjective peer review judgements are prone to discrepancies as they are based on opinions, and also could suffer from errors in human judgement. The inevitable result is different opinions on whether an agency project or initiative is beneficial to consumers or not. For example, if a competition agency analyses the economics of bundling, they are likely to find that bundling can be pro-competitive in some instances. In those circumstances, how does one judge whether the agencies research efforts are successful? People who think that bundling is anti-competitive will likely say that the research is incomplete and promotes results that will harm the ultimate objective of the competition agency, helping consumers. By contrast, people who think bundling is useful will agree that the research should be considered as a contribution to economic learning that furthers the competition agency's pro-consumer mission. Theoretically, this subjective difference in opinion could be avoided with research that emphasises econometrics or modelling. These are still subject to interpretation, however, and in any event, more empirical econometric modelling is not possible for most projects that competition agencies undertake.

### **G. IMPROVED DATA COLLECTION AND DISCLOSURE**

Competition agencies are the principal source of information about what they do. A competition agency that does not release meaningful information impedes the assessment of its work. Good disclosure is an essential ingredient of the transparency that holds government agencies accountable and promotes improvements in public policy. Thus, a key measure of the quality of an agency's process is quality of disclosure.

The creation of a system of meaningful disclosure has two dimensions. The first is the agency's self-examination of its disclosure and reporting practices. As part of a routine process of evaluating its operations, agency insiders should consider whether existing disclosure techniques—website-accessible databases, annual reports, speeches, testimony to legislative bodies—provide complete, consistent and informative descriptions of what the agency is doing. Disclosure practices that rely heavily or entirely on the reporting of aggregate measures

of activity—eg the agency performed X number of investigations, prosecuted Y number of cartels or issued Z quantity of reports—will almost certainly be insufficient. Such numerical tabulations afford no insight into the type or quality of specific matters.

The second useful starting place for building a system of meaningful disclosure is public consultation. Agencies can learn a lot from the groups which know the competition agency best: advocacy organisations, law firms, economic consultancies, in-house counsel and academics.<sup>38</sup> These consultations can take the form of hearings, individual interviews or questionnaires. Through any of these means, respondents could be asked to give their opinion of the agency's disclosure practices, as well as other questions bearing upon the agency's performance. How readily can outsiders determine what the agency has done? Are cases and no-litigation matters reported in a consistent, current and informative manner? Does the agency provide well-reasoned explanations for its various policy interventions, as well as provide a useful statement of reasons for terminating matters that have involved a substantial use of its own resources or expenditure or effort by external parties? This approach can be part of a larger process by which the agency consults outsiders about the professionalism of its operations and about the actual effect of its competition policy programme.

We expect that such a process of agency introspection and external consultation will identify a number of areas for improvement in existing disclosure regimes. We perceive one of the most urgent needs to be the creation of a consistent approach for reporting relevant activity. We suggest that a template for reporting law enforcement activity would include the following fields: (i) a particular time to identify the commencement of an action (we suggest the date when the complaint was filed); (ii) the name of the agency when the matter was filed; (iii) a description of the action that classifies it by the principal theory of violation (ie merger, monopoly, horizontal or vertical); (iv) the nature of the remedy as either conduct or structural; if both, then the category should be chosen based on overall similarity, ie whether the remedy had more conduct or structural aspects; and (v) the history of litigation following the initiation of the complaint.<sup>39</sup> An agency should separately track and report instances in which the threat of a lawsuit or the pendency of an investigation can be said, with confidence, to have induced a change in a firm's conduct—as, for example, when the threat of a lawsuit causes parties to abandon a proposed merger.<sup>40</sup>

Peer review can supply a useful way to interpret such data sets and to probe the foundations of the reported information. Peer review is, by nature, some-

<sup>38</sup> See Sokol, *supra* n 3 (using survey of practitioners to assess quality of merger control in US).

<sup>39</sup> See the appendix for a possible format of such a case reporting template that contains antitrust matters announced by the US FTC and DOJ for the 2001 calendar year.

<sup>40</sup> See, eg US Department of Justice, "Department of Justice and Several States Will Sue to Stop United Airlines from Acquiring US Airways" (27 July 2001), available at <http://www.justice.gov/opa/pr/2001/July/361at.htm> (accessed on 18 April 2011).

what subjective, but there can still be some consistency in how peer reviews are conducted. We can imagine that the two multinational organisations most deeply involved in performing peer reviews of competition agencies—the OECD and UNCTAD—could consult with each other and with external groups to refine standards for peer review exercises. Greater consistency can be achieved by developing consistent categories of activity for analysis for each measured variable and, perhaps, assigning a numerical value to each category. From this starting point, a researcher could apply econometric modelling to the numerical values, or results could simply be compared to give a better understanding of agency performance.

The next step, once the criteria have been developed, is to determine how they should be applied to arrive at a grading scale. The counting method is self-explanatory, being an activity-based measure, with “more cases” as the data points. A peer-review method would have to rely upon a similar approach to that described above to ensure consistencies between variables by developing consistent categories for each measured variable and then assigning a numerical value to each category. But, as described earlier, the counting method weighs all cases equally regardless of an individual case’s impact on developing the law. By adding the peer-review method to the scoring system, cases could be scored depending on their impact on the law. Of course, arriving at a scoring system and agreeing the extent to which certain cases have had an impact on the law will be subjective, but a useful trend could perhaps be discerned by increasing the number of data points through individual questionnaires or interview feedback.

Any case-counting method (including our template) ignores non-litigation activities. This could be remedied by agencies collecting more and making publicly available information about non-litigation activity as well as litigation activity. Non-litigation activity would include advocacy projects, reports and matters involving the operation of agency systems that are closely related to the litigation process but do not always generate litigation events. For example, in the US, developing a more complete picture of how agencies handle merger review could be achieved by collecting and publishing information on when voluntary request letters and second requests are issued. For agency investigations into monopolistic conduct, horizontal restraints and vertical restraints, the appropriate date to collect would be the formal initiation of the agency’s investigation. By adding this additional level of detail, the activity-based component of the review will also address the concern that non-merger activities may suffer when agency leadership opts to devote more resources to merger matters. The number of reports that an agency releases may be a useful activity-based variable, but it would be more useful to evaluate the impact of a report. Ignoring non-litigation activities is not a concern with a peer-review method, as reports, assessment of leadership and strategy, and other inputs could be added to the peer review.

We pointed out earlier that a policy needs to be assessed over time. A case counting method would not be useful, but a peer-review method could be made to account for this issue because some of the reviews of a particular time period could assume or account for the current policy thinking at the time. Another difficulty with relying on case counting is the temptation it creates for enforcement officials to focus on inputs rather than outcomes. This could be offset by a peer review that reviews outcomes based on their impact. Allied to this concern is that there may be a number of enforcement matters for which it could be difficult to allocate responsibility across administrations. Peer reviews could solve this problem by assessing the quality of enforcement decisions in each time period.

## **H. CONCLUSION**

Our case activity template supplemented by peer reviews is one step towards improving our assessment of competition agencies, but combining the two methods offers a methodology to more comprehensively evaluate a competition agency's performance. After all, just because an evaluation is not perfect does not mean the evaluation should not be done. To the contrary, even an imperfect evaluation, albeit as accurate as possible, is a positive step to both understanding and improving your competition agency so that it will always measure up. We see multinational networks as valuable means for identifying superior disclosure methods and techniques for evaluation.

## APPENDIX: US FTC & DOJ ANTITRUST MATTERS ANNOUNCED: JANUARY 2001-JUNE 2010

Case Name	Defendants	Date	Agency	Agency Head	Characterization	Admin Remedy	Add. Detail on Remedy	Federal Remedy
In the Matter of Winn-Dixie Stores, Inc.	Winn-Dixie Stores, Inc.	08/01/2001	FTC	Pfofsky	Merger	Consent Order	Conduct Relief	
In the Matter of FleetBoston Financial Corp. and Summit CanCorp	FleetBoston Financial Corp. and Summit CanCorp	25/01/2001	DOJ	James	Merger	Consent Order	Divestiture	
In the Matter of El Paso Energy Corp. and the Coastal Corp.	El Paso Energy Corp. and the Coastal Corp.	29/01/2001	FTC	Pfofsky	Merger	Modified Consent Order	Divestiture	
In the Matter of Energy Corp. and Energy-Koch, LP	Energy Corp. and Energy-Koch	31/01/2001	FTC	Pfofsky	Merger	Consent Order	Conduct Relief	
In the Matter of Firstar Corp. and U.S. Bancorp.Inc.	Firstar Corp. and U.S. Bancorp.Inc.	05/02/2001	DOJ	Melamed	Merger	Consent Order	Divestiture	
In the Matter of the Dow Chemical Co. and Union Carbide Corp.	Dow Chemical Co. and Union Carbide Corp.	05/02/2001	FTC	Pfofsky	Merger	Consent Order	Divestiture	
In the Matter of Kodak	Kodak	06/02/2001	DOJ	Melamed	Merger	Consent Order	Divestiture	
In the Matter of Sensient	Sensient	23/02/2001	DOJ	Melamed	Merger	Consent Order	Divestiture	
In the Matter of Fifth Third Bancorp.and Old Kent Financial Corp.	Fifth Third Bancorp.and Old Kent Financial Corp.	08/03/2001	DOJ	Melamed	Merger	Consent Order	Divestiture	
In the Matter of DTE Energy Co. and MCN Energy Group Inc.	DTE Energy Co. and MCN Energy Group Inc.	20/03/2001	FTC	Pfofsky	Merger	Consent Order	Divestiture and easement	
In the Matter of Hoechst Marion Roussel, Inc.; Carderm Capital L.P.; and Andrx Corp.	Hoechst Marion Roussel, Inc.; Carderm Capital L.P.; and Andrx Corp.	02/04/2001	FTC	Pfofsky	Horizontal Restraint	Consent Order	Conduct Relief	
FTC v. Schering-Plough Corp.; Upsher-Smith Laboratories; and American Home Products Corp.	Schering-Plough Corp.; Upsher-Smith Laboratories; and American Home Products Corp.	02/04/2001	FTC	Pfofsky	Horizontal Restraint	ALJ dismisses FTC allegations, Commission overturns	Appealed to Federal Court	11th Cir. Ruled against FTC SCOTUS denied certiorari
FTC v. The Hearst Trust	The Hearst Trust	04/05/2001	FTC	Pfofsky	Merger		Divestiture and Disgorgement	Filed in DC Consent Order
In the Matter of Siemens AG and Vodafone Group Plc	Siemens AG and Vodafone Group Plc	06/04/2001	FTC	Pfofsky	Merger	Consent Order	Divestiture	
In the Matter of The News Corp. Limited and Chris-Craft Industries Inc.	The News Corp. Limited and Chris-Craft Industries Inc.	11/04/2001	DOJ	Melamed	Merger		Divestiture	Consent Order
In the Matter of General Electric and Honeywell	General Electric and Honeywell	02/05/2001	DOJ	Melamed	Merger		Divestiture	Consent Order
United States v. 3D Corp.	3D Corp.	06/06/2001	DOJ	Melamed	Merger		Divestiture	Consent Order
In the Matter of LaFarge S.A.	LaFarge S.A.	18/06/2001	FTC	Muris	Merger	Consent Order	Divestiture	
In the Matter of BB&T Corporation and F&M National Corp.	BB&T Corporation and F&M National Corp.	19/06/2001	DOJ	James	Merger	Consent Order	Divestiture	Consent Order
In the Matter of Signature Flight Support Corp.	Signature Flight Support Corp.	20/06/2001	DOJ	James	Merger		Divestiture	Consent Order
In the Matter of Thomson's Acquisition	Thomson's Acquisition	27/06/2001	DOJ	James	Merger		Divestiture	Consent Order
In the Matter of First Union Corp. and Wachovia Corp.	First Union Corp. and Wachovia Corp.	26/07/2001	DOJ	James	Merger	Consent Order	Divestiture	
In the Matter of Bestfoods Baking Co.	Bestfoods Baking Co.	30/07/2001	DOJ	James	Merger	Consent Order	Divestiture	

Case Name	Defendants	Date	Agency	Agency Head	Characterization	Admin Remedy	Add. Detail on Remedy	Federal Remedy
In the Matter of PolyGram Holding, Inc.; Decca Music Group Limited; UMG Recordings, Inc.; and Universal Music & Video Distribution Corp.	PolyGram Holding, Inc.; Decca Music Group Limited; UMG Recordings, Inc.; and Universal Music & Video Distribution Corp.	31/07/2001	FTC	Muris	Horizontal Restraint	ALI rules in favor of FTC. Commission upholds ruling	Conduct Relief	
In the Matter of Warner Communications Inc.	Warner Communications Inc.	31/07/2001	FTC	Muris	Horizontal Restraint	Consent Order	Conduct Relief	Consent Order
In the Matter of Premdor Inc.	Premdor Inc.	03/08/2001	FTC	Muris	Merger	Consent Order	Conduct Relief	
In the Matter of Chevron Corp. and Texaco Inc.	In the Matter of Chevron Corp. and Texaco Inc.	07/09/2001	FTC	Muris	Merger	Consent Order	Divestiture	
In the Matter of Metso Oyj and Svedala Industri AB	Metso Oyj and Svedala Industri AB	07/09/2001	FTC	Muris	Merger	Consent Order	Divestiture	
In the Matter of MSC Software Corp.	MSC Software Corp.	10/10/2001	FTC	Muris	Merger	Consent Order	Divestiture	
In the Matter of Sungard	Sungard	23/10/2001	DOJ	James	Merger	Consent Order	Divestiture	
United States v. General Dynamics	General Dynamics	23/10/2001	DOJ	James	Merger	Dismissed Complaint	Parties abandoned transaction	
In the Matter of Seagram Spirits and Wine by Diageo PLC and Pernod Ricard S.A.	Seagram Spirits and Wine by Diageo PLC and Pernod Ricard S.A.	23/10/2001	FTC	Muris	Merger	Consent Order	Divestiture	
In the Matter of Chicago Bridge & Iron Co. N.V., Chicago Bridge & Iron Co., and Pitt-Des Moines, Inc.	Matter of Chicago Bridge & Iron Co. N.V. Chicago Bridge & Iron Co., and Pitt-Des Moines, Inc.	25/10/2001	FTC	Muris	Merger	Commission Order in favor of FTC	Divestiture	Court of Appeals ruled in favor of FTC by denying petition from
In the Matter of Airgas, Inc.	In the Matter of Airgas, Inc.	26/10/2001	FTC	Muris	Merger	Consent Order	Divestiture	
In the Matter of Wells Fargo and Co.	Wells Fargo and Co.	29/11/2001	DOJ	James	Merger	Consent Order	Divestiture	
In the Matter of Suntrust Bank and Huntington National Bank	Suntrust Bank and Huntington National Bank	03/12/2001	DOJ	James	Merger	Consent Order	Divestiture	
In the Matter of Konijnlijke Ahold N.V. and Bruno's Supermarkets, Inc.	Konijnlijke Ahold N.V. and Bruno's Supermarkets, Inc.	07/12/2001	FTC	Muris	Merger	Consent Order	Divestiture	
In the Matter of Nestle Holdings, Inc., and Ralston Purina Co.	In the Matter of Nestle Holdings, Inc., and Ralston Purina Co.	11/12/2001	FTC	Muris	Merger	Consent Order	Divestiture	
In the Matter of Suiza Foods and Dean Foods	Suiza Foods and Dean Foods	18/12/2001	DOJ	James	Merger	Consent Order	Divestiture	
In the Matter of Valero Energy Corp. and Ultramar Diamond Shamrock Corp.	Valero Energy Corp. and Ultramar Diamond Shamrock Corp.	18/12/2001	FTC	Muris	Merger	Consent Order	Divestiture	
FTC v. Libbey	Libbey	18/12/2001	FTC	Muris	Merger	Final Consent Order; abandon transaction	Conduct Relief; could not merge without notifying FTC	Preliminary injunction in district court
In the Matter of INA-Holding Schaeffler KG and FAG Kugelfischer Georg Schaefer AG.	INA-Holding Schaeffler KG and FAG Kugelfischer Georg Schaefer AG.	20/12/2001	FTC	Muris	Merger	Consent Order	Divestiture	