

ANTITRUST IN HIGH-TECH INDUSTRIES: IMPROVING THE FEDERAL ANTITRUST JOINT VENTURE

*William E. Kovacic**

INTRODUCTION

Seventy years ago, Joseph Schumpeter published his formative theory describing how innovation gives capitalism its vitality.¹ Schumpeter asserted that the most important type of competition is “the competition from the new commodity, the new technology, the new source of supply, the new type of organization.”² He explained that such changes in the existing commercial order do not merely erode “the margins of the profits” of incumbent firms; instead, they strike at “their foundations and their very lives.”³ Thus, innovation-driven competition crushes incumbent firms like “a bombardment,” while other forms of rivalry merely “forc[e] a door.”⁴

Many scholars have challenged individual elements of Schumpeter’s thesis about technological change and the process of competition, particularly his view that monopolies are the best means to foster innovation that spurs growth.⁵ Nonetheless, commentators generally endorse Schumpeter’s conclusion that technological innovation is the most important source of economic progress in market economies.⁶ For roughly the past thirty years, judges, enforcement officials, and academics have agreed that competition

* Global Competition Professor of Law and Policy, George Washington University Law School. From 2006 to 2011, Kovacic was a member of the Federal Trade Commission and chaired the agency from March 2008 to March 2009. The views expressed here are the author’s alone.

¹ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (Harper & Bros., 3d ed. 1950) (1942).

² *Id.* at 84.

³ *Id.*

⁴ *Id.*

⁵ For a representative critique, see F. M. SCHERER, INNOVATION AND GROWTH 169-200 (2d prtg. 1986).

⁶ See F. M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 407 (2d ed. 1980) (“Making the best use of resources at any moment in time is important. But in the long run, it is dynamic performance that counts.”); see also William F. Baxter, *The Definition and Measurement of Market Power in Industries Characterized by Rapidly Developing and Changing Technologies*, 53 ANTITRUST L.J. 717, 726 (1985); Jesse W. Markham, *Concentration: A Stimulus or Retardant to Innovation?*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 247, 252-57 (Harvey J. Goldschmid et al. eds., 1974).

plays a key role in promoting innovation⁷ and that antitrust policy should encourage technological progressiveness.⁸

Of the challenges that the U.S. antitrust system has confronted since its creation in 1890, none have proven more formidable than the analytical difficulties caused by Schumpeter's "perennial gale of creative destruction."⁹ This challenge is most evident in sectors featuring intense technological innovation. Technological dynamism complicates each major task associated with the application of the federal antitrust statutes: the measurement of market power, the assessment of competitive effects, and the formulation of remedies.¹⁰ The treatment of these issues is crucial to the outcome of inquiries by several government bodies—notably, the European Union's Directorate General of Competition and the Federal Trade Commission ("FTC")—into allegations of unlawful exclusion by Google.¹¹

Analytical problems related to technological dynamism have attracted close attention from academics, enforcement agencies, and practitioners.¹² Modern commentary has made numerous contributions to the conceptual foundations of antitrust analysis in high-technology industries.¹³ The FTC and the Antitrust Division of the Department of Justice ("DOJ") have devoted extensive efforts to increase understanding of the main analytical issues in antitrust law and to improve their analysis of mergers and other forms of business conduct.¹⁴

⁷ ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 1192-96 (2d ed. 2008).

⁸ See Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1026-27 (1987); see also James D. Hurwitz & William E. Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63, 113-18 (1982) (discussing judicial concern for preserving incentives to innovate in deciding claims of illegal monopolization).

⁹ SCHUMPETER, *supra* note 1, at 84.

¹⁰ Each of these analytical challenges figured prominently in the Department of Justice prosecution of Microsoft for illegal monopolization. These issues are examined in detail in Harry First & Andrew I. Gavil, *Re-Framing Windows: The Durable Meaning of the Microsoft Antitrust Litigation*, 2006 UTAH L. REV. 641.

¹¹ See Amir Efrati, *Texas Reveals Details of Google Probe*, WALL ST. J. (Feb. 16, 2011), <http://online.wsj.com/article/SB10001424052748704343404576146831548622872.html>; *EU Could Decide on Google Antitrust Case by End of March*, THE GUARDIAN, (Jan. 19, 2012, 4:44 AM), <http://www.guardian.co.uk/technology/2012/jan/19/google-antitrust-europe-decision>; David Streitfeld & Edward Wyatt, *U.S. Escalates Google Case by Hiring Noted Outside Lawyer*, N.Y. TIMES (Apr. 26, 2012), <http://www.nytimes.com/2012/04/27/technology/google-antitrust-inquiry-advances.html>.

¹² See *infra* notes 22-27 and accompanying text.

¹³ Noteworthy examples include CHRISTINA BOHANNAN & HERBERT HOVENKAMP, *CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION* (2012); MICHAEL A. CARRIER, *INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW* (2009); Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575 (2007).

¹⁴ Major contributions from the U.S. antitrust agencies have included FED. TRADE COMM'N, *THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION* (2011);

The attainment of superior concepts is a vital pursuit, but it only partly strengthens antitrust policy's treatment of technology-driven innovation. This Article examines another key determinant of policy quality. It focuses on the institutional arrangements through which the U.S. federal antitrust agencies develop competition policy for high-technology industries. This Article extends an important, emerging literature that shows how the quality of a jurisdiction's institutional infrastructure can influence its ability to deliver good policy outcomes.¹⁵ Too often the performance of antitrust systems suffers from a mismatch between policymaking mandates and the capacity of the institutions entrusted with their implementation. Thus, this Article offers suggestions to improve antitrust policymaking.

The Article proceeds in two parts. Part I summarizes the main difficulties that technological dynamism poses for antitrust analysis. This Part also sets out the principal critiques advanced by commentators regarding the capacity of U.S. antitrust institutions to develop competition policy in high-technology industries. Part II begins by identifying useful steps the U.S. antitrust system has taken to address these concerns. The remainder of Part II suggests further improvements to the joint venture through which the DOJ and the FTC make national competition policy.

I. TECHNOLOGICAL DYNAMISM AND THE INSTITUTIONS OF THE U.S. ANTITRUST SYSTEM

High technology is no stranger to antitrust law. In the American experience, the formation of antitrust doctrine and policy has often taken place in disputes involving industries that are undergoing significant technological change. Many cases that have set standards governing single-firm conduct have arisen in sectors where the attainment or maintenance of market power depended upon the development or exploitation of new technology. Debates involving technological innovation figured prominently in the early twentieth century prosecution of Standard Oil of New Jersey for the monopolization of petroleum refining,¹⁶ and have continued to appear in mod-

U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007) [hereinafter ANTITRUST ENFORCEMENT]; FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003) [hereinafter TO PROMOTE INNOVATION]; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995) [hereinafter ANTITRUST GUIDELINES].

¹⁵ Examples include DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT (2011); D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37 (2007); Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions: Values, Structure, and Mandate*, 41 LOY. U. CHI. L.J. 455 (2010).

¹⁶ See *Standard Oil Co. v. United States*, 221 U.S. 1, 47-48 (1911).

ern cases involving claims of unlawful exclusion by IBM,¹⁷ Intel,¹⁸ Microsoft,¹⁹ and Xerox.²⁰

This Part discusses the special challenges that technological dynamism poses for antitrust analysis in these and other matters. It describes the perceived limitations of the antitrust system to deal effectively with these challenges and considers how well antitrust institutions have responded to the major critiques of competition policy in sectors undergoing rapid technological change.

A. *Special Challenges to the Antitrust System*

Antitrust disputes in high-tech industries often present acutely difficult variants of core antitrust issues and pose analytical challenges that put extreme pressure at the joints of existing antitrust rules. Rapid change in products and processes can make it very hard for courts and enforcement agencies to assess the competitive significance of individual firms. For example, the exercise of defining relevant markets and measuring market power can be especially difficult when an agency or court must assess the relative weight of an incumbent technology as compared to that of a new technology that threatens to displace it.²¹ If emerging rivals to the existing technology are understated, the competitive importance of the existing technology is exaggerated. If the importance of an emerging technology is overestimated, one slights the durability and amount of the incumbent's power.

The rapid rate of change also accentuates the lag time between the emergence of new industrial phenomena and the time it takes the antitrust system to comprehend their significance and to modify existing rules to accommodate them. The inadequacies of existing mechanisms for adjudicating high-tech disputes are intensified by the accelerated rate of change and the greater unpredictability about the course of future competition. Even when expert decision makers move at their fastest pace, traditional antitrust tribunals find it difficult to account for industry changes that take place as a proceeding unfolds and to make accurate predictions about how specific remedies might influence future competition.

¹⁷ See *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1383 (9th Cir. 1983); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 448 F. Supp. 228, 231 (N.D. Cal. 1978), *aff'd sub nom.* *Memo-rex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980) (per curiam).

¹⁸ See *In re Intel Corp.*, No. 9341, 2010 WL 4542454 (F.T.C. Nov. 2, 2010).

¹⁹ See *United States v. Microsoft Corp.*, 253 F.3d 34, 64-66 (D.C. Cir. 2001) (en banc) (per curiam).

²⁰ See *In re Xerox Corp.*, 86 F.T.C. 364, ¶ 14 (1975).

²¹ In a case challenging the formation and operation of a patent pool, antitrust liability depended on whether the relevant market consisted of all refinery capacity or only capacity based on new catalytic cracking technology. See *Standard Oil Co. v. United States*, 283 U.S. 163, 176-79 (1931).

B. *Critiques of the Performance of the U.S. Antitrust System*

Commentators have presented three major critiques about the capacity of the U.S. antitrust system to respond to the analytical challenges discussed above.²² The first relates to a knowledge problem. This criticism asserts that courts and antitrust enforcement agencies have a dangerously imperfect understanding of innovation in technologically dynamic sectors.²³ The knowledge critique has two dimensions—assertions that the antitrust system has (1) a limited capacity to interpret how innovation has shaped the industry status quo and (2) an even weaker ability to make accurate forecasts about the path and commercial significance of innovation in the future.²⁴ These knowledge inadequacies undermine the diagnosis of observed behavior and frustrate the design of remedies that will improve economic performance.²⁵

The second asserted policy deficit is a perspective problem. Commentators argue that a single-minded focus on antitrust enforcement as the perceived solution to apparent competitive bottlenecks fails to account for decisions by other institutions that shape behavior in technology-driven sectors.²⁶ This cramped perspective leads antitrust officials to treat competition law and the enforcement of competition statutes as superior tools to handle problems that arise from other government policy failures.

The third critique focuses on the speed of decision making in antitrust cases. This criticism states that the prosecution of antitrust cases operates too slowly to redress even manifestly harmful conduct.²⁷ The time needed to investigate possible violations and litigate cases puts agencies in a position to address industry conditions and competitive problems that no longer ex-

²² See William Kovacic, *Antitrust After Microsoft: Upgrading Public Competition Policy Institutions for the New Economy*, 32 UWLA L. REV. 51, 54-56 (2001) (reviewing criticisms of antitrust law's application to high-technology industries and outlining the characteristics of a regulatory regime that would address these criticisms).

²³ This critique figured prominently in commentary about the DOJ case against Microsoft. See RICHARD B. MCKENZIE, *TRUST ON TRIAL: HOW THE MICROSOFT CASE IS REFRAMING THE RULES OF COMPETITION* 1-47 (2000).

²⁴ *Id.* at 217-29.

²⁵ *Id.* at 226.

²⁶ This was an important theme of the proceedings of the Temporary National Economic Committee in the late 1930s and early 1940s, which looked beyond mere enforcement of antitrust laws to remedy overconcentration of economic power. See TEMP. NAT'L ECON. COMM., *FINAL REPORT AND RECOMMENDATIONS*, S. DOC. NO. 77-35, at 35-37 (1st Sess. 1941) (presenting recommendations for reform of the U.S. patent system).

²⁷ See William E. Kovacic, *The Digital Broadband Migration and the Federal Trade Commission: Building the Competition and Consumer Protection Agency of the Future*, 8 J. ON TELECOMM. & HIGH TECH. L. 1, 15 (2010).

ist. By this view, the antitrust system peddles furiously on a bicycle to catch up with industry developments that speed ahead in a Formula One racer.

C. *Modern Progress in Antitrust Policymaking*

The critiques set out above have inspired important adjustments in U.S. antitrust policy. In recent decades, the DOJ and the FTC have made genuine progress towards improving their institutional capacity to address special challenges posed by technological dynamism. One important adjustment involves the concern that the antitrust process suffers from tunnel vision and takes an enforcement-centric approach to addressing high-technology competition problems. The U.S. enforcement agencies have adopted a broader, multidisciplinary perspective for addressing questions that arise at the intersection of the antitrust and intellectual property systems. The FTC took a large step in this direction in the mid-1990s by convening hearings on competition policy and innovation in the global economy.²⁸ In 2002, the DOJ, the FTC, and the U.S. Patent and Trademark Office held hearings on competition policy and the patent system.²⁹ Each set of proceedings and the reports that followed them recognized that problems commonly observed in the competition policy realm have roots in the rights-granting process of intellectual property law.³⁰ Hence, the prosecution of antitrust cases—for example, the application of monopolization concepts to expand access to intellectual property rights—may only be a crude, second-rate solution to cure weaknesses that reside in the rights-granting process.

U.S. enforcement agencies have also shown a greater awareness of the need to strengthen the base of knowledge that supports competition analysis in high-technology sectors. This awareness has led to several enhancements in institutional capability. One such measure taken by enforcement agencies is the recruitment of more professionals with expertise in disciplines related to high technology. For example, until the early part of the 2000s, Suzanne Michel was the FTC's only patent attorney. By reason of her mastery of the disciplines of antitrust law and patent law, she was the human equivalent of what antitrust lawyers call an essential facility. She was indispensable to the FTC's efforts to focus additional resources on issues, such as standard setting, which arise regularly in high-technology sectors. She was also instrumental in helping the agency design its public consultations on intellectual property issues and in preparing reports based upon those proceedings.

²⁸ See Susan DeSanti, Dir. of Policy Planning, Fed. Trade Comm'n, Selected Themes from the FTC's Hearings on Global and Innovation-Based Competition (March 7, 1996) (transcript available at <http://www.ftc.gov/speeches/other/speech37.shtm>).

²⁹ TO PROMOTE INNOVATION, *supra* note 14, at 3-4.

³⁰ See *id.* at 5.

Michel gently, but persistently, reminded FTC leadership that if the agency aspired to do great things involving high technology, it should recruit more high-technology specialists—especially patent lawyers. The agency proceeded to expand its complement of patent attorneys to roughly ten individuals. However, it is apparent that the maintenance of superior human capital in this area will require continuing attention. In 2011, Michel left the FTC to take a position in the private sector.³¹ As a staff attorney and manager during the prior fifteen years, no person surpassed her influence at the FTC in shaping the agency's competition programs involving high technology. Michel's departure is a sobering reminder of how quality of staff and human talent can ebb and flow in ways that dramatically affect the capacity of an agency to perform well.

A final way in which federal antitrust agencies have improved the institutional foundations of antitrust policy is by providing guidance and stimulating public debate about their work in this field. The DOJ and the FTC issued guidelines on antitrust and intellectual property in 1995 and issued a major report on antitrust and intellectual property policy in 2007.³² In substance, these measures dramatically upgraded the analytical framework that the agencies use to analyze innovation and technology-related issues. As a matter of process, these initiatives involved extensive public consultations that enabled the agencies to expand their base of knowledge.

II. IMPROVEMENTS TO THE FEDERAL ANTITRUST ENFORCEMENT JOINT VENTURE

The programs discussed immediately above have helped strengthen the capacity of the U.S. antitrust system to address issues involving high technology.³³ However, areas remain that require substantial improvement. The U.S. antitrust community tends to look at the framework of institutions as a secondary consideration, and thus, settles for a passing grade in institutional arrangements when a truly superior mark is attainable. When a student asks, "Can I pass the course with a C minus?" the answer is "Yes." Yet nobody should be pleased with attaining the minimum satisfactory result. Today, the U.S. institutional framework performs well enough to pass the course, but not to achieve the highest grade. Given the vast economic stakes involved in competition policy's ability to resolve innovation and high-technology issues correctly, there is a critical need to perform better.

³¹ Sarah Forden & Jeff Bliss, *Google Says It Hires FTC Intellectual Property Expert Michel*, BLOOMBERG (Aug. 3, 2011, 12:58 AM), <http://www.bloomberg.com/news/2011-08-02/google-hires-federal-trade-commission-intellectual-property-expert-michel.html>.

³² ANTITRUST ENFORCEMENT, *supra* note 14; ANTITRUST GUIDELINES, *supra* note 14.

³³ See *supra* Part I.C.

This Part considers institutional enhancements that would place the U.S. system on the path to receiving an A. First, this Part reviews the tensions that limit the ability of the two federal antitrust agencies, the DOJ and the FTC, to cooperate effectively in formulating national policy. It then sets out specific measures to increase the integration of policymaking between these two agencies.

A. *The Federal Enforcement Joint Venture: Inherent Tensions*

The delivery of federal antitrust policy is essentially a joint venture between two government institutions: the DOJ and the FTC.³⁴ The DOJ and the FTC occupy substantially the same policy domain. Owing to distinctive mandates and capabilities, both agencies are substitutes and complements. Although the multiplicity of regulatory authority happens by accident in a number of areas of economic regulation, the substitution possibilities between the DOJ and the FTC were a deliberate legislative policy choice.³⁵ This policy choice was most evident in the adoption of the Clayton Act in 1914, through which Congress placed both agencies in essentially the same policy domain.³⁶

These agencies also have capabilities that make them policy complements. Sections 6 and 9 of the Federal Trade Commission Act ("FTC Act") give the FTC information-gathering and reporting powers that the DOJ lacks.³⁷ Section 7 of the FTC Act allows the FTC to serve as a master in chancery and to advise federal courts on the design of remedies in antitrust cases.³⁸ Since 1914, Section 7 has only been used once, yet it provides a platform for the FTC to improve the quality of remedies in antitrust cases initiated by both federal agencies.³⁹

The quality of the U.S. system depends on the quality of policy integration and team production between the DOJ and the FTC. How well does

³⁴ CRANE, *supra* note 15, at 27.

³⁵ Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 88-89, 92 (2003).

³⁶ Section 7 of the Clayton Act, 15 U.S.C. § 18 (2006), prohibits any merger "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Section 15 of the Clayton Act, 15 U.S.C. § 25, empowers the DOJ and Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), empowers the FTC to seek a court order enjoining any merger that would violate Section 7. In addition, the FTC may seek a cease and desist order in an administrative proceeding under Section 11 of the Clayton Act, 15 U.S.C. § 21. *See* FED. TRADE COMM'N, OFFICE OF THE GEN. COUNSEL, A BRIEF OVERVIEW OF THE FEDERAL TRADE COMMISSION'S INVESTIGATION AND LAW ENFORCEMENT AUTHORITY (2008), available at <http://www.ftc.gov/ogc/brfovrwv.shtm>.

³⁷ 15 U.S.C. §§ 46, 49.

³⁸ 15 U.S.C. § 47.

³⁹ *See United States v. Corn Prods. Ref. Co.*, 234 F. 964, 967, 1018 (S.D.N.Y. 1916).

the federal antitrust joint venture function today? It is not a suitable answer to say that, at any moment, one of the venture's participants is performing well. Nor is it entirely encouraging to observe that, despite an underlying culture of suspicion and acrimony, these agencies tend to muddle through when it matters.

In many commercial contexts, the joining of rivals in a common venture is often beset by centrifugal forces that threaten to diminish the effectiveness of the collaboration, if not destroy it. Overcoming the inherent tensions associated with a joint venture of rivals is the key to the effectiveness of that venture. Joint production between government agencies features many of the problems that arise when rival business enterprises collaborate. The DOJ and the FTC have occasionally overcome these problems with great success. An illustration of one of these successes is the 2010 Horizontal Merger Guidelines ("HMG"),⁴⁰ although the attainment of this collaboration may have resulted from special circumstances that are not easy to replicate. The two principal authors of the HMG, Carl Shapiro and Joseph Farrell, were colleagues and co-authors at the University of California at Berkeley before coming to the DOJ and the FTC, respectively, to serve as chief economists.⁴¹ Both Shapiro and Farrell came to Washington, D.C. with the principal aim of preparing the new merger guidelines.⁴² Their partnership was vital to overcoming the general reluctance of the DOJ and the FTC to participate in collaborative projects and realize a common cause.

Shapiro and Farrell convinced their respective agencies that the existing federal guidelines had become stale because the last major overhaul of the federal guidelines had taken place in 1992.⁴³ Not only did the 1992 guidelines give an increasingly imperfect view of the agencies' current practice, they suffered in comparison to more recent offerings by other competition authorities.⁴⁴ Consequently, in 2006, the DOJ and the FTC issued commentaries that described the agencies' approach to merger analysis and identified areas where current practice departed from the bare terms

⁴⁰ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010).

⁴¹ Curriculum Vitae of Joseph Farrell 1, 3-9 (2012), <http://emlab.berkeley.edu/users/farrell/cv.pdf>; Curriculum Vitae of Carl Shapiro 1, 2-7 (2011), <http://faculty.haas.berkeley.edu/shapiro/shapirocv.pdf>.

⁴² This observation is based on the author's personal discussions with Professors Farrell and Shapiro at the time of their arrival at the FTC and the DOJ, respectively, in 2009. Cf. Serge Moresi, *The Use of Upward Price Pressure Indices in Merger Analysis*, THE ANTITRUST SOURCE (Am. Bar Ass'n, Chicago, Ill.), Feb. 2010, at 1, 1 (discussing how an article by Professors Farrell and Shapiro might influence potential changes in the upcoming HMG).

⁴³ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1997). In 1997, the two agencies amended the original 1992 guidelines to adjust the treatment of efficiencies. *Id.* at 2.

⁴⁴ Commission Notice 31/03, Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 5 (EC).

of the 1992 guidelines.⁴⁵ Even with this clarification, the agencies realized that they must upgrade their product or lose international influence in a competitive global market for policy analysis.

The 2010 HMG drafting effort is the exception, rather than the norm, for interagency coordination. The DOJ and the FTC generally cooperate only as needed. They do not approach their interaction with a willing, enthusiastic, and whole-hearted motivation to recognize complementarities and realize them in practice. The U.S. antitrust community takes the absence of visible conflict between the two agencies as a sign of effective integration; if they are not fighting in the streets, they are believed to be working well together.⁴⁶ Furthermore, external observers credulously accept the assurances of the FTC and DOJ leadership before congressional committees that they are working effectively together.⁴⁷

These public compatibility rituals mask the losses to the U.S. system that result from inadequate integration. The U.S. antitrust joint venture operates far inside the production possibilities frontier. It does not warrant a failing grade. It gets by with a C- to a C+, yet what sensible jurisdiction would be satisfied with this level of performance? The U.S. agencies need to work much harder at integration to receive an A. The following section provides suggestions on how to achieve that grade.

B. *Six Paths to Improving Performance*

Beginning with Ronald Coase's article *The Nature of the Firm*,⁴⁸ economists have devoted extensive attention as to why firms use contracts or ownership to obtain needed inputs or perform other activities.⁴⁹ Among other considerations, scholars have focused on the costs associated with reliance on what Oliver Williamson has termed "markets and hierar-

⁴⁵ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006).

⁴⁶ This is based upon the author's conversations with members of the United States antitrust bar before and during his tenure with the Federal Trade Commission.

⁴⁷ See, e.g., *Federal Trade Commission's Bureau of Competition and the U.S. Department of Justice's Antitrust Division: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 19-22, 34 (2010) (statements of Christine A. Varney, Assistant Att'y Gen. of Antitrust, and Jon Liebowitz, Chairman, Fed. Trade Comm'n) (describing successful joint initiatives between the FTC and the DOJ).

⁴⁸ R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

⁴⁹ See *id.* at 390-91 (discussing the costs of contracting for every piece of work and the value of establishing a firm framework to reduce these costs); see also Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 *GEO. MASON L. REV.* 1, 15-18 (2003) (discussing the importance of transaction cost economics). See generally OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985) (explaining how firms utilize contracts through a transactions-cost economics framework).

chies”—contracting with outside parties or performing functions subject to internal oversight by the firm’s managers.⁵⁰

A similar framework helps illuminate the ways that the federal anti-trust agencies might achieve deeper policymaking integration. There are at least three ways to integrate federal antitrust policy by ownership. One is to merge the antitrust functions of the FTC into the DOJ. Such a move might involve a parallel effort to provide the FTC with enlarged consumer protection functions. A second path is to combine the entire federal civil enforcement portfolio within the FTC and leave the DOJ with responsibility for criminal matters only. A third way is to build selected civil enforcement activities, such as merger control, within the FTC and to permit the agencies to continue to share authority for other matters.

This Article sidesteps the question of whether integration by ownership is a desirable way to improve policy integration in the United States. In the late 1990s, I wrote that DOJ was the appropriate survivor if there was to be a single U.S. antitrust agency.⁵¹ In the past fifteen years, I have changed my assessment. The FTC improved its performance by realizing more of the possibilities inherent in its original charter. My experiences in working with DOJ since 2001 have also left me with a somewhat diminished view of its own capabilities and performance. I am at a loss to say what the ideal federal structure would be. Possibilities include continuation of the status quo, the consolidation of all civil enforcement authority in the FTC, or the unification of all enforcement power in the DOJ.

Even if I had a clear vision of the ideal structure for federal enforcement, I do not immediately foresee the type of exogenous shock that would cause Congress to overcome the hard-wired features of the legislative process—a process through which legislators derive income streams from companies subject to the jurisdiction of the government agencies they oversee.⁵² It would take a cataclysm in the form of a spectacular regulatory smash-up to inspire a legislative reconsideration of the distribution of federal antitrust authority. Such an upheaval is not impossible. It was interesting to see that President Obama expressed an interest in simplifying the federal government’s organization chart in his State of the Union addresses for 2011 and 2012.⁵³ The President singled out overlapping grants of au-

⁵⁰ OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 252-53 (1975).

⁵¹ William E. Kovacic, *Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?*, 41 *ANTITRUST BULL.* 505, 540 (1996).

⁵² See *infra* Part II.B.1.

⁵³ President Barack Obama, State of the Union Address (Jan. 24, 2012), in 157 *CONG. REC.* H151 (daily ed. Jan. 24, 2012), available at <http://www.gpo.gov/fdsys/pkg/CREC-2012-01-24/pdf/CREC-2012-01-24-house.pdf>; President Barack Obama, State of the Union Address (Jan. 25, 2011), in 157 *CONG. REC.* H461 (daily ed. Jan. 25, 2011), available at <http://www.gpo.gov/fdsys/pkg/CREC-2011-01-25/pdf/CREC-2011-01-25-pt1-PgH457-6.pdf>.

thority as a useful place to begin a rationalization.⁵⁴ Perhaps the Obama administration will never get around to this endeavor. But who can be confident that the issue of the rationality of shared federal enforcement is a mere abstraction? To say that an upheaval in the status quo is unlikely is not to say that it is impossible, much less to deny that antitrust falls directly within the category of duplicate competencies whose wisdom is not entirely self-evident.

The FTC should be especially attentive to possibilities for structural adjustments. On a number of occasions in its history, the FTC has spun-off functions to other institutions. In the 1930s, the FTC served as an incubator for the Securities and Exchange Commission.⁵⁵ More recently, the FTC has performed a similar role in the creation of the Consumer Financial Protection Bureau (“CFPB”).⁵⁶ Close examination of the FTC reveals a number of seams that could be taken apart to detach some policy functions from others. The agency is a policy conglomerate that combines competition law and consumer protection. As a matter of formal organization and operations, there is relatively little internal integration of these functions within the FTC. A decision to move the agency’s competition portfolio to the DOJ would not involve a wrenching restructuring of the FTC. Additionally, the FTC’s work in data protection and privacy has assumed a distinctive identity, making this function a candidate for a future offshoot that could establish a stand-alone national privacy agency. As there is no inevitable permanence to the FTC’s existing configuration, the possibility of a future redistribution of authority ought to be a continuing matter of concern for the agency.

Suppose that a structural realignment of the federal antitrust system—greater policy integration through ownership—will be politically infeasible for some time to come. There remain valuable paths to better policy development by “contract”—a strengthening of cooperation by which the DOJ and the FTC realize complementarities and improve the performance of the national antitrust joint venture. The following discussion sets out six ways that these agencies could improve cooperation without a structural adjustment.

⁵⁴ State of the Union Address (2011), *supra* note 53, at H461 (identifying overlapping government agency responsibilities in international trade, housing policy, and the regulation of salmon fishing).

⁵⁵ Marc Winerman, *The FTC at Ninety: History Through Headlines*, 72 ANTITRUST L.J. 871, 880 (2005) (reviewing the formation of SEC and debates over FTC’s future role in securities regulation).

⁵⁶ The Dodd-Frank Act transferred most of the FTC’s rulemaking authority for financial services to the new CFPB. Dodd-Frank Wall Street Reform and Consumer Protection Act, Title X, Pub. L. No. 111-203, 124 Stat. 1376, 1955 (2010) (codified in scattered sections of 12 U.S.C.). On the establishment of the new CFPB, see John E. Villafranco & Kristin A. McPartland, *New Agency, New Authority: What You Need to Know About the Consumer Financial Protection Bureau*, THE ANTITRUST SOURCE (Am. Bar Ass’n, Chicago, Ill.), Dec. 2010, at 5-6.

1. Clearance

Since the late 1940s, “clearance” is the mechanism that the DOJ and the FTC have used to decide which agency will handle specific matters.⁵⁷ The functioning of the existing clearance system entails significant avoidable costs in the routine disposition of antitrust matters, three of which are discussed below. The first cost involves the failure of the two agencies to concentrate experience in ways that build and apply capability. My views about the appropriate allocation of activities between the two agencies are shaped by my experience as an academic and practitioner in studying the aerospace sector. The successful aircraft programs of producers such as Boeing, Northrop Grumman, Lockheed Martin, and McDonnell Douglas exploited learning curves within and across programs. For example, a McDonnell Douglas engineer or assembly worker who joined the company in the late 1940s would have worked on roughly ten major aircraft projects by the end of a career. The successful companies build into the next program what they learn from previous programs. Often, the great commercial and military aircraft are the product of cumulative learning.

Modern experience with the DOJ-FTC clearance agreement demonstrates that, in too many instances, these agencies fail to integrate the lessons they have learned from prior experiences. The agencies’ disputes over clearance for matters involving Google provide an example. Which agency should receive custody of Google? Oversight of Google is a major prize in the antitrust business, and agencies in large part make their reputations by handling highly visible matters.⁵⁸ If an antitrust agency reviews a merger involving the fur-lined bathtub sector, nobody cares. The *Wall Street Journal* will not put the story on page B1, much less A1.

How have the DOJ and the FTC resolved the Google oversight disputes? Both desire to handle antitrust matters involving the company, and both have claims based on relevant expertise. To resolve the contest for custody, the agencies have subdivided the experience. By agreement between the agencies, the DOJ reviews mergers involving Google, and the FTC deals with non-merger questions.⁵⁹ This is a bizarre allocation princi-

⁵⁷ ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 132-33 (2007).

⁵⁸ William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 919 (2009).

⁵⁹ For example, the DOJ reviewed Google’s acquisitions of ITA Software and Motorola Mobility. See Press Release, U.S. Dep’t of Justice, Justice Department Requires Google Inc. to Develop and License Travel Software in Order to Proceed with Its Acquisition of ITA Software Inc. (Apr. 8, 2011), <http://www.justice.gov/opa/pr/2011/April/11-at-445.html>; Press Release, U.S. Dep’t of Justice, Statement of the Department of Justice’s Antitrust Division on Its Decision to Close Its Investigations of Google Inc.’s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd. (Feb. 13, 2012), <http://www.justice.gov/opa/pr/2012/February/12-at-210.html>. Meanwhile, the FTC is allegedly investi-

ple. Markets involving search and related services are extraordinarily complex and dynamic. To understand developments in this sector is an enormous challenge for any antitrust enforcement body. Ideally, the same team of case handlers would address all matters involving Google because they would proceed down the learning curve faster. Only a jurisdiction committed to inferior analysis would subdivide activity in a vitally important and technologically dynamic sector in this way. Nor is Google the only unfortunate example. Since the early 1990s, the agencies have allocated matters involving the defense sector without serious regard to the importance of cumulative learning.⁶⁰

A second difficulty with the DOJ-FTC clearance arrangement is that it creates temptations for the agencies to engage in manipulative conduct designed to appropriate specific matters. The principal currency for obtaining clearance is experience with the affected sector. The most important form of experience usually consists of the most recent previous inquiry involving the industry. Hence, to build its base of experience, an agency could be tempted to issue a broader second request in a merger or to conduct a wider investigation in a non-merger matter. Additionally, an agency might examine more products or ask for more information than it would otherwise. These forms of more expansive inquiries help extend the experience footprint that becomes the basis for the next clearance contest.

Clearance-related disagreements create a continuing source of institutional friction. Not every clearance matter involves hand-to-hand combat. Most are resolved without dispute. Yet the occasional instances of conflict—whether those conflicts occur once a month or every two months—deplete the account of goodwill between the agencies. Perceived instances of overreaching often confirm deep-seated suspicions that the other agency is deceitful and engage top leadership in debates that erode trust between the agencies.

A third cost of the existing clearance process is time. For mergers, interagency quarrels can consume nearly all of the initial 30-day waiting pe-

gating Google's activities relating to internet searching. See Jeff Bliss & Sara Forden, *Google Said to Be Possible Target of Antitrust Probe by FTC*, BLOOMBERG (Apr. 5, 2011), <http://www.bloomberg.com/news/2011-04-05/google-said-to-be-possible-target-of-antitrust-probe-after-ita-acquisition.html>.

⁶⁰ For example, the FTC reviewed combinations of airframe producers, such as Boeing and McDonnell Douglas, and DOJ reviewed combinations of producers of tactical missiles, such as Raytheon's merger with Hughes Aircraft Company. Press Release, U.S. Dep't of Justice, Justice Dep't Requires Raytheon to Sell Key Electronics Business in Order to Go Forward with Its Hughes Aircraft Deal (Oct. 2, 1997), <http://www.justice.gov/opa/pr/1997/October97/415at.html>; Press Release, Fed. Trade Comm'n, Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation (1997), <http://www.ftc.gov/opa/1997/07/boeingsta.shtm>; see also William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 444-47 (2003).

riod.⁶¹ Several times each year, outside counsel representing merging parties will receive a phone call from an agency official offering the following choice: the parties can pull their papers and re-file the premerger notification or the agency will issue a boilerplate second request before the initial waiting period runs out.⁶² Clients can scarcely believe that, in a country with unequalled experience in merger review, they must “pull and re-file” in order to permit the agencies to accomplish what they should have done during the initial waiting period.

The agencies tried to retool the clearance process in 2002.⁶³ They devised a more rational, transparent allocation of sectors and a more sensible formula for assigning matters in sectors undergoing rapid change.⁶⁴ The endeavor foundered after hitting the rocks of legislative parochialism. I blame myself for failing to anticipate the problems that should have occurred to me from years of studying the interaction between Congress and the antitrust agencies. On the morning that the DOJ and the FTC announced their proposed clearance reforms, I explained the measures to staff members of the Senate Commerce Committee, whose chair was Senator Ernest Hollings (D-S.C.). Reflecting the views of Senator Hollings, the Commerce Committee staff expressed intense displeasure over the FTC’s decision to give the DOJ responsibility for matters involving the entertainment and media sectors as part of the reforms.

This meeting exposed me to the Committee staff’s unfiltered, incandescent disapproval—they pulled no punches in telling me what they thought. Their main objection went essentially like this: “The members of the Committee receive campaign contributions from the industries overseen by agencies subject to the Committee’s oversight. For companies in a sector to feel a need to contribute to the Committee’s members, it is not necessary for the FTC to look at all antitrust matters involving that sector. The FTC need only do enough investigations to seem like a player.” The staff also emphasized the “respect” that industry participants pay Committee leadership. Among other practices, this “respect” may take the form of visits by celebrity performers employed by media companies and visits by top managers who inform Committee members about new product developments.

It became apparent that the Committee members regarded decisions about agency oversight as their prerogative. As one member pointed out to me: “Those are not your industries. They are our industries. What the FTC did by allocating the media and entertainment sectors to the DOJ is the equivalent of a company informing a shareholder that it has extinguished the shareholder’s stock and eliminated the income stream that goes with it.”

⁶¹ TIMOTHY J. MURIS, COMMENTS ON THE FTC-DOJ CLEARANCE PROCESS BEFORE THE ANTITRUST MODERNIZATION COMMISSION 5-6 (2005).

⁶² *Id.* at 6.

⁶³ ANTITRUST MODERNIZATION COMM’N, *supra* note 57, at 130; MURIS, *supra* note 61, at 8-9.

⁶⁴ MURIS, *supra* note 61, at 9-10.

The Committee used a real property analogy by explaining: “This is a form of community property. The FTC tried to alienate the property without getting our signature on the deed too.”

The failure of the clearance reforms in 2002 indicates that future adjustments will require a three-way negotiation among the agencies and Congress. The committees are unlikely to dispense with something of value without getting something equivalent in return. It is not evident what types of trades will suffice to make that happen. What is clear are the costs of the status quo—if the existing allocation mechanism stays in place, clearance will continue to result in a subdivision of experience and the dilution of knowledge that would improve the analysis of developments in high-technology sectors.

2. Pooling Experience

The issuance of the 2010 HMG presented an opportunity to set the process of federal merger review on a better footing. Both federal agencies have several teams of attorneys who specialize in merger control. Regular, extensive pooling of experience among these groups has great promise to strengthen the performance of the federal joint venture. Furthermore, close collaboration among these teams would help improve consistency in the application of the new guidelines and increase learning based on accumulated experience.

One method of pooling experience would be the formation of a working group that joins the individual merger groups over time to discuss the implementation of the new guidelines. This mechanism would accelerate the movement of the two agencies down the learning curve. This level of integration between the DOJ and the FTC is not currently occurring. There are occasional, sporadic contacts, but no systematic exchange of knowledge and experience. With extended contacts, each agency’s knowledge of specific sectors and technology-driven innovation would likely improve. The agencies would be in a better position to address issues concerning liability and the design of remedies—for example, the tricky questions that come up regularly in remedies that require the licensing of intellectual property.

Another instrument would be the creation of formal interagency teams to investigate matters involving firms or sectors both agencies desire to oversee. For example, one could imagine the establishment of a DOJ-FTC Google team that would conduct merger and non-merger inquiries. The team could then make recommendations to the agency that would decide individual matters. Under the terms of the existing DOJ-FTC agreement on Google, the team would make merger recommendations to the DOJ and non-merger recommendations to the FTC.⁶⁵ By this measure, case handlers

⁶⁵ See *supra* note 59 and accompanying text.

could concentrate their efforts on learning about Google and other firms involved in search engine development and related services.

A further form of integration would consist of expanded staff exchanges between the agencies. Currently, there is no process by which the DOJ and the FTC routinely exchange staff or managers. A formal staff exchange program might place ten or so staff members of one agency in the other agency at any one time. This would allow for further communication between the two agencies and would be a force for increased collaboration.

3. Section 5 of the FTC Act

Discussions about the use of Section 5 of the FTC Act to develop anti-trust conduct standards focus on deliberations and policymaking within the FTC.⁶⁶ This is an excessively narrow perspective. To define the role of Section 5 in the U.S. antitrust system will require a conversation between the FTC and the DOJ. Such a discussion should involve joint consideration of the respective roles of the Sherman Act⁶⁷ and Section 5 of the FTC Act. The federal antitrust joint venture needs to develop a common understanding of the types of matters that are best resolved through the application of Section 5 in the FTC's administrative process. The formulation of coherent U.S. competition policy standards, and the realization of complementarities between the two agencies, requires joint consultations and not unilateral policymaking.

Working as a team, the federal agencies could discuss how antitrust doctrine ought to evolve over the coming decade and could analyze the selection of cases that would serve to advance these doctrinal objectives. The DOJ tends to regard Section 5 as an irritant or a threat—a mechanism that enables the FTC to guide the development of doctrine in a manner that gives the DOJ a subordinate policymaking role. Instead, the DOJ should approach Section 5 as a potentially useful element in the full portfolio of instruments that the federal antitrust laws make available to the two agencies. An interagency conversation about the integration of policymaking under the Clayton, FTC, and Sherman Acts has not taken place. To conduct interagency discussions on this topic would require the agencies to address fundamental questions about how the federal antitrust joint venture ought to operate. The agencies would have to identify complementarities (such as how the useful application of the FTC Act could supplement the prosecution of cases in federal courts under the Sherman and Clayton Acts) and consider how to realize these possibilities through deeper integration.

⁶⁶ See, e.g., Amy Marshak, Note, *The Federal Trade Commission on the Frontier: Suggestions for the Use of Section 5*, 86 N.Y.U. L. REV. 1121, 1137-38 (2011).

⁶⁷ 15 U.S.C. §§ 1-7 (2006).

4. Adjudication

From time to time foreign observers ask whether the United States ought to establish a specialized competition tribunal. The answer is that the United States already has such a body—the FTC. This is another area in which the federal antitrust agencies should engage in common policymaking and consider what types of matters are best suited for decision through the FTC’s administrative process. Are there matters for which the DOJ might make referrals to the FTC on the ground that administrative elaboration presents the best means for doctrinal development in difficult, unsettled areas of antitrust law? For example, administrative adjudication could be a superior vehicle for developing norms governing the use of loyalty discounts by dominant firms. An FTC administrative trial might be a superior forum in which to frame presumptions for minimum resale price maintenance based on the criteria suggested by the Supreme Court majority in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*⁶⁸ For the purposes of building coherent national competition policy and improving the operation of the federal antitrust joint venture, these and related possibilities ought to be explored through the process of joint consultation and discussion.

5. The FTC as the Remedies Agency

In adopting the FTC Act in 1914, Congress created the possibility that the FTC would become the federal government’s main repository of expertise on antitrust remedies.⁶⁹ Section 7 of the FTC Act allows the agency to serve as a special master to assist the federal courts in formulating remedies.⁷⁰ Through Sections 6 and 9 of the FTC Act, Congress also gave the FTC distinctive powers to collect information—powers that could be applied to develop a better understanding of developments in high-technology sectors, to design superior remedies, and to evaluate the consequences of past decrees.⁷¹

To realize this vision, the federal agencies would have to intensify their cooperation and engage in a routine process of consultation concerning what they have learned in the course of implementing remedies. This would be a substantial improvement beyond the generally sporadic contacts

⁶⁸ 551 U.S. 877 (2007). In *Leegin*, the Court held that the rule of reason governed the legality of minimum resale price maintenance (“RPM”). *Id.* at 900. The Court cautioned that it was not endorsing a rule of per se legality for minimum RPM, and it provided criteria to help identify when RPM had net anticompetitive effects. *See id.* at 885-86, 898.

⁶⁹ *See* William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285, 1317-18 (1999); *supra* notes 37-39 and accompanying text.

⁷⁰ *See supra* notes 38-39 and accompanying text.

⁷¹ *See supra* note 37 and accompanying text.

that characterize the existing relationship. A sustained joint effort—such as a common working group that focused on remedies—would be the foundation for improved policy making. Topics for consideration would include a study of what the agencies have learned by applying remedial terms that mandate access to networks, the licensing of intellectual property, and the operation of other controls on behavior. The DOJ's recent interest in relying more heavily on behavioral remedies demonstrates the value of pooling agency experience to provide case handlers with a better basis for selecting remedial solutions in the future.⁷²

6. The Common Research Agenda

The federal agencies can improve their performance by devising a common research program that better informs the agencies' policy judgments for high-technology industries. One focal point is the evaluation of past enforcement practice. One of the first projects I worked on as a junior attorney in the Planning Office of the FTC's Bureau of Competition was initiated during Mike Pertschuk's chairmanship and was a program that assessed the effects of past FTC cases. I acknowledge all of Professor Dennis Carlton's cautions about the examination of individual enforcement events as the basis for formulating larger views about what antitrust agencies ought to do.⁷³ Nonetheless, as part of a larger portfolio of evaluation efforts, individual ex post evaluations can be informative.

In the late 1970s and early 1980s, the FTC gave young academics contracts for \$10,000 to study specific cases.⁷⁴ One of these academics was Professor Tim Bresnahan, who was at that time a junior assistant professor in the Department of Economics at Stanford University.⁷⁵ Bresnahan studied the 1975 settlement of the FTC's monopolization case against Xerox.⁷⁶ He examined the FTC's internal records and publicly available data to assess the effects of the settlement.⁷⁷ A distillation of the results of his study was published in the *American Economic Review* in 1985.⁷⁸ Bresnahan's

⁷² See Christine Varney, *Division Update Spring 2011*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/atr/public/division-update/2011/aag-message.html> (last visited on June 24, 2012).

⁷³ Dennis W. Carlton, *The Need to Measure the Effect of Merger Policy and How to Do It* 3 (Econ. Analysis Grp., U.S. Dep't of Justice, Discussion Paper No. 07-15, 2007), <http://www.justice.gov/atr/public/eag/228687.pdf>.

⁷⁴ William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503, 524-25 (2006) [hereinafter *Ex Post Evaluations*].

⁷⁵ *Id.* at 526.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Timothy F. Bresnahan, *Post-Entry Competition in the Plain Paper Copier Market*, 75 AM. ECON. REV. 15 (1985).

research shed useful light on the FTC's theory of the case and its use of mandatory patent licensing to settle the case.⁷⁹

One can envision a common program through which the two agencies sit down at the beginning of the year and ask: "What should our research agenda be in the year ahead? How can we build sectoral expertise and improve our institutional memory? Can we create better partnerships with external research bodies, such as universities and think tanks? Can we put more and better data into the public domain to stimulate debate on matters such as patent policy? Can we engage in a better advocacy program to target problems we have identified in the course of investigations and litigation?"

In every budget cycle, the agencies can ascertain a well-identified increment for policy research and development ("R&D"). Superior work in R&D-intensive sectors requires that the agencies have the equivalent of their own R&D program to build knowledge. The common R&D investment could yield a better understanding of technologically dynamic sectors and a greater ability to make better use of the agencies' law enforcement and non-enforcement policy tools.

Consider an example involving the baby food industry that demonstrates how a better understanding of past experience can prove useful in policymaking. This example does not involve what is considered to be a high-technology sector, but it underscores the value of a strong institutional memory. In the late 1990s, H.J. Heinz Company sought to acquire Beech-Nut Nutrition Corporation, and the FTC succeeded in blocking the transaction.⁸⁰ At the time, the leading firm in the baby food sector was Gerber Products Company, which held a market share of roughly 65 percent.⁸¹ In the late 1970s, the FTC considered the prosecution of a no-fault monopolization case under Section 5 of the FTC Act.⁸² In order to find a potential respondent for a Section 5 no-fault case, the FTC's Bureau of Competition screened various firms and identified several possible candidates: Campbell Soup Company (canned soup), Eastman Kodak Company (photographic film), and Gerber (baby food).⁸³

Gerber's perceived dominance extended back to the 1940s and seemed imperious to the competitive gestures of two long-standing also-rans: Beech-Nut and Heinz. The FTC's work on the Heinz-Beech-Nut merger in the late 1990s did not consider the work it had done on a possible no-fault

⁷⁹ *Ex Post Evaluations*, *supra* note 74, at 526-27.

⁸⁰ *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 711 (D.C. Cir. 2001). The author served as an advisor to the merging parties in this transaction.

⁸¹ *See FTC v. H.J. Heinz Co.*, 116 F. Supp. 2d 190, 192 (D.D.C. 2000), *rev'd*, 246 F.3d 708 (D.C. Cir. 2001).

⁸² Timothy J. Muris, Chairman, Fed. Trade Comm'n, *How History Informs Practice: Understanding the Development of Modern U.S. Competition Policy* 28 (Nov. 19, 2003), *available at* <http://www.ftc.gov/speeches/muris/murisfallaba.pdf>.

⁸³ *Id.* at 28 & n.66.

case involving baby food in the 1970s. In deciding whether to allow Heinz to buy Beech-Nut, the FTC might have treated its earlier inquiry as a factor favoring the transaction. Examination of the agency's earlier work would have shown that Gerber's market share had been stuck at around 65 percent for decades. The durability of Gerber's position might have lent credence to Heinz's argument that the acquisition of Beech-Nut did not pose competitive risks but instead created the possibility of new and stronger competition in the sector. Gerber's own documents, produced through third-party discovery during the FTC's challenge to the merger, indicated that Gerber regarded the combination of Heinz and Beech-Nut as posing a serious threat to its historical dominance.⁸⁴ Perhaps an examination of the 1970s no-fault inquiry would not have changed the FTC's mind. Yet the agency did not draw upon this earlier experience—which provided at least modest assurance that the merger was not a move from three firms to two—but instead promised to move the industry from a dominant firm and an ineffective fringe to a configuration of two significant rivals. Seen this way, the case was not a consolidation of three firms to two but rather a move from one firm to two.

This is but one instance in which better understanding of past agency experience would improve the analysis of a transaction's likely effects on competition. Greater efforts by both agencies to use past experience could yield a better idea of what to look for in a subsequent transaction and could provide a deeper awareness of the phenomena that have shaped the sector. Among other things, the agencies could attain better knowledge of how technological changes have affected specific sectors and a better understanding of what is likely to happen in the years ahead.

CONCLUSION

The U.S. competition policy community displays a remarkable complacency about the existing institutional framework. There may be signs that this could change. In his two most recent State of the Union addresses, President Obama expressed his interest in examining the organization of government and assessing the rationality of the existing distribution of policymaking tasks. He did not mention antitrust law, but his stated concerns about policymaking coherence and public administration are easily applied to the U.S. competition policy system. The attainment of superior analytical concepts is an important, but partial, solution to improvements in the treatment of high-technology industries. The strengthening of the institutional

⁸⁴ Jonathan B. Baker, *Efficiencies and High Concentration: Heinz Proposes to Acquire Beech-Nut* (2001), in *THE ANTITRUST REVOLUTION* 150, 164 (John E. Kwoka, Jr. & Lawrence J. White eds., 4th ed. 2004).

infrastructure for policy making and deeper integration within the federal antitrust joint venture deserves equal attention.