

Winter 2010

Designing Antitrust Agencies for More Effective Outcomes: What Antitrust Can Learn From Restaurant Guides

D. Daniel Sokol

University of Florida Levin College of Law, sokold@law.ufl.edu

Follow this and additional works at: <https://scholarship.law.ufl.edu/facultypub>



Part of the [Administrative Law Commons](#), [Antitrust and Trade Regulation Commons](#), and the [Law and Society Commons](#)

Recommended Citation

D. Daniel Sokol, *Designing Antitrust Agencies for More Effective Outcomes: What Antitrust Can Learn From Restaurant Guides*, 41 Loy. U. Chi. L.J. 573 (2010), available at <http://scholarship.law.ufl.edu/facultypub/229>

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in UF Law Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

Designing Antitrust Agencies for More Effective Outcomes: What Antitrust Can Learn from Restaurant Guides

D. Daniel Sokol*

I. CREATING A RESTAURANT GUIDE SURVEY MODEL FOR MEASURING ANTITRUST EFFECTIVENESS

When you have to go to a city with which you are unfamiliar and you want to find a good place to eat, you look for information on restaurants in Zagat, Michelin, or some other food guide.¹ The recommendations may not be exactly right, as taste is at some level idiosyncratic.² However, generally a survey recommendation provides a good overall sense of a restaurant's quality. It also provides a relative sense of how the restaurant compares to others of the same type of cuisine, whether it has a good wine list or is among the most romantic locations for a dinner date, and so forth.

Restaurant reviews and "best of" lists must be approached cautiously. There are many biases at play. Selection bias might distort the analysis, as it may create a non-random sample.³ Cognitive biases can skew the reliability of information.⁴ Sometimes such biases are partially due to too much information and choice.⁵ How helpful is it if we hear from a

* Assistant Professor of Law, University of Florida Levin College of Law. Thanks to Russ Damtoft, Jeff Harrison, Tim Hughes, David Hyman, Michal Gal, Bob Lande, Russ Pitman, and Maurice Stucke for their suggestions.

1. This issue is particularly salient given the decline of expert restaurant reviewers, the rise of survey-based evaluations, and on-line individual evaluations that can be aggregated.

2. The Romans, who knew something about good food, used the expression *De gustibus non est disputandum* (There is no disputing about tastes).

3. See e.g., Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1128-33 (1992) (providing a discussion of issues of selection bias).

4. Richard H. Thaler, *Mental Accounting and Consumer Choice*, 4 MARKETING SCI. 199 (1985) (explaining consumer behavior through transaction utility), reprinted in RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* 25, 33-37 (1st paperback ed. 1994).

5. WAYNE D. HOYER & DEBORAH J. MACINNIS, *CONSUMER BEHAVIOR* 115 (Houghton Mifflin 3d ed. 2004); PHILIP KOTLER & KEVIN LANE KELLER, *MARKETING MANAGEMENT* 186 (Prentice Hall 12th ed. 2006).

friend or review that a restaurant's food and service was spotty? Maybe the chef had a bad day, but the restaurant is otherwise very good. A survey allows us to aggregate responses and overcome some biases. Yet, some restaurant surveys may create a bandwagon effect in which we might believe something because others do or skew how we process information because only those with strong opinions may respond to a survey. Given these trade-offs, we are still probably better off in a world with restaurant guides than one without them because such guides reduce the search and planning costs of going out for a meal.

Why bring up restaurants in a symposium about antitrust institutions? For one, a symposium at Loyola University Chicago School of Law allows me to highlight that Chicago is a great restaurant city at all price ranges.⁶ Second, antitrust has a long history of food-related enforcement.⁷ Compelling as these reasons are, I want to focus instead on antitrust institutions and the idea of creating a Zagat-style guide to antitrust agencies. A significant issue in antitrust is in how effective the system is. However, we lack effective measurements oftentimes to determine the relative strengths and weaknesses of antitrust and its institutions.

Antitrust policy should be concerned with the quality and effectiveness of the antitrust system. Some efforts at agency effectiveness include self-study of antitrust agencies to determine the factors that lead to improving agency quality.⁸ Such studies, however,

6. Donald Burnam, *America's Best Restaurant Cities 2007*, FORBESTRAVELER.COM, Apr. 17, 2007, <http://staging.forbestraveler.com/food-drink/restaurant-cities-story.html>.

You'd think that Chicago's Midwestern swagger would make it a meat-and-potatoes town, but as America's most majestic, wide-open, best-designed city, it's also central to American gastronomy, from innovations like the salad bar at R.J. Grunt's and hip tapas bars like Café Ba-Ba-Reeba! to some of the best Mexican food in the U.S. at Topolobampo and Frontera Grill. It's a lot more fun to eat out in Chi-town than almost anywhere else.

Id.; Alan Richman, *2nd City No More*, GQ, June 2006, available at <http://www.gq.com/food-travel/alan-richman/200605/chicago-second-city>.

7. For some recent cases see, e.g., *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008); *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001); *FTC v. Hicks, Muse, Tate & Furst Equity Fund V, L.P.*, No. 1:02-cv-02070-RWR (D.D.C. dismissed Oct. 31, 2002); *Nestlé Holdings, Inc.*, 136 F.T.C. 791 (2003) (consent order). Food systems issues also are ones in which monopsony may play an important role. See generally ROGER BLAIR & JEFFREY HARRISON, *THE LAW AND ECONOMICS OF MONOPSONY* (forthcoming 2010) (explaining the importance of monopsony issues in antitrust analysis).

8. E.g., William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903 (2009) [hereinafter *Rating the Competition Agencies*] (advocating a normative criteria for standards of antitrust agencies); William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503 (2006) [hereinafter *Using Ex Post Evaluations*] (suggesting ex post evaluation in making competition policy).

often focus only on enforcement decisions and other agency initiatives such as competition advocacy. They do not reflect at least one other part of the equation:⁹ what do non-government users of the antitrust system think about the quality of antitrust agencies?

What if we created a yearly survey of antitrust agencies around the world from the consumer perspective? Law school graduates in the United States are well aware of the importance of rankings because of the U.S. News rankings that rate law schools.¹⁰ One result is that the U.S. News rankings take away some of a school's ability to control its reputation.¹¹

I propose that an antitrust agency rating focus on quality, which is a reputational ranking. Quality has more to do with perception. An agency cannot easily buy a better rating the way a law school can by increasing its students' median LSAT score by two points. Restaurants understand that if the quality (or at least the perception of the quality) of their food and service decline, so will business. If antitrust agencies want to improve their ratings, they can improve the quality of their service (procedural issues and transparency) as well as the quality of their food (substantive decision-making).

Do the consumers of the antitrust system understand quality the way that consumers at a restaurant do? People might have different notions of quality at a restaurant. I love anchovies on pizza; my wife does not. Nevertheless, that does not mean that she cannot appreciate the difference between a good pizza that has anchovies and a bad one.

Something analogous occurs in antitrust. Consumers of the antitrust system, such as antitrust lawyers, think that a well-reasoned decision is one that supports their client's position. Yet, these lawyers also accept that antitrust decision-making for clients is based on a risk-reward system and that greater antitrust risk may lead to an adverse enforcement outcome. A high-risk decision that comes out unfavorably

9. *Rating the Competition Agencies*, *supra* note 8, at 903 (suggesting a number of different issues that need to be factored into such an analysis).

10. Alfred L. Brophy, *The Relationship Between Law Review Citations and Law School Reputation*, 39 CONN. L. REV. 43, 50 (2006); Paul L. Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483 (2004); Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403 (1998); Nancy B. Rapoport, *Ratings, Not Rankings: Why U.S. News & World Report Shouldn't Want to Be Compared to Time and Newsweek—or The New Yorker*, 60 OHIO ST. L.J. 1097 (1999).

11. Michael Sauder & Wendy Nelson Espeland, *Strength in Numbers? The Advantages of Multiple Rankings*, 81 IND. L.J. 205 (2006). Because of the various weights given to various subjective and objective factors, it is possible to game the U.S. News system. Plus, playing to the rule is at least, in part, the point.

but is well reasoned is better for predictability of the antitrust decision, future business counseling, and litigation strategy than a favorable decision that is poorly reasoned. On some level, good lawyers accept that decisions might not go their way but respect a system that provides for well-reasoned decision-making.¹²

With both food and antitrust, there are two types of consumers—locals and those who have comparative perspective. When I started law school at the University of Chicago, I was directed by the locals to eat at Giordano's and Gino's East because they were regarded as the two "best" pizza places in Chicago. Because I had not grown up in the Midwest, I was unfamiliar with the Chicago version of pizza. For those not acquainted with Chicago deep-dish pizza, it is best described as a pizza casserole. Deep-dish pizza is quite heavy and bakes for so long that the cheese cannot be placed on top of the pizza or it would burn. Chicago deep-dish may be many things but to non-locals it is not pizza. Real pizza is thin crust that comes out crispy from the oven. The tip of a good thin crust pizza slice should not fall under the weight of too much cheese.¹³ People might differ as to what constitutes superior toppings or the advantages of a wood versus gas oven, but a slice of pizza should not be heavier than the Areeda and Hovenkamp multi-volume antitrust treatise.¹⁴

Similarly, a rating system for antitrust agencies that relies only on what local lawyers think about an agency may lead to mistaken inferences. Local lawyers might have their own sense of what constitutes high quality merger analysis. Such a view, however, may be quite different from practitioners from other jurisdictions.

In favor of local opinion is that local practitioners may be repeat players and the ones most familiar with the local antitrust system and therefore the best to judge its quality.¹⁵ Yet, foreign lawyers have a

12. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 188 (2004).

13. If you don't believe me, believe Alton Brown of the Food Network and Bon Appétit Magazine. Food Network, Top American Restaurants: Bon Appetit Picks the Best, <http://www.foodnetwork.com/food-network-specials/top-american-restaurants-bon-appetit-picks-the-best/index.html> (last visited Feb. 7, 2010) (choosing only thin crust pizzas as the best pizzas in America).

14. I will not even get into calorie counts between deep-dish and thin slice. Actually, I will. One slice of Giordano's deep-dish pepperoni pizza has 800 calories with 25 grams of total fat. One slice is almost half of a person's daily caloric intake. My Fitness Pal, Calories in Giordano's Pizza Stuffed Pizza: Pepperoni Pizza, <http://www.myfitnesspal.com/food/calories/giordanos-pizza-stuffed-pizza-pepperoni-pizza-945895> (last visited Feb. 7, 2010).

15. One measurement that could be used would be a comparative local ranking—how does antitrust regulation perform relative to banking regulation, telecom regulation, securities regulation, etc. This would allow locals to weigh the relative success of the antitrust system. However, if local practitioners have thoughts about multiple regulators, this would suggest that

better comparative perspective of the quality of a given antitrust system and can compare the *relative* quality of one agency to another.

At the practical level, it is not clear how much useful cross-comparative information will emerge. As a restaurant patron, I can go into restaurants worldwide and apply comparable standards. But who actually walks into multiple competition agencies and deals with their respective staffs? I suspect that in the case of the National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI), it is primarily Peruvian lawyers. In the case of the Federal Antimonopoly Service (FAS), it is Russian lawyers. Even in most multinational mergers, it is the retained local counsel who undertake most of the interaction with the agencies. Local counsel, therefore, may filter their agency interaction in a way that does not provide in-house counsel or other outside counsel a true sense of the pros and cons of a particular agency and antitrust system.

There is a trade-off between local knowledge and comparative perspective. In the absence of agreed standards, there may be multiple “optimal” approaches. For this reason, it is important to poll the opinions of both sets of lawyers and to disaggregate results between locals and non-locals.¹⁶

Do we at least agree as to the basic elements of what constitutes a pizza or, for that matter, antitrust enforcement? We have a sense overall of the contours of merger control and cartel enforcement from international best practices from the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN).¹⁷ As to the specific practices of antitrust law and policy, these will vary from country to country but should be within the range of accepted international practices.¹⁸ There is not a clear sense of what best practices are in a number of substantive areas of antitrust,

they are not repeat players before the antitrust agency and their opinion may be skewed by outlier experiences.

16. Of course, it is also crucial to keep the identity of survey respondents confidential.

17. Org. for Econ. Co-operation and Dev. (OECD), *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, OECD Doc. C(98)35/Final (Mar. 25, 1998); OECD, *Recommendation of the Council on Merger Review*, OECD Doc. C(2005)34 (Mar. 23, 2005); OECD, OECD Competition Comm., *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations* (Oct. 2, 2005); First Annual Conference of the Int'l Competition Network (ICN), Notification & Procedures Subgroup, Naples, Italy, Sept. 28–29, 2002, *Guiding Principles for Merger Notification and Review Procedures*; Fifth Annual Conference of the ICN, Cape Town, S. Afr., May 3–5, 2006, *Recommended Practices for Merger Notification and Review Procedures*.

18. D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. 1081 (2009) [hereinafter Sokol, *International Antitrust*].

particularly in the area of single firm conduct.¹⁹

II. WHAT WOULD THE SURVEY INCLUDE?

What then should we use to rank antitrust agencies? I believe that the ranking should be based on consumers' personal experience in the last year regarding the following issues ranked from one (lowest score) to five (highest score):²⁰

1. How do you rate the transparency of the antitrust agency in its decision-making process?

This question gets to the issue of how transparency aids in business planning.²¹ In a restaurant, you want to know the hours of operation of the restaurant as well as issues like the chef's use of butter or spices. With antitrust agencies, firms want to understand the enforcement priorities of the agency and issues such as the determinants for why agencies decide to undertake or not undertake enforcement decisions. Transparency includes enforcement standards and procedures and the broader issue of the decision-making framework of the agency on various substantive antitrust issues.²² Transparency also includes agencies releasing studies in which agency staff use confidential information to undertake meta-analysis of how certain kinds of claims and situations play out in case analysis before the agency, even if it does not result in a decision.²³

Of course, there are certain costs and benefits to transparency. Increased transparency taxes resources. However, the potential benefits in increased transparency for an agency include greater predictability

19. David S. Evans, *Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules*, 10 CHI. J. INT'L L. 161 (2009); Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, 10 CHI. J. INT'L L. 189 (2009); William H. Page, *Mandatory Contracting Remedies in the American and European Microsoft Cases*, 75 ANTITRUST L.J. 787 (2008); Mats A. Bergman et al., *Atlantic Divide or Gulf Stream Convergence: Merger Policies in the European Union and the United States*, (July 1, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=975102>.

20. Along with a box for "not applicable."

21. See generally Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFF. L. REV. 937 (2003) (offering thoughts on transparency in merger enforcement).

22. John M. Nannes, *Transparency in Federal Antitrust Enforcement Decisions: A Reaction to Professor Grimes*, 51 BUFF. L. REV. 1017, 1017-18 (2003).

23. Malcolm B. Coate, *Theory Meets Practice: Barriers to Entry in Merger Analysis* (Feb. 18, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=988423>; Malcolm B. Coate, *Alive and Kicking: Collusion Theories in Merger Analysis at the Federal Trade Commission* (Jan. 1, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1030067>.

and accountability for the agency and better planning by the non-agency users of antitrust in a given country. These seem to outweigh the costs.

2. How do you rate the level of expediency of issues before the agency?

Time is money. A lack of business certainty has negative effects upon firms. Yet, there have to be trade-offs regarding expediency. A quick “wrong” decision is not better than a slow “right” decision.

3. How do you rate the procedural fairness of the antitrust system?

Procedural fairness should be an important bedrock not just of antitrust but of the entire legal system.²⁴

4. How do you rate the quality of the judiciary’s ability to understand antitrust issues?

The judiciary plays an important role in antitrust because it can uphold or strike down a determination of wrongdoing made by an agency. If the judiciary does a poor job in understanding the economic basis for antitrust, decision-making may be highly variable.²⁵ It also matters if the judiciary is climbing a learning curve as opposed to being persistently bad in its decision-making.

5. How do you rate the quality of the staff of the antitrust agency?

An antitrust agency is only as good as the quality of the staff of the agency.²⁶ If case handlers cannot distinguish a good case from a bad one, antitrust will become an arbitrary regulatory tax on doing business within a given jurisdiction.

6. How do you rate the quality of the leadership of the antitrust agency?

Are the managers doing a good job? Management of the antitrust agency is responsible for the strategic vision of the agency, such as

24. Joel Brockner et al., *Cultural and Procedural Justice: The Influence of Power Distance on Reactions to Voice*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 300, 301 (2001); Larry Heuer et al., *The Role of Societal Benefits and Fairness Concerns Among Decision Makers and Decision Recipients*, 31 L. & HUM. BEHAV. 573, 574 (2007); Solum, *supra* note 12, at 188; A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 23–24 (2009); Diane P. Wood, *Antitrust at the Global Level*, 72 U. CHI. L. REV. 309, 315 (2005).

25. D. Daniel Sokol, *Limiting Anti-Competitive Government Interventions that Benefit Special Interests*, 17 GEO. MASON L. REV. 117, 145 (2009); Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals* 6 (Geo. Mason L. & Econ. Research Paper Series, Research Paper No. 09-07, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319888.

26. Sokol, *International Antitrust*, *supra* note 18, at 1082–83; D. Daniel Sokol & Kyle W. Stiegert, *Exporting Knowledge Through Technical Assistance and Capability Building*, 5 J. COMPETITION L. & ECON. (forthcoming 2010).

setting the enforcement and non-enforcement priorities. This is distinct from agency staff that has a more technical (and tactical) role in the implementation of the law and policy.

The next group of questions goes to the quality of substantive analysis in antitrust analysis.

7. How do you rate the overall quality of merger review?

Quality in mergers has both procedural/timing issues and substantive issues. It may be that a merger regime is good on process but bad on analysis and vice versa. It is possible to isolate each element by breaking up the question into additional sub-questions.

7a. How do you rate the quality of the merger review process?

7b. How do you rate the quality of substantive merger review?

8. How do you rate the quality of cartel enforcement?

Some of the effectiveness of cartel enforcement may be a function of what the legal system provides. Does the law allow for a leniency program? Does the antitrust law provide for criminal sanctions for individuals? Are civil penalties sufficient for optimal deterrence?²⁷ These institutional factors will shape the quality of antitrust as much as the abilities of the agency staff and leadership.

9. How do you rate the workability of the legal standards under rule of law principles?

The rule of law means many things to many people.²⁸ Maurice Stucke has expressed concern that the rule of reason in antitrust may

27. John M. Connor, *Latin America and the Control of International Cartels*, in *COMPETITION LAW AND POLICY IN LATIN AMERICA* (Eleanor M. Fox and D. Daniel Sokol eds., 2009) (suggesting that global fines are not high enough for optimal deterrence); John M. Connor & Robert H. Lande, *The Size of Cartel Overcharges: Implications for U.S. and EU Fining Policies*, 51 *ANTITRUST BULL.* 983 (2006) (arguing that EU and U.S. fines are not sufficient to prevent recidivism).

28. Friedrich A. Hayek, *The Origins of the Rule of Law*, in *THE CONSTITUTION OF LIBERTY* 162 (Univ. of Chi. Press 1960); Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 *CHINESE J. INT'L L.* 1, 6-7 (2003); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 *VA. L. REV.* 253, 264-67 (2009). Perhaps the current state of the academic literature is best summarized by Mathew D. McCubbins, Daniel B. Rodriguez & Barry R. Weingast, *The Rule of Law Unplugged* (Texas Law, Public Law Research Paper No. 154, 2009) (abstract), available at <http://ssrn.com/abstract=1467797> ("The 'Rule of Law' is a venerable concept, but, on closer inspection, is a complex admixture of positive assumptions, occasionally wishful thinking, and inchoate political and legal theory.").

violate rule of law principles. He describes rule of law principles as those that:

- are “prospective, accessible and clear” to constrain the government (both the executive and judiciary) from exercising its power arbitrarily;
- make “it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge”;
- apply to all persons equally, offering equal protection without prejudicial discrimination; and
- are “of general application and consistent implementation; [they] should be capable of being obeyed.”²⁹

However one defines these terms, the rule of law seems to be important to a well functioning antitrust system as it is to a broader legal system.

Of the set of questions below on substantive antitrust issues, many of the questions are good in principle but difficult to get enough results in practice for a survey to be meaningful. Most jurisdictions have few cases or investigations in many of these substantive areas of law on a yearly basis.³⁰

I do not include additional comments for the following questions because these questions are ones that go to specific types of conduct and how the antitrust system in a given country resolves them. Some of the basic behavior for each type of substantive issue might be the same across jurisdictions based on economic theory. However, some of the assumptions behind the theory may not hold across countries because of issues such as the size of the economy, economic concentration, openness to trade, ease of raising capital, how contract-law enforcement in a country might implicate antitrust law enforcement, or other issues. These questions focus on the antitrust agency, but courts implicitly affect such responses because the agency will choose to bring (or not

29. Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1416–19 (2008).

30. See, e.g., ICN, *Unilateral Conduct Working Group Questionnaire on Predatory Pricing and Exclusive Dealing/Single Branding and Responses*, <http://internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct/unilateral-conduct-working-group-and-responses-2007> (last visited Mar. 6, 2010); ICN, *Unilateral Conduct Working Group Questionnaire on Tying, Bundled Discounts and Single-Product Loyalty Discounts and Rebates and Responses*, <http://internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct/questionnaire> (last visited March 6, 2010).

bring) certain cases based on how courts react to such cases. Agencies also may frame cases in one way rather than another because of potential success with courts.³¹

10. How do you rate the quality of agency action in cases involving joint ventures?
11. How do you rate the quality of agency action in cases involving bundling?
12. How do you rate the quality of agency action in cases involving tying?
13. How do you rate the quality of agency action in cases involving exclusive dealing?
14. How do you rate the quality of agency action in cases involving refusals to deal?
15. How do you rate the quality of agency action in cases involving resale price maintenance?
16. How do you rate the quality of agency action in cases involving predatory behavior?
17. How do you rate the quality of agency action in cases involving price discrimination?

III. DOES THE RESTAURANT ANALOGY WORK IN AN ANTITRUST CONTEXT?

Measuring quality is highly subjective. In this sense, the problem is that “local” in antitrust is not geographic (e.g., I do not like Chicago-style pizza) but rather an economic philosophy (I do not think that most vertical restraints are problematic). Thus, for many, what is high quality may be determined by what they think an agency should do.

One broad measurement of the quality of the substantive enforcement issues is whether the agency has a clear sense of the goal(s) that it sees for competition law—whether or not we agree with the goal(s)—and consistently and rationally applies the law to achieve the goal(s). Another measurement of quality might mean well-reasoned decision-

31. Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1211–12 (2007).

making based upon an error-cost framework. The appeal of a survey is that it allows us to utilize the wisdom of a large group to reach a socially efficient way to determine what constitutes “quality.”³²

Some of the restaurant parallel weakens because the restaurant must satisfy customers in order to survive, whereas the agency has a completely different constituency as far as its budget. Moreover, different people involved in the restaurant dynamic have different expectations for the restaurant. Antitrust enforcers have different goals than do private lawyers. The enforcers want to serve the public interest (even if they also have a public choice agenda as well), whereas private lawyers represent their clients. Maybe they each have different sets of assumptions and expectations of what should be on the menu.

What purpose would such a ranking serve? Unlike restaurant customers, there are not reduced search costs from a ratings guide for agencies. Lawyers and businesses cannot take a pass on an agency with only one star. In most cases, they are stuck eating the lousy food and putting up with the lousy service that a bad antitrust agency provides.³³

Cross-country comparisons of antitrust agencies may not be measuring the same type of restaurant. Restaurants in some countries face different constraints such as the availability of good steak or seafood. Significant political and economic differences across countries shape the contours of antitrust within that country. Different countries’ competition authorities face different challenges. The economic organization of the country may be such that there are few or many state-owned enterprises.³⁴ For others, the nature of industrial organization in the country (factors such as trade openness and concentration) will shape the resource allocation within an antitrust agency. For some agencies, dealing with state aid and abuse of dominant position may be more probative and afforded greater weight

32. JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS* (2004) (explaining that collective knowledge may be better than individual knowledge).

33. This, of course, is not totally correct. Firms can potentially find a new country to do business in and there can be some sort of global Tiebout choice regarding policy preferences. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (providing a theoretical model of how mobile consumer voters shape the level of public goods a locality provides). For global firms that need to be in all (at least major) jurisdictions, there is no ability to exit the market. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970) (explaining the choices of voice and exit).

34. Eleanor M. Fox, *An Anti-Monopoly Law for China—Scaling the Walls of Government Restraints*, 75 ANTITRUST L.J. 173, 173 (2008); D. Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State Owned Enterprises*, 2009 BYU L. REV. 1713 (2009).

than some other antitrust issues.

In contrast to subjective standards of a survey, are there any objective metrics to baseline (and compare) the agencies' performance? There might be some metrics which may cut across all agencies. Objective metrics could supplement some of the subjective metrics of antitrust the way Zagat's can baseline restaurants on price or the number of entrées.

Some cross-country quantitative measurements exist. Whether they measure the right things is another question. The World Economic Forum provides a score in its annual *Global Competitiveness Report* based on the overall perception of a country's antitrust effectiveness.³⁵ This is not a broad survey and a high overall score may still mask significant flaws on particular issues. The survey uses both publicly available data and survey data of a group of worldwide business leaders. Some antitrust articles have used these sets of scores as a proxy of agency effectiveness.³⁶

Additional objective measures could include the length of time to conduct merger review or prosecute a price-fixing suit. It might include the level of fines collected or the ratio of agency budget to the number of attorneys of the staff. These and other "objective" measurements are actually highly subjective. A short length of time for cases could mean that an agency is working expeditiously. However, it could also mean that an agency looks for cheap wins and is prone to settle on terms that are not optimal because of a lack of resources to try cases or lack of confidence in winning difficult cases before the courts. The level of fines may seem low but given the size of the economy and of firms in that country, maybe the fines collected are properly calibrated. In other circumstances, if one measures success by the level of fines, it may lead to excessive fines.

One could measure the budget-to-staff ratio of an agency to try to determine a measurement of "bang for the buck." A budget-to-staff ratio provides a measure of resources used per person. However, some agencies have larger administrative staff than others.³⁷ Other agencies need more economists than lawyers because of the type of cases that the

35. WORLD ECONOMIC FORUM, *THE GLOBAL COMPETITIVENESS REPORT 2009–2010* (2009), available at <http://www.weforum.org/pdf/GCR09/GCR20092010fullreport.pdf>.

36. Keith N. Hylton & Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects*, 74 ANTITRUST L.J. 271 (2007); Michael W. Nicholson, *An Antitrust Law Index for Empirical Analysis of International Competition Policy*, 4 J. COMPETITION L. & ECON. 1009 (2008).

37. D. Daniel Sokol, *The Development of Human Capital in Latin American Competition Policy*, in *COMPETITION LAW AND POLICY IN LATIN AMERICA* 15 (Eleanor M. Fox and D. Daniel Sokol eds., 2009).

agency brings. In yet other agencies the size of the staff is not a clear picture of “bang for the buck” because a staff member may have multiple tasks. The staffer may have some antitrust *and* some non-antitrust functions like consumer protection or intellectual property enforcement.

The age of the agency might matter because the older the agency, the better the institutional knowledge. It is possible to quantify the age of an agency based on when the antitrust law went into effect. Is such a measurement actually useful? It is not clear that it is. It assumes institutional knowledge grows over time and that age might be an indirect proxy for an upward learning curve of an agency. However, particularly in developing-world antitrust agencies, turnover is high. In some countries the agency might lose twenty-five percent of its staff per year. This attrition may be a function of the success of an agency—because of the expertise developed, staffers have many opportunities in the private sector at salaries much greater than what they were making while working for the government.³⁸

Does the number of decisions an agency undertakes matter because it speaks to activity? If so, this has the potential to bias the ranking to favor those agencies that prosecute many cases. This may lead to over-enforcement or to a focus on the wrong sort of enforcement—little cases that do not matter as opposed to large ones that have a bigger impact on conduct and the shape of antitrust doctrine. Case counts are a highly political measure. A subjective qualitative measure may be less political because it captures the sense of what people think about the quality, not quantity, of enforcement.

IV. CONCLUSION

Even with its flaws, there are reasons to think that agencies would be responsive to a restaurant guide-style rating. One benefit of Zagat’s is that the information helps rivals benchmark their performance against comparables, thereby improving quality of food or service. Pride and self-respect will motivate agencies to improve.³⁹ Benchmarking allows

38. 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, 283 (2001).

39. D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 98–99 (2007) [hereinafter Sokol, *Monopolists Without Borders*]. That is exactly what seems to happen with health-care report cards. No one went to medical school to be below-average. There are strong professional norms of excellence that motivate improved performance if there is a feedback loop. David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, 90 CORNELL L. REV. 893,

younger antitrust agencies to see the level of practice of more mature institutions in implementing antitrust law.⁴⁰ External to the agency, the ratings may affect other parts of government. Good or bad ratings may prompt action from the governmental body that has antitrust oversight. The quality of the review may change the level of funding for the agency or may be a factor in a change in agency leadership.⁴¹

Antitrust agency leadership across countries, fonts of wisdom though they may be, have blinders to their own weaknesses. We know what agencies say at conferences and in their annual reports.⁴² Most of what they do is to highlight the positive developments. What we do not know is what really happens in those agencies. A “customer” survey of the quality of the agency provides feedback to the agency of a broader group that might highlight a different set of issues.

I do not, alas, have a great solution. An imperfect ratings system may be better than no ratings at all. Agencies may not realize how bad they are doing comparatively or in an absolute sense. Most people seem to think they are above average in looks. Of course, fifty percent of such people are wrong in their views. With an assessment of the antitrust system and a poor showing, an agency may rethink its goals and the tools at its disposal. The benefit of a ranking of agencies is that it creates a vehicle to begin the process of agency self-assessment.⁴³

Three issues in particular require greater depth and analysis in future work. First, it is important to identify the reasons for reviewing antitrust and the process to go about such a review. Second, the theories needed to be tested with real world cases and results evaluated. Third, methodologies need to be reevaluated in light of the results.

Let the ratings begin!⁴⁴

940–41 (2004).

40. Mariana Bode & Oliver Budzinski, *Competing Ways Towards International Antitrust: The WTO Versus the ICN* (Marburg Papers on Econ., Working Paper No. 03-2005, 2005), available at <http://ssrn.com/abstract=888682>.

41. Sokol, *Monopolists Without Borders*, *supra* note 39, at 98–99.

42. See, e.g., OECD, Resale Price Maintenance, OECD Doc. DAF/COMP (2008)37 (Sept. 10, 2009), available at <http://www.oecd.org/dataoecd/39/63/43835526.pdf>; John Fingleton, Chief Executive, Office of Fair Trade, Closing Speech to the ICN Conference (Jun. 5, 2009), available at <http://www.internationalcompetitionnetwork.org/media/library/ICNclosingspeech.pdf>.

43. Joyce Ehrlinger & David Dunning, *How Chronic Self-Views Influence (and Potentially Misperceive) Estimates of Performance*, 84 J. PERSONALITY & SOC. PSYCHOL. 5, 6–7, 13–15 (2003).

44. Maybe you were expecting “Let them eat cake!” instead?