SYMPOSIUM: AT THE INTERSECTION OF ANTITRUST AND INTELLECTUAL PROPERTY LAW: LOOKING BOTH WAYS TO AVOID A COLLISION

ARTICLES

The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property

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I. INTRODUCTION

Nothing determines the success of a competition agency[1] more than its skill in setting a strategy for applying its authority. Good competition agencies, new and old, create effective, forward-looking mechanisms for

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establishing goals and devising means to accomplish them.[2] To do otherwise is to be swept along entirely by a current of external impulses, whether in the form of complaints from consumers, requests for action

intellectual property. Part III then reviews how, since the major reforms of the FTC in the late 1960s and early 1970s, the Commission has sought to improve the agency's performance by studying the past. Part IV uses the most recent FTC initiatives, discussed in Part II, along with the Commission's past experience with historically oriented research, discussed in Part III, to suggest prescriptions about how the FTC and other competition authorities can use history to develop effective competition policy strategies.

II. THE FTC AND INTELLECTUAL PROPERTY: A SURVEY OF RECENT ACTIVITY

Much of what the FTC does today takes place at the intersection of competition policy and intellectual property. This is not a recent devel-

and attempted monopolization, research and reports, and submission of amicus briefs dealing with issues of patent policy—demonstrate the application of the Commission's litigation and non-litigation policy instruments for making competition policy.

A. Merger Review

Since the 1990s, the FTC has examined a large number of mergers that posed issues involving the acquisition or application of IP rights.[8]

of branded pharmaceutical products and producers of generic drugs, agreements which ostensibly are designed to resolve patent disputes, but which the Commission has alleged involve payments by the branded drug producer to delay entry into the market of an equivalent generic product.[15] The FTC has also attacked what it has alleged to be agreements not to compete between brand-name and generic companies outside the context of patent litigation.[16]

C. Monopolization and Attempted Monopolization

In recent years, the FTC has pursued a number of matters that allege monopolization or attempted monopolization in connection with the exploitation of IP rights. These matters fall into two categories. In one group of cases, the FTC has obtained relief to forestall allegedly improper efforts by branded pharmaceutical producers who seek to manipulate the process created by the Hatch-Waxman Amendments (Hatch-Waxman Act) to the Food, Drug and Cosmetic Act[17] in order that they may block or delay market entry by producers of generic equivalents.[18]

EntryTestimonySenate07202006.pdf (describing FTC's litigation and non-litigation initiatives involving the entry of generic pharmaceutical products).

15. On the FTC's cases and private suits dealing with similar claims, see C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent*

The second category of monopolization and attempted monopolization cases has involved the manner in which companies participate in the

FTC's enforcement actions over the past five years constitute the agency's most ambitious program in roughly thirty years.[25] From January 2001 through the present, the FTC has initiated four IP-related cases alleging illegal monopolization or attempted monopolization: *Biovail/Elan*,[26] *Bristol-Myers Squibb*,[27] *Unocal*,[28] and *Rambus*.[29] A fifth case, *Valassis*,[30] did not involve IP rights but closely resembles a claim of attempted monopolization and was prosecuted as a violation of the FTC Act's prohibition on unfair methods of competition.[31] This rate of prosecution (five cases in nearly six years) exceeds the rate of new FTC monopolization or attempted monopolization cases in any five-year period since the early to mid-1970s.[32]

Beyond the mere rate of activity, a more meaningful measure of an enforcement program's significance is the economic importance of the matters it initiates and the effect of the results it obtains. The four IP-related cases discussed above each involved either the production and

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that has interpreted § 2 of the Sherman Act, see ERNEST

sale of pharmaceutical drugs (*Biovail/Elan*[33] and *Bristol-Myers Squibb*[34]) or standard setting (*Unocal*[35] and *Rambus*[36]). In qualitative terms, the performance of the pharmaceutical sector and the operation of standard-setting bodies are among the most important competition policy issues of our time.[37] In terms of observable results, the Commission prosecutions of Biovail/Elan, Bristol-Myers Squibb, and Unocal yielded some of the largest benefits to consumers in the history of FTC cases involving monopolization or attempted monopolization. The payoff from the *Unocal* case is likely to be at least $500 million per year in reduced prices for gasoline sold in California,[38] and the direct effects of the two "Orange Book" settlements in 2003 (*Biovail/Elan* and *Bristol-Myers Squibb*) have likely exceeded hundreds of millions, if not billions, of dollars.[39] Few previous FTC § 2 prosecutions have yielded comparable results.[40] When the number of cases and the observable outcomes are both taken into account, the FTC's program of monopolization and attempted monopolization cases since 2001 arguably has no parallel in the agency's history.[41]

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D. Research and Reports

The FTC has relied extensively on research and reports to improve the state of competition policy concerning intellectual property.[42] These efforts fall into essentially two categories. The first involves the pharmaceutical sector. In 2000, the Commission commenced a study of the entry of generic drugs into the market under the framework established by the Hatch-Waxman Act.[43] The agency used its authority under § 6(b) of the FTC Act[44] to obtain details of settlements that had been struck between the makers of branded pharmaceutical drugs and producers of generic equivalents of these drugs.[45] The agency's study of the settlements (eighty-six in total) yielded recommendations that resulted in regulatory policy adjustments by the Food and Drug Administration (FDA)[46] and congressional modifications of the Hatch-Waxman Act.[47] The FTC's generic drug study has also become an influential focal point for discussion by commentators and competition authorities that are examining questions associated with the pharmaceutical sector.[48] Pursuant to measures that Congress adopted in 2003 in the Medicare Prescription Drug, Improvement, and Modernization Act,[49] the FTC's staff has issued annual reports on the types of patent settlements reached between branded

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Institute, as stating that the federal antitrust agencies during the Bush administration "[do not] even seem to think that monopolies are bad").

42. *See* William E. Kovacic, Remarks at the Intellectual Property and Antitrust Roundtable, *in* FORDHAM CORP. L. INST., INTERNATIONAL ANTITRUST LAW & POLICY 285, 314–15 (Barry Hawk ed., 2005) (discussing the FTC's investments in "competition policy research and development" relating to competition issues involving IP rights).

43. *See* FED. TRADE COMM'N, GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY (2002) [hereinafter FTC GENERIC DRUG STUDY], *available at* http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf. *See supra* note 17 and accompanying text for discussion of the Hatch-Waxman Act.

44. Section 6(b) of the FTC Act authorizes the Commission to compel corporations, persons, or partnerships to prepare and file special reports. 15 U.S.C. § 46(b) (2000).

45. *See* FTC GENERIC DRUG STUDY, *supra* note 43, at 9–11 (describing methodology used to gather data for FTC study).

46. *See* FED. TRADE COMM'N, FULFILLING THE ORIGINAL VISION: THE FTC AT 90, at 29 (2004), *available at* http://www.ftc.gov/os/2004/04/040402abafinal.pdf (discussing the impact of recommendations made in the FTC's generic drug study upon FDA regulations concerning implementation of the Hatch-Waxman Act).

47. *See* Timothy J. Muris, *More Than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773, 777 (2005) [hereinafter *Muris-Pitofsky Dialogue*] (comments by former FTC Chairman Timothy Muris; discussing impact of publication of FTC generic drug study).

48. *See, e.g.*, Hemphill, *supra* note 15.

49. Pub. L. No. 108-173, 117 Stat. 2071 (2003). Among other provisions, the 2003 Act requires that notice of patent settlements between branded and generic pharmaceutical manufacturers be given to the FTC and to the Department of Justice. *See* 21 U.S.C. § 355 (2006).

and generic producers of pharmaceuticals.[50] The Commission also has undertaken a new § 6(b) study to examine the practice by which branded pharmaceutical producers authorize market entry by specific generic producers.[51]

The second major area of research and reporting activity involves the operation of the U.S. patent system. In 2003, the FTC published a report on the U.S. patent system and the effect of the rights-granting process on competition.[52] The chief basis for the report was an extensive set of hearings conducted by the FTC and the Department of Justice (DOJ) in 2002.[53] The FTC's report made recommendations for patent system reform that, among other ends, are designed to ensure that patents granted satisfy existing standards of patentability.[54] The report has commanded close attention among patent authorities and competition agencies around the world and has stimulated considerable debate among academic commentators and practitioners.[55]

E. Amicus Submissions in the Federal Courts

In recent years, the Commission has contributed to a number of amicus filings whose aim is to encourage courts to account for competition policy considerations in the app

suggested in its amicus filing, the district court rejected the argument that *Noerr* protection was warranted simply because the defendant's patent filings had been accepted and reviewed by the FDA.[58] Drawing extensively on the findings of the FTC's 2003 Patent Report, the Commission's staff has also participated in the formulation of positions taken by the Solicitor General in various recent patent-related cases before the Supreme Court.[59]

F. Summary

The FTC's modern competition policy program continues and extends the agency's more distant practice of devoting significant attention to issues associated with intellectual property. Several features of the initiatives described above stand out. First, the commitment to devote substantial resources to IP-related matters stemmed from a conscious decision within the agency to assign a high priority to this area of competition policy.[60] That decision reflected the view that such issues had large and unmistakable importance for economic performance and consumer welfare. The second noteworthy trait is the degree to which the Commission has employed the full array of its distinctive mix of policy tools—administrative litigation, litigation directly in the federal courts, empirical research, convening hearings, preparing reports, filing amicus briefs, and advocating before Congress.

competition agency that lacks the broader portfolio of policy-making tools provides a badly limited platform on which to operate in this area.

III. USING HISTORY TO G

B. Learning from and Applying Lessons from the Past: The FTC After 1969

In a number of important respects, the Commission accepted the historically based diagnosis of its ills, presented by the Nader and ABA studies, and it undertook measures to correct these flaws.[71] Perhaps the most important manifestation of these efforts was the enhancement of the FTC's processes for strategic planning.[72] By the late 1970s, the FTC had established several units with responsibility for helping to choose priorities and develop better approaches for setting priorities. One group, the Office of Policy Planning and Evaluation, was designed to provide guidance for the agency as a whole.[73] Supplementing the work of this body were two new offices within the Bureau of Competition: The Office of Special Projects and the Planning Office.[74] To an exceptional degree, these planning units undertook what might be called historically oriented research as a guide to formulating the agency's competition policy strategy.

This concentration of effort became most evident during the Chairmanship of Michael Pertschuk from 1977 to 1981.[75] Several initiatives undertaken during Pertschuk's chairmanship stand out. First, the Commission hosted a symposium at which business historians presented work relating to the role of competition policy in the United States from the late nineteenth century through the twentieth century.[76] Not only did the proceedings generate a transcript that remains a superb resource for

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71. *See* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, *in* PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 63, 82 (Robert MacKay et al. eds., 1987) (describing how the ABA report's negative assessment of past FTC antitrust programs helped motivate the agency to pursue the ABA's recommended reforms).

72. The ABA report found that the FTC, from its inception, had performed deficiently in large measure due to its "fundamental failure to establish goals and priorities and to implement effective planning controls consistent with those goals and priorities." ABA REPORT, *supra* note 62, at 77.

73. The Commission's development in the late 1960s and 1970s of new methods for setting priorities and planning programs is reviewed in Kovacic, *Congressional Oversight*, *supra* note 6, at 643–45, 659–61. Two of the most notable heads of the agency-wide planning apparatus during the 1970s were Wesley J. Liebeler, who directed the office in the mid-1970s, and Robert Reich, who held that post in the late 1970s.

74. On the formation of these units, see *id.* at 659. The Special Projects group was directed by Albert Foer, and the Planning Office was managed by John Kirkwood, who is now a member of the Seattle University School of Law faculty. The author's first position with the FTC began in 1979 with Professor Kirkwood's Planning Office.

75. For a list of the periods of service of the FTC's commissioners and chairmen, see Commissioners and Chairmen of the Federal Trade Commission (Feb. 2006), http://www.ftc.gov/ftc/history/06commissionerchartlegal.pdf.

76. The proceedings of the business historians' symposium are reproduced in National Competition Policy—Historians' Perspectives on Antitrust and Business Relationships in the United States (Federal Trade Commission, Aug. 1981).

projects.[81] The hearings helped to establish a norm that has become a foundation for the FTC's operations: the habit of using hearings, work-

reports,[88] and the anniversary roundtable was an occasion to gather many past directors of the Bureau of Economics to discuss the agency's past and future role as a vehicle for economic research.[89] In 2004, the Commission held a two-day research symposium to honor the 90th anniversary of the passage of the FTC Act.[90] A central theme of the papers presented at the symposium was the consideration of how the agency's past experience might improve its performance in the future.[91] Finally,

for change by calling attention to the Commission's alleged imperviousness to reform despite the recommendations of numerous blue-ribbon studies and individual commentators in the half-century since 1914. One way to shed the Commission's image as an institution content with mediocrity was to embrace the much-discussed but long-neglected reform agenda. As discussed below,[94] the enormously ambitious FTC competition policy program of the 1970s can be explained as an effort to execute a decisive, visible break from a dismal past.

The Commission's renewed interest in history stemmed from more than desperate necessity. Although I cannot prove the point rigorously, the pursuit of numerous historically oriented research projects in the second half of the 1970s arguably was a consequence of devoting significant resources to create and sustain new policy and planning units. As one who served in the Bureau of Competition's Planning Office from 1979 through 1982, I am convinced that the urgency of addressing fundamental questions about the appropriate role of the agency and the design of its programs inevitably led the Commission's offices and their researchers to examine the origin and evolution of the Commission's competition programs.[95] It is also no accident that the pursuit of new historically oriented projects in the 1990s and 2000s took place during the tenure of Chairmen Robert Pitofsky and Timothy Muris, who spent much of their careers working in or writing about the FTC and found it useful to consider the agency's work in a larger historical context.[96]

What has emerged in the past thirty-five years or so, both from initiatives inspired by necessity and from measures adopted by choice, is a norm of agency behavior that takes the past seriously as a source of guidance for the future. This is a healthy trend for at least two reasons. First, there is considerable value to an institution in pausing from time to time to engage in ceremonial reflection. Any institution that aspires to greatness should and must take time to recall its past and to acknowledge the work of individuals who have contributed significantly to its development. This is a vital element of the commitment that a great institution makes to those who labor on its behalf. Second, past experience can have great practical value as a source of guidance about the appropriate course for current and future policy. The discussion below turns to some of the

94. *See infra* notes 120–29 and accompanying text.

95. It is also true that, to some extent, an element of externally imposed need inspired these projects. Some of my own research from this period took place as Congress was considering measures to curtail the Commission's competition and consumer protection authority. My work was designed, in part, to refute arguments that the Commission had ignored the preferences of Congress. *See* Kovacic, *Congressional Oversight*, *supra* note 6.

96. The importance of a historical perspective to both Pitofsky and Muris is apparent in the dialogue reproduced in the *Muris-Pitofsky Dialogue*, *supra* note 47.

practical lessons that a thoughtful examination of history can have for a competition policy agency as it devises a strategy for matters involving intellectual property.

IV. DESIGNING EFFECTIVE COMPETITION POLICY STRATEGIES: LESSONS FROM FTC HISTORY

The FTC's experience in the modern era and its investment of resources in historically oriented projects illustrates how examining the past can inform the judgment of competition agencies about how to use their authority. The discussion in this Part identifies six guidelines that draw upon the Commission's history. The observations presented here apply to a competition agency's formulation both of general strategies and of specific strategies for intellectual property.

A. Build an Accurate Profile of Powers and Activities

The process by which a competition authority decides how to use scarce resources must build upon a recurring examination of the agency's existing foundation of statutes and regulations, as well as its existing patterns of activity.[97] Competition agencies operate in dynamic commercial and regulatory environments. Continuing changes in business patterns, methods of business operation, global trading patterns, and regulatory institutions at home and abroad require competition agencies to examine the adequacy of the statutes and regulations that supply the authority for their existing programs. Vital areas for attention include the sensibility of existing substantive rules and remedies, the significance of exemptions or other limits on the scope of the agency's operations, adjustments in the activities of other government bodies that share authority with the competition agency, and developments that stem from the exercise of private rights of action. This process of reassessment can profit substantially from contributions by expert observers outside the agency.[98]

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97. The proposals made in this paragraph are derived from William E. Kovacic, *Achieving Better Practices in the Design of Competition Policy Institutions*, 50 A

The process of regular stock-taking should also include an examination of past patterns of agency activity. The competition authority should build and maintain a database that reports all cases initiated; supplies the subsequent history of these matters; and aggregates statistics about the cases using a classification scheme that permits comparisons over time. Similar data sets should be maintained for non-enforcement activities, such as the preparation of reports and advocacy measures. An accurate understanding of the status quo is necessary to consider the wisdom of existing strategies and to formulate refinements.[99]

B. Employ a Balanced Portfolio of Policy Instruments

The term "competition policy" sometimes is equated with the enforcement of prohibitions against anticompetitive business practices.[100] The traditional focus of what most competition agencies do is to bring cases against such practices.[101] Indeed, prosecuting cases is a vital, although not the only, element of a competition policy system: in formulating a law enforcement strategy, policymakers should seek to direct, as the main priority, enforcement resources toward practices posing substantial dangers for consumers, the cessation of which will promise the largest rewards for society.[102] The identification of such practices in the IP field often requires extensive study and industry-specific knowledge, as the role that IP rights play in competitive processes can vary substantially from industry to industry.[103] As discussed below,[104] this typically will require conscious efforts by the agency to improve its base of knowledge and ensure that it has the necessary human capital to pursue specific matters.

Properly understood, sound competition policy encompasses a larger collection of policy instruments by which a country can promote

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99. Examples of modern research by FTC officials that are based on this premise include Kovacic, *Competition Policy Norms*, *supra* note 25, and Leary, *supra* note 93.

100. *See* William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265, 281 (2001) [hereinafter Kovacic, *Institutional Foundations*] (describing the tendency in some commentary to equate competition law and policy with the prosecution of statutes that forbid various forms of business conduct).

101. *See* Kovacic, *Competition Policy Norms*, *supra* note 25, at 407–10 (discussing and criticizing the case-centric conception of competition policy).

102. *See Muris-Pitofsky Dialogue*, *supra* note 47, at 832–43 (discussing appropriate priorities for FTC antitrust law enforcement).

103. *See* William E. Kovacic & Andreas P. Reindl, *An Interdisciplinary Approach to Improving Competition Policy and Intellectual Property Policy*, 28 FORDHAM INT'L L.J. 1062, 1089–90 (2005) (discussing the importance to competition agencies of pursuing a research and analysis agenda concerning IP issues).

104. *See infra* Part IV.F.

business rivalry.[105] For any specific competition policy issue, antitrust enforcement might not always be the sole or superior policy instrument to be used.[106] To promote market rivalry, nations can tailor competition

competition and pro-competition policies. The competition authority can be a catalyst for public debate about the appropriate role of government intervention in the economy and the correct choice of strategies for using competition as a means to improve economic performance. Performing

federal antitrust enforcement swings

telephone system, and the world's largest producer of photocopiers.[127] In a number of quarters, these initiatives were viewed as merely a good start.[128] Instead, it was a serious mismatch between enforcement objectives and institutional capability.

My view is that the federal agencies would have been better off if they had accepted an enforcement norm that emphasized choosing a smaller number of matters. I cannot offer a rigorous proof for the proposition, but I believe that an effort focused on prosecuting a smaller number of cases might have shortened the time needed to complete each case and would have permitted more attention to be directed toward improving the analytical foundations of each case. As it was, relatively few of the FTC's litigation efforts in this period succeeded, generating a considerable cost in resources and a drain on the institution's morale.[129]

A critical factor in avoiding commitment/capability mismatches is a careful assessment of the agency's human capital. A public agency goes only as far as its professional and administrative staff will carry it. This is particularly true in the area of intellectual property, where expertise in patent law, the sciences, or engineering is likely to be necessary to the formulation and prosecution of cases and to the pursuit of research and advocacy functions. The recruitment and retention of those with special skills must be considered as one element of larger efforts to ensure that an agency's programmatic commitments are commensurate with its capabilities to fulfill the commitments.

D. Understanding the Intellectual Foundations of Competition Policy

perceptions about what constitutes good enforcement policy. Two examples illustrate the point. As discussed above,[130] the intellectual weakness of government enforcement policy in the late 1960s and 1970s was not that the agencies defied existing notions of sound economics and attacked large corporations as an end in itself. The enforcement policies of the federal antitrust agencies toward dominant firms in this period rested upon an analytical model that highly respected commentators thought to be a suitable basis for enforcement. The more appropriate criticism of federal enforcement policy is that the agencies failed to pay adequate attention to new academic research that was raising serious doubts about the soundness of the intellectual platform upon which the deconcentration program rested.[131] The FTC launched its ambitious program of monopolization and attempted monopolization cases in the 1970s in the face of growing evidence that economists had serious second thoughts about their theories.[132] This experience suggests the need to engage in continuing efforts to determine whether existing ideas—both those that favor intervention and those that discourage it—are attuned to changes in thinking that warrant adjustments.

A second example involves the sources of ideas that have influenced courts, from the mid-1970s to the present, to impose more demanding standards on plaintiffs who pursue monopolization or attempted monopolization cases.[133] There is a tendency in antitrust commentary to attribute this judicial narrowing of the zone of liability for dominant firms to the influence of "Chicago School" scholars such as Robert Bork and Frank Easterbrook, who have proposed that antitrust law and policy should largely or completely ignore claims of unlawful exclusion by large enterprises.[134] This interpretation overlooks the substantial degree to which "Harvard School" scholars such as Philip Areeda and Donald Turner influenced courts' retreat from expansive applications of antitrust law that would curb the behavior of dominant firms.[135] Careful examination of the intellectual foundations of the more permissive jurisprudence

130. *See supra* notes 122–24 and accompanying text.

131. *See* Kovacic, *Competition Policy Norms*, *supra* note 25, at 458.

132. *See* Kovacic, *Failed Expectations*, *supra* note 25, at 1138 (discussing erosion of the intellectual foundations of FTC deconcentration cases).

133. On the retrenchment of liability standards for monopolization and attempted monopolization in the past thirty years, see GELLHORN ET AL., *supra* note 24, at 153–90.

134. *See* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago-Harvard Double Helix*, 2006 COLUM. BUS. L. REV. (forthcoming) (collecting sources and describing the conventional view that non-interventionist Chicago School preferences account for modern limitations on monopolization and attempted monopolization doctrine).

135. *Id.* (analyzing the impact of modern Harvard School scholars on judicial analysis of monopolization and attempted monopolization claims from the 1970s to the present).

of the past three decades reveals

dynamism.[141] One vital means to sustain capacity is to establish a research capability and research agenda that permits the agency to analyze the difficult issues that frequently emerge in the analysis of IP matters. By investing in competition policy research and development,[142] a competition agency creates a foundation for its advocacy activities and its selection of possible subjects for law enforcement.[143]

There are a variety of specific research and analysis tools that an agency can use to sustain and improve its intellectual proficiency. Means to this end include the periodic use of hearings, such as the FTC's innovation and globalization hearings in the 1990s[144] and the joint FTC/DOJ hearings on intellectual property in 2002,[145] and the preparation of empirical studies, such as the FTC's generic drug study in 2003.[146] An agency should also undertake a routine program of evaluation. The successful execution of competition policy programs requires a continuing commitment by competition authorities to assess the impact of efforts to design and implement the competition policy system.[147] By habitually reviewing the effects of completed cases and the agency's existing organization and operational procedures, an agency can identify adjustments that will help it to improve the quality of its programs.

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debate the need to have a process for deciding what the choices should be, lest the agency's program simply be determined by default.

To insist that a competition agency consciously formulate a strategy is not to suggest that doing so is easy or that a plan chosen in advance can be followed mechanically and without adaptation. The agency is like an ocean-going ship in the age of sail. The officers of the vessel have authority to select a course, but they have no power to control tides, currents, storms, winds, and other natural phenomena. Even with a course properly and carefully charted, a gale can push the ship well off of its track. One mark of a good captain is the capacity to adapt in the face of events whose occurrence can be anticipated but whose timing and severity cannot accurately be predicted. After the intervening force has spent itself, the effective commander of the ship instructs the helm to bring the vessel back to the originally specified course. It is the difference between an order that simply says "Sail" or "Drift along" and one that says "Sail on this heading."

The urgency of establishing and pursuing a conscious strategy stems from several closely related considerations. No competition agency enjoys unlimited funds, and the scarcity of resources demands that choices be made among a range of possible applications of the agency's powers. Society has a vital stake in having the agency make these choices in a manner that most improves economic performance. A well-defined strategy clearly informs external observers—business managers, consumers, and government bodies—about the agency's intentions and guides the agency's own staff. If asked to state the agency's top five priorities in a minute or less, the agency's leaders and top managers should be able to do so with a half-minute to spare.

In preparing a strategy and selecting tactics to implement it, an agency can learn a great deal from its past and from the histories of other competition policy institutions. Conscious, recurring efforts to examine past experience can yield informative perspectives about how to allocate resources, how to choose the mix of litigation and non-litigation instruments to accomplish specific competition policy objectives, and how to build institutional capacity. The path of the development of competition policy has accustomed all of us to accept the important connection between law and economics. A greater appreciation of the value of interdisciplinary study that links law and history could improve the formulation of wise competition policy programs no less dramatically.