

Designing Better Institutions to Enforce Competition Law: A Symposium Introduction

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The 2009–2010 academic year marked the fifteenth anniversary of the founding of the Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law. The Institute for Consumer Antitrust Studies is a non-partisan, independent academic center designed to explore the impact of antitrust enforcement on the individual consumer and the public, and to shape policy issues. The Institute promotes a comprehensive, inclusive view of the benefits of competition law and policy that includes, yet goes beyond, prevailing narrow notions of economic efficiency. The Institute fulfills its mission by sponsoring symposia, academic colloquia, and a unique student fellowship.

In order to celebrate its fifteenth birthday, the Institute embarked on an ambitious agenda of five programs during calendar year 2009. The year began with Antitrust Marathon III: Antitrust and the Rule of Law, a roundtable discussion held at the British Consulate in Cambridge, Massachusetts in April to discuss substantive and procedural aspects of the rule of law in competition matters from a comparative perspective.¹ The celebration continued with the ninth annual Loyola Antitrust Colloquium which featured four cutting edge papers and a robust conversation among the professors, practitioners, policy makers, and judges in attendance.² The spring semester concluded with a two-day conference on comparative monopolization law co-sponsored with the University of Haifa at their beautiful campus atop Mount Carmel in

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1. The Antitrust Marathon is a series of roundtable discussions co-sponsored with the Competition Law Forum of the British Institute of International and Comparative Law designed to address timely issues in comparative competition law. The issue papers and edited transcript from Antitrust Marathon III have been published in 22 *LOY. CONSUMER L. REV.* 1 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503011.

2. For the full program of the symposium, see Loyola University Chicago School of Law, Institute for Consumer Antitrust Studies, http://www.luc.edu/law/academics/special/center/antitrust/events.html#antitrust_col (last visited Mar. 11, 2010).

Haifa on the Mediterranean coast of Israel.³ The final program took place in the fall with Antitrust Marathon IV: Marathon with Authority in Dublin, Ireland, where thirty distinguished speakers discussed the relationship between competition policy and other regulatory regimes and the institutional regimes necessary to enforce them.⁴

Institutional design, although never far from the surface at any of these events, was the explicit theme of the September 2009 program which is the basis for this symposium issue. This theme and the symposium itself were the brain child of Ilene K. Gotts, the chair of the Antitrust Section of the American Bar Association for 2009–2010.⁵ The Institute and the Law School are grateful for her inspiration, energy, and follow-through that turned this idea into a reality and made possible our participation in this wonderful event. With the help of Ms. Gotts, my co-organizer Melanie Aitken, Commissioner, Canadian Competition Bureau, the panel chairs, the speakers, and the hard-working staff of the Antitrust Section, the Institute, the Law School, and the *Loyola University Chicago Law Journal*, we gathered on September 11, 2009, in the new ceremonial court room at the Law Center.

The ABA Section of Antitrust Law, in conjunction with the Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law, assembled a first-rate group of leading scholars, current and former enforcement officials, and practitioners to examine the different institutional frameworks for implementing competition law and policy. The institutional frameworks applied by each jurisdiction may be of even greater significance than the substance of the rules they apply, but has received far less attention. The discussion to date of the institutions of antitrust and competition policy has been far less robust than the discussion of the liability rules and other topics in the competition law field.

This symposium signaled a renewed focus on institutional concerns and sought to approach this critical issue from a comparative

3. For the full program of the Haifa conference, see Loyola University Chicago School of Law, Institute for Consumer Antitrust Studies, <http://www.luc.edu/law/academics/special/center/antitrust/events.html#monopolization> (last visited Mar. 11, 2010). The papers from the Haifa conference will be published shortly in a special symposium issue of the *Antitrust Law Journal*.

4. For full details see Loyola University Chicago School of Law, Institute for Consumer Antitrust Studies, <http://www.luc.edu/law/academics/special/center/antitrust/events.html#marathon> (last visited Mar. 11, 2010). The papers and transcript from Antitrust Marathon IV will be published in a forthcoming issue of the *European Competition Journal*.

5. American Bar Association, Section of Antitrust Law, <http://www.abanet.org/antitrust/home.html> (last visited Mar. 11, 2010).

perspective, drawing on the wisdom of key enforcers, observers, and participants from the principal competition jurisdictions from around the world including the United States, the European Union, Canada, Japan, Australia, and others. Our goal was to:

- Identify and offer a comparative analysis of the frameworks adopted in different jurisdictions for the investigation, review, and adjudication of antitrust issues;
- Analyze the causes and consequences of these differences;
- Consider how the different frameworks operate in theory and practice in reaching sound decisions in a fair and efficient manner; and
- Evaluate the need and nature for improvements including both incremental change and sweeping overhauls of the institutions and procedures now in place.

The symposium included three panels and a keynote talk from FTC Commissioner William Kovacic.⁶ We proudly present a number of the papers and selected comments from the symposium in order to keep the conversation alive and maintain the momentum to include institutional design, along with the substance and procedure of competition law, as a topic of academic interest for years to come.

The first panel focused on the principal models for competition enforcement that have been adopted in various jurisdictions and discussed the origins of the different approaches to decision-making. The speakers addressed such topics as:

- Who makes the ultimate decisions regarding liability and remedy: specialized decision-makers or courts of general jurisdiction?
- Who decides the facts: specialist courts, generalist courts, sectoral regulators, or competition enforcement agencies?
- How does the law on the books differ from the law in action in terms of competition law enforcement and institutional arrangements?
- Are the differences between the principal competition

6. FTC Commissioner Kovacic is both a pioneer and leading authority in the field of institutional design and competition policy. Some of the themes of Commissioner Kovacic's remarks at the Loyola-ABA symposium can be found in William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903 (2009); William E. Kovacic, Commissioner, Fed. Trade Comm'n, Speech at the Office of Fair Trading, London, Eng.: Engineering the Competition Agency of the Future: Perspectives from the FTC Self-Study (Mar. 4, 2009), available at <http://www.ftc.gov/speeches/kovacic/090304oftlondon.pdf>.

jurisdictions a function of deliberate policy decisions, cultural mores, historical events, or other factors?

- How do the different approaches reflect other concerns and values such as market integration, protection of domestic producers, empowerment of minority populations, protection of privacy, safety, and the environment, and other concerns?

While the order of articles in this symposium issue differs from the order of presentations at the symposium, this introduction will focus chronologically on each group of panelists. This symposium begins with the paper from Professors Michael Trebilcock and Edward Iocabucci of the University of Toronto Faculty of Law that provides an overview of the full range of issues discussed throughout the day. We continue with the thoughtful paper from Professor Eleanor Fox of NYU School of Law that focused on design and change in enforcement institutions, including the European Union and many of the other leading competition jurisdictions throughout the world.

The second panel focused on analyzing competition law outcomes and the outputs of the different frameworks and enforcement regimes. This panel considered whether the various decision-making processes are fair, transparent, predictable, and contribute to an appropriate range of rulings and remedies. The discussion included whether the regimes in one jurisdiction can serve as appropriate models for other jurisdictions; more specifically, are the regimes in one jurisdiction unsuited for jurisdictions that have different substantive objectives? The panelists further focused on whether differing enforcement regimes are necessary for merger and non-merger matters or private versus governmental enforcement.

This panel produced a rich array of papers and comments as well. Allen Fels, the Dean of the Australia and New Zealand School of Government, writes on *A Model of Antitrust Regulatory Strategy* based in part on his experience as the former chair of the Australian Competition and Consumer Commission. Professor Michal Gal of the University of Haifa offers her thoughts on institutional design and resource scarcity from her perspective as one of the leading scholars of competition policy in small economies.⁷ Next comes the co-authored paper of Cal Goldman, the former head of the Canadian Competition Bureau, which expands on his comments at the symposium on the evolving role of the Commissioner of the Competition Bureau in the

7. See generally MICHAL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES (2003) (explaining concepts of institutional design relating to small economies).

Canadian system. Finally, we are proud to include the paper of Professor Mitsuo Matsushita on important recent changes in the Japanese Antimonopoly Law. Professor Matsushita was unable to attend the symposium due to illness but was kind enough to provide his paper for inclusion in the symposium issue.

In the final panel, the panelists focused on the insights of comparative institutional analysis as applied to the enforcement of competition law. Comparative institutional analysis seeks to analyze how different combinations of markets, politics, courts, and bureaucracies are appropriate for the allocation of rights and the resolution of disputes. Despite the obvious application of this body of work to the competition law area, it has only rarely been used to analyze either U.S. or comparative antitrust issues.⁸ We were fortunate to have Neil Komesar, the pioneer of comparative institutional analysis,⁹ offer his thoughts on the application of this powerful body of work to questions of competition law and enforcement. Finally, Professor Danny Sokol of the University of Florida College of Law addresses the usefulness of comparative institutional analysis in antitrust and some of the reasons why this tool has been underutilized to date.

The Institute for Consumer Antitrust Studies is proud to work with the Antitrust Section of the ABA and the *Loyola University Chicago Law Journal* to bring you this symposium both to memorialize the symposium that took place this past September,¹⁰ but also to bring to the forefront the question of institutional design as a critical topic for further study, reflection, and debate.

8. See e.g. Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1, 42 (2008); Spencer Weber Waller, *Areeda, Epithets and Essential Facilities*, 2008 WIS. L. REV. 359, 385; D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 69–73 (2007).

9. See generally NEIL K. KOMESAR, *LAW'S LIMITS: RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001); NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* (1997) (analyzing markets, politics, and courts in addressing increasingly complex and large scale social problems).

10. In addition to the articles and comments in this symposium, the full audio of the symposium is available at American Bar Association, Section of Antitrust Law, <http://www.abanet.org/antitrust/at-programs/symp-09/audio.html> (last visited Mar. 11, 2010).