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How To Measure Success: Agency Design and the FTC at 100

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undredth birthday upon us, I would like to spend a few minutes this morning discussing the

nique role the agency plays in promoting competition and to emphasize how the agency's unique

esign contributes to its success.

These are issues I have spent many years thinking about – from my early days advising

ommissioner Swindle to my time working on the FTC at 100 Report

[2] as Director of the Office

of Policy Planning under Bill Kovacic to the many months between my nomination and confirmation by the Senate.

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[1] The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. I am grateful to my advisor, Alexander Okuliar, for his invaluable assistance in preparing this speech.

[2] WILLIAM E. KOVACIC, CHAIRMAN, FED. TRADE COMM'N, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR SECOND CENTURY, THE CONTINUING PURSUIT OF BETTER PRACTICES (Jan. 2009), available at http://www ftc.gov/reports/federal-trade-commission-100-our-second-century-continuing-pursuit-better-practices-report.

But, this year in particular, I have had good cause to again reflect seriously on what we do at the FTC, our institutional strengths, and how to successfully leverage those strengths for the good of consumers and the country in the century ahead. My remarks this morning include only my opinions and are not meant to reflect the views of the Commission or any other Commissioner – although I bet they would agree that the agency is a paradigm of success

II. <u>What is Success</u>?

But, how should we define success? In a recent article, former Chairman Bill Kovacic and Professor David Hyman identify the three most important factors to predict the long-term success of agency design: consistent political support, policy coherence, and the capacity and capability to handle the agency's mission.[3] Let's take a look at each of these for a minute and see how the FTC measures up.

a. <u>Political Support</u>

As a threshold matter, an agency needs consistent political support, or, as Kovacic and Hyman call it, "political implications." They note that this is the most important of the factors to success. In their words, "An agency is doomed if it lacks a supportive constituency, or if the performance of its duties generates crippling political opposition. More broadly, an agency will not be able to operate effectively if its structure raises serious doubts about its legitimacy or increases the vulnerability to political pressure that the performance of its duties will arouse."[4]

This first factor speaks directly to the FTC's origins and the stability of its structure as a bipartisan entity. The FTC was born from early twentieth century dissatisfaction with the way the

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[3] David A. Hyman & William E. Kovacic, Why Who Does What Matters: Governmental Design, Agency Performance, the CFPB, and PPAtP & 4T /P <<>W1-3(ha<>W1-Td [(a)snEMC /Knw Tu)2h.003 Tw 8( )]TJ 0v3 Tw 8( )]TJ Tw [(8( )6rTJ 0 Tc 0 Tw [L1(reg5 Tw |

Department of Justice was enforcing – or, really, not enforcing – the Sherman Act.[5] As many of you know, in the Gilded Age years preceding the FTC's creation, the country underwent a massive wave of corporate consolidation.[6] In the decade straddling the turn of the twentieth century there were 42 deals producing companies controlling over 70 percent of their respective industries.[7] During the peak of this merger boom, from 1898 to 1902, at least 303 companies disappeared each year and in 1899, over 1208 were merged out of existence.[8] For several years, the government offered essentially no meaningful response.

The leadership at DOJ was not entirely to blame for this situation. It was a product of many factors, including the underdeveloped understanding about the economic implications of corporate consolidations, political indifference (or worse), and a Supreme Court that had expressly called into question whether the Sherman Act applied to mergers. Many of you may recall from law school the Supreme Court's 1895 decision in United States v. E.C. Knight Co.[9] The Court rejected the government's attempt to stop the sugar trust from buying four Pennsylvania plants, even though it would give the trust a 98 percent share of the national market.[10] The Court read the Commerce clause to exclude transactions from federal law, because they impact commerce "only incidentally and not directly."[11] In addition, since the trust was mainly a manufacturer, the Court noted that, "Commerce succeeds to manufacture, and is not part

[5] David A. Hyman & William E. Kovacic, Institutional Design, Agency Life Cycle, and the Goals of Competition Law, 81 Fordham L. Rev. 2163, 2167 (2013).

[6] Marc Winerman, The Origins of the FTC: Concentration, Cooperation, Control, and Competition, 71 ANTITRUST L. J. 1, 17 (2003).

[7] Id. at 7.

[8] Id at 6.

[9] United States v. E.C. Knight Co., 156 U.S. 1 (1895).

[10] Winerman, The Origins of the FTC, supra note 6 at 8.

[11] Id.

of it."[12] Hence, you can see my point about relatively unsophisticated view of law, economics, and antitrust in that era. These years of unchecked consolidation and competitive excesses triggered an era of public

out-of-power party continues to have a serious voice in U.S. competition policy and enforcement decisions.

b. Policy Coherence

This leads me to the next most important factor for agency success – policy coherence – something that Kovacic and Hyman note is similar to identifying, "[i]n economic terms, [whether] the [agency's] functions [are] complements or substitutes[.]"[15] They further observe, "Synergies and efficiencies are more likely to result if there are commonalities among the functions…."[16] Again, the FTC's design offers strong policy coherence because of its dual mandate for competition and consumer protection. These are different, but equally-important complementary tools for the agency to help promote fairness in our markets and thereby promote consumer welfare.[17] Each tool protects consumers in different ways, and each has its limitations, allowing one to offer relief where the other cannot.

Competition is the first line of defense – a competitive market is a welfare-enhancing one for consumers. Aggressive competitors fight for consumers using price and quality as their weapons, including the quality of service. They work hard to protect their reputations because they know that a dissatisfied customer can easily turn to alternatives. But there are limits to this – as former FTC Chairman Tim Muris once wryly observed, "the commercial thief loses no sleep over its standing in the community."[18] Some companies engage in fraud, dishonesty, unilateral breach of contract, or other conduct that hurts consumers, with little regard for their reputations or the possibility of being put out of business. Because a competitive market sometimes cannot

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[15] Hyman & Kovacic, Why Who Does What Matters, supra note 3, at 21.

[16] Id.

[17] Timothy J. Muris, The Interface of Competition and Consumer Protection, Fordham Corporate Law Institute's Twenty-Ninth Annual Conference on International Antitrust Law and Policy (Oct. 31, 2002).

[18] Id. at 4.

discipline these behaviors, we also use our consumer protection authority.[19] But these missions are aligned, which allows the agency to apply them cohesively and imbues all Commission Staff with a sense of common purpose – to protect consumers.

c. Capacity and Capability

So, we come to the third most important factor: agency capacity and capability. Capacity refers to resources, which in large part hinges on an agency's credibility with Congress. Capability, according to Kovacic and Hyman, is slightly different, turning on "whether an agency has the tools to make good decisions, and does so."[20] Over the years, I have read arguments challenging the FTC's capability to make good decisions on competition matters. These arguments usually turn to historical FTC losses in appellate courts as examples of our failure. I will focus the remaining few minutes of my remarks explaing why, based on our design protocol, the agency is doing exactly what it was meant to do – identifying competition problems in the economy, developing proof of the problems, debating the evidence of harm and proper course internally, and then leading by example outside the agency with every advocacy, enforcement, and regulatory tool at its disposal. And contrary to what you may be hearing, our efforts do pay off, just not always right away. But that's sometimes the risk of leading.

III. Intellectual Leadership Is the True Measure of Agency Success

The agency's design gives it the singular ability to identify a potential competition problem in the market, develop empirical research to determine whether the problem actually exists, and then plan and execute a multi-year advocacy and enforcement agenda to rectify the problem – in other words, the FTC is designed specifically to lead others in the continuous development of competition law to accurately reflect changing economic conditions. It is in the

[19] *See* Timothy J. Muris, *Principles for A Successful Competition Agency*, 72 U. CHI. L. REV. 165, 173-76 (Winter 2005).

[20] Hyman & Kovacic, Why Who Does What Matters, *supra* note 3, at 27.

the past 29 years the FTC is the only antitrust agency that has appeared before the Supreme Court as a party, and our six cases in that period demonstrate our impact on doctrinal developments.[23]

Importantly, most of our doctrinal contributions have depended on broad use of all our agency functions – research, advocacy, administrative litigation, and federal court enforcement – and several have first been met with failure in the courts – sometimes repeated failure – before realizing wider success. Two examples include our efforts revitalizing hospital merger enforcement and pursuin

The Supreme Court granted certiorari in our case against Actavis for its drug Androgel to resolve the conflict between the circuit courts. The rest, as they say, is history. The Court decided Actavis in June 2013, rejecting both the Eleventh and the Third Circuits' approaches in favor of a rule of reason analysis. In essence, the Supreme Court agreed with the FTC that pay-for-delay agreements <u>can</u> harm consumers and violate the antitrust laws.

IV. <u>Chief Justice Edward Douglass White and the Rule of Reason</u>

I want to close with a story that was wonderfully recounted by Bill Kolasky as part of his Trustbuster series in Antitrust Magazine and that I think about when I hear claims that the FTC is incapable of making good competition law decisions because of its win/loss record in court. It is the story of Chief Justice Edward Douglass White and his work to introduce the rule of reason into the Sherman Act.[26] Justice White was appointed to the Court in 1894.[27] A few years later, the Court encountered its second antitrust case, Trans-Missouri Freight Association,[28] in which the United States sued to stop a railroad association from jointly setting rates. The majority, in its analysis, adopted a literal reading of the Sherman Act and condemned the association activity.[29]

Justice Peckham, writing for the Court, reasoned that when the "plain and ordinary" language of a statute "pronounces as illegal every contract or combination in restraint of trade or commerce . . . all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."[30]

Justice White exposed this remarkably constricted logic, explaining it contradicted "the plain intention" of the Sherman Act "to protect the liberty of contract and the freedom of trade."

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[26] William Kolasky, Chief Justice Edward Douglass White and the Birth of the Rule of Reason, 24 ANTITRUST 7, Summer 2010.

[27] Id. at 78.

[28] United States v. Trans

and ignored the common law handling of the term, “restraint of trade” under a reasonableness standard.[31] He argued, “If the rule of reason no longer determines the right of the individual to contract . . . what becomes of the liberty of the citizen or of the freedom of trade?”[32]

Despite the obvious failings of the majority approach, Justice White would not be fully vindicated for fourteen years, when, as Chief Justice, he authored the Court’s landmark 1911 opinions in Standard Oil[33] and American Tobacco[34] and set out in detail