

Competition Policy in Times of Recovery

William E. Kovacic

George Washington University Law School

AdC Webinar

April 22, 2021

Upheaval

- Immediate, Continuing Economic Distress
- Lasting Damage to Commercial Ecology
 - Small and medium enterprises
- Shocking Stress Test for Public Institutions, Including Competition Agencies

Policy Responses

- Massive Public Expenditures
- Reassessment of Assumptions About Economic Policymaking
 - When/where is competition useful?
- Probing Review of Public Administration

Possibilities That Uniquely Arise from Upheaval

- Economic Policy
 - Opportunities to build competition policy into the core of new economic policies, including public expenditure programs
- Institutional Design
 - Competition agencies: innovation by necessity
 - Operating procedures
 - Analytical capacity: e.g., Artificial Intelligence
 - Economy-wide expertise
 - Cooperation within and across jurisdictions

This Afternoon's Agenda

- Global Context: Recognition of Competition as a Pillar of National Recovery Strategy
- How Pro-Competition Orientation Can Help Realization of National Economic Goals
- Notable, Informative Examples
- Personal Views Only
- Contact: wkovacic@law.gwu.edu

Resources

- Anderson, Kovacic, Müller, Salgueiro & Sporysheva, *Competition Policy and the Global Economy: Current Developments and Issues for Reflection*, 88 GEORGE WASHINGTON UNIVERSITY LAW REVIEW 1421 (2020)
- Anderson, Jones & Kovacic, *Preventing Corruption, Supplier Collusion, and the Corrosion of Civic Trust: A Procompetitive Program to Improve the Effectiveness and Legitimacy of Public Procurement*, 26 GEORGE MASON LAW REVIEW 1233 (2019)

My Point of View

- Non-Executive Director, United Kingdom's Competition and Markets Authority
- Former US Federal Trade Commission Board Member, Chair, General Counsel, Case Handler
- Academic Researcher
- Government Advisor

Pandemic Responses: Global Context

- Major Recovery Efforts: Underway/Planned
 - Large public expenditures
- Stocktaking of Existing Policy/Regulatory Framework in Light of COVID Stress Test
- Some Notable Recent Policy Measures
 - Australia: Digital Economy Studies/Cases
 - EU: Digital Markets Act
 - Japan: Post-Pandemic Competition Strategy
 - UK: Digital Markets Unit

Informative Earlier Experience

- Australia's Economic Descent: 1960 to 1990
- National Productivity Comm'n: *Hilmer Review*
 - Remove barriers to internal economic integration
 - Enhance competition law enforcement system
 - Subject public enterprise to competitive discipline
 - Apply pro-competitive insights to policymaking
- Result: Strong, Positive Economic Effects for Growth and Innovation

Competition Policy Instruments

- Law Enforcement
- Research and Reporting
- Advice to Government

Government Antitrust Enforcement

- Challenge Private Barriers to Better Economic Performance
 - Price, quality, productivity, innovation
- Increase Market Permeability as Source of Market Discipline, Economic Mobility
 - New entry/expansion by smaller firms

The Modern Revolution in Information Services and Equipment

- Status Quo for First Half of 20th Century
- Regulatory Policies at National/State Levels
 - Restrictions on entry, deployment of new services
 - Limits on competition in telecom equipment
- Exclusionary Conduct by Private Firms
 - Interconnection
 - Equipment Installation

Telephone: 1950s





1960s: The Carterfone Autopatch Machine

The Original "Carterfone"

This original Carterfone, manufactured by Carter Communications in 1955, served as a model for mobile radio users to interconnect with the public telephone network. One of the Carterfones was challenged by the telephone companies in 1961, and a lengthy struggle began that ultimately led to the Federal Communications Commission.

On June 26, 1968, the FCC handed down the landmark Carterfone Decision. The resolution of Tom Carter's struggle for acceptance of the concept of interconnection provided the catalyst for a multi-billion dollar industry that today serves all areas of communications: mobile-data, voice, message. The historic Carterfone Decision allowed an open, competitive market to exist for communications equipment and facilities to the benefit of the communications user.

This original Carterfone is one of the few remaining devices in existence, and has been preserved in recognition of the historic legal milestone it represents.

Carterfone Communications Corporation
Dallas, Texas

Camera (and Film) 1980s



Mainframe Computer: 1960s



Today



Three Formative Cases: Catalysts for the Modern Digital Economy

- *US v. AT&T* (1956 Settlement)
- *In re Carterfone* (Federal Communications Commission 1968) [with participation by US Department of Justice]
- *US v. AT&T* (1982 Modification of 1956 Settlement)

Competition Agencies as Advocates

- Promote Market Access
- Bring Procompetitive Perspective to Public Policymaking
 - Existing policy
 - Proposed measures

Malcolm McLean, Competition Advocacy, and the Modern Transportation Revolution

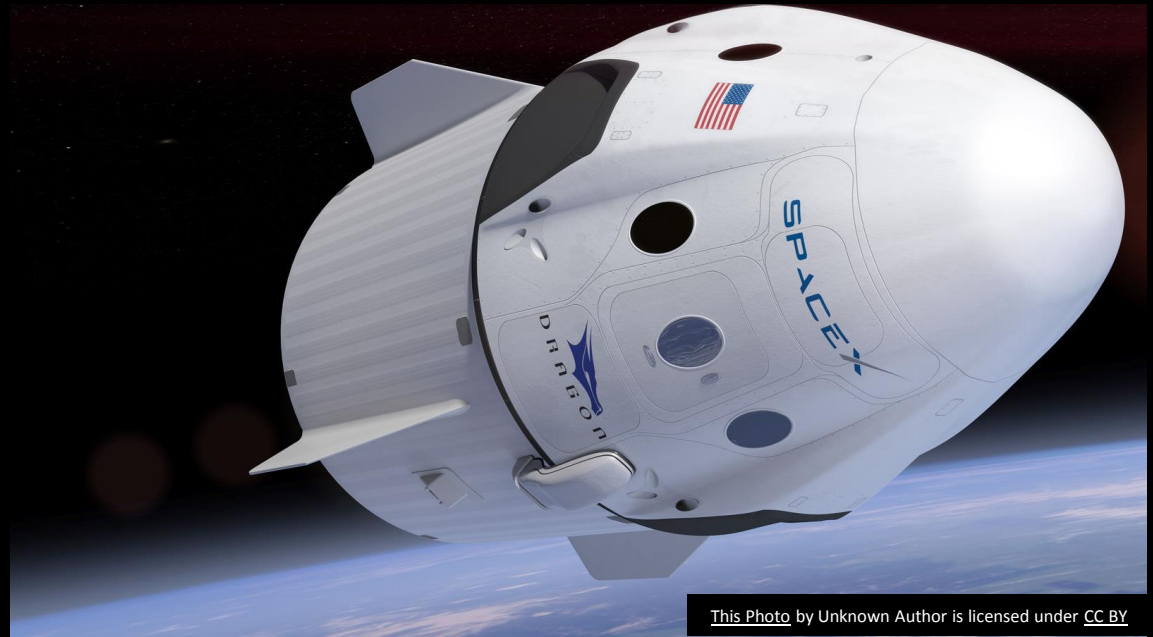


Containerized Shipping

- Barriers to Adoption
 - Extensive regulatory controls on entry into trucking and upon intermodal competition
- Competition Agency Contribution
 - US DOJ and FTC research on trucking and advocacy before the Interstate Commerce Commission and the Congress



This Photo by Unknown Author is licensed under [CC BY-SA](#)



This Photo by Unknown Author is licensed under [CC BY](#)

The Modern Revolution in Space Transportation

NASA, DOD, and SpaceX

- 2006: US Government Encourages Creation of Joint Venture Between Boeing and Lockheed Martin [United Launch Alliance (ULA)] to Serve as Sole Provider of Launches to USG
- FTC Advocacy to Department of Defense and NASA: Importance of Sustaining an Alternative
- 2006 to Present: Qualification of SpaceX as Major Competitor to ULA
- See Kovacic, *Competition Policy Retrospective: The Formation of the United Launch Alliance and the Ascent of SpaceX*, 27 GEORGE MASON LAW REVIEW 863 (2020)

Competition Agencies as Valuable Resource for Government

- Some Special (Unique?) Competition Agency Strengths
 - Expertise Derived from Law Enforcement
 - Microeconomic Policy Research
- Awareness of How the Larger Policy “Enabling Environment” Shapes Economic Outcomes

Illustration: UK Competition and Markets Authority

- United Kingdom CMA Illustrations:
 - COVID policy initiatives and guidance
 - DaTA Unit Analytics
 - Market study: electric vehicle charging
 - Massive government spending forthcoming
 - Collaboration across agencies: ICO, OFCOM
 - Penrose: CMA annual competition review

OECD Competition Policy Toolkit: Four Basic Questions for Government

- What Are the Policy's Goals?
- Is There a Good Fit Between the Policy's Goals and the Means Proposed to Achieve Them?
- Are There Alternatives that Can Attain the Policy's Aims While Leaving More Room for Competition?
- Is the Policy Achieving Its Objectives?

Subsidies: Three Questions Competition Agencies Can Pose

- What Is the Problem To Be Solved?
- Has the Suggested Approach Worked Well Before?
 - What determined success (or caused failure)?
- How Will We Know the Proposed Works?
 - Are existing programs working as Intended?

Public Procurement: The Competition Agency Contribution

- Deeper Cooperation: Competition Agencies and Public Procurement Authorities
- Focal Points
 - Detect, punish, and deter collusion and corruption, especially through better analytics
 - Encourage adoption of pro-competitive procurement techniques that achieve better value

Closing Thoughts

- Competition as a Pillar of Economic Recovery
- Competition Agencies as Valued Partners to Government in Economic Policymaking
 - Challenging private barriers to competition
 - Suggesting procompetitive policy options based on deep sectoral expertise and broad knowledge of the economy and the policy environment that shapes economic performance