PRIORITY SETTING AND RESOURCE ALLOCATION IN THE UNITED STATES

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Towards a Proactive Agenda

• Avoiding the nightmare scenario
  – A full diet of mandatory tasks can leave no time or resources to address conduct that seriously injures consumer welfare

• Strategy needed to identify the practices that cause the greatest injury to competition
  – Fish where the fish are
  – Studies on identification of priorities
    • FTC at 100 Study (2009)
    • ICN Agency Effectiveness Handbook, Strategic Planning and Prioritization (2010)
  – Specific priorities will vary among countries
Learning from FTC at 100 Study

- Identification of the Goals
- Focus on outcomes, not outputs
- Building internal and external support
- Application of full range of tools
  - Enforcement
  - Advocacy within government
  - Studies and publicity
ICN Identifies “Good Practices”

• 2010 Chapter of Agency Effectiveness Handbook
• Strategic Planning
  – Establish mission, strategy, objectives, means of assessing success
  – Recognition of constraints
  – Commitment of agency leadership
  – Buy-in from staff
• Prioritization
  – Delivers on objectives in strategic plan
  – Allocation of resources
  – Develop an appropriate portfolio of activities
  – Prioritization criteria (consumer welfare, sectoral, institutional)
  – Prioritization procedures can vary
Discretion to Set a Pro-Active Agenda

- Complaints often focus on injury to individual competitor, not on competitive or consumer welfare.
- Requiring every case to be addressed can shift resources away from practices that harm consumer welfare.
- Having discretion to focus on real problems and to avoid wasting resources is an advantage.
- Existence of a private right of action can liberate agency to address the conduct that causes the greatest injury.
Formal Process in the United States

- Government Performance and Results Act applies across government
  - A transparent process to establish:
    - Strategic Goals
    - Objectives
    - Performance Measurements
  - Tends to be at a high level of generality
  - Measurement of law enforcement performance is challenging
    - Difficult to measure ultimate outcomes
    - Measuring deterrent effect is difficult
  - Annual public reporting of results
Formal Strategic Planning at FTC

• **Competition Strategic goal:** prevent anticompetitive mergers and other anticompetitive business practices

• **Objectives:**
  – Take action against anticompetitive mergers and practices that may cause significant consumer injury
  – Prevent consumer injury through education.
  – Enhance consumer benefit through research, reports, and advocacy.
  – Protect American consumers in the global marketplace by providing sound policy recommendations and technical advice to foreign governments and international organizations to promote sound competition policy.
Measurement and Publication of Results

- **Example of Measures**: Consumer savings of at least 13 times the amount of FTC resources allocated to the merger program, and 20 times the amount allocated to the non-merger program.

- **2012 Results**: Savings 14.9 times resources (merger) and 18.3 times resources (non-merger).

- Results are published annually.
  - See http://www.ftc.gov/opp/gpra/2012parreport.pdf)
Prioritization at the FTC

- Translates strategic goals into operational priorities.
- Identification of practices that cause greatest injury to consumer welfare and where government intervention is appropriate.
- Sources of prioritized matters
  - Internal research and development (workshops, studies)
  - Specialized divisions understand issues in specific sectors
  - Complaints
  - Merger notifications
- Chairman provides overall guidance; Bureau Director selects cases through evaluation committee process that includes all internal stakeholders
Current FTC Priorities

• Competition priorities focus on areas that touch consumers most, including:
  – Containing health care and drug costs
  – Fostering innovation and competition
  – Advancing competitive principles
  – Monitoring energy markets
  – Guarding consumer pocketbooks

• Prioritization is not exclusive, and allows for flexibility to address new issues as they arise
Selection of Appropriate Tools

• Tools selected appropriate to the problem presented
  – Law enforcement: to address private anticompetitive conduct
  – Competition advocacy: to address potentially anticompetitive conduct encouraged or required by state or local governments or other federal agencies
  – Research and policy studies: to provide analysis and information to inform political debate
  – Education: to aid consumer choice

• Avoiding the law of the tool: “to a person with a hammer, everything looks like a nail”
Example: Pharmaceuticals

• Health care consumes 17% of GDP in the United States

• Generic drugs are substantially cheaper than branded pharmaceuticals

• Special procedures exist for regulatory approval of generics
  – Legislation encourages early litigation of claims of patent infringement by generics
  – Litigation often results in agreements where branded drug manufacturers pay generic firms to stay out of the market

• FTC determined that such agreements cost consumers $3.5 billion annually
Result of Pharmaceutical Prioritization

- Identification of tools
  - Legislative changes suggested to Congress, but not adopted
  - Litigation
    - Initial losses in lower courts, followed by
    - June 2013 decision by U.S. Supreme Court that such agreements could be anticompetitive

- A major victory for consumers and vindicated FTC’s prioritization