Principles for a Successful Competition Agency

Timothy J. Muris†

It has been thirty years since I first joined the Federal Trade Commission (FTC) staff and began the professional relationship that would anchor my career. Throughout, I have often reflected on what makes public institutions successful. Part I of this Essay provides a framework for defining success in government agencies. Building on that definition, Part II offers six guiding principles for an effective competition agency. These principles focus not just on the goals for successful policy, but also on how such policy should be created and implemented. Of course, good policy based on sound economics and profound respect for fundamental legal principles is essential. Nevertheless, no matter how well crafted a policy may be, no public institution achieves success without a coherent strategy for exercising its authority and spending its resources wisely. Strong policy ideas must be married to effective implementation.

While discussing these guiding principles, I describe the consensus that has developed regarding the proper goals of competition policy. The complementary Essay by former FTC Chairman Robert Pitofsky also acknowledges this consensus and touches on some disagreements at the margins.1 I conclude in Part III with brief comments on the areas of disagreement identified by Chairman Pitofsky. This discussion largely serves to underscore, not to undermine, the extent of the modern consensus regarding the proper goals of competition policy.

I. WHAT IS “SUCCESS” FOR GOVERNMENT AGENCIES?

Obviously, we could hold an entire symposium on how to measure government “success.” This Part attempts something a bit less heroic. I want only to outline a basic framework for measuring success.

In Washington, a prominent definition of institutional success—as reflected in favorable press accounts and congressional attention—measures action: for example, the number of new initiatives, the num-

† Former Chairman, Federal Trade Commission. The views here are my own and not necessarily those of the Commission or of any other Commissioner. I would like to thank Maureen K. Ohlhausen, Thomas Krattenmaker, and William E. Kovacic for their considerable help in preparing this Essay.

ber of large cases brought, and the size of the companies affected. For an agency like the FTC, the most attention is paid publicly to the prosecution of cases, preferably "big" ones, or to the launching of "tough" regulations, while nonlitigation activities that have a major impact on public policy or less obviously significant cases and rules that do not tackle large players, but that alter doctrine in important ways, are usually overlooked. Closing ill-conceived measures from previous administrations can result in adverse publicity, especially if the initiatives received favorable attention when launched.

The brevity of the tenure of government officials exacerbates the shortcomings of this measure of success. An agency head garners great attention by beginning "bold" initiatives and suing big companies. When the bill comes due for the hard work of turning initiatives into successful regulation and proving big cases in court, these agency heads are often gone from the public stage. Their successors are left either to trim excessive proposals or even to default, with possible damage to agency reputation.

The departed agency heads, if anyone in the Washington establishment now cares about their views, can always blame failure on faulty implementation by their successors. Because of the great difficulty in determining which of the many players who worked on an initiative was responsible for its failure, blaming those who followed will usually be at least plausible. Moreover, the focus in Washington will have shifted to the bold proposals of some new agency head, leaving less time or interest to determine what caused the failure of previous proposals.

Clearly, institutional success can and should be measured by means other than column inches in newspapers or the simple number of cases filed. One preferable definition comes from the field of economics. An economist measures the success of an action by determining whether its benefits outweigh its costs. This analysis is a useful starting point, but it has serious operational shortfalls. For one, unlike a for-profit private enterprise, an agency's performance often lacks objective measures, such as profitability and share price. Whatever one's views of Jack Welch's personality or management style, General Electric's success could be measured in its bottom line. A second problem is that, even when economists attempt measures of agency performance, they frequently disagree, or the available data do not permit firm conclusions.

2 See Tyler Cowen, Why Does Freedom Wax and Wane? 20–21 (Mercatus Center, George Mason 2000).
Nevertheless, one can propose a definition of success that draws upon economics and recognizes these shortfalls. An important insight of the economics of principal-agent relations aids this effort at definition: measure outputs when possible; when you cannot, focus on inputs. Moreover, for a public agency, public opinion is relevant, but that opinion must be well-informed and appropriately consider the agency’s mission.

With this background, let me propose a three-part definition for agency success. First, a primary component for a successful agency is a clear understanding of and support for its core mission among its constituents—the agency staff, the private entities it regulates, the courts, its peers in government, and (depending on the agency) the academic community. This does not mean that the agency’s mission must be “popular” or that the constituents must support every particular agency action. For example, most staff in a budget office such as the Federal Office of Management and Budget, members of the public, and other government agencies agree that budget bureaus should try to protect the public fisc even though they may not agree with specific recommendations to limit spending.

Second, this core mission must derive from a vision of the institution clearly shared among and respected by constituents not just today but over long periods, enduring through electoral cycles. Over long periods of time—perhaps decades—scholars usually adjudger favorably the core mission of successful agencies. Thus, by this definition, the Civil Aeronautics Board’s core mission—held for decades—of tight regulation of airline competition failed when confronted with massive evidence that the regulation’s costs exceeded its benefits. The FTC’s core competition mission for over thirty years—enforcement of the Robinson-Patman Act—had failed by the 1970s when the academy and most practitioners came to consider this enforcement as harmful to consumers.

See generally Armen A. Alchian and Harold Demsetz, Production, Information Costs, and Economic Organization, 62 Am Econ Rev 777 (1972) (proposing that a firm can sometimes more economically monitor productivity by measuring worker inputs rather than by measuring outputs, which the authors refer to as “across market”).

See Robert M. Hardaway, Transportation Deregulation (1976–1984): Turning the Tide, 14 Transp L J 101, 134-50 (1985) (arguing that airline deregulation has succeeded on all fronts by both proving to be false the fears raised by those in favor of regulation and substantially improving the airline industry for consumers and competitors alike).


Finally, besides a clear and respected long-term understanding of its core mission, a successful public institution needs a coherent strategy for exercising its authority and spending its resources. A key manifestation of this strategy is publicizing its positive agenda—the measures the agency intends to pursue to accomplish its core mission. Without a general strategy and a positive agenda, an agency becomes a passive observer, swept along by external developments and temporary exigencies. An institution that merely reacts to circumstances and does not work from a coherent philosophy will ultimately fail to achieve lasting success. This positive agenda must direct not just the agency heads but the institution at all levels, from line staff to managers to executives. For the agency’s staff, an articulated positive agenda focuses efforts on measures most likely to fulfill the institution’s mission.

The FTC has such a positive agenda, a product of the work of many people over many years. The heart of this positive agenda is to search for practices that harm consumers by hampering the competitive process and violating the basic rules that govern exchange. The FTC’s success, in large part, reflects this shared vision of the agency’s core mission, which has evolved for over twenty years through several administrations. Antitrust has become an area of bipartisan cooperation. Although disagreements exist in close cases, there is widespread agreement that the clearly articulated purpose of antitrust is to protect consumers, that economic analysis should guide case selection, and that horizontal cases, both mergers and agreements among competitors, are the mainstays of enforcement. Moreover, today there is bipartisan recognition that antitrust law is a way of helping to organize our economy. A freely functioning market, subject to the rules of antitrust, provides maximum benefits to consumers.

Robert Pitofsky’s tenure as FTC chairman was in that vein of bipartisanship, as I believe was mine. Of course, he brought his intellect, scholarship, and management skills to the job. But a key reason for his success as chairman was that his agenda and enforcement policies reflected the bipartisan consensus of the agency’s core mission. Those policies were not significantly different from those of his predecessor in the previous administration, nor from mine. The disagreements considered at the end of this Essay are truly at the margins.

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The importance of these different levels of an agency is a prominent theme in the best book on agencies ever written, James Q. Wilson’s *Bureaucracy: What Government Agencies Do and Why They Do It* (Basic 1989).
II. GUIDES FOR AN EFFECTIVE COMPETITION AGENCY

Building upon the foregoing discussion of "success," let me turn to six guides that competition agencies should follow. These guides explain how to create and implement successfully a positive agenda.

A. Develop a Proper Understanding of the Role of a Competition Agency

An effective competition agency must understand its proper role. The United States has largely chosen markets to organize its economy. This decision is firmly grounded in the understanding that open markets and competition best guarantee commercial freedom, economic efficiency, and consumer welfare. Antitrust plays a major role in shaping our markets, our institutions, and the relationships among market participants. Indeed, the Supreme Court has called the Sherman Act "a comprehensive charter of economic liberty."  

Antitrust law helps maintain effective competition by prohibiting conduct that unreasonably restricts markets. Antitrust law is, in effect, a form of regulation that competes with other regulatory structures and, in most instances, makes direct regulation unnecessary. Antitrust regulation, however, is not of the intrusive stripe. Antitrust does not prescribe command and control regulation, nor detailed rules of conduct. Indeed, modern antitrust's mainstays are simply to avoid mergers in highly concentrated industries conducive to anticompetitive behavior and to avoid naked restraints (that is, those without efficiency justifications) on trade with competitors. Antitrust is one of the economy's umpires, not one of its star players.

Antitrust's goal is to protect consumers. Antitrust law should care intensely about sustaining the effectiveness of competition and display indifference about the identities or fortunes of individual market participants. A well-functioning market serves consumers because competition presses producers to offer lower prices or to improve product quality to succeed. Competition also motivates sellers to provide truthful, useful information about their products and drives them to fulfill their promises to consumers.  

8 See Northern Pacific Railway Co v United States, 356 US 1, 4 (1958) (stating that competition will best preserve democratic political and social institutions).
9 15 USC § 1 et seq (2000).
11 See, for example, Paul H. Rubin, The Economics of Regulating Deception, 10 Cato J 667, 679 (1991) (arguing that pooling equilibrium will give incentives for sellers to disclose all product information, and questioning the need for disclosure regulation); Howard Beales, Richard Craswell, and Steven C. Salop, The Efficient Regulation of Consumer Information, 24 J L & Econ 491, 502 (1981) (same).
understanding and painful practical experience, antitrust now finally regards enhancing consumer welfare as its single unifying goal. Antitrust relies on sound economics, both theoretical and empirical.

While antitrust law most often involves enforcement against private parties, competition agencies must also consider the effects of government actions. Protecting competition by focusing solely on private restraints is like trying to stop the water flow at a fork in a stream by blocking only one channel. A system that sends private price fixers to jail, but makes government regulation to fix prices legal, has not completely addressed the competitive problem. It has simply dictated the form that the problem will take.

The point can be restated as a competition policy theorem: regulatory success in attacking private restraints increases the efforts that firms will devote to seeking public restraints. Indeed, rational firms are likely to prefer public restraints. Public restraints can be far more effective at restraining competition. Public restraints are often open and notorious. Public restraints also solve the entry problem more efficiently. Rather than ceaselessly monitoring the marketplace for new rivals, a firm can simply rely on a public regime that, for example, provides only a few licenses. Perhaps the clearest example of public restraints that outperform private restraints are those that include built-in cartel enforcement. While cheating often undermines private cartels, those who cheat on public cartels, once identified, can be sanctioned through the government.

Because of the importance of public restraints, the FTC emphasizes enforcement against misusing government processes to restrain competition. Although most uses of government to restrain competition do not violate antitrust law, certain egregious cases do. For example, the state can suppress competition, but the action must truly be that of the state itself, not of private parties. Thus, in FTC v Ticor Title Insurance Co, the agency challenged title insurance companies' practice of agreeing among themselves on the fees they would charge for background title searches. While the law in many states authorized such agreements, in some of these states the agreements were subject to "negative option" state review, whereby rates set by private parties were subject to veto at the state's discretion. The Court found that the party claiming state action immunity must show that the state offi-

13 Id at 638.
14 The state action doctrine, first articulated in Parker v Brown, 317 US 341 (1943), shields certain anticompetitive behavior from federal antitrust enforcement if the conduct is in furtherance of a clearly articulated state policy and is actively supervised by the state. See generally
cials have taken the necessary affirmative steps to determine the specifics of the price-setting scheme. A state’s mere failure to veto under negative option review, the Court held, is insufficient.

More recently, in *South Carolina State Board of Dentistry*, the FTC sued the board—a quasi-governmental entity established to supervise the practice of dentistry and dental hygiene—alleging that it unlawfully restrained competition in the provision of preventive dental care by promulgating an emergency regulation that unreasonably restricted the ability of dental hygienists to deliver preventive services to children in South Carolina schools. After the regulation became effective, treatment ceased for thousands of children. The complaint further alleged that the board’s action was “undertaken by self-interested industry participants with economic interests at stake,” and that it “was contrary to state policy, and was not reasonably related to any countervailing efficiencies or other benefits sufficient to justify its harmful effects on competition and consumers.”

An additional competitive problem involves petitioning the government. Such petitions enjoy constitutional protection, but the privilege can be abused. For example, under the Hatch-Waxman Amendments to the Food, Drug, and Cosmetic Act, a branded drug manufacturer lists patents claiming its branded drug in the “Orange Book” compiled by the federal Food and Drug Administration (FDA). Companies seeking FDA approval to market a generic equivalent of that drug before patent expiration must provide notice to the branded manufacturer, which can file a patent infringement action that triggers an automatic thirty-month stay of the FDA approval process. The FTC has examined allegations that individual brand-name drug manufacturers have used improper Orange Book listings to trigger the thirty-month stay. For example, an FTC complaint filed against Bristol-Myers Squibb (BMS) alleged that BMS misled the FDA about the scope, validity, and enforceability of patents to secure listing in the Orange Book, breached its duty of good faith and candor with the U.S.

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15 *Ticor*, 504 US at 638.


17 Id at *2.


Patent and Trademark Office (PTO) while pursuing new patents claiming these drugs, and filed baseless patent infringement suits against generic drug firms that sought FDA approval to market lower-priced drugs.

Although the BMS matter raised the question of whether the **Noerr-Pennington** doctrine protected the challenged conduct, because the case was resolved by consent order, rather than a trial on the merits, the issue was not litigated. The FTC did, however, provide a detailed explanation of its views on the immunity issue in the Analysis to Aid Public Comment that accompanied the complaint and consent order. The Commission not only stated that BMS's individual acts were not Noerr-protected, but also that a clear and systematic pattern of anticompetitive misuse of governmental processes—such as BMS's alleged conduct—is inconsistent with Noerr.

Moreover, in 2003 the FTC sued Union Oil Company of California (Unocal) for allegedly committing fraud in connection with regulatory proceedings before the California Air Resources Board (CARB) regarding the development of reformulated gasoline (RFG). The administrative complaint states that during the RFG rulemaking process, Unocal made materially false and misleading statements to CARB and other regulatory participants. While stating that its emissions research data were "nonproprietary" and "available to CARB . . . and the general public," Unocal failed to disclose that it had pending patent claims on these research results and that it intended to assert its proprietary interests in the future. The complaint contends that throughout the rulemaking process, Unocal, in its inter-

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22 First articulated in Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc 365 US 127 (1961), the doctrine holds that antitrust law does not reach certain anticompetitive conduct that consists of, or is incidental to, petitioning the government. Id at 135-36. See also United Mine Workers of America v Pennington, 381 US 657 (1965) (holding that joint efforts to influence public officials do not violate antitrust law, even if intended to eliminate competition).


24 Id. The Commission also stated that Noerr does not protect conduct that merely triggers ministerial government action rather than seeking a discretionary decision. See In re Buspirone Patent Litigation, 185 F Supp 2d 363, 369–73 (SD NY 2002), in which the district court issued an order denying Noerr immunity and adopting much of the reasoning in a Commission amicus brief filed in the case.


26 Id ¶ 2(a).
actions with CARB and other industry participants, intentionally perpetuated the materially false and misleading impression that it had relinquished, or would not enforce, any proprietary interests in its emissions research results regarding the new RFG.27

Although an FTC administrative law judge held that Unocal’s efforts in soliciting action by CARB were protected by the *Noerr-Pennington* doctrine as a matter of law, in an opinion I authored the FTC disagreed and remanded the case for factfinding.28 The Commission stressed the concern that “misrepresentations that distort government decision making in ways that create or shield market power may inflict severe and long-lasting public harm.”29 Although it recognized that “any rule regarding petitioning based on misrepresentation must be fashioned and applied with care, so as not to undermine principles of federalism and effective government decision making,”30 it determined that “these reservations may be overcome in appropriate settings,”31 and found no impediment to the complaint as a matter of law.32 “Whether we view misrepresentation as a distinct variant of sham petitioning or as a separate exception to *Noerr-Pennington*, the fabric of existing law is rich enough to extend antitrust coverage, in appropriate circumstances, to anticompetitive conduct flowing from deliberate misrepresentations that undermine the legitimacy of government proceedings.”33 The FTC held that

false petitioning loses *Noerr-Pennington* protection only in limited circumstances, such as when the petitioning occurs outside the political arena; the misrepresentation is deliberate, factually verifiable, and central to the outcome of the proceeding or case; and it is possible to demonstrate and remedy this effect without undermining the integrity of the deceived governmental entity.

B. Integrate Competition and Consumer Protection Policy

Besides antitrust laws, most modern governments design laws to protect consumers directly. The same government agency need not necessarily handle competition and consumer issues, although the

27 Id ¶ 2(c).
29 Id at 24.
30 Id at 21.
31 Id at 22.
32 Id at 45.
33 Id at 30.
34 Id at 48.
FTC has found this combination highly useful. Competition and consumer protection agencies, however, should recognize the complementary nature of their missions. Around the world, this recognition is growing.

Competition and open markets work best with rules, not anarchy. Our market economy has a well-specified structure of property rights, contract law, and other rules of conduct. One of government’s most useful roles is to provide what are called default rules—terms that apply when the parties do not explicitly specify otherwise. The more efficient these rules, the greater the scope for exchange and thus the greater the gain to consumers. When contracts are formed, even in the most complex transactions, parties cannot specify the terms for every possible contingency. Instead, courts, legislatures, and agencies have developed default rules that are like buying off-the-rack rather than specially tailored clothes. Many of these rules of exchange are so basic—for example, rules against fraud, breach of contract, and deceptive advertising—that we do not even think about them as rules at all. In this way, a vast common law has evolved to facilitate transactions.

Enforcing these rules that help ensure that consumers can make well-informed decisions is the core of the FTC’s consumer protection program. Prevention of fraud and deception helps consumers in two ways: first, most obviously, by deterring dishonest sellers; and second, by making it easier for honest sellers to make credible product claims.

Both consumer and competition policy serve to improve consumer welfare, and they naturally complement each other. Competition theory that excludes consumer policy is not only shortsighted but, given the growing importance of consumer issues, can ultimately be self-defeating. Consumer policy that ignores its impact on competition can result in cures worse than the disease. An agency’s contribution to the economy can be measured by its progress in increasing consumer welfare overall. Thus, well-conceived competition and consumer policies should take complementary paths to the same goal.

At its core, government should protect consumer sovereignty by addressing practices that impede informed consumer choice. Preventing deception, while fostering the free flow of truthful and nonmisleading information to consumers, is crucial to this mission. Accordingly, the FTC strives to stop deception without imposing unduly burdensome restrictions that might chill the dissemination of information useful for consumers. Because truthful and nonmisleading information is also critical for competition, the Commission opposes overly broad restrictions on the provision of such information, whether imposed by the government or private organizations.

Because of its antitrust responsibilities, the FTC knows that robust competition is the best means to protect consumers. Rivalry among producers, and the threat and fact of entry from new suppliers, fuel the contest to satisfy consumers. In competitive markets, firms prosper by beating their rivals. In turn, competition has important implications for the design of policies to regulate advertising and marketing practices. Without a continual reminder of competition's benefits, consumer protection programs can impose controls that ultimately diminish the very competition that increases consumer choice.

Competition principles help ensure that consumer protection is consistent with consumer sovereignty. They remind us that some consumer protection measures—even those motivated by the best of intentions—can fail if they infringe on consumer sovereignty.

36 For example, consumer sovereignty may be frustrated if sellers do not honor their contracts with consumers. See Orkin Exterminating Co, Inc, 108 FTC 263, 364-68 (1986) (holding that Orkin’s unilateral increase in renewal fees caused unavoidable consumer harm), affd, 849 F2d 1354, 1364-65 (11th Cir 1988).

37 See, for example, In the Matter of Request for Comment on First Amendment Issues, No 02N-0209, 4-5 (Sept 13, 2002) (Comments of the Staff of the Bureau of Economics, Bureau of Consumer Protection, and Office of Policy Planning), online at http://www.ftc.gov/os/2002/09/fdatextversion.pdf (visited Nov 26, 2004) (suggesting that when consumers have more information about the good they purchase, more incentives are created for sellers to satisfy customers); In the Matter of American Medical Association, 94 FTC 701, 993-96 (1979) (challenging the Association’s prohibition on physician advertising), enforced as modified, 638 F2d 443 (2d Cir 1980), affd per curiam by an equally divided court, 455 US 676 (1982); Federal Trade Commission, Policy Statement in Regard to Comparative Advertising, 16 CFR § 14.15 (2003) (encouraging the naming or referencing of competitors, but with clarity and disclosure if required to avoid deception); Robert Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv L Rev 661, 670-71 (1977) (discussing the advantages to consumers and competition that flow from comparative advertising).

intentions—can hinder sellers from providing what consumers demand. The FTC recently participated, for example, in a court challenge to a state law that banned anyone other than licensed funeral directors from selling caskets to the public over the internet. While recognizing the state’s intent to protect its consumers, the agency questioned whether the law did more harm than good. In an amicus brief, the FTC noted, “Rather than protect[ing] consumers by exposing funeral directors to meaningful competition, the [law] protects funeral directors from facing any competition from third-party casket sellers.”

Similarly, the FTC recently filed an amicus brief challenging a decision by West Virginia’s State Bar Committee on Unauthorized Practice of Law that barred nonattorneys from performing certain functions associated with the settlement of residential real estate transactions. The FTC argued that, given a complete lack of evidence that consumers suffered any harm from lay practice, the restriction on competition “serve[s] to protect West Virginia attorneys’ economic interests,” not the public interest.

C. Engage in Competition Policy Research and Development

Another principle for successful antitrust agencies is to engage in competition policy research and development. Continuing, substantial efforts to increase an agency’s knowledge base are necessary to address new commercial phenomena, to analyze complex technical issues involving health and safety, and to respond to new technologies. These developments often occur in a regulatory environment in which a competition agency must use the force of its arguments, not fiat, to persuade public authorities to cooperate in law enforcement and other forms of policymaking.

Just as a high-technology company must research to develop new products, so too must a competition agency expand its knowledge to design law enforcement and other policies to conquer current and anticipated consumer problems. A farsighted feature of Congress’s institutional design is that it gave the FTC flexible tools to perform the necessary research and development. Given that the branch of


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economics most relevant to a competition agency—industrial organization—has become increasingly theoretical, with less attention on empirical evidence, the need for such government research and development is all the greater. 41

One example of how the FTC uses these tools to ensure that it accurately understands and properly responds to new challenges is its initiative on e-commerce. The Commission sponsored a three-day workshop on Possible Anticompetitive Efforts to Restrict Competition on the Internet. 42 The workshop examined state regulations and private arrangements, often adopted for purposes unrelated to competition, which may aid existing bricks-and-mortar businesses at the expense of new internet competitors. The workshop spawned several projects. For example, the FTC Bureau of Economics studied the availability of wine over the internet. 43 The study found that a state’s ban on direct wine shipments from out-of-state sellers reduces the varieties of wine available and prevents consumers from purchasing certain premium wines at lower prices. The FTC staff then assessed the impact on wine consumers of barriers to e-commerce, concluding that states could benefit consumers by allowing direct shipment of wine to individual purchasers. 44

A more resource-intensive project at the FTC has been holding in-depth hearings on specific topics. Much credit belongs to former Chairman Pitofsky, who prompted the FTC to look beyond litigation alone to the “full panoply” of competition policy tools at its disposal. From the beginning of his chairmanship, Pitofsky restored the agency’s role in using factfinding hearings and workshops to identify the appropriate path of future policies and to formulate a law enforcement and advocacy agenda. The agency’s hearings on globalization and innovation, 45 collaboration among competitors, 46 and B2B

42 Notice of Public Workshop and Opportunity to Comment, 67 Fed Reg 48472 (July 24, 2002). The workshop agenda, the participants’ written statements, and public submissions are online at http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm (visited Nov 26, 2004).
ventures<sup>47</sup> provided valuable examples of how the FTC could use its distinctive capabilities to communicate with and to the business community and develop a consensus about the future course of policy.

This effort continued while I was chairman. In October 2003, the agency issued a report on how to promote innovation by finding the proper balance of competition and patent law and policy.<sup>48</sup> The report followed hearings that the FTC and Department of Justice (DOJ) convened in February 2002, which took place over twenty-four days and involved more than 300 panelists. The federal agencies heard perspectives from business representatives from large and small firms, the independent inventor community, leading patent and antitrust organizations and practitioners, and scholars in economics and patent and antitrust law. In the report, the FTC proposed legislative and regulatory changes to improve patent quality, including recommendations to create a new administrative procedure to make it easier for firms to challenge a patent's validity at the PTO without having to raise an expensive and time-consuming federal court challenge.<sup>49</sup> The agency also would allow courts to find patents invalid based on the preponderance of the evidence, without having to find that clear and convincing evidence compels that result. Among other proposals, the report further recommended that Congress require actual, written notice of infringement from patentees, or deliberate copying, as the predicate for liability for willful patent infringement.<sup>50</sup>

Turning to health care, the FTC and DOJ held twenty-seven days of joint hearings on the topic from February through October 2003. The hearings broadly examined the state of the health care marketplace and the role of competition, antitrust, and consumer protection in satisfying the preferences of Americans for high quality, cost effective health care. The hearings gathered testimony from approximately 250 panelists, including representatives of various provider groups, insurers, employers, lawyers, patient advocates, and leading scholars on subjects ranging from antitrust and economics to health care quality and informed consent. The report that followed examined the cur-


<sup>49</sup> Id at 7-12.

<sup>50</sup> Id at 16-17.
rent role of competition in health care, how it can be enhanced to increase consumer welfare, and how antitrust enforcement can and should work to protect existing and potential competition in health care. The report found that competition has affected health care markets substantially over the past three decades and that new forms of organization and new strategies for reducing costs and enhancing quality have developed in response to cost pressures. Nonetheless, competition remains less effective than possible in most health care markets because the prerequisites for fully competitive markets are not satisfied. The report made a number of recommendations about ways to encourage more competition, such as the provision of better information about price and quality and the reduction of government regulation that limits competition.

D. Employ a Broad Range of Policy Tools and Remedies

Sound competition policy requires not only identifying appropriate priorities through careful and thorough study of issues, but also deciding how to accomplish an agency's substantive ends. The Commission has become more proficient over time in applying its array of policy instruments in a systematic, coordinated way. For example, the FTC has sought to remove impediments to competition in pharmaceuticals, pursuing this goal on multiple fronts. The FTC studied generic drug entry prior to patent expiration, examining anticompetitive conduct by drug firms and recommending changes to the laws governing generic entry; filed comments with the FDA, advocating that it make the changes the study suggested; and testified before Congress to support proposed legislation to increase competition in the industry. The final legislation adopted the FTC's two main recommendations.

52 Id at 20-24.
Moreover, the FTC intervened in private suits to advance its arguments. In particular, it filed an amicus brief in private antitrust litigation about allegedly fraudulent representations to the FDA by a branded drug company to forestall generic entry. The court agreed that such conduct was not immune from the antitrust laws. This important precedent should assist future enforcement against this kind of conduct.

Finally, the FTC brought several cases challenging anticompetitive conduct by drug manufacturers, most of which resulted in consent orders prohibiting such conduct. The agency also resolved concerns about the competitive effects of a merger of two drug companies through a consent agreement involving nine different markets.

Of course, a competition agency cannot always solve by itself the problems it identifies through research and study. The information and expertise it develops, however, can add important knowledge in the search for solutions. For example, FTC staff recently released a report on online contact lens sales, which concluded that increased competition from online sellers can enhance consumer welfare and recommended that state policymakers rescind or refrain from adopting requirements, such as state licensing of contact lens sellers, that unduly burden internet commerce. Similarly, the FTC, with the DOJ’s Antitrust Division, has commented to state courts and legislatures, as well as state and national bar associations, against expanding the definition of the practice of law to restrain competition from nonattorneys for activities such as real estate closings. The agencies cautioned that such restrictions likely raise consumers’ costs and limit their competitive choices without any evidence that this competition hurts consum-


59 See, for example, In the Matter of Bristol-Myers Squibb Co, No C-4076 (Apr 14, 2003) (Decision and Order).

60 Pfizer, Inc and Pharmacia Corp, No C-4075 (May 27, 2003) (Decision and Order) (finding that the drug companies involved violated the Clayton Act and the FTC Act).

61 See FTC Staff Report, Possible Anticompetitive Barriers to E-Commerce: Contact Lenses 24 (Mar 2004), online at http://www.ftc.gov/os/2004/03/040329creportfinal.pdf (visited Nov 26, 2004). Texas, for example, had implemented such a law. See id at 25, citing the Contact Lens Prescription Act, Tex Occupational Code Ann § 353 (West 2004), previously at Vernon’s Ann Tex Civ Stat article 4552-A (requiring unlicensed contact lens sellers to obtain a physical copy of the contact lens prescription before dispensing lenses). See also Lens Express v Ewald, 907 SW2d 64 (Tex App 1995) (upholding the physical prescription requirement).

62 See, for example, Brief Amici Curiae of the Federal Trade Commission and the United States, McMahon v Advanced Title Services Co of West Virginia at 7–21 (cited in note 40) (arguing that prohibiting lay settlement services does not serve the public interest).
ers. Thus far, most policymakers have refrained from adopting these expanded definitions.

In sum, a competition agency should always consider both its substantive goals and the tools available to achieve its ends, either through its own actions or through advocating the benefits of competition to other decisionmakers.

E. Pay Attention to Institutional Capabilities

An important corollary to the previous guide is that an agency must consider its institutional capabilities. As discussed in Part I, too often the effectiveness of competition policy is equated with the number and visibility of cases pursued. Experience with competition policy shows that this focus ignores the need to evaluate an agency’s commitments in light of its institutional capabilities. There are multiple blind spots. One is that the cramped view of what activity matters—principally litigation—discourages careful consideration of the full range of tools available to address competition policy problems.

The FTC’s antitrust agenda of twenty-five years ago involving dominant firms provides a good example of unduly expensive litigation. In 1979, the agency had initiated and was pursuing nine monopolization or attempted monopolization cases. Most sought structural relief in the form of divestitures or mandatory licensing of trademarks or other intellectual property. In addition to the shaky conceptual basis for most of these matters, the sheer number of large, difficult cases was staggering. These included shared monopoly cases in the cereal and oil industries and a massive investigation that contemplated another in automobiles; three cases to explore predatory pricing doctrine; two novel cases testing the boundary of exclusionary practices; and a matter involving important and sensitive competition concerns in the agricultural cooperative field.

A second failing is to ignore commitments that significantly out-run an agency’s capability. Agencies can create a serious problem by taking on so many matters that the agency lacks the human capital to execute them well. Again the overambitious case load in the 1970s overtaxed the agencies’ capabilities, thereby raising doubts about the

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63 Timothy J. Muris, How History Informs Practice—Understanding the Development of Modern U.S. Competition Policy, remarks before the ABA Antitrust Section Fall Forum, Washington, D.C. 38-42 (Nov 19, 2003), online at http://www.ftc.gov/speeches/muris/murisfallaba.pdf (visited Nov 26, 2004) (arguing that the FTC in the 1970s was overextended, both in taking on too many large cases and in attempting too many novel causes of action).

64 The DOJ’s dominant-firm program in the late 1960s and 1970s was as ambitious. From 1969 to 1974, the DOJ committed itself to restructuring the world’s leading computer producer, the country’s two leading tire producers, and the world’s largest telephone system.
FTC's ability to handle the matters successfully. The Commission would have been far better off choosing a smaller number of matters and handling them well.

Finally, an agency must avoid the dilemma facing the dog chasing the car: what to do once it catches it. Agencies must avoid cases that enjoy some respectable theoretical support but involve implementation issues likely to prove overwhelming in actual prosecution. For example, an agency should avoid cases with proposed solutions that are infeasible or have costs that outweigh the benefits. Moreover, some theories place unsupportable demands on the agency's ability to make fine distinctions between acceptable and prohibited behavior. Thus, the government cases in the 1970s challenging single-firm attempts to attain or exploit monopoly power were resource intensive and largely unsuccessful.66 As discussed in his Essay, Chairman Pitofsky's attention to, and improvement of, antitrust remedies formed a major accomplishment of his tenure.

F. Make Agency Actions and Agenda Transparent

Modern competition policy teaches an important lesson about what competition authorities must do to develop support for their programs. They must work continuously to articulate a positive agenda and to state the assumptions that guide that agenda's formulation. Thus, FTC officials publicly discuss in detail what the agency does in each area of its mandate—competition policy, consumer policy, and the integration of economic analysis into both policies.

As chairman, I spoke and wrote often about the FTC's positive agenda.67 Using the guidelines presented in this Essay and those speeches, I identified four goals. First, promote competition as a basic principle of economic organization through strong enforcement and focused advocacy. Second, attack conduct that poses the greatest threat to consumer welfare. Third, fully use the agency's distinctive institutional capabilities by applying the entire range of policy instruments. Fourth, attach a high priority to improving the institutions and processes by which antitrust policy is formulated and applied.

66 See Pitofsky, 72 U Chi L Rev 209 (cited in note 1).
III. ISSUES THAT REMAIN TO BE ADDRESSED

I have attributed much of the FTC’s success to a shared vision of the proper role of a competition agency, a vision that has evolved for over twenty years through several administrations and Chairs. To recapitulate, antitrust has become an area of bipartisan cooperation. There is widespread agreement that the purpose of antitrust is to protect consumers, that economic analysis should guide case selection, and that horizontal cases—both mergers and agreements among competitors—are the mainstays of antitrust. As Chairman Pitofsky’s and the other Essays in this Symposium reveal, there remain issues outside this consensus. This Part briefly addresses three of these issues: the proper standard for exclusionary behavior under § 2 of the Sherman Act, what limits should be placed on vertical mergers, and whether in practice antitrust enforcers actually consider efficiencies when evaluating mergers. We will see that, with the possible exception of monopolization cases, these controversies are truly at antitrust’s edges. Although the monopolization issue is crucial for private enforcement, because the government brings so few monopolization cases, its impact on the FTC is not great.

A. The Sherman Act and Exclusionary Behavior

Turning to the first issue, some have expressed concern that the government’s brief urging the Supreme Court to grant certiorari in Verizon Communications Inc v Law Offices of Curtis V. Trinko, LLP,68 proposed a new, and unduly stringent, standard for determining whether exclusionary conduct is required for a § 2 claim based on unilateral action.69 This is more of a perceived disagreement than an actual one, based on a misunderstanding of the government’s summary of the appropriate standard in its brief at the certiorari stage. While the brevity of the discussion of what constitutes exclusionary conduct in the certiorari brief probably muddied the waters, the government’s later brief on the merits clearly stated the proper standard, which is that exclusionary conduct is essential to any § 2 claim based on unilateral action.70

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The merits brief asserted that to prove monopolization or attempted monopolization the plaintiff must demonstrate that the defendant engaged in exclusionary conduct and that, in cases asserting a duty to assist rivals, conduct is exclusionary only if it would not make economic sense but for the tendency to impair rivals. This is sometimes called the "profit sacrifice" test. The brief also stated that applying this standard does not mean closely balancing social gains against competitive harms, but rather that the "harm to competition must be disproportionate to consumer benefits (in terms of providing a superior product, for example) and to the economic benefits to the defendant (aside from benefits that accrue from diminished competition)."

The profit sacrifice test thus was said to be a special case, applying only to refusals to assist rivals and to predatory pricing. Although one can criticize this test because modern economic theory posits conditions under which refusals to deal (and predatory pricing) might be anticompetitive, empirical support that these theories have practical significance is nonexistent. Accordingly, to avoid false positives, a restrictive rule, such as the sacrifice test, is appropriate in these limited circumstances.

Nevertheless, mostly because of active private enforcement, the proper boundaries for Sherman Act § 2 enforcement remain the most important antitrust issue lacking consensus. In part, the disagreement reflects the lack of evidence regarding whether practices such as the ones discussed in the previous paragraph and other so-called exclusionary practices, such as bundling and tying, are used with any frequency to harm consumers. The fact that so much of this Symposium is devoted to § 2 issues illustrates both lack of consensus and the importance of these issues.

B. Vertical Mergers: Defining Limits

A second issue at the margin of the antitrust consensus involves vertical mergers. Although the 1984 vertical merger guidelines are outmoded, current government enforcement against vertical mergers is sensible. Consider two recent FTC actions: Cytyc/Digene, which
involved complementary cervical cancer screening tests, and Synopsys/Avant!, which concerned complementary integrated circuit design software products. The FTC voted to block the former and close its investigation of the latter. Although the theory of competitive harm in each involved the combined firm’s incentive to use its market power in one product to harm competition in the complementary product, the method by which harm would occur, the incentives of the firms to act anticompetitively, and the potential impact on competition and consumers differed significantly between the cases, as did the FTC’s ability to forecast the likelihood of future events.

The means by which the combined Cytyc firm could harm rivals were well defined. The theory was that Digene would no longer support liquid Pap test suppliers who were rivals to Cytyc in obtaining the FDA approval necessary for use of the Digene product in combination with the rival’s products. In contrast, the Synopsys theory was that the firm would make improvements to its logical synthesis product that worked better with the Avant! place-and-route product than with rival products. Exactly what changes would occur was unclear. Cytyc/Digene appeared to have strong incentives to act anticompetitively, while Synopsys/Avant!’s incentive to limit interoperability with its rivals (and antagonize customers) was unclear.

Moreover, in Cytyc, the only other liquid Pap test competitor and potential new entrants would have been substantially impeded with-

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were the most widely used sensitive primary screening tool for the detection of cervical cancer. Digene was the only company in the U.S. selling a DNA-based test for the human papillomavirus (HPV), which was believed to cause nearly all cervical cancer cases.

76 See Statement of Commissioner Thomas B. Leary: Synopsys Inc/Avant! Corp, File No 021-0049 (July 26, 2002), online at http://www.ftc.gov/os/2002/07/avantlearystmnt.htm (visited Nov 26, 2004). Synopsys had a nearly 90 percent share of “logical synthesis” or “front-end” tools for chip design, and Avant! had a roughly 40 percent share of so-called “place and route” or “back-end” tools.

77 The FTC challenged Cytyc’s proposed acquisition of Digene, alleging that the combination would reduce competition and increase consumer prices in the market for primary cervical cancer screening tests. The parties abandoned the merger before FTC staff filed a motion in a federal district court to enjoin the transaction. See FTC Seeks to Block Cytyc Corp.’s Acquisition of Digene Corp (cited in note 75).


79 By purchasing Digene, Cytyc could have limited the access of its only existing liquid Pap test competitor, TriPath Imaging, to Digene’s HPV test by making it more difficult for TriPath to secure the needed approvals.

80 See Joseph J. Simons, Merger Enforcement at the FTC, Keynote Address to the Tenth Annual Golden State Antitrust and Unfair Competition Law Institute, Santa Monica, California (Oct 24, 2002), online at http://www.ftc.gov/speeches/other/021024mergeenforcement.htm (visited Nov 26, 2004).
out the merged firm’s cooperation. In contrast, Avant! faced significant competitors downstream who would not be substantially impeded. Another difference between the cases involved the timing of the anticompetitive threat. In Cytyc, the alleged potential harm would occur in the short term. In contrast, the competitive harm in Synopsys would not happen until well into the future, if at all.

C. Merger Efficiencies: Providing Proof

Chairman Pitofsky also raises the treatment of merger efficiencies as an issue not yet in equilibrium.\(^8\) Misunderstandings about the role of efficiencies in the guidelines, in prosecutorial decisions, and in court decisions have led some antitrust attorneys to advise their clients not to make the effort necessary to put forward their best efficiencies case. On the FTC side, the dearth of sound, factually supported efficiencies presentations leads the agency usually to reject the efficiencies that are claimed. When the parties present back-of-the-envelope calculations or advance claims of efficiencies with insufficient empirical support, the staff understandably will not accept them. Although this may give the FTC a reputation for not welcoming efficiencies arguments, the only deserved reputation is one for rejecting poorly developed arguments. Parties do not bother providing detailed material, and, without such material, the agency does not believe an efficiencies argument. This is a classic “chicken and egg” problem. Internally, however, both Chairman Pitofsky and I took seriously the few substantial, well-documented efficiencies arguments we received.\(^8\)

Moreover, we both recognized that mergers can lead to a variety of efficiencies.

CONCLUSION

Although there will always be close cases and issues at the margins that remain unsettled—witness the emphasis of this Symposium on the search for appropriate standards for monopolization—at the FTC there is now a clear understanding of the agency’s core mission, shared by the agency staff, the private entities it regulates, and its peers in government. This shared vision is implemented through a strategy that recognizes the many tools available to shape policy. Today, the FTC enjoys bipartisan political support and is largely immune from the partisan squabbling that characterizes so much of our current political discourse.

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\(^8\) See Pitofsky, 72 U Chi L Rev at 221–24 (cited in note 1).

\(^8\) Perhaps the best known example of the agency accepting efficiency claims involved the GM-Toyota joint venture. See General Motors Corp, 103 FTC 374 (1984).
Nevertheless, the FTC has hard work ahead to retain its status as a successful agency. In consumer protection, for example, it should continue to develop tools to fight fraud, in particular increasing its ability to mobilize government agencies around the world to reduce the incidence and impact of consumer fraud. The FTC should also continue its role as an advocate against the myriad restraints the government imposes mistakenly in the name of consumer protection. In competition policy, the agency should continue to clarify the role of antitrust law in policing business misuse of governmental processes to harm consumers. The agency should also devote increased resources to the monopolization issue, especially in studying those practices that some economists claim can be used to exclude competitors to the detriment of consumers. Empirical evidence about the conditions under which the practices harm or benefit consumers is essential for substantial progress in clarifying the law of monopolization.

Thus, great progress has been made, but much more remains to be done. Although enforcement is its most consistently used tool, the FTC should continue to employ its institutional capabilities carefully and not measure success based solely on bringing cases. It should also strive to make its actions and agenda transparent to all. Above all, the FTC must recognize its important, but limited, role of enforcing the basic rules that help a market economy function efficiently.