Competition System Architecture: How to Choose an Effective Institutional Design

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- “If analysts and operators are to increase their ability to achieve desired policy outcomes, ... we shall have to find ways of thinking harder about the problem of ‘implementation,’ that is, the path between the preferred solution and actual performance of the government.”
Modern Competition Law: The Remarkable Global Expansion

• Creation of Competition Law Systems
  – By 1950: <5
  – By 1990: <20
  – July 2012: Approximately 120
  – By 2020: 130+
Institutional Transformation

• Consolidation of National Competition Agencies: Brazil, France, Portugal, Spain, UK
• Functions Redistributed: Ireland, Netherlands, Spain
• Decentralized Prosecution: Private Rights Augmented
• Criminalization: Chile, Mexico, South Africa
• More Networked Enforcement: COMESA
• Intra-Agency Realignment: DG Comp CET
How To Achieve An Effective Institutional Design?

• UK Inquiry
  – Focused attention upon first principles about public administration and competition policy
  – Could have benefitted from
    • Better conceptual tools to select among system design alternatives
    • Fuller body of scholarly work on experience with other competition systems
The Epidemic Failures

• Too Little Attention to:
  – How specific design characteristics improve or retard effectiveness
  – How individual adjustments in institutions interact with other system elements
  – How a system’s impact on economic performance can best be measured
Consequences

• Countries Make Key Design Choices Based on:
  – Doubtful assumptions about cost savings (don’t count on it any time soon)
  – Poor awareness of reform side effects (going criminal is more complicated than you think)
  – Inattention to system-wide interdependences (raise sanctions, and courts demand greater impartiality safeguards in agency decision-making)
Research and Policy Goals

• Improve Conceptual Understanding of Public Sector Institutions
  – Compare: Coase, *Theory of the Firm*

• Test Links Between Design-Performance

• Focus on Competition Systems and Apply to Other Fields
  – E.g.: Consumer Financial Protection Bureau
Today’s Agenda

• Identify Major Design Issues
• Discuss Some Interrelationships
• Offer Some Tentative Conclusions
• Joint Work with David Hyman, University of Illinois College of Law
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Eight Core Design Issues

• Status: Independence and Accountability
• Governance by Single Director or Board
• Self-Contained Entity or Subunit
• Diversification of Policy Making Agents
• Optimal Assignment of Policy Duties
• Best Portfolio of Policy Instruments
• Integration of Decision Making Functions
• Internal Distribution of Authority
Status

• Typical Advice: Competition Agencies Must Be “Independent” from Political Influence

• Overlooked Tradeoffs
  – As agency powers grow, so do demands for accountability to elected officials or courts
  – Excessive detachment from politics yields isolation
  – Expanded non-litigation activity (e.g., advocacy) exposes agency to more political buffeting
Autonomy/Accountability Reconciled

• Autonomy Defined
  – Independence from Interference in prosecution and disposition of cases (key to legitimacy)
  – Intellectual integrity

• Accountability
  – Clear disclosure of basis for policy choices
  – Accessible to discuss/defend policy choices
Governance

• Unitary Hierarchy
• Multimember Board
• Hybrids
  – Single Executive
  – Consultation with External Board
Boards and Hierarchies Compared

• Boards
  – Less coherence and clarity in branding?
  – Diversify expertise
  – More legitimacy?
  – Better results from collective decisions?
  – Harder to capture?
  – Slower deliberation

• Hierarchies
  – Clearer branding
  – Narrower perspective but can diversify expertise at deputy level
  – More prone to abrupt political shifts
  – Faster deliberation
Self-Contained Entity or Subunit of Other Body

- **Self-Contained Body**
  - Easier branding
  - Greater adaptability and responsiveness
  - Reduced transaction costs

- **Subunit**
  - Harder branding
  - Greater realization of synergies?
Diversification of Policy Making Bodies: N or N+ Agents

• Monopolist Provider: Public or Private
• Multiple Agents in Same Domain
  – Combination of public or private agents
• Single Agent with Contestability
  – Bodies with scaleable portfolios
Diversified Prosecution

- Impact on Policy Coherence
- Coordination Costs
- Benefits of Innovation/Rivalry
  - Will rivalry occur on the right margins?
Optimal Assignment of Policy Duties

• Single Purpose Agency
  – Example: Competition agency

• Multifunction Agencies
  – Multiplicity is the modern norm: competition plus
    • Consumer protection (the most common choice)
    • Government procurement
    • Access terms for regulated sectors
    • Scrutiny of unfair contract terms
Single- or Multi-Function Agencies

• Impact on Policy Coherence/Branding
  – Theoretical vs. actual synergies

• Deference before Courts
  – Are multifunction agencies expert in all functions?

• Internal Coordination Costs
  – Degree of actual integration?

• Multiplicity as Safeguard Against Capture

• Migration of Budgets and Policy Emphasis
Optimal Portfolio of Policy Instruments

- Law Enforcement Powers and Procedures
- Rulemaking
- Research and Reporting
- Advocacy
- Broad Portfolio: Independence Effects
What Does Each Measure Entail? Three Illustrations

- Premerger Review: Greater Ability to Stop Harmful Deals, but Administrative Challenges
- Criminal Sanctions: Greater Deterrence, but Coordination Burdens for Administrative Agencies
- Advocacy: Greater Capacity to Solve Problems at their Cause, but Important Consequences for Autonomy
Integration of Decision Making Tasks

• To Aggregate or Disaggregate
  – Decision to investigate
  – Decision to prosecute
  – Determination of culpability
  – Imposition of sanctions
Consequences of Integration

• Quality Control Effects
  – Diminishing confirmation bias

• Equilibration by
  – Courts: Less deference
  – Legislators: more demands for oversight
Integration Decisions as Exercise in Quality Control

• Aim: Test Evidence Rigorously to Improve Outcomes

• At What Point in the Lifecycle of a Matter Are Controls Best Imposed?
  – E.g., Internal Adversarial Processes

• How to Signal Quality to Courts/Others
Internal Distribution of Authority

• How Much Delegation to Subordinate Levels of Agency?
  – Chambers of the Bundeskartellamt

• Location and Status of Economists

• Who Makes Recommendations to Leadership?
  – US FTC: Competition/Consumer Protection, Economics, General Counsel
Future Steps

• Map Status Quo More Completely/Accurately
  – GW Benchmarking Project
• Assess Links Between Specific Features or Bundles of Traits on Agency Performance
  – Types of outputs
  – Quality of policy outcomes
Hopeful Signs

- Greater Study of Individual Systems
  - Example: Crane, (2011); Wilks (2011)
- More Comparative Work
  - Example: Beaton-Wells/Ezrachi (2011)
- Refinement of Conceptual Frameworks
  - Example: Trebilcock/Iacobucci (2010)
- International Networks: ICN, OECD, UNCTAD
Conclusion: The Emerging Frontier

• Opportunities to Improve Performance with Better Understanding of:
  – Costs, benefits, and tradeoffs associated with specific design elements
  – Interactions among design elements
  – Connection between agency architecture and policy outcomes
• Value of Comparative Study