

# LIFECYCLES OF COMPETITION SYSTEMS: EXPLAINING VARIATION IN THE IMPLEMENTATION OF NEW REGIMES

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## I

### INTRODUCTION

The emergence of competition law as a global enterprise is a remarkable development in economic regulation.<sup>1</sup> For nearly a century after the adoption of the first national statutes in the late nineteenth century,<sup>2</sup> competition law, or antitrust, was largely an American idiosyncrasy.<sup>3</sup> This is no longer the case. Since

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1. See Umur Aydin & Tim Büthe, *Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits*, 79 LAW & CONTEMP. PROBS., no. 4, 2016, at 2 (describing development of competition law and challenges faced by competition agencies). In this article, "competition law" encompasses the policy tools (including law enforcement, advocacy, research, market studies, and business education) that countries use to proscribe anti-competitive business practices and to promote the adoption of pro-competitive public policies. See 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, 281–86 (2001) [hereinafter *Institutional Foundations*] (describing policy tools that comprise competition law and policy).

2. See D. Jeffrey Brown, *Introduction to Competition Law*, in COMPETITION ACT & COMMENTARY 1, 6–13 (Stikeman Elliott LLP ed., 2015) (describing passage of Canada's competition law in 1889).

3. The United States enacted its first federal antitrust law, the Sherman Act, in 1890. Sherman Act, 15 U.S.C. §§ 1–7 (1982). The adoption of the statute is examined in MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916*, at 93–117 (1988). A small number of other jurisdictions established competition law systems in the century after the Sherman Act was passed. Notable additions took place in 1958 when Germany's competition law took effect and the European Community, through the Treaty of Rome, adopted the competition articles that created the European Union's competition law system. On the enactment of Germany's competition law, see Gerard Braunthal, *The Struggle for Cartel Legislation*, in CASES IN COMPARATIVE POLITICS 187, 191–200

the late 1980s, the number of jurisdictions with competition laws has soared from roughly thirty to more than 130,<sup>4</sup> and more are on the way.<sup>5</sup> Many modern adopters are countries that once seemed immutably committed to central planning and government ownership as the foundations for economic progress until the recent past.<sup>6</sup>

The astonishing global expansion of competition law has considerable economic significance beyond the well-established regimes in the European Union and the United States, which together had, until recently, functioned as a form of regulatory duopoly in international competition law since the early 1990s.<sup>7</sup> For large multinational companies, the establishment of new systems in Brazil and China and the makeover of India's older, ineffective competition regime have transformed the planning of mergers and required reconsideration of practices such as the licensing of intellectual property.<sup>8</sup> Though its Anti-Monopoly Law only took effect in August 2008,<sup>9</sup> China already is a peer of the European Union and the United States in its capacity to shape global norms of

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(James B. Christoph & Bernard E. Brown eds., 1965). The adoption of the competition articles of the Treaty of Rome is recounted in DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* 342–45 (Oxford University Press, paperback ed. 2001).

4. See William E. Kovacic, *The United States and Its Future Influence on Global Competition Policy*, 22 *GEO. MASON L. REV.* 1157, 1157–58 & n.7 (2015) [hereinafter *Influence*] (describing global creation of competition law systems). The calculation of how many countries have competition law systems is an imprecise exercise. For a discussion of classification questions and other methodological issues, see Mark R.A. Palim, *The worldwide growth of competition law: an empirical analysis*, 43 *ANTITRUST BULL.*, Spring 1998, at 105 [hereinafter Palim, *Worldwide Growth*].

5. For example, Nigeria is moving toward enacting a competition law. Mark Briggs, *Nigeria edges closer to competition law*, *GLOB. COMPETITION REV.* (June 9, 2016), <http://globalcompetitionreview.com/news/article/41227/nigeria-edges-closer-competition-law/> [<https://perma.cc/8STQ-B8W5>].

6. The adoption of competition laws in the BRICS countries (Brazil, Russia, India, China, and South Africa) is illustrative. Thirty years ago, these nations seemed unlikely to pursue market-based reforms and create competition systems. See generally *COMPETITION LAW IN THE BRICS COUNTRIES* (Adrian Emch et al. eds., 2012) (detailing establishment of competition law in BRICS nations); see also *COMPETITION LAW AND ENFORCEMENT IN THE BRICS AND IN DEVELOPING COUNTRIES* (Frederic Jenny & Yannis Katsoulacos eds., 2016) [hereinafter *COMPETITION LAW AND ENFORCEMENT*] (discussing development of competition law in BRICS nations and other developing countries). The adopters since 1990 are not only planned economies or developing countries. These include Austria, Italy, and the Netherlands. See NMa, *Annual Report 1998*, at 3 (1998), available at [www.acm.nl/en/publications/publication/11598/NMa-1998-Annual-0Report/](http://www.acm.nl/en/publications/publication/11598/NMa-1998-Annual-0Report/) [<https://perma.cc/T775-L98Y>] (noting adoption by the Netherlands of its first competition law in 1998); [www.agcm.it/en/](http://www.agcm.it/en/) [<https://perma.cc/TD2A-WSWH>] (describing enactment of Italy's first competition law in 1990).

7. See William E. Kovacic, *Dominance, Duopoly and Oligopoly: The United States and the Development of Global Competition Policy*, 14 *GLOB. COMPETITION REV.* 39, 39 (2010) (recounting the development of the EU/U.S. competition law duopoly).

8. See Kovacic, *Influence*, supra note 4, at 1158 (discussing the expansion in the number of the world's competition systems and its significance for business decision making).

9. Xiaoye Wang & Adrian Emch, *Chinese Antitrust—a Snapshot*, *J. ANTITRUST ENF'T* 12, 12–13 & n.1 (Supp. Oct. 2015) (describing adoption and implementation of China's Anti-monopoly Law).

business behavior.<sup>10</sup> In the years to come, regional alliances such as the Association of Southeast Asian Nations may achieve the same stature.<sup>11</sup>

For students of regulation, the establishment of new competition law systems commands attention for another reason. The creation of so many new systems—roughly 100 new regimes in barely twenty-five years<sup>12</sup>—provides an unmatched opportunity to study why regulatory institutions come into being, how they evolve, and what makes them succeed or fail in carrying out their legal mandates. Our unscientific impression is that there is no other field of economic policy in which so many jurisdictions adopted a new regulatory regime for the first time in so short a period.<sup>13</sup> Competition law now encompasses an extraordinary array of

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10. See generally CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS (Adrian Emch & David Stallibras eds., 2013) (discussing how China's Anti-monopoly Law has already shaped global business); see also Symposium, *Competition Law in China Today*, 3 J. ANTITRUST ENF'T 1 (Supp. Oct. 2015) (discussing development of China's competition law system); Yane Svetiev & Lei Wang, *Competition Law Enforcement in China: Between Technocracy and Industrial Policy*, 79 LAW & CONTEMP. PROBS., no. 4, 2016, at 190.

11. The Association of South East Asian Nation committed its members to adopt competition laws by the end of 2015. The association's competition law treaty commitments appear at [www.asean.org](http://www.asean.org). This spurred the creation of new systems in Myanmar and the Philippines. The association recently launched the Competition Policy and Law Program to encourage cooperation and policy integration in competition law across the region. Calvin Hui, Singapore's Competition Commission leads effort to align competition policy and law in ASEAN (Apr. 27, 2016), available at <http://www.channelnewsasia.com/news/business/singapore/singapore-s-competition/2735476.html>.

12. See Aydin & Büthe, *supra* note 1, at 2 (describing diffusion of competition systems globally). We derive our estimate from several sources. We began with Mark Palim's study in 1998, which identified jurisdictions with competition laws as of 1990. See Palim, *Worldwide Growth*, *supra* note 4, at 106–09 & n.15. We then identified adopters since 1990 with the George Washington University Law School's Competition Law Center data base and the membership data for the International Competition Network. See *Worldwide Competition Database*, THE GEO. WASH. COMPETITION L. CTR., <http://www.gwclc.com/World-competition-database.html> [<https://perma.cc/D3WP-9KEK>] (compiling data on institutional characteristics of competition law systems); *Members Directory*, INT'L COMPETITION NETWORK, [www.internationalcompetitionnetwork.org/members/member-directory.aspx](http://www.internationalcompetitionnetwork.org/members/member-directory.aspx) [<https://perma.cc/Z5YX-K7VV>].

13. In the late 1980s and in the 1990s, many communist or socialist countries undertook market-oriented economic reforms. The economic reform process in these countries is documented in THE EMERGENCE OF MARKET ECONOMIES IN EASTERN EUROPE (Christopher Clague & Gordon C Raussner eds., 1992) [hereinafter EMERGENCE] (describing economic reforms undertaken by transition economies after fall of Berlin Wall and dissolution of the Soviet Union). These changes reflected the realization that a successful transition to a market system required basic changes in the existing legal framework. See Mancur Olson, *The Hidden Path to a Successful Economy*, in EMERGENCE, *supra*, at 55, 65 (“To realize all the gains from trade, . . . there has to be a legal system and political order that enforces contracts, protects property rights, carries out mortgage agreements, provides for limited liability corporations, and facilitates a lasting and widely used capital market that makes the investments and loans more liquid than they would otherwise be.”). Amid all economic law reform activity in this period, the breadth of adoption of competition laws seems unmatched. We tested our impression by examining the proceedings of the Organization for Economic Cooperation and Development, whose programs support reforms to spur economic growth. ORG. FOR ECON. COOPERATION & DEV., OECD 50<sup>TH</sup> ANNIVERSARY VISION STATEMENT 2 (2011) (“Throughout its history, the OECD . . . has assisted countries in fostering good governance and reforming and improving their economic policies to generate greater economic growth.”). The OECD operates through a framework of about 250 committees, expert groups, and working groups. See Hugh M. Hollman & William E. Kovacic, *The International Competition Network: Its Past, Current and Future Role*, 20 MINN. J. INT'L L. 274, 289 (2011) (describing operations of OECD). Our review of their work reveals no other area of economic regulation in which so many

jurisdictions in most parts of the world.<sup>14</sup> Since 1990, the extensive experimentation with institutional design and policy implementation for competition law has elicited attention from scholars in economics, history, law, political science, and public administration.<sup>15</sup>

This article examines one aspect of the global adoption of competition law systems: what jurisdictions must do to build the institutions needed for effective competition law implementation, and in particular, to develop programs that improve economic performance.<sup>16</sup> Rather than assess whether recently-created competition systems have reduced prices, improved product quality, or stimulated innovation,<sup>17</sup> this article analyzes how well various jurisdictions have created the institutional predicates for achieving these aims.

This article discusses the topic of institutions and implementation as follows. Part II sets out the major assumptions that have guided our study of competition system lifecycles.<sup>18</sup> It discusses the importance of institutional design and policy implementation capacity, and, focusing on institutional considerations, provides our own definition of what constitutes a “good” competition regime.

Part III considers the specific obstacles that a jurisdiction must surmount to establish an effective competition law regime. In doing so, it emphasizes that the establishment of a well-functioning system in most jurisdictions is likely to be a relatively slow process. It suggests that it takes roughly twenty to twenty-five years from the adoption of a law to determine whether a new competition law regime is on the path to successful implementation over the longer term. In more

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jurisdictions have created new legal regimes in numbers comparable to competition law.

14. See Aydin & Büthe, *supra* note 1, at 2 (describing the expansion of competition law systems). The broad geographic distribution of competition systems is evident from the membership of the International Competition Network. See *Member Directory*, INTERNATIONAL COMPETITION NETWORK, [www.internationalcompetitionnetwork.org/members/membersdirectory.aspx](http://www.internationalcompetitionnetwork.org/members/membersdirectory.aspx) (listing, by continent, International Competition Network members).

15. The multidisciplinary study of new competition systems is evident in the contributions to this issue of *Law & Contemporary Problems*. See, e.g., Aydin & Büthe, *supra* note 1 (collaboration between two political scientists to analyze the development of new competition systems); A.E. Rodriguez & Ashok Menon, *The Causes of Competition Agency Ineffectiveness in Developing Countries*, 79 *LAW & CONTEMP. PROBS.*, no. 4, 2016, at 37 (study by economists of limits on ability of competition agencies to implement policy successfully).

16. Commentators identify improved economic performance (for example, greater productivity and increased innovation) as an important competition policy goal, but also suggest that competition law can help realize other aims, such as the reduction of corruption and poverty. See *Competition law and Policy: drivers of economic growth and development*, 4 COHERENCE FOR DEVELOPMENT 1 (Org. for Econ. Cooperation & Dev., Jan. 2015) (discussing competition law’s capacity to increase productivity and innovation, while also fighting corruption and reducing poverty). In focusing on improvements in economic performance, we are aware that nations adopt competition laws to achieve other policy goals. See Barak Orbach, *The Goals of Antitrust*, 81 *FORDHAM L. REV.* 2151 (2013) (discussing varied objectives of competition systems). We know of no jurisdiction that, in enacting and implementing a competition law, has been indifferent to the purpose of improving economic performance.

17. A growing literature has sought to assess the economic impact of competition law enforcement decisions. See *ORG. FOR ECON. COOPERATION & DEV., REFERENCE GUIDE ON EX-POST EVALUATION OF COMPETITION AGENCIES’ DECISIONS* (Apr. 2016) (presenting framework for ex post evaluation and reviewing studies of effects of competition agency decisions).

18. See *infra* Part II.

difficult circumstances, the path can be longer. This calls for realism in setting expectations about what a competition system can do, and how quickly it can do it.

Though the more than 100 competition systems formed since the late 1980s have evolved in different ways, some general patterns have emerged. Part IV presents the principal evolutionary paths that new competition systems have taken. We call these paths “lifecycles” to convey the notion that there are recurring patterns in how competition systems evolve. By studying system lifecycles, jurisdictions can improve the performance of existing competition regimes and can better anticipate and contend with obstacles to creating effective new systems. The path most closely associated with implementation success is a gradual upward sloping curve of progress—a condition that underscores the importance of sustained, incremental improvements to institutions entrusted with key implementation tasks.

Part V presents factors that determine the rate at which new systems gain implementation proficiency. Key considerations include resources (financial outlays and human capital), agency leadership, political commitment and stability, and the quality of supporting institutions, such as courts and universities.<sup>19</sup>

Part VI offers some conclusions about the path of implementation success. Given a choice between consumption in the form of starting new cases or other programs and investment in institution-building, new systems are well advised to emphasize investment when allocating resources in the first decades of their development.

## II

### INSTITUTIONAL DESIGN AND GOOD AGENCY PERFORMANCE

This article’s basic premise is that improvements in institutional arrangements tend to yield superior policy outcomes. For much of the 1990s, the national and multinational donor organizations that fostered adoption of competition laws generally gave inadequate attention to institutional design and policy implementation.<sup>20</sup> Organizations that advised nations in the formulation of new laws slighted the institutional arrangements that are vital to the successful implementation of new competition laws.<sup>21</sup> Donors often measured their own success by the number of new laws adopted, without regard to the effectiveness or sustainability of the laws they helped implement.<sup>22</sup> At the same time, the

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19. See *infra* Part V.

20. See William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT’L L. 403, 404 (1997) [hereinafter *Getting Started*] (describing weak attention given to implementation concerns in the 1990s).

21. See William E. Kovacic, *Lucky Trip? Perspectives from a Foreign Advisor on Competition Policy, Development and Technical Assistance*, 3 EUROPEAN COMP. J. 319 (2007) [hereinafter *Lucky Trip*].

22. Kovacic, *Getting Started*, *supra* note 20, at 404.

competition law agendas of international organizations such as the Organization for Economic Cooperation and Development were rich in discussions regarding what substantive competition programs systems should pursue but lean in treatment of how to effectuate them.<sup>23</sup>

To a striking degree, policy implementation issues were seen as mere technical details to be sorted out once the competition law had been passed.<sup>24</sup> In drafting new competition statutes, external advisors often provided off-the-rack solutions from other jurisdictions with little tailoring to account for local conditions or implementation capabilities.<sup>25</sup> The prevailing wisdom also pressed toward adopting fully-loaded competition regimes that included the complete set of policy commands that were the norm in older systems such as the European Union and the United States.<sup>26</sup> This development partly reflected the view that transition economies would have a single political opportunity to make basic economic reforms.<sup>27</sup> If one assumed that the political will to enact reforms would evaporate, it became necessary to pack everything into the competition law from the outset. The possibility for future upgrades or gradual, phased implementation was seen as remote.<sup>28</sup>

#### A. The Ascent Of Implementation Concerns

Academic scholarship and government policymaking over the past fifteen years reveal a growing recognition that implementation issues demand close attention from day one of a law reform process.<sup>29</sup> Statutes with grand policy aspirations but weak means for implementation can pointlessly consume resources from both public officials and business operators.<sup>30</sup> Worse, they can engender cynicism about lawmaking and public administration generally in the eyes of citizens who too often have seen their governments promise too much and deliver too little.<sup>31</sup> But implementation is increasingly getting the attention it deserves from academics, government officials, and practitioners. With greater

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23. The agenda of Policy Roundtables convened by the Organization for Economic Cooperation and Development displays this tendency. Org. for Econ. Cooperation & Dev., Competition Committee, Policy Roundtables, [www.oecd.org/competition/roundtables.htm](http://www.oecd.org/competition/roundtables.htm) [<https://perma.cc/E26R-KZ8A>]. Until the mid-2000s, the topics of these roundtables dealt predominantly with issues of substantive antitrust analysis. From the mid-2000s onward, one sees a larger number of sessions that address policy implementation concerns.

24. See Kovacic, *Getting Started*, *supra* note 20, at 404.

25. See generally Kovacic, *Lucky Trip*, *supra* note 21 (examining this tendency across several countries). On the dangers of this approach for law reform, see Jean-Jacques Laffont, *Competition, Information, and Development*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT 1998 237 (Boris Pleskovic & Joseph E. Stiglitz eds., 1999).

26. See Kovacic, *Getting Started*, *supra* note 20, at 407.

27. See Kovacic, *Institutional Foundations*, *supra* note 1, at 274–75.

28. Kovacic, *Institutional Foundations*, *supra* note 1, at 274–75, 298–301.

29. THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES (Eleanor M. Fox & Michael J. Trebilcock eds., 2013); Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions*, 25 WORLD COMP. L. & ECON. REV. 361 (2002).

30. See Kovacic, *Getting Started*, *supra* note 20, at 404.

31. Kovacic, *Getting Started*, *supra* note 20, at 404.

frequency and intensity, discussions about competition law today address how to establish the institutional foundations necessary to achieve good policy results<sup>32</sup> as well as how to measure the effectiveness of different institutional configurations.<sup>33</sup>

This article's focus on lifecycles emphasizes the history of policy implementation across jurisdictions. Building a new regulatory system involves considerable experimentation with substantive policy approaches and implementation techniques.<sup>34</sup> The capacity to learn from one's own experience and from the collective experience of other institutions with similar responsibilities separates superior institutions from weaker regimes.<sup>35</sup> This historical perspective guides the initial design and early operation of a regulatory system and, more importantly, informs the pursuit of refinements that improve performance over time.<sup>36</sup> Agencies that embrace a virtuous cycle of experimentation, assessment, and refinement greatly boost their prospects for success.<sup>37</sup>

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32. See, e.g., DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* xi (2011) ("Institutions . . . are a critical and underappreciated driver of an antitrust policy that interacts in many subtle ways with substantive antitrust rules and decisions."); ANNETJE OTTOW, *MARKET AND COMPETITION AUTHORITIES: GOOD AGENCY PRINCIPLES* (2015) (discussing generally how competition systems operate and their structural principles).

33. See generally David A. Hyman & William E. Kovacic, *Competition Agency Design: What's on the Menu?*, 8 EUR. COMPETITION J. 527, 528–36 (2012) (assessing a variety of different competition agency design systems and how choices can affect future effectiveness of these systems).

34. See generally William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 GEO. MASON L. REV. 843 (2001) (modeling antitrust enforcement as an experimental process and urging use of ex-post evaluation to assess outcomes of enforcement experiments). This is evident, for example, in the experience of the United States. The decision to create a second federal enforcement institution in 1914 (the Federal Trade Commission) can be seen as an experiment with administrative policy development as an alternative to enforcement of the antitrust laws by the Department of Justice in the federal courts. See Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control and Competition*, 71 ANTITRUST L.J. 1, 62–88, 90–92 (2003) (discussing legislative rationale for creation of FTC). The evolution of the Justice Department's criminal enforcement program against cartels likewise has exhibited considerable experimentation and adjustment, especially since the mid-1970s. See William E. Kovacic, *Criminal Enforcement Norms in Competition Policy: Insights from US Experience*, in CRIMINALISING CARTELS 45 (Caron Beaton-Wells & Ariel Ezrachi eds., 2011).

35. See Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921 to 1925*, 77 ANTITRUST L.J. 145, 146–49 (2010) (describing value of historical study as way to understand the FTC and to identify challenges other agencies will face in the early period of their development); William E. Kovacic, *The FTC at 100: Into Our Second Century* 2-5 (Jan. 2009) [hereinafter *FTC at 100*], <http://www.ftc.gov/system/files/documents/reports/federal-trade-commission-100-our-second-century/ftc100rpt.pdf> [<https://perma.cc/JUE2-BJKZ>] (discussing benefits to FTC of benchmarking itself with other competition agencies).

36. See generally Edward J. Balleisen & Elizabeth K. Brake, *Historical Perspective and Better Regulatory Governance: An Agenda for Institutional Reform*, 8 REG. & GOV. 222 (2014) (highlighting different ways in which regulatory agencies use history to make future policy choices and evaluating historical perspectives in shaping regulatory policy).

37. See William E. Kovacic, *Achieving better practices in the design of competition policy institutions*, 50 ANTITRUST BULL. 511, 511–13 (Fall 2005) (making the case for a process of policy innovation that involves experimentation with new techniques, the identification of superior approaches through regular evaluation, and the adoption of better practices); William E. Kovacic, *Politics and Partisanship in U.S.*

## B. Note On Methodology

There is a large and growing body of literature on the development of new competition law systems.<sup>38</sup> This reflects the exceptional number of research paths opened by the remarkable expansion of competition law as a global concern. This article builds upon this literature and draws upon three additional resources. One such resource is a benchmarking project undertaken by the George Washington University Law School's Competition Law Center. This project has collected information about ten major institutional characteristics for the world's 130 competition law systems.<sup>39</sup> The process of preparing this study has provided a valuable opportunity to use the information to see how individual systems have evolved.

A second information source consists of reports and peer reviews prepared by the International Competition Network, the Organization for Economic Cooperation and Development, and the United Nations Conference on Trade and Development on matters related to competition law implementation.<sup>40</sup> One of this article's authors has written three of these reviews and is now engaged in a project to study the implementation of earlier recommendations in Ukraine.<sup>41</sup>

The third source consists of interviews. The authors have spoken with current and former competition agency officials, practitioners, and academics, and have conducted site visits in various countries.<sup>42</sup> These activities yield information that can be illuminating or untrustworthy—sometimes at the same time. There are many difficulties associated with relying on interviews to assess the quality of competition agencies or to form conclusions about how they evolved.<sup>43</sup> Current

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*Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687, 708 (2014) [hereinafter *Partisanship*] (describing three step process of experimentation, assessment, and refinement).

38. See *supra* notes 12–15 and accompanying text (describing how establishment of new systems creates new opportunities for scholarly study).

39. *World Competition Database*, *supra* note 12.

40. The OECD's peer reviews are collected at [www.oecd.org](http://www.oecd.org) [<https://perma.cc/YJJ2-4SSM>]. The UNCTAD peer reviews appear at [www.unctad.org](http://www.unctad.org) [<https://perma.cc/3GAF-LACB>].

41. Kovacic has co-authored UNCTAD peer reviews for Armenia, Pakistan, and Ukraine. UNCTAD, Voluntary Peer Review of Competition Law and Policy: Ukraine (July 5, 2013) [hereinafter *UNCTAD Ukraine Peer Review*], available at [www.unctad.org/en/PublicationsLibrary/ditclp2013d3\\_en.pdf](http://www.unctad.org/en/PublicationsLibrary/ditclp2013d3_en.pdf) [<https://perma.cc/2E8A-WD8S>]; UNCTAD, Voluntary Peer Review of Competition Law and Policy: Pakistan (June 6, 2013), available at [www.unctad.org/en/PublicationsLibrary/ditclp2013d4\\_en.pdf](http://www.unctad.org/en/PublicationsLibrary/ditclp2013d4_en.pdf) [<https://perma.cc/NK7Q-556X>]; UNCTAD, Voluntary Peer Review of Competition Policy: Armenia (Aug. 31, 2010), available at [www.unctad.org/en/docs/ditclp20101\\_en.pdf](http://www.unctad.org/en/docs/ditclp20101_en.pdf) [<https://perma.cc/E23U-3J6P>]. Kovacic presently is participating in an OECD project to examine Ukraine's implementation of recommendations contained in the UNCTAD peer review and an earlier OECD peer review of Ukraine's competition law system. OECD, Peer Review of Ukraine's Antimonopoly System (2008), available at [www.oecd.org](http://www.oecd.org) [<https://perma.cc/YJJ2-4SSM>].

42. Since 2011, at least one of the authors has visited the competition authorities of the following jurisdictions that adopted competition laws from 1990 onward: Albania, Argentina, Armenia, Barbados, Botswana, Brazil, Chile, China, Colombia, the Czech Republic, Ecuador, Hong Kong, Hungary, India, Indonesia, Ireland, Israel, Italy, Kenya, Latvia, Lithuania, Malaysia, Mauritius, Mexico, Morocco, Netherlands, Pakistan, Peru, Poland, Portugal, Serbia, Singapore, South Africa, Spain, Taiwan, Thailand, Turkey, Ukraine, and Zambia.

43. On the hazards in relying on first-person narratives to understand the actions and motives of a



or former agency officials sometimes portray events in a way that flatters their contributions to public service;<sup>44</sup> practitioners occasionally grind axes to express unhappiness arising from an adverse result in a matter before a competition authority;<sup>45</sup> and academics periodically scold agencies for not embracing their policy recommendations.<sup>46</sup> To correct for these difficulties the authors have sought to interview as many individuals as possible and to verify subjective assessments by reference to observable facts.

The collection and interpretation of this information is deeply influenced by the interdisciplinary orientation of Duke University's Kenan Institute for Ethics' Rethinking Regulation Initiative.<sup>47</sup> The legal system analysis is enriched by insights derived from several bodies of learning that the Rethinking Regulation Initiative seeks to unite: economics, history, law, political science, and public administration.<sup>48</sup> For competition law or otherwise, the establishment of a successful regulatory regime requires an awareness of the economic and political conditions that facilitate or hinder policy implementation, an understanding of the incentive structures that motivate agency leadership and staff, and reflection upon perspectives derived from actual experience.<sup>49</sup> Simply drafting legal commands and procedural mechanisms without these pillars begs failure.<sup>50</sup>

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competition agency, see William E. Kovacic, *Antitrust Stories*, 4 COMPETITION POL'Y INT'L 241 (2008) (reviewing ANTITRUST STORIES (Eleanor M. Fox & Daniel A. Crane eds., 2007)).

44. See Kovacic, *Partisanship*, *supra* note 37, at 697–98 (describing how current and former antitrust officials sometimes depict events in a manner that magnifies their accomplishments).

45. In our experience competition law practitioners tend either to criticize competition agencies for not being active enough, or, when the agency is active and moves against one of their clients, for reaching an infringement decision.

46. Kovacic spent fifteen years in academia before returning to the Federal Trade Commission to serve in senior management positions. The experience drove home how poorly academics understand the size of the gap between the theory of public policy and its practice.

47. See *Rethinking Regulation*, THE KENAN INSTITUTE FOR ETHICS AT DUKE UNIVERSITY, [www.kenan.ethics.duke.edu/regulation/about/rethinking-regulation](http://www.kenan.ethics.duke.edu/regulation/about/rethinking-regulation) [<https://perma.cc/E6J9-3XHV>] (last visited May 29, 2016) (outlining the Rethinking Regulation Initiative and its goals).

48. *Id.* See also David Deller & Francesca Vantaggiato, *Revisiting the Regulatory State: A Multidisciplinary Review Establishing a New Research Agenda* (Centre for Competition Policy, University of East Anglia, 2014) (discussing value of multidisciplinary perspective in analyzing regulatory agency design and performance).

49. On the importance of a careful examination of existing economic and political conditions and institutional arrangements as a foundation for regulatory reform, see William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DEPAUL L. REV. 1197, 1215–23 (1995) [hereinafter *Perspectives*]. See also MICHAL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES 4 (2003) (discussing special considerations in devising competition policy in small markets; observing that “Small economies need a competition policy that is specifically tailored to their markets.”); Oliver Budzinski & Maryam H.A. Beigi, *Generating Instead of Protecting Competition*, in THE ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THE IMPLICATIONS FOR COMPETITION LAW 224, 229 (Michal S. Gal et al., eds., 2015) (“Competition policy is not an isolated concept; it needs to be effective with respect to the context of the society where it is implemented”).

50. The habit of Western advisors of giving transition economies off-the-rack regulatory solutions devised in well-established market economies, and to slight implementation issues, is criticized in William E. Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U. J. INT'L L. & POL'Y 437, 437–39, 445–51 (1996) [hereinafter *Entrepreneur*].

### III POLICY IMPLEMENTATION: TASKS, CHALLENGES, AND REALISTIC EXPECTATIONS

Evaluating competition law regimes raises a dual inquiry: not only how but also when to determine whether a new competition law system is working effectively. The first part of the question requires at least a preliminary inquiry into what constitutes good performance by a regulatory agency and, ideally, how much an agency has contributed to improvements in economic performance. Because performance is difficult to measure, elected officials, journalists, practitioners, regulators, and academic researchers often use activity-related proxies.<sup>51</sup> Perhaps the most common performance metric used in popular and scholarly discussions of regulatory agency behavior, and certainly the behavior of competition agencies, is the amount of activity in the form of investigations launched, cases prosecuted, fines imposed, and rules promulgated.<sup>52</sup> Many competition agency officials begin speeches by saying that their organizations have been “busy,” a statement based on the premise that high levels of activity certify quality in an agency.<sup>53</sup>

Yet activity levels are dreadfully ambiguous indicators of agency performance.<sup>54</sup> To be sure, activity is hardly irrelevant to a sound assessment of

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51. On the popularity of activity-based measures of competition agency performance, see William E. Kovacic, *Creating a Respected Brand: How Regulatory Agencies Signal Quality*, 22 GEO. MASON L. REV. 237, 246–47 (2015) [hereinafter *Respected Brand*]; William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 908 (2009) [hereinafter *Rating the Competition Agencies*]; William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 404–05 (2003) [hereinafter *Enforcement Norms*]. There is a healthy and growing effort, by agencies and scholars, to develop and apply techniques for answering the fundamental question of economic impact. This is evident, among other places, in the programs of the OECD’s Competition Committee, which has held several roundtables on the evaluation of competition agency effectiveness. See *supra* note 17 and accompanying text.

52. See, e.g., *Rating Enforcement 2015: The Annual Ranking of the World’s Top Antitrust Authorities*, GLOB. COMPETITION REV. 1, 2–32 (2015) (presenting evaluation criteria, which gives the heaviest weight to activity levels, including cases prosecuted); James C. Cooper & William E. Kovacic, *Behavioral Economics and Its Meaning for Antitrust Agency Decision Making*, 8 J.L. ECON. & POL’Y 779, 783–84 (2012) (describing forces that create pressure for regulators to maximize “observable action”); William E. Kovacic et al., *How Does Your Competition Agency Measure Up?*, 7 EUR. COMPETITION L.J. 25, 27–30, 37–39 (2011) [hereinafter *Measure Up*] (discussing popularity of activity-based measures of competition agency effectiveness).

53. See Kovacic et al., *Measure Up*, *supra* note 52, at 27–28 (noting this tendency); see also Renata B. Hesse, Principal Deputy Assistant Attorney General, Antitrust Division, U.S. Dep’t of Justice, *Remarks at the Global Competition Review Live 5<sup>th</sup> Annual Antitrust Law Leaders Forum 1* (Miami, FL, Feb. 5, 2016), available at <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-renata-b-hesse-delivers-remarks-global> (“2015 was a busy year for the division – we opened a number of investigations, logged a lot of trial time, and recorded several victories of note”); Sharis Pozen, Acting Assistant Attorney General, Antitrust Division, U.S. Dep’t of Justice, *Developments at the Antitrust Division & The 2010 Horizontal Merger Guidelines – One Year Later 1* (Washington, D.C., Nov. 17, 2011), available at <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-sharis-pozen-speaks-american-bar-association-2011> (“[I]t has been a busy and exciting time to be at the division.”).

54. See Svetlana Ardasheva et al., *Distorting effects of competition authority’s measurement: the case*

agency performance.<sup>55</sup> An agency that does nothing to apply its powers properly can be regarded as a failure.<sup>56</sup> For example, at least some level of law enforcement is necessary to deter infringements, to build and sustain agency capacity, and to establish the institution's legitimacy, in a broad political and social sense.<sup>57</sup> After all, why should legislators entrust public funds to an agency that mothballs its powers? But a single-minded focus on activity (the output) cannot automatically be equated with accomplishment (the outcome). Doing a lot of things is not the same as doing the right things, or doing them the right way.

Activity-centrism also creates warped incentives for senior leaders, who may focus on the acclaim and headlines that accompany new initiatives but ignore the long-term costs to the agency and the public when improvidently conceived (but flashy) matters later implode.<sup>58</sup> Leaders who succumb to the sirens of activity also are likely to underinvest in long-term assets, failing to develop and cultivate knowledge, procedures, administrative infrastructure, and staff capacity that would increase the agency's potential for future success.<sup>59</sup>

In the first decades of a new competition agency, resources should be allocated primarily to the enhancement of institutional foundations and agency capability, and secondarily to the exercise of law enforcement or rulemaking powers.<sup>60</sup> The key institutional foundations include: processes for defining goals, choosing a strategy to realize the agency's objectives, selecting projects, and testing evidence rigorously; regular investments in knowledge; the disclosure of enforcement intentions and analytical methods; and routine evaluation.<sup>61</sup> As capability increases, the agency can pursue a more ambitious program.<sup>62</sup> This

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*of Russia*, 29 INT'L J. PUBLIC SECTOR MGMT 288 (2016) (documenting adverse incentive effects of measuring competition agency performance by counting the number of tasks completed); Kovacic, *Rating the Competition Agencies*, *supra* note 51, at 908 (explaining why activity levels poorly reflect agency performance); Kovacic, *Enforcement Norms*, *supra* note 51, at 408–10; Kovacic et al., *Measure Up*, *supra* note 52, at 37–39.

55. See Kovacic, *Respected Brand*, *supra* note 51, at 247–48 (describing importance to an agency's credibility of sustaining a basic level of activity).

56. See *id.* (describing how non-enforcement of a legal command can deny an agency "an important measure of political and reputational capital"). At the same time, however, an antitrust agency's reputation may improve if it declines to enforce a legal command that has come to be widely regarded as ill-conceived and hostile to consumer interests. See Kovacic, *Enforcement Norms*, *supra* note 51, at 410–15 (describing retreat of Department of Justice and Federal Trade Commission since early 1970s from enforcement of the Robinson-Patman Act); Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064, 2066–67 (2015).

57. See Kovacic, *Respected Brand*, *supra* note 51, at 247–48.

58. See William E. Kovacic & David A. Hyman, *Consume or Invest: What Do/Should Agency Leaders Maximize?*, 91 WASH. L. REV. 295, 317–20 (2016) [hereinafter *Consume or Invest*] (analyzing this phenomenon).

59. See *id.* at 304–13 (discussing how excessive emphasis on launching new cases or rulemaking proceedings can cause underinvestment in building capacity needed to carry out such measures successfully).

60. See *infra* Part IV.C (discussing the need to match program commitments to institutional capabilities, especially early on in an agency's lifetime).

61. See Kovacic et al., *Measure Up*, *supra* note 52, at 30–33 (setting out institutional predicates for success).

62. See *id.*

article assumes that improvements in capability—notably, increases in the agency’s human capital, the augmentation of its base of knowledge, and mastery of the evidence-gathering methods and analytical techniques that are integral to the development of successful cases and other policy measures—tend over time to increase the frequency with which the agency’s work improves social welfare.

Mexico’s competition system illustrates the virtues of sustained incremental improvement. Mexico’s competition agency is a success story, but it was not an overnight wonder. The agency did not mount a major assault on the dominant position of Telmex, the largest provider of telecommunications services in Mexico, and its politically powerful leader, Carlos Slim, until well into the second decade of its operations.<sup>63</sup> Though the Telmex matter—which focused on conduct alleged to be an abuse of a dominant market position—did not accomplish all of its goals, the properly timed action catalyzed significant improvements in the country’s telecommunications sector.<sup>64</sup>

A second issue is to determine the right time to assess effectiveness. It is possible to form tentative views in the earliest stages of a new regime.<sup>65</sup> For both domestic participants and external observers, it is sensible to monitor progress of a new system from its early days and use regular assessments as tools to improve programs or institutional arrangements.<sup>66</sup> Early focal points for evaluation include success in hiring skilled professionals and administrative personnel, building public awareness of the competition law regime, issuing guidelines regarding the agency’s enforcement intentions, and in accelerating the processing of routine tasks, such as the review of merger applications under a system of mandatory notification.<sup>67</sup> A habit of assessing the results of individual matters and measuring progress in building an effective administrative infrastructure facilitates learning and shows the way to improvements that strengthen the competition system.<sup>68</sup> This process also supplies the basis for an agency to seek “upgrades” to its powers, structure, and resources to remedy imperfections that become apparent in the course of operating the agency.<sup>69</sup>

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63. William E. Kovacic, Interview with Eduardo Perez Motta, Former President of the CFC (Mexico’s competition commission) in Washington, D.C. (Apr. 7, 2016); Umut Aydin, *Competition Law and Policy in Mexico: Successes and Challenges*, 79 LAW & CONTEMP. PROBS., no. 4, 2016 at 170–71.

64. Interview with Eduardo Perez Motta, *supra* note 63. The Mexican competition authority’s initiative appears to have helped trigger a major upgrading of the powers of Mexico’s telecommunications regulator and motivated closer scrutiny of Telmex going forward. *Id.*

65. Kovacic, *Institutional Foundations*, *supra* note 1, at 313–14 (describing importance of early and continuing efforts to evaluate progress toward building effective competition law institutions).

66. *Id.*

67. Kovacic, *Getting Started*, *supra* note 20, at 446–52.

68. Kovacic, *FTC at 100*, *supra* note 35, at 4–6 (habit of self-assessment serves to increase capacity and improve performance).

69. A characteristic of successful competition systems, both old and new, is that they periodically receive enhancements in powers, structure, and resources. This has been the case for newer systems such as South Africa, Brazil, Chile, and Mexico. See Dennis Davis, *The South African Competition Experience: A Review of Fifteen Years into a New Regime*, in ANTITRUST IN EMERGING AND DEVELOPING COUNTRIES 159 (Eleanor M. Fox et al., eds., 2015) (reviewing experience in South Africa); Andre Gilberto, *Competition Law Enforcement in Brazil: How CADE Is Overcoming Deep Structural Problems*

One can, and should, assess progress continuously throughout the development of the new regime. Competition officials are increasingly aware that this type of routine assessment is a core element of good management: regular assessment of performance facilitates the process of learning and improvement by which institutions become more effective.<sup>70</sup> At the same time, one should keep in mind that it can take twenty to twenty-five years to form a reliable impression of whether the new system truly has taken root and is able to realize sustained implementation success. Views formed in the earliest stages of a competition regime can be misleading.<sup>71</sup> For most jurisdictions it takes at least this long to construct and set the system's institutional footings, which include adopting and refining the initial statutory scheme, obtaining judicial interpretations of the law's substantive commands and procedural features, building capacity within the competition agency, and improving the supporting institutions (such as universities) whose contributions are necessary to sustain an effective system.<sup>72</sup>

The need to observe a new system's development for a significant time before drawing strong conclusions about its ruggedness and effectiveness is apparent in the experience of Latin America's competition systems through the mid-1990s. Within five years of its creation, Peru's competition agency INDECOPI<sup>73</sup> had gained a superior reputation within Latin America and globally, largely through the work of Beatriz Boza, the agency's first chair, and the exceptional professionals she recruited to fill senior management posts.<sup>74</sup> The launch of new competition systems in Argentina, Brazil, and Venezuela was no less impressive. Astute leaders headed each of these systems (Jorge Bogo in Argentina, Gesner Oliveira in Brazil, and Ana Julia Jatar in Venezuela) and attracted bright, young men and women to join them.<sup>75</sup> The early success these systems enjoyed in

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to *Become an Internationally Recognized Agency*, in ANTITRUST IN EMERGING AND DEVELOPING COUNTRIES 11 (Eleanor M. Fox et al. eds., 2015) (analyzing Brazil); Francisco Agüero, *Chilean Antitrust Policy: Some Lessons Behind Its Success*, 79 LAW & CONTEMP. PROBS., no. 4, 2016, at 152–54 (discussing the Chilean case); Aydin, *supra* note 63, at 182 (discussing development of Mexico's system).

70. On May 16, 2016, Kovacic chaired a roundtable of competition agency enforcers a conference in Mexico City at the Competition Midyear Meeting of the International Bar Association. The panelists included Esteban Grecco, the head of Argentina's competition agency; Eduardo Frade, a member of the board of CADE, Brazil's competition authority; and Alejandra Palacios, the president of Mexico's competition agency. All emphasized the value of developing and applying performance metrics to assess the quality of their internal procedures.

71. See *infra* notes 73–81 and accompanying text.

72. See generally Kovacic, *Institutional Foundations*, *supra* note 3 (expanding on how competition systems grow and evolve and that it is necessary to give these institutions proper time to mature before assessing their success).

73. See generally LESSONS FROM THE FIRST YEARS OF INDECOPI: PERU'S EXPERIENCE IN MARKET REGULATORY REFORM 1993–1998 (Beatriz Boza ed., 1998) (discussing the formation and early years of INDECOPI).

74. Interview with Luis Canseco-Diaz, Former Judge with Peru's Intellectual Property Court, in Lima, Peru (Aug. 21, 2016).

75. Kovacic observed the development of these institutions in the course of several visits to these countries in the 1990s and in conversations with the three officials at various international events in that decade.

building exceptional teams of professionals and articulating a vision of policy implementation appeared to set a foundation for even better days to come.<sup>76</sup>

Experience over the past two decades has confounded some of the elevated expectations of the mid-1990s. Of the three jurisdictions that had ascended quickly, only Brazil's competition system today retains the full luster of its early days.<sup>77</sup> At the same time, the performance of Latin American systems that seemed less promising in the mid-1990s has improved steadily.<sup>78</sup> For example, the competition law regimes in Chile and Mexico developed slowly. Beginning in the 1990s, each system gradually enhanced the quality of its professional staff, obtained improvements in their statutory mandates, and undertook progressively more ambitious enforcement programs.<sup>79</sup> Chile and Mexico now stand with Brazil as cases of largely successful policy implementation.<sup>80</sup> Colombia's competition regime, begun over a half-century ago, has also made notable progress in recent years.<sup>81</sup>

However, these examples provide no assurance that an agency that emerges from its first decades in good condition is guaranteed to remain successful. Beyond this period, older and newer agencies alike face challenges that can determine whether they will sustain better performance or if they will suffer lasting damage. Poland's experience indicates why a period of twenty to twenty-five years of experience arguably is necessary to assess a regime's resilience. The establishment of a competition policy system in Poland in the early 1990s was a crucial event in the formerly communist states of central and Eastern Europe.<sup>82</sup> Poland was an early and continuing barometer for measuring the success of competition law reforms among the suddenly large and expanding cohort of transition economies.<sup>83</sup> As a result of Poland's strong commitment to the

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76. Interview with Marcelo Calliari, Former Member of CADE, in London, United Kingdom (June 27, 2016).

77. See ANTITRUST IN EMERGING AND DEVELOPING COUNTRIES, *supra* note 69 for an informative treatment of developments in Latin America since the mid-1990s. See also ORG. FOR ECON. COOPERATION & DEV., COMPETITION AND MARKET STUDIES IN LATIN AMERICA (2015); ORG. FOR ECON. COOPERATION & DEV., FOLLOW-UP TO NINE PEER REVIEWS OF COMPETITION LAW AND POLICY OF LATIN AMERICAN COUNTRIES: ARGENTINA, BRAZIL, CHILE, COLOMBIA, EL SALVADOR, HONDURAS, MEXICO, PANAMA AND PERU (2012); COMPETITION LAW AND POLICY IN LATIN AMERICA (Eleanor M. Fox & D. Daniel Sokol eds., 2009); Claudia Schatan, *The Dynamics of Competition Policies in Small Developing Economies: the Central American Countries' Experience*, in NEW COMPETITION JURISDICTIONS 91 (Richard Whish & Christopher Townley eds., 2012).

78. See *infra* notes 79–81 and accompanying text.

79. Interview with Julian Pena, Partner, Allende & Brea, Buenos Aires (Nov. 20, 2015).

80. See Aydin, *supra* note 63 (detailing Mexico's progression).

81. See GLOB. COMPETITION REV., THE ANTITRUST REVIEW OF THE AMERICAS 2016, <http://globalcompetitionreview.com/reviews/74/antitrust-review-americas-2016> [<https://perma.cc/ACQ8-PGPH>] (recounting the modern progress of Brazil, Chile, Colombia, and Mexico).

82. See generally JOHN FINGLETON ET AL., COMPETITION POLICY AND THE TRANSFORMATION OF CENTRAL EUROPE (1996) (describing early development of competition law in the Visegrad nations, including Poland).

83. See generally Russell Pittman, *Competition Law in Central and Eastern Europe: Five Years Later*, 43 ANTITRUST BULL. 179 (1998) (highlighting Poland as one of the first countries to adopt competition laws in the aftermath of the Soviet Union breakup).

endeavor as well as substantial, prolonged support from the European Union and United States competition regimes, the Polish Office of Competition and Consumer Protection became a formidable and well-respected institution.<sup>84</sup> The twentieth birthday of the Polish competition system in 2012 occasioned an international celebration of the country's accomplishments, as evidenced by the creation of a capable team of professionals, the gradual development of effective advocacy and law enforcement programs, and its leadership for new agencies in Central and Eastern Europe.<sup>85</sup> In April 2013, the Office hosted the International Competition Network's Annual Conference, the largest annual gathering of the world's competition agencies.<sup>86</sup>

The past three years have provided jarring reminders that Poland and other competition agencies can take nothing for granted. In 2014, the head of state dismissed the Polish Office of Competition and Consumer Protection's well-regarded chair, Malgorzata Krasnodebska-Tomkiel, over a policy disagreement.<sup>87</sup> Her successor, Adam Jassar, preserved key ingredients of his predecessor's program, and added new and useful enhancements; he quickly dispelled fears that Tomkiel's ouster foreshadowed a new and unwelcome period of intrusive political interference in the Office's operations.<sup>88</sup> But in December 2015, new political leadership announced its intent to dismiss Jassar as soon as his replacement could be arranged.<sup>89</sup>

Even in the best of circumstances, leadership changes in regulatory agencies can be a source of considerable anxiety for businesses and the agency's own staff.<sup>90</sup> It is still more unsettling when the political intervention causes the

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84. See generally Michael Wise, *Review of Competition Law and Policy in Poland*, 5 OECD J. OF COMPETITION L. & POL'Y 83 (2003) (discussing the development of competition law in Poland and its role in helping to reshape the Polish economy).

85. See CHANGES IN COMPETITION LAW OVER THE PAST TWO DECADES (Malgorzata Krasnodebska-Tomkiel ed., 2010) (commemorating the twentieth anniversary of the creation of Poland's competition law system).

86. *ICN 12<sup>th</sup> Annual Conference*, ICN, [www.icnwarsaw2013.org](http://www.icnwarsaw2013.org) [<https://perma.cc/2U3W-ETJY>].

87. Interview with Malgorzata Krasnodebska-Tomkiel, Former President of Poland's UOKIK, Warsaw, Poland (Oct. 12, 2015); Faez Samedi, *Poland sacks authority head*, GLOB. COMPETITION REV. (Feb. 10, 2014), <http://globalcompetitionreview.com/news/article/35210/poland-sacks-authority-head/> [<https://perma.cc/5KW4-XLLD>] (reporting dismissal of Malgorzata Krasnodebska-Tomkiel as head of Poland's Office of Competition and Consumer Protection).

88. Interview with Malgorzata Krasnodebska-Tomkiel, Former President of Poland's UOKIK, Warsaw, Poland (Oct. 12, 2015); Interview with Adam Jassar, President of Poland's UOKIK, Warsaw, Poland (Oct. 13, 2015); Katy Oglethorpe, *Government advisor to head Polish Authority*, GLOB. COMPETITION REV. (Mar. 19, 2014), available at <http://globalcompetitionreview.com/news/article/35535/government-advisor-to-head-polish-authority/> [<https://perma.cc/W9B3-C4NV>] (reporting appointment of Adam Jassar to lead Poland's Office of Competition and Consumer Protection).

89. PaRR, 2016 Global Trends Monitor 21 (201/35535/6) (noting dismissal of Adam Jassar as head of Poland's UOKIK in January 2016); Tom Madge-Wyld, *Poland appoints new competition chief*, GLOB. COMPETITION REV. (May 13, 2016), <http://globalcompetitionreview.com/news/article/41049/poland-appoints-new-competition-chief/> [<https://perma.cc/KY97-CR5Y>] (reporting appointment of Marck Niechcial to replace Adam Jassar as head of Poland's Office of Competition and Consumer Protection).

90. See generally Kovacic, *Partisanship*, *supra* note 37 (describing influence of politics and partisanship on U.S. antitrust policymaking).

removal of top management. To undergo multiple politically inspired dismissals in only a few years would be an immense shock for any agency. The disorienting effect on the agency itself, with the uncertainty about future programs and the inevitable shuffling of personnel in the front office and other management positions, should not be underestimated. External observers would be hardly less distressed as they wonder about how and when elected officials would intervene again in the agency's work. Some agencies have demonstrated the resilience to bounce back from seemingly abrupt and unanticipated leadership changes that in some sense were related to a policy clash between the agency's head and the country's political leadership.<sup>91</sup> The concern is that such transitions can undermine the agency's performance, at least in the short term, and cause serious reputational damage over the longer term. It takes a long time to climb a tall mountain; the descent from a misstep generally is much faster.

For the most part, an older, better-established, and more experienced agency is more likely to be in a stronger position to respond to such blows and recover. This is because: (a) a better-established and more experienced agency has had more time to build a career staff that provides continuity and stability over time and is able to carry out the work of the agency despite significant disruptions in leadership;<sup>92</sup> and (b) such an agency probably has accumulated reputational capital that it can "spend" in the time of a crisis to maintain its standing in the eyes of external audiences.<sup>93</sup> A relatively newer agency, by contrast, may be more vulnerable to being swept aside or permanently diminished because it has not had the opportunity to build a staff of sufficient depth and experience or to build a reputation that can sustain it in difficult times.

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91. Consider two examples. Beatriz Boza, the first head of Peru's INDECOPI, left her agency after the political upheaval surrounding the departure of Alberto Fujimori, the country's president. Fujimori had brought Boza back to Peru to lead INDECOPI, and his ouster as president led her to leave INDECOPI. Interview with Beatriz Boza, Former President of INDECOPI, Lima, Peru (Dec. 7, 2011). In the decade or so after Boza left office, INDECOPI underwent significant policy adjustments under new leadership. In recent years, the agency appears to have made progress in improving its programs and stature under the leadership of Hebert Tassano. Interview with Luis Canseco-Diez, Founder, DiezCanseco, Lima, Peru (Aug. 21, 2016). The second example is the Israel Antitrust Authority. Earlier this year, the agency's president, David Gilo announced his resignation after the country's president decided to override the antitrust agency's opposition to a merger of two natural gas companies. Sharon Udasin, *Antitrust Commissioner David Gilo to resign in August amid gas disputes*, THE JERUSALEM POST (May 25, 2015), <http://www.jpost.com/Business-and-Innovation/Antitrust-Commissioner-David-Gilo-to-resign-in-August-amid-gas-disputes-404017>. The resignation raised questions about the future stability of Israel's antitrust regime. These concerns have been allayed by the appointment of a highly respected practitioner, Michal Halperin, who previously had worked at the Israel Antitrust Authority. Ora Coren, *Prominent Lawyer Michal Halperin Named Israel's New Antitrust Chief*, HAARETZ (Jan. 27, 2016), <http://www.haaretz.com/Israel-news/business/premium-1.699928> [<https://perma.cc/KY97-CR5Y>]. All indications suggest that the leadership transition has proceeded smoothly, and the work of the agency has not been adversely affected. Interview with David Gilo, Former Chairman of the Antitrust Authority of Israel, Rhodes, Greece (July 4, 2016).

92. See Kovacic, *Partisanship*, *supra* note 37, at 704 (discussing resilience of a long-standing professional staff).

93. See William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085, 2106-07 (2015) (discussing how competition agencies accumulate and spend political capital).



### A. Testing The Agency's Powers

All new competition agencies must work through an initial period where they apply their powers for the first time. Inevitably, there will be a lag (sometimes substantial) between the new competition law's effective date and when its implementing agency becomes proficient in performing basic tasks associated with carrying out investigations, gathering evidence, formulating theories of liability, and prosecuting cases.<sup>94</sup> It is one thing to sit in a training seminar to hear an expert review the analytical foundations of competition law and explain the conceptual ingredients of something like offenses based on single-firm misconduct. It is entirely another to identify a potential target for prosecution, prepare a case, and carry it through a series of judicial appeals.

There is nothing automatic or easy about the launch of a new system and the learning process that is vital to a successful program. Three basic examples illustrate the difficulties a new agency confronts in carrying out essential tasks associated with law enforcement. A necessary first step for a competition agency is to define its objectives and choose a strategy to achieve its aims.<sup>95</sup> Legislators often seek to achieve a wide range of objectives in passing a competition law.<sup>96</sup> The competition agency is left in the difficult position of reconciling the varied—and sometimes contradictory—policy aims and formulating a coherent program.<sup>97</sup>

The second task is more prosaic but no less important: mastering the use of search warrants or related tools that authorize agencies to collect information or conduct unannounced inspections of business premises and collect evidence.<sup>98</sup> For an agency that has never done one, the dawn raid can be a complex, bewildering process. A properly executed dawn raid that yields information useful in preparing a case requires preparing a specific description of the

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94. Many senior officials from new competition agencies confirmed for us that none of this is easy for an agency starting from scratch. Interview with Dragen Penezic, Secretary General, Serbian Competition Commission, Belgrade, Serbia (April 7, 2016); Interview with Skaidrite Abrama, President, Latvian Competition Commission, Riga, Latvia (May 8, 2015); Interview with Sarunas Keraskouskas, Chairman, Lithuanian Competition Commission, Vilnius, Lithuania (September 10, 2015); Interview with Anna Fornalczyk, Former President, Competition and Consumer Protection Agency of Poland, Warsaw, Poland (Oct. 13, 2015).

95. See William E. Kovacic, *The Digital Broadband Migration and the Federal Trade Commission: Building the Competition and Consumer Protection Agency of the Future*, 8 J. TELECOM. & HIGH TECH. L. 1, 8–9 (2010) (discussing importance of definition of goals and choice of strategy as determinants of agency effectiveness).

96. See David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 FORDHAM L. REV. 2163, 2165–69 (2013) (discussing how legislatures seek to realize multiple policy goals by enacting competition laws). See also DAVID LEWIS, ENFORCING COMPETITION RULES IN SOUTH AFRICA: THIEVES AT THE DINNER TABLE 111–12, 117–28 (2015) (describing public interest objectives of South Africa's competition law).

97. See Winerman & Kovacic, *Outpost Years*, *supra* note 35, at 149–57 (recounting struggles of early FTC to resolve tensions among competing legislative visions of what the agency should accomplish).

98. On the use of these evidence gathering techniques in cartel investigations, see INT'L COMPETITION NETWORK, ANTI-CARTEL ENFORCEMENT MANUAL 1–47 (May 2009), <http://www.internationalcompetitionnetwork.org/uploads/library/doc340.pdf> [<https://perma.cc/74K2-U994>].

materials to be collected, correctly identifying the premises to be searched, assembling a team of inspectors with a clear idea of what items to seize and what information to collect (such as passwords for computer systems), a sound methodology for making an inventory of items taken, an expert in the law governing searches who can deal with on-site objections raised by business managers, and, once evidence is collected, a team of forensic specialists who can analyze and distill the relevant evidence.<sup>99</sup> This is further complicated if an agency must search multiple premises, where the agency must synchronize the timing of entry to avoid alerting some office managers of the raid's imminence and thus giving them an opportunity to conceal or destroy responsive records.<sup>100</sup>

For a novice agency (and for a few experienced agencies), drafting and executing a search warrant are tasks fraught with opportunities for error. Most competition agencies can recount stories about arriving at the business offices only to discover that the search warrant (usually approved by a magistrate or other judicial officer) listed the wrong address for the premises to be inspected, thus rendering the search instrument invalid.<sup>101</sup> In other cases, the difficulties go beyond occasions for simple institutional embarrassment. In some jurisdictions, the competition agency faces a serious possibility that its employees will encounter a violent response when they arrive to carry out the dawn raid.<sup>102</sup> In other countries, the danger of terrorist bombings effectively precludes the competition agency from conducting compulsory searches or even visiting business premises for voluntary interviews.<sup>103</sup>

A third example involves applying merger control mechanisms that require advance notification of certain transactions and impose a suspensory period in which the parties are barred from closing their deal. Roughly seventy

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99. *Id.* (discussing performance of these tasks).

100. *Id.* at 15 (“It is a good practice to make entry simultaneously with search teams on other premises and equip each Team Leader with a mobile phone and the numbers of a central command post and/or all other relevant team leaders in order to enable continuous coordination.”).

101. The first dawn raid carried out by Portugal's competition authority is illustrative. When the agency's officials came to the premises of the business enterprise to be examined, they discovered that the firm's headquarters had moved across the street. Thus, the search warrant listed an address different from the firm's current address. The search instrument, as signed by the magistrate, did not authorize the agency to search the new headquarters facility. The Portuguese authority obtained a new warrant, this time with the correct address, and executed the search some days later. The search was unproductive, perhaps because the target enterprise used the interim to move potentially troublesome records to a new location, or to sweep computers for electronic records. Interview with Mariana Taveras, Former Chief of Staff to the President of Portugal's Competition Agency, London, United Kingdom (Jan. 28, 2016).

102. In visits to Russia in the 1990s, Kovacic heard on a number of occasions from officials in the Federal Antimonopoly Service that some sectors were controlled by mafia-like organizations that would not hesitate to gun down a government official seeking to present a search warrant. See William E. Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U. INT'L L. REV. 437, 444–45 (1996) (discussing concerns expressed by employees of the regional offices of the Federal Antimonopoly Service).

103. This is the case for the Competition Committee of Pakistan, which cannot conduct operations in some violence-prone regions of Pakistan. Interview with Joseph Wilson, Commissioner of the Competition Commission of Pakistan, Geneva, Switzerland (July 10, 2016).

jurisdictions have established variants of this process,<sup>104</sup> and all have underestimated the administrative burdens it entails. The United States created the prototype for this form of merger control with the Hart-Scott-Rodino Antitrust Improvements Act of 1976.<sup>105</sup> The statute's implementing regulation took effect in January 1979, and the first years of its operation were marked by the U.S. antitrust agencies' often chaotic efforts—with great resources at their disposal and long experience with merger analysis—to build internal procedures to evaluate large bodies information in a relatively short time and to prepare cases for litigation challenging potentially anti-competitive transactions.<sup>106</sup> Nearly every jurisdiction that has traveled this path has found that it takes considerable time and resources to build capable teams of case handlers to review proposed transactions, to devise administrative procedures for organizing and evaluating large amounts of information, to find ways to give informative disclosure and advice to business planners, and to capture and retain knowledge gained from practice.<sup>107</sup>

The experience with merger review points to the vital role of learning in the development of a competition agency and, more generally, a competition system. The search for effective methods of policy implementation involves an inevitable element of experimentation; key focal points include the establishment of processes to identify promising subjects for investigation, selecting strong cases, and successfully prosecuting infringements.<sup>108</sup> With experimentation comes a mix of success and failure. There is no shame in failure—only in making a habit of it,

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104. GETTING THE DEAL THROUGH: MERGER CONTROL 2016, at 450–79 (John Davies ed., 2016).

105. 15 U.S.C. § 18a (2000). See generally William Blumenthal, *Twenty Years of Hart-Scott-Rodino Merger Enforcement*, 65 ANTITRUST L.J. 813 (1997) (detailing the origins and effects of the Hart-Scott-Rodino merger control reforms).

106. See William E. Kovacic, *HSR at 35: the Early US Premerger Notification Experience and its Meaning for New Systems of Competition Law*, in NEW COMPETITION JURISDICTIONS 9 (Richard Whish & Christopher Townley eds., 2012) [hereinafter *HSR at 35*] (highlighting the early difficulties of the FTC in implementing a new program of compulsory advance notification of mergers).

107. China provides an informative illustration. In creating its competition law system, China greatly underestimated the administrative difficulties that its premerger notification system would present. Twenty people were assigned to the new merger review unit of the Ministry of Commerce—ten professionals and ten administrative support staff. The badly understaffed bureau has struggled to cope with the volume of mandatory filings, though staffing increases (the office now numbers approximately 40) and the adoption of a fast-track mechanism for benign transactions has put the office in a better position to manage the program. See William E. Kovacic, *China's Competition Law Experience in Context*, 3 J. OF ANTITRUST ENFT SUPP. 1, 2 (2015) (discussing early implementation of China's Antimonopoly Law and its merger review mechanism). A similar pattern has emerged in the Philippines, whose new competition law took effect in May 2016. The law includes a mandatory merger notification system, which requires merging parties to report proposed transactions in advance and allow the competition agency an opportunity to review the transaction before it closes. From the effective date of the law, the new agency's small professional staff was swamped with merger filings. The first months of the agency's operations have been dominated by a struggle to review transactions submitted under the mandatory notification system. Interview with El Cid Butuyan, Commissioner, Philippines Competition Commission, Lima, Peru (Aug. 21, 2016).

108. See generally William E. Kovacic, *Using Ex Post Evaluation to Improve the Performance of Competition Authorities*, 31 J. CORP. L. 503 (2006) (examining the experimental nature of much policy making in competition law).

especially the repetition of past missteps. Successful agencies progress because they learn: they improve through a three-step process of experimentation, evaluation, and refinement.<sup>109</sup>

Thus, one of the most important attributes of successful competition systems is the establishment of a culture within the competition agency that promotes continuing critical self-assessment and a commitment to doing better in the future. The development of what today are seen generally as valuable enforcement techniques—for example, the use of leniency mechanisms to detect and deter cartels<sup>110</sup>—did not occur instantaneously or with immediate success.<sup>111</sup> The U.S. system of mandatory premerger notification, discussed above, changed dramatically from its inception in 1979 to the present as the U.S. antitrust agencies adjusted reporting requirements and expanded efforts to make the mechanism’s operation more transparent for affected parties.<sup>112</sup> The lesson from these and other experiences is that a competition agency rarely gets things right from day one. The real measure of an agency is not where it begins, but how it learns and progresses.

## B. Recruiting And Retaining a Capable Staff

It can take a number of years to see whether an agency has established a reputation that enables it to attract and retain good attorneys, economists, and administrative professionals.<sup>113</sup> Some agencies never succeed in recruiting sufficient numbers of capable staff. Others do well in the early years when enthusiasm for a new program, ambitious enforcement measures, and charismatic leadership make the agency a desirable employer. A serious test for such agencies is whether they can effectively become more than an executive M.B.A. program that identifies good talent for absorption by the private sector or by other public agencies.

Some countries will find it easier than others to build the necessary critical mass of human capital. Consider the advantageous initial conditions in which

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109. See Kovacic, *Partisanship*, *supra* note 37, at 708.

110. On the development of leniency as a powerful, widely employed method for detecting cartels, see ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION (Caron Beaton-Wells & Christopher Tran eds., 2015) [hereinafter LENIENCY RELIGION].

111. On the difficult and uncertain path that the Department of Justice traveled to transform an ineffective leniency program, begun in the 1970s, into a potent tool for cartel detection, see Ann O’Brien, *Leadership of Leniency*, in LENIENCY RELIGION, *supra* note 110, at ch. 2. The reforms undertaken in 1993 and 1994 have been supplemented by a variety of enhancements (for example, the establishment of a marker system to encourage firms to report misconduct as quickly as possible, and the creation of “amnesty-plus” to spur companies to reveal additional cartels beyond the conspiracy immediately under investigation) that reflect learning from experience. Interview with Melvin Price, Head of the Criminal Enforcement Program, Department of Justice, Antitrust Division, Lima, Peru (Aug. 20, 2016).

112. See Kovacic, *HSR at 35*, *supra* note 106 (describing refinements to U.S. premerger notification system).

113. See generally Kovacic, *Respected Brand*, *supra* note 51 (assessing the importance of reputation and branding to an agency’s performance).

Singapore established its Competition Commission in 2005.<sup>114</sup> Public administration in Singapore features a longstanding tradition of superb public institutions staffed by highly qualified personnel and governed by stringent standards of integrity.<sup>115</sup> The Competition Commission of Singapore began its operations, as new systems inevitably do, in a country with no experience in competition law. Nonetheless, the new agency had first-rate human capital: the typical profile for both senior managers and junior case handlers included a first university degree from Singapore and a second (or further in some cases) degree from an elite institution outside the country.<sup>116</sup> To obtain the necessary expertise to implement competition laws, Singapore recruited senior managers and advisors from countries with extensive experience in competition law.<sup>117</sup> No competition agency has enjoyed a better beginning in this respect, and the Singapore Competition Commission's tradition of building a staff with exceptional professional skills continues today.

In many other countries, creating the necessary critical mass of human capital is a much slower process. This is especially true in the former Soviet republics and in nations that turned to market-based reforms after a long period of central planning.<sup>118</sup> Even in these circumstances, there are encouraging examples showing that it is possible to establish a capable team through a deliberate, gradual recruitment process. Latvia's and Lithuania's competition authorities are members of the cohort of new agencies established in the early to mid-1990s. Both institutions stand out for their quality of agency leadership and staff personnel.<sup>119</sup> Serbia's competition agency recently reached its tenth birthday, and the institution has made considerable progress in raising the professionalism of its staff.<sup>120</sup>

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114. See generally COMPETITION COMMISSION OF SINGAPORE, THE FIRST DECADE (2015) (recounting the history of the Competition Commission of Singapore).

115. Our account of the development of competition law in Singapore draws heavily on numerous interviews that Kovacic conducted with Robert Ian McEwin since the early 2000s. A native Australian with a doctorate in economics and a law degree, McEwin served for several years on the staff of the Competition Commission of Singapore from the time of its formation. He witnessed the creation of the institution and has studied its development closely since.

116. We base this observation on several visits (most recently, in April 2016) with the Competition Commission of Singapore that Kovacic conducted since the agency was formed in 2005. These visits have provided information about the backgrounds of the Commission's managers and case handlers.

117. Interview with Han Li Toh, Director General, Competition Commission of Singapore, London, United Kingdom (June 23, 2016).

118. See Kovacic, *Entrepreneur*, *supra* note 50, at 451–60 (discussing limits on talent available to staff competition agencies in formerly planned economies); Kovacic, *Institutional Foundations*, *supra* note 1, at 305–06.

119. We base this observation on site visits that Kovacic made to the Latvian authority in May 2015 and December 2015 and to the Lithuanian authority in September 2015.

120. Interviews with Dragen Penezic, Secretary General, Commission for Protection of Competition in the Republic of Serbia, Belgrade, Serbia (April 11–12, 2016). Kovacic had the opportunity to meet with the entire board of the Serbian authority on April 12 to discuss the agency's development. Several factors have accounted for improvements in the professionalism of the Serbian authority's professional staff. The agency (a) formed closer ties with academics at local universities to identify promising candidates for recruitment; (b) strengthened internal training programs; and (c) expanded efforts to

The experience of these and other agencies shows that it is possible to attain requisite levels of capacity, yet it also demonstrates that accumulating necessary skills will take considerable time in many jurisdictions. Consider why the jurisdictions showing progress—for example, Latvia, Lithuania, and Serbia—have built good teams. Several ingredients are important: agency leadership that recognizes the importance of human capital to the institution and makes recruitment and retention a high priority from the start; the initiation of a sufficient number of law enforcement or other initiatives that showcase the attractions of competition law as a career and the special experience that employment with the competition agency can offer; the creation of links to the university community that draw promising students to the agency; and the establishment of a career development program for employees, including an internal academy for training in concepts and practical skills, and opportunities to participate in professional development programs—such as conferences and workshops—outside the agency.

Efforts to establish a talented professional staff in many countries take place without the benefit of university programs that teach courses in competition economics and law in early phases of the competition system.<sup>121</sup> But successful competition law systems and other regulatory regimes invariably draw upon indigenous academic hubs that teach competition law and industrial organization economics, and generate research that informs policy development.<sup>122</sup> Here, too, the formation of these capabilities from scratch is an important but difficult and lengthy process.<sup>123</sup>

### C. Predictable Challenges In, And Resistance From, The Courts

In nearly every jurisdiction with a competition law, initial efforts to exercise the enforcement agency's powers have elicited robust challenges in the courts by affected firms.<sup>124</sup> Most agencies spend at least a decade defending challenges to every significant aspect of their authority, including the power to gather information, the application of the substantive mandate to challenge business behavior, and the power to impose sanctions.<sup>125</sup> It can easily take two decades or

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attract lateral candidates with substantial experience in law firms or other government agencies. Success in attracting higher quality staff also depended on the agency's ability to portray itself as an exciting, dynamic place to pursue a career. Another example of an agency that is seeking to upgrade its staff as a means for improvement is Argentina. The Argentina Competition Commission is undergoing a major makeover and has added thirty new professionals in the current year. Interview with Pablo Trevisan, Commissioner, Argentina Competition Commission, New York, New York (Oct. 28, 2016).

121. See Kovacic, *Institutional Foundations*, *supra* note 1, at 272 (describing importance of indigenous academic bodies).

122. *Id.*

123. *Id.*

124. See generally Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921–1925*, 77 ANTITRUST L.J. 145 (2010) (detailing the early travails of the U.S. Federal Trade Commission before the federal courts).

125. We derive this estimate from conversations with current and former competition agency heads who described the early experience of their agencies before the courts. See, e.g., Interview with Eduardo

more for an agency to obtain judicial rulings—often from the jurisdiction’s highest court—that either sustain the agency’s efforts to exercise its legal mandate, or make clear that further legislative reforms are necessary.<sup>126</sup>

In most jurisdictions, courts in the early implementation period are likely to regard the competition law with wariness or ambivalence.<sup>127</sup> Few judges will have any previous familiarity with competition law concepts.<sup>128</sup> As a consequence, judges will tend to focus closely on apparent deviations from procedural requirements established in the competition law or imposed by the jurisdiction’s administrative procedure code.<sup>129</sup> In Mexico, for example, the competition system’s first decade was stymied by the judicial habit of routinely issuing injunctions to cure apparent failures by the competition agency to abide by procedural mandates.<sup>130</sup> Programs that provide judicial training in competition law can improve the capacity of courts to deal with substantive issues, but these programs take time to develop, even if only to create interest among judges to participate in the training exercises.

#### D. Responding To Changes In Agency Leadership

It is important to monitor how an agency fares following leadership changes. Some agencies have gotten off to a seemingly great start by reason of highly visible and capable leadership. Many of these have descended rapidly in

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Perez Motta, Former President of Mexico’s Competition Commission, Washington, D.C. (Apr. 7, 2016); Interview with Joseph Wilson, Commissioner, Competition Commission of Pakistan, Geneva, Switzerland (July 15, 2016).

126. We base this estimate on discussions with current and former heads of competition agencies who described their agencies’ early experiences before the courts. *See supra* notes 42–46 and accompanying text. In some jurisdictions, the initial period of judicial interpretation might be shorter. The 20-year estimate reflects the time needed, in most jurisdictions, for the agency to begin to exercise its powers and to issue decisions, for the parties to seek judicial review, and for matters to make their way to decision by the highest court in the jurisdiction. There may be several trips to the nation’s highest courts—for example, one litigation cycle to test the agency’s powers to use compulsory process to gather information, and a separate cycle to test the agency’s interpretation of the law and the evidence before it. We also note the experience of the Federal Trade Commission, which required decades to gain judicial endorsement of key elements of its authority. *See* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L. REV. 587, 611–17 (1982) [hereinafter *Congressional Oversight*].

127. *See* Kovacic, *Institutional Foundations*, *supra* note 1, at 306 (discussing weaknesses of courts in transition economies); Kovacic, *Perspectives*, *supra* note 49, at 1211. In many conversations about his experiences in transition economies, Frederic Jenny has emphasized the tendency of judges in civil law jurisdictions to focus carefully on issues of procedural and administrative correctness and to shrink from engaging in the economic and legal issues presented by many competition law cases. This explanation matches experience in the first decade of Mexico’s law, where the courts scanned the work of the competition agency for procedural imperfections. Interview with Eduardo Perez Motta, Former President, Mexican Competition Commission, Washington, D.C. (Apr. 7, 2016).

128. *Id.*

129. *Id.*

130. *See* Aydin, *Competition Law and Policy in Mexico*, *supra* note 63, at 170–71; Sergio Garcia-Rodriguez, *Mexico’s New Institutional Framework for Antitrust Enforcement*, 44 DEPAUL L. REV. 1149, 1177 (1995) (In mid-1990s, Mexico’s “judicial system is perceived by many as plagued with considerable delays, institutional corruption, and a lack of independence”).

performance when the first generation leader departs and a less capable successor takes office. Newer agencies, just like older agencies, can suffer from the rivalry and jealousy that can characterize relationships between current and former leaders.<sup>131</sup> As illustrated by the Polish example, several handoffs will be necessary to determine if the government remains committed to appointing high quality officials and whether the agency succeeds in embedding good process and analytical capability in the institution itself—rather than relying chiefly on the skill of a given leader. After several leadership changes, it is also possible to assess whether leaders have accepted a norm that defines success in terms of the agency's achievements and suppresses the impulse for individual credit-claiming and blame-casting.

#### E. Overcoming Economic And Political Shocks

The first twenty to twenty-five years of a competition system's operation provide a rough idea of its capacity to respond to external economic and political shocks that occur, in various forms, in all jurisdictions. At some point, often in the first decades of its existence, a competition system will be tested by economic or political upheaval. Like a sailing ship lashed by a storm, the agency must manage to stay afloat during the immediate crisis and to resume its intended course once the conflict has abated.<sup>132</sup> No competition agency, old or new, will survive if it takes its political support's depth and durability for granted, or assumes that social acceptance of competition as a principle of economic

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131. We offer an example based on conversations with current and former officials of a transition economy competition agency that had an older law but received a significant upgrade during the 2000s. The officials asked that the identity of the jurisdiction not be disclosed. The first head of the retooled agency undertook an ambitious program of enforcement. The first chair departed, and the original chair's successor (who had been a protégé of the chair) developed an acrimonious relationship with the original chair. The original chair publicly accused the successor of professional misconduct and privately criticized the work of the agency after the handover of leadership. The successor matched the original chair blow-for-blow in public discussions and in private conversations. Kovacic visited the headquarters of the agency and saw a wall on which the photographs of all previous members of the commission appeared, save one—the picture of the previous chair and voluble critic of the current chair. The empty space in the gallery stood out. Kovacic asked the current chair about the omission. The current chair replied that the photograph would not be displayed during the current chair's tenure. The feud did nothing to advance the cause of the agency.

132. An instructive example involving an older competition system is the response of the European Union's Competition Directorate to the financial crisis that began in 2008. The desperation to restore the soundness of banks within the European Union created extreme pressures to override existing competition law requirements, including the regime that limits state aid. The Commissioner for Competition (Neelie Kroes) fought a valiant and successful battle to sustain the role of the Competition Directorate in scrutinizing state subsidies, including bailouts for financial institutions. The crisis had the possibility for severely damaging the Competition Directorate's role in economic policymaking and, for the longer term, diminishing its effectiveness. We are grateful to Philip Lowe, who served as Director General for the Competition Directorate during the crisis, for recounting this episode in numerous conversations over the past five years. See also *An Interview with Sir Philip Lowe, Non-Executive Director of the Board of the UK Competition and Markets Authority*, 11 COMPETITION L. INT'L 99, 104–05 (Oct. 2015) (recounted some aspects of DG Competition's response to the financial crisis that began in 2008).



organization is so profound and enduring that no shift in economic fortunes can unseat it.<sup>133</sup>

All agencies have encountered challenges that test their ability to take a punch and keep fighting. Vigorous law enforcement can create political backlash that inspires ministers and legislators to intervene destructively in the competition agency's work.<sup>134</sup> Changes in economic conditions can erode support for competition as a principle of economic organization.<sup>135</sup> Political support also can evaporate amid political upheaval or conflict: political upheaval can render competition law a subordinate political concern, or make the competition regime entirely irrelevant.<sup>136</sup> These challenges are daunting for older agencies, and are even more taxing for relatively new systems. Even a new system that appears to have weathered its early years in good condition and set a sound foundation for future improvements can be bruised by economic and political upheaval.<sup>137</sup>

One other trend characterizes the development of new systems and the impact of economic and political shocks. In many countries, the initial design of a competition regime places the new institution within a government ministry or other departments subject to control of elected officials.<sup>138</sup> This can be interpreted as the political regime's distrust of the new system. Or somewhat more positively, it can be viewed as a desire to place the new institution under closer observation.<sup>139</sup> Over a period of years, many countries with new systems have been willing to give the competition agency greater autonomy.<sup>140</sup> Thus,

133. See generally William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869 (1988) (discussing periodic legislative assaults on FTC's authority and specific enforcement matters since 1914).

134. See Kovacic, *Congressional Oversight*, *supra* note 126, at 623–27, 664–67 (describing episodes of destructive congressional intervention in FTC's programs).

135. A good case can be made that the U.S. competition laws did not become mainstream elements of national economic policy until the late 1930s, following the abandonment of central planning initiatives tried in the First New Deal. TONY A. FREYER, *ANTITRUST AND GLOBAL CAPITALISM, 1930–2004*, 8–59 (2006); TONY A. FREYER, *REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA 1880–1990*, 196–232 (1992).

136. We offer the examples of Egypt and Ukraine. Egypt's competition system got off to a promising start following the adoption of a competition law in 2005. It recruited well and created a strong administrative infrastructure under its first chair, Mona Yassine. Less than a decade later, a series of tumultuous political events rocked the competition system and, for a time, essentially suspended the operation of the competition regime. In recent years, the Egyptian Competition Agency has gotten back on its feet and restored its program. Ukraine was a generally encouraging case from the passage of the country's antimonopoly act in the early 1990s. Within the past five years, the country has undergone a political revolution, the occupation of substantial territory in its eastern regions, and grave economic distress. Over the past year, the Antimonopoly Committee of Ukraine has undergone a basic makeover and can now be likened to a new start-up agency.

137. See *infra* note 146 and accompanying text.

138. See Marianela Lopez-Galdos, *Results of the George Washington University Global Competition Benchmarking Survey (2016)* [hereinafter *Benchmarking*] (describing patterns in location of competition agencies within the framework of government).

139. This also could be seen as a willingness of a country to provide political support for the new institution. See Aydin & Büthe, *supra* note 1, at 29–32.

140. See *supra* note 130 and accompanying text describing change in status of Mexico's competition agency.

agencies that initially were subject to closer political control have gained a greater measure of independence over time.

#### F. Demonstrating Resilience

To a large degree, all of these considerations reveal the competition system's resilience. It takes at least twenty years to see if the agency has generated positive accomplishments like successfully attacking cartels or adjusting anti-competitive government policies in response to effective advocacy. But this time period is also required for the agency to demonstrate its ability to take a punch and keep moving forward.

These punches can take many forms: a major case that fails in the courts, a powerful industry lobbying campaign to induce legislators to withdraw funding or authority, an improper disclosure of confidential information that casts doubt on the agency's procedural safeguards, or, worse, an episode of corruption involving a top agency official.<sup>141</sup> It is important to know if the agency can cope well with adversity and, if it has committed errors, repair problems and improve performance going forward.

An agency's resilience is further tested when a jurisdiction restructures the institutions responsible for implementation. Over the past ten years, a number of jurisdictions have made fundamental changes to their competition agencies. France, Portugal, Spain, and the United Kingdom each took two separate national competition agencies and consolidated policy responsibility into single institutions.<sup>142</sup> Brazil combined the competition responsibilities of three distinct bodies into a single authority.<sup>143</sup> Ireland merged its competition agency and consumer protection authority into one institution.<sup>144</sup> After creating a single competition agency from two existing bodies, Spain then formed an omnibus regulatory body consisting of the competition agency and six sectoral regulators.<sup>145</sup>

Such structural realignment can be a source of considerable upheaval. The new institution must perform both challenging conceptual tasks—for example, how to define the purpose and identity of the new institution—and seemingly mundane administrative tasks—such as joining up two separate information technology systems—whose successful completion is necessary for a smooth transition. The transition from the predecessor institutions to the new configuration, from the announcement of the planned redesign through the

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141. Experience with Indonesia's competition system provides such a grim example. One of its commissioners has been convicted of taking a bribe in 2008 in connection with an abuse of dominance matter.

142. David A. Hyman & William E. Kovacic, *Competition Agency Design: What's On the Menu?*, 8 EUR. COMPETITION J. 527, 528–29 (2012) (describing structural changes in France, Portugal, Spain and the United Kingdom).

143. *Id.* The Netherlands also merged its consumer protection authority, its competition agency, and the regulator responsible for postal services and telecommunications into one entity.

144. Lopez-Galdos, Benchmarking, *supra* note 138.

145. *See generally id.*

launch and early operations of the new body, creates an inevitable amount of disarray and comes at some cost in effectiveness.<sup>146</sup>

### G. Realistic Expectations

The factors set out here caution against embracing unrealistic expectations about what a new competition system is likely to achieve in its first decade or two. Part IV explains that the performance of a competition system depends crucially on matters such as funding and human capital.<sup>147</sup> Competition agencies that are weakly funded and situated in jurisdictions with a weak talent pool must implement the law more gradually than agencies blessed with substantial financial resources and first-rate talent can.<sup>148</sup> Even for the best-resourced agency with superb staff, it can take considerable time to become proficient in tasks such as law enforcement or competition advocacy. There is no such thing as an “easy” cartel case or “simple” dawn raid for an agency that has never done one.<sup>149</sup> The essential architecture of a leniency program may seem fairly straightforward (give immunity for the first cartel member to inform), but the routine application of leniency schemes presents extraordinary complexities that can perplex even the most-experienced regimes.<sup>150</sup>

There is a chronic tendency to underestimate the administrative burdens imposed by statutory or regulatory requirements that compel the competition agency to devote resources to certain types of matters. Examples include compulsory merger notification with mandatory waiting periods and administrative law requirements that force the agency to investigate all complaints brought to its attention with little or no discretion to brush aside

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146. The announcement of an intended structural change—either a merger of agencies or functions, or a divestiture of some policy duties—immediately inspires speculation within the staff of the affected agencies about their place in the new regime. The uncertainties associated with a realignment will cause some employees to pursue other career opportunities. When departures reach a certain level, vital institutional memory walks out the door.

147. See *infra* Part IV.

148. See Kovacic, *Institutional Foundations*, *supra* note 1, at 298–301 (discussing possibilities for phased introduction of competition law system); Rodriguez & Menon, *supra* note 15.

149. We have not conducted a systematic survey, but our interviews suggested that many new agencies take years before conducting their first dawn raid. The Competition Authority of Kenya, for example, performed its first dawn raid shortly after the fifth anniversary of the creation of the agency. Interview with Francis Kariuki, Director General, Competition Authority of Kenya, Nairobi, Kenya (Sept. 14, 2016). Serbia’s competition authority conducted its first dawn raid in its tenth year. Interview with Dragen Penezic, Secretary General, Commission for Protection of Competition in the Republic of Serbia, Belgrade, Serbia (Apr. 11–12, 2016).

150. In no particular order, a list of complications includes the following issues: the treatment of informants who were deeply involved in the formation of a cartel, but also are offering high quality evidence to the prosecutor; the level of protection to be given to informants who are not first to report wrongdoing, but have evidence whose quality surpasses that provided the first application; the completeness of information the leniency applicant must provide to qualify for immunity; the relationship of leniency to private rights of action for damages (for example, whether a party seeking compensation for injuries may obtain access to information provided by the leniency applicant). Interview with Marvin Price, Head of the Criminal Section, Antitrust Division, Department of Justice, Lima, Peru (Aug. 20, 2016).

manifestly insignificant matters in favor of pursuing more economically meaningful priorities.<sup>151</sup> There is a lengthy learning process by which agencies adapt to cope effectively with these and similar mandates.

This article's call for realism in assessing the implementation experience of any single agency is grounded in the value of comparative study. In response to a question about how an individual competition agency is performing, one might ask, "Compared to what?" The comparative perspective provides a more reliable view of what agencies are able to do. If a large number of hardworking, intelligent people require a certain amount of time to complete certain tasks, it is unrealistic to expect others to do notably better. As in sport, incremental advances in performance can be expected over time, and specific agencies may achieve major advances with respect to some tasks. On the whole, progress takes place in smaller steps, and "records" in this field generally are not broken in giant leaps.

#### IV

#### LIFECYCLES

The accumulated experience of new systems since the late 1980s demonstrates three principal implementation trajectories: an initial ascent followed by decline; a flat line; and a gradual upward progression. This article calls these trajectories lifecycles. They suggest patterns in how agencies evolve, and the study of the patterns can inform agencies about what to expect as they seek to implement a competition law.

##### A. Early Ascent Followed By Decline

One cohort of systems rose early and then entered a sustained period of decline. In some cases, the first period consisted of a sharp vertical ascent followed by a descent almost as dramatic as the initial climb. Venezuela's competition system fits this profile.<sup>152</sup> In the early years, such agencies are often heralded as success stories.<sup>153</sup> A strong first-generation leader—for example, Ana Julia Jatar in Venezuela—who succeeds in bringing superior talent into the agency in its first years typically propels this ascent.<sup>154</sup> The decline is set in motion by various factors: the charismatic leader's departure without the development

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151. COMESA initially set low reporting thresholds for mergers subject to its regional merger review mechanism. The low thresholds generated additional income for COMESA (because more transactions were reportable) but at the cost of straining the capacity of the small secretariat assigned to review transactions. Interview with George Lipimile, Director General, COMESA Competition Unit, New York, New York (Oct. 28, 2016).

152. Marianela Lopez-Galdos, *Noches De Boda Para El Derecho De La Competencia En Venezuela [Venezuela's Competition Law's Honeymoon]*, GACETA JURIDICA DE LA UNION EUROPEA Y DE LA COMPETENCIA (May 2007).

153. Ana Julia Jatar, *Venezuela Competition Policy: The Promotion of Social Change, in COMPETITION POLICY, DEREGULATION, AND MODERNIZATION IN LATIN AMERICA* (Moises Naim ed., 1999).

154. See Kovacic, *Entrepreneur*, *supra* note 50, at 456–57 (describing role of Ana Julia Jatar in establishment of Venezuela's competition agency).

of an institutional framework to carry on the agency's work; a change in national political leadership that results in a redirection of policy; or a legal dispute that casts doubt on the legitimacy of the framework.<sup>155</sup>

In some instances, the collapse associated with this scenario is not complete, but rather a noticeable descent from the early period of seemingly effective implementation. Argentina and Peru are prominent examples in this category.<sup>156</sup> The agency does not crash into the ground, but descends to a level of performance that is decidedly modest compared to its initial accomplishments. In this case, the agency stalls for some of the same reasons suggested above. It may also decline after a change in leadership that dramatically reorients the agency, like the political upheaval which led to the departure of Beatriz Boza and the curtailment of INDECOPI's authority in Peru,<sup>157</sup> or in response to the emergence of political philosophies questioning the value of market-oriented reforms as in Argentina.<sup>158</sup>

Political turmoil inspired by discontent with market reforms deeply affects the competition law regime. In some instances, anti-market political movements have placed the competition policy system into a holding pattern during which the best case scenario is that the agency can hope to retain a critical mass of its top staff, who devote themselves during the hiatus to research and analysis tasks in anticipation of a future resumption of operations.<sup>159</sup> In the worst case, the repudiation of market processes converts the competition agency into a Frankenstein's monster, retarding, rather than promoting, competition.

In some instances, political upheaval has been debilitating. In recent years, a political and economic crisis in Ukraine, coupled with the Russian annexation of Crimea and a war in the country's eastern regions, has threatened to destroy a competition system that was formed in the early 1990s and had shown gradual, though uneven, progress in its first two decades.<sup>160</sup> In 2014, economic and political

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155. Bruce M. Owen, *Competition Policy in Latin America* (Oct. 2003) (Stanford Law and Economics Olin Working Paper No. 268), available at <http://ssrn.com/abstract=456441> [<https://perma.cc/E5EB-FZ4W>].

156. Anna Julia Jatar & Luis Tineo, *Five Years of Competition Policy in Peru: Challenges in the Transition to a Market Economy*, in *PERU'S EXPERIENCE IN MARKET REGULATORY REFORM: LESSONS FROM THE FIRST FIVE YEARS OF INDECOPI: 1992–1998* (Beatriz Boza ed., 1998).

157. See ORG. FOR ECON. COOPERATION & DEV., *PERU – PEER REVIEW OF COMPETITION LAW AND POLICY*, 15–16 (2004), <https://www.oecd.org/daf/competition/34728182.pdf> [<https://perma.cc/HMK9-HMV5>] (outlining the narrowing of Indecopi's powers in the early 2000s).

158. See Julian Pena, *Promoting Competition Policies from the Private Sector in Latin America*, in *COMPETITION LAW AND POLICY IN LATIN AMERICA* 469 (Eleanor M. Fox & D. Daniel Sokol eds., 2009) (discussing how retreat from market liberalization impeded development of competition law in Argentina).

159. This arguably describes the situation faced by competition authorities in countries such as Venezuela and Zimbabwe.

160. The largely successful launch and early implementation of Ukraine's competition system is recounted in Roger Alan Boner & William E. Kovacic, *Antitrust Policy in Ukraine*, 31 *GEO. WASH. J. INT'L L.* 1 (1997). The second decade of Ukraine's competition regime features positive contributions, but several elements of the system attracted criticism, especially its merger control mechanism. See *UNCTAD Ukraine Peer Review*, *supra* note 41, at 7–8, 23–24 (reviewing accomplishments of Ukraine's

turmoil pressed the Antimonopoly Committee of Ukraine to the edge of its existence<sup>161</sup> Among other consequences, the crisis led Ukraine's government to impose drastic economic austerity measures, including a seventy percent cut in the Antimonopoly Commission's budget, which forced most agency officials to take involuntary half-time leave and caused numerous managers and staff to leave the agency.<sup>162</sup> In mid-2015, the government reconstituted the Antimonopoly Commission with a new chair and a new board.<sup>163</sup> To a significant degree, the institution is, in effect, being re-created from the ground up.

Egypt's competition system provides a similar example. While it enjoyed a promising start with good funding and inspired leadership, the country's political turmoil following the Arab Spring uprising placed the competition policy system into virtual suspension. During this time, the agency has strived to retain, with mixed success, many of its best professionals, who devoted themselves during the hiatus to research and analysis tasks in anticipation of a future resumption of operations.<sup>164</sup>

These examples do not mean that agencies cannot rebound from decline following a promising start. In Argentina, the recent regime change has yielded a new commitment to improve the performance of the competition system and the appointment of capable new leadership to the competition agency.<sup>165</sup> Additionally, there are promising signs of improvement in Peru, a country whose system once stood atop the ladder in Latin American and is now striving to regain that position.<sup>166</sup> At this year's Annual Conference of the International Competition Network in Singapore, Peru's competition agency was honored for

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competition system and noting areas for improvement, including merger control).

161. Interview with Yuri Yevgenev, Chairman, Antimonopoly Committee of Ukraine, Kiev, Ukraine (July 22, 2016).

162. *Id.*

163. *Id.* See also Interview with Yuriy Terentyev, Chairman, Antimonopoly Committee of Ukraine, 15 ANTITRUST SOURCE 6 (July 2016), [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/aug16\\_full\\_source.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug16_full_source.authcheckdam.pdf) [<https://perma.cc/QR7C-ATRE>] (discussing restoration of Ukraine competition agency).

164. On the turbulent political conditions in Egypt following the Arab Spring revolution and its effects on Egypt's competition system, see Peter Speelman, *Competition Law in the Middle East and Northern Africa: The Experiences of Gunisia, Jordan, and Egypt*, 4 N.Y.U.J. INT'L L & P. 1227, 1245–50 (Summer 2016). See also Waleed Shoukry, *Egypt: Overview*, in THE AFRICAN AND MIDDLE EASTERN ANTITRUST REVIEW 2015 17, 18 (Glob. Competition Rev. 2014) (“The past three years have been a period of political cynicism, unprecedented violence and economic dislocation in Egypt. Competition law was one of the tools that was used to target businessmen and market players who were close to the presidential palace.”). More recently, the Egyptian Competition Authority has had success in restoring its law enforcement program and, generally, resuming normal operations. Interview with Mona El Garf, GLOB. COMPETITION REV. (Oct. 28, 2016), <http://www.globalcompetitionreview.com/features/article/42073/an-interview-mona-el-garf/> [<https://perma.cc/ZR3J-2U5Y>].

165. *Argentina announces new authority head*, GLOB. COMPETITION REV. (Feb. 2016), <http://globalcompetitionreview.com/news/article/40525/argentina-announces-new-head-authority/> [<https://perma.cc/53PC-HUVE>].

166. We base this observation on discussions that Kovacic conducted with INDECOPI's staff and leadership in Lima, Peru on August 19–21, 2016.

its program to discourage other government bodies (for example, legislatures, other regulatory agencies) from adopting competition-retarding policies.<sup>167</sup>

## B. The Flat Line

A second trajectory resembles a flat line. Some new systems never get off the ground after the adoption of the law and the formation of the competition agency. For various reasons, they are unable to apply their nominal powers to enforce the law or perform advocacy tasks.<sup>168</sup> Some systems fail to receive the minimum necessary levels of funding. This ordinarily occurs in jurisdictions that suffer from severe poverty and do not enjoy financial support from external sources such as foreign aid agencies or multinational donors, which can supplement the budget.<sup>169</sup> In other systems, like Paraguay's, an absence of political support for competition law has stalled implementation. This can be the result of the appointment of leaders who are committed to inactivity or be due to a conscious refusal to provide needed resources.<sup>170</sup> For example, in the Dominican Republic, the competition agency still awaits the appointment of an official who, by law, must approve the initiation of law enforcement proceedings, five years after its creation.<sup>171</sup> The Dominican Republic agency has established a substantial program to train its personnel and, it engages in advocacy measures like public education; yet the agency is unable to apply enforcement powers that, on the surface, were a major reason for the creation of the regime.<sup>172</sup> In yet other countries, such as Thailand, the courts have struck down a key feature of the implementation mechanism, and the jurisdiction's political leadership has not adopted a substitute device.<sup>173</sup>

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167. World Bank, *Winners Announced for Global Competition Advocacy Contest* (Apr. 28, 2016), <http://www.worldbank.org/en/news/press-release/2016/04/28/winners-announced-for-global-competition-advocacy-contest> (recognizing Peru for “embedding competition principles in public and industrial policies through advocacy”).

168. See Aydin & Büthe, *supra* note 1.

169. See, e.g., Cynthia Clement et al., *Competition Policies for Growth: Legal and Regulatory Framework for Sub-Saharan African Countries* (IRIS Center, University of Maryland, 2001) (describing resource impediments to development of competition policy in various African countries).

170. See Julian Pena, *Promoting Competition Policies from the Private Sector in Latin America*, in *COMPETITION LAW AND POLICY IN LATIN AMERICA* 469 (Eleanor M. Fox & D. Daniel Sokol eds., 2009) (discussing impact of erosion of political support for competition law and other market-oriented reforms in Latin America).

171. Interview with Michelle Cohen, President, Commission for the Defense of Competition, Dominican Republic, Geneva, Switzerland (July 7, 2015). In September, Cohen was fired by the Dominican Republic's Chamber of Deputies. More questions into firing of Dominican competition watchdog chief, *Dominican Today*, (Sept. 15, 2016), <http://www.dominicantoday.com/dr/local/2016/9/15/60609/More-questions-into-firing-of-Dominican-competition-watchdog-chief> [https://perma.cc/EM3Z-8A4Y]. News reports have indicated that Cohen was dismissed in response the business community's objections to Cohen's exercise of the Pro Competencia's advocacy and reporting functions.

172. Interview with Michelle Cohen, *supra* note 171.

173. R. Ian McEwin, *Designing Competition Law under Financial Crisis: Indonesia and Thailand Compared*, 10 *COMPETITION POL'Y INT'L*, Spring 2014, at 247 (describing barriers to enforcement of Thailand's competition law). Thailand's government is considering proposals to cure this deficiency and otherwise strengthen the powers and status of the country's competition authority. Interview with

Agencies which have risen quickly and fallen and agencies what have never left the flat line are not irretrievably failed. In some cases, largely inactive agencies have begun to build programs that have promise of upward progression. For example, Armenia's competition authority has recently shown signs of overcoming badly inadequate funding levels and an unfavorable political environment to take steps that could establish a useful program.<sup>174</sup> Similarly, elected political leadership in Argentina is beginning to place the competition regime on better institutional footing and rely more heavily on competition policy to improve economic growth.<sup>175</sup> The Antimonopoly Committee of Ukraine is in the early stages of rehabilitation following a political crisis that nearly destroyed the agency.<sup>176</sup>

What explains the ability of dormant systems, or weakly performing institutions, to gain the resources and political support needed to improve? In some instances, international organizations have helped inspire reforms by recommending improvements in the competition law system, including enhancements of the agency's legal mandate, its resources, or its structure. The peer reviews issued by bodies such as the Organization for Economic Cooperation and Development and the United Nations Conference on Trade and Development appear to have helped catalyze changes in government policy.<sup>177</sup>

### C. General Upward Progression

The third trajectory is a generally upward progression with fluctuations upward and downward. The slope of progress can vary: some systems' slopes are steep (Brazil, Singapore, South Africa) while others' are more gradual (Barbados, Chile, Indonesia, Jamaica, Kenya, Mexico). The trajectory usually is not an unbroken upward arc because the agency encounters successes and setbacks along the way. Mexico, for example, has achieved important improvements in its statutory framework and in the implementation of its law enforcement and advocacy programs. Yet, a recent redesign of the agency and a change in leadership resulted in a massive loss of senior management (with the departure of seventeen of the agency's top eighteen managers in 2015).<sup>178</sup>

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Robert Ian McEwin, New York, New York (Oct. 28, 2016).

174. UNITED NATIONS CONF. ON TRADE & DEV., VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY: ARMENIA (Aug. 2010), [http://www.unctad.org/en/Docs/ditccpl20101\\_en.pdf](http://www.unctad.org/en/Docs/ditccpl20101_en.pdf) [<https://perma.cc/V52Q-YFA7>].

175. Interview with Esteban Grecco, Chairman of the Argentina's Competition Commission, Mexico City, Mexico (May 16, 2016); *Macri relanza la Comision Nacional de Competencia*, DIARIO LA GACETA (Feb. 2016), <http://www.gacetamercantil.com/notas/95421/> [<https://perma.cc/PNM7-89UX>].

176. See ANTITRUST SOURCE, *supra* note 163 and accompanying text.

177. At their best, peer reviews put the weight of a larger international community behind suggested reforms and give advocates of change a stronger basis for proposing improvements.

178. Interview with Alejandra Palacios, President, Federal Competition Commission of Mexico, Mexico City (May 16, 2016); see also Interview with Alejandra Palacios, Chair, COFECE, Mexico, 15 ANTITRUST SOURCE 5 (June 2016), [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/jun16\\_palacios\\_intrvw\\_6\\_17f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/jun16_palacios_intrvw_6_17f.authcheckdam.pdf) ("As an authority, we have experienced



Restocking the leadership team took time and came at some cost in performance in the short term.

In their first years, these gradually ever more successful systems often are not identified as rising stars. Recall that the competition regimes of Chile and Mexico were not seen as obvious candidates for success. However, over time, they have shown steady improvement and grown resilient as a result of better resourcing, staffing, program selection, and political support. A second factor is a regime change which brings in new political leadership committed to making competition law a more central element of national economic policy. Just as a regime change can affect a competition system adversely, new political leadership can revive an ailing competition mechanism.<sup>179</sup>

## V

### FACTORS ACCOUNTING FOR IMPLEMENTATION SUCCESS

Studying the lifecycles of various competition systems involves observing factors that tend to improve the prospects for successful implementation.

#### A. Funding

Well-funded agencies generally tend to outperform poorly resourced regimes.<sup>180</sup> A condition that links many of the least successful systems is a dearth of resources from internal sources and an inability to enlist external donors to fill the gap.<sup>181</sup> Some agencies enjoy robust financial support from their first days onward but a large budget from the start is by no means a prerequisite for success. Singapore and South Africa are two examples of agencies that have undergone gradual, steady improvements in implementation from the beginning.<sup>182</sup> In other

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profound changes in the last two years.”).

179. This condition describes current efforts by new political leadership to bolster Argentina’s competition system. See Interview with Esteban Manuel Greco, President of the National Commission for the Defense of Competition, Argentina, 15 ANTITRUST SOURCE 5 (June 2016), <https://www.competitionpolicyinternational.com/wp-content/uploads/2016/08/CPI-Talks-Greco-Interview.pdf> (“Argentina has a new approach to competition policy and this implies in the first place an intention to activate competition law enforcement and competition policy.”).

180. *Agency Effectiveness Study*, 4 J. ANTITRUST ENF’T 2 (forthcoming 2016) (discussing importance of adequate funding to competition agency effectiveness). Substantial resources do not ensure effectiveness. See Aydin & Büthe, *supra* note 1. Public and private bodies, alike, sometimes apply generous outlays poorly. We are aware of one newer agency that devotes a third of its budget to the motor pool; top officials are assigned an automobile and driver. Yet a dearth of funding places an agency at a severe disadvantage.

181. *Latin American enforcers bemoan administrative hurdles*, GLOB. COMPETITION REV. (May 2016).

182. South Africa provides a good example of how the government underscored its support for the new competition system with the budget. The first quarters for the new Competition Commission of South Africa and the Tribunal in which it brings its cases was an elegant office park near Pretoria. The campus resembled the accommodations one might expect from a prosperous law firm or business venture. The institutions since have been relocated to facilities in Johannesburg, yet still in a manner that reflects the stature and importance of the competition agencies. Interview with Tembinkosi Bonakele, Chairman, Competition Commission of South Africa, Durbin, South Africa (Nov. 10, 2015).

jurisdictions, such as Colombia and Mexico, the gradual ascent of the competition system has benefited from periodic substantial increases in outlays that enhanced the capability of the competition agency and supported the pursuit of more ambitious law enforcement and advocacy programs.<sup>183</sup> Agencies that demonstrate their ability to manage and apply a lesser allotment of resources place themselves in a stronger position to seek greater outlays in the future.

## B. Human Capital

Funding, in turn, deeply influences a second vital condition: the ability to attract and retain top rate talent and to spend funds for external consultants.<sup>184</sup> An agency's ability to establish effective law enforcement or advocacy programs hinges largely on its human capital.<sup>185</sup> As the agency's talent increases, it can undertake more ambitious programs. The level of skill should be paramount in the choice of enforcement and non-enforcement matters.

## C. Matching Commitments To Capabilities

The more effective competition systems strive to match program commitments to delivery capabilities. A weakly resourced agency must strive to select programs that it has a fighting chance of carrying out successfully. This requires strong discipline in program selection to avoid making commitments to matters that the agency cannot execute successfully.<sup>186</sup> A common trap an agency faces in early years is the tendency to begin a large number of highly ambitious matters that exceed the capability of staff and run serious risks of failure before the courts.<sup>187</sup>

This points to a basic dilemma that confronts agency leaders in the early decades of a competition agency, and, perhaps, other new regulatory bodies:

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183. Interview with Alejandra Palacios, President, Mexican Competition Commission, Mexico City, Mexico (May 16, 2016).

184. This is a crucial consideration in Ukraine's current efforts to reinvigorate its competition system, which was formed in the early 1990s. The Antimonopoly Committee of Ukraine pays its professional staff roughly \$200 per month. Without an increase in budget and flexibility to increase wages, Ukraine's competition agency will struggle to recruit and retain skilled professionals. Interview with Yuri Yevgenyev, Chairman, Antimonopoly Committee of Ukraine, Kiev, Ukraine (July 22, 2016).

185. Cf. D. Daniel Sokol, *The Development of Human Capital in Latin American Competition Policy*, in *COMPETITION LAW AND POLICY IN LATIN AMERICA* 13 (Eleanor M. Fox & D. Daniel Sokol eds., 2009) (detailing the difficulties associated with building this crucial dimension of capacity in transition economies).

186. Hyman & Kovacic, *Consume or Invest*, *supra* note 58, at 318–21 (setting out measures to ensure that agency has ability to undertake initiatives successfully).

187. See *infra* notes 190–91 and accompanying text (discussing case of Pakistan's competition commission). This problem is not limited to newer competition systems. The U.S. Federal Trade Commission underwent a major make-over in the 1970s in response to criticism that the agency had focused overwhelmingly on trivial matters and had avoided dealing with conduct that posed serious harm to consumers. In seeking to bolster its program in the 1970s, the agency initiated an extraordinary array of competition and consumer protection matters that badly outstripped its human capital. Many of the ambitious FTC matters begun in this period collapsed as a consequence. The FTC experience in the 1970s is examined in Hyman & Kovacic, *Consume or Invest*, *supra* note 58, at 305–11.

When allocating resources, what is the right balance between “consumption” in the form of initiating new law enforcement matters and “investments” in administrative infrastructure, procedures, knowledge, and other forms of capability that put the agency in a position to succeed for the long term?<sup>188</sup> There is a critical mass of enforcement necessary for the agency to build credibility among business managers, develop the capacity of its staff, and attain legitimacy in the eyes of elected officials and the larger public.<sup>189</sup> Therefore, a new agency may be forced to operate at a tempo that, to some extent, exceeds its ability to complete all of its projects successfully. But if the gap between early promises and actual delivery becomes too great, many projects will collapse in a manner that demoralizes the agency’s staff and creates a reputation for ineptitude.

The relaunch of Pakistan’s competition system over the past decade illustrates the hazards of creating a serious mismatch between a program’s commitments and its capacities. The first generation of the reformed agency’s leadership undertook an agenda of high-profile challenges in major sectors of the economy.<sup>190</sup> At first, these measures were seen as evidence of the agency’s new vitality and courage, replacing the timidity of the former system with bold acts. Within years, it became apparent that the agency lacked the capacity to capably manage a large number of ambitious projects, particularly in the face of strong resistance from the affected businesses, which enmeshed the agency in protracted, indeterminate litigation.<sup>191</sup>

#### D. Learning

Learning is one of the most important processes by which agencies adapt to cope effectively with the mandates they are entrusted to implement. As the competition authority accumulates experience, it can reasonably seek to conduct a larger number of inquiries or undertake individual matters of greater difficulty. Our perception is that the more effective agencies learn in two ways – from their own experience and from the experience of other competition law regimes— either directly from individual regimes or indirectly through the work of international bodies such as the International Competition Network, Organization for Economic Cooperation and Development, and the United Nations Conference on Trade and Development.<sup>192</sup> To learn from its own experience, the agency must devise a process for assessing its completed projects and its processes, and incorporating what it learns into its future work.<sup>193</sup> In order

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188. *Id.* 322–24.

189. See Kovacic, *Respected Brand*, *supra* note 51, at 247–48.

190. Khalid Mirza, Presentation, Roundtable on foundations of an effective competition agency (July 19–21, 2011).

191. See FERNANDO FURLAN & WILLIAM E. KOVACIC, UNCTAD, PEER REVIEW OF THE COMPETITION SYSTEM OF PAKISTAN, 11–13 (2013) (examining Pakistan’s competition system’s modern experience).

192. See *supra* notes 34–37, 65–69 and accompanying text. See also Hollman & Kovacic, *supra* note 13 (discussing role of multinational networks in collecting and transmitting knowhow).

193. See *supra* notes 65–69 and accompanying text (discussing the importance of evaluation in

for any single agency to learn from the experience of other bodies, the agencies with experience must share what they know, the good and the bad, alike.<sup>194</sup>

### E. Political Support

It is extraordinarily difficult to implement a competition policy program in a jurisdiction that is hostile or indifferent to the aims of the law. It is still more difficult to build a program amid political entropy. Weak political support or episodes of severe political instability inevitably lengthen the period for effective implementation of the competition law. By contrast, strong political support—which the agency itself may help to build<sup>195</sup>—allows an agency to overcome many of the impediments noted above and enables it to focus on making the case for its work through its performance.

### F. Supporting Institutions

The implementation of competition law depends heavily on the quality of supporting institutions, what Allan Fels refers to as “co-producers.”<sup>196</sup> A crucial such institution for a competition agency is a country’s judicial system. A well-functioning judicial system confers a great advantage on the development of the competition regime. By contrast, a country with feeble or, worse, corrupt courts faces a lengthy process of retooling its judiciary or establishing new tribunals dedicated to competition law.<sup>197</sup>

A competition system also ultimately cannot thrive without the support of academic institutions that teach courses and perform research in competition law and industrial organization economics.<sup>198</sup> The speed with which a jurisdiction develops a sound intellectual infrastructure will affect the pace and quality of implementation.

### G. International Cooperation

Engagement with other jurisdictions can help agencies overcome resource limits, accelerate learning, and build political support.<sup>199</sup> This goal can be

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improving agency performance).

194. An agency must be willing to suppress the instinct to save face by concealing its failures or by attributing all good outcomes solely to its skill (rather than, for example, to sheer luck). It may be easier to do this in a setting—say, a small, closed meeting of senior competition agency officials—in which senior managers are willing to speak more freely. Since the early part of this decade, Kovacic has participated in a seminar hosted by the Fordham Law School in which 15–20 senior competition officials discuss sensitive topics (for example, dealing with political pressure applied by elected officials) that would be awkward to address in front of a large audience. This format facilitates a more open and informative discussion and has great potential to accelerate learning across agencies.

195. See Aydin & Büthe, *supra* note 1, at 18–19.

196. We are grateful to Allan Fels for bringing this concept to our attention.

197. See Kovacic, *Institutional Foundations*, *supra* note 1, at 306–07.

198. See *supra* notes 121–23 and accompanying text.

199. See Thomas J. Doleys, *Promoting Competition Policy Abroad: European Union Efforts in the Developing World*, 57 ANTITRUST BULL. 337 (2012) (discussing the influence of the European Union and its member states on the development of competition systems in emerging markets).

accomplished through bilateral programs of technical assistance, agency-to-agency cooperation, or through participation in international regional alliances or larger international networks.<sup>200</sup> To an increasing degree, these mechanisms enable agencies to obtain highly valuable information about the substance and process of competition law. Further, regular exchanges with their counterparts in other countries allows agency leaders to learn how to deal with sensitive issues involving political pressure and relations with other public agencies.

#### H. Periodic Assessment And Upgrades

The most successful implementation efforts have taken place in jurisdictions that undertake periodic reviews of the competition system.<sup>201</sup> The virtuous cycle one observes in the best systems consists of a three-stage process of experimentation, assessment, and refinement.<sup>202</sup> Many of these states, including Brazil, Mexico, South Korea, and Taiwan, have returned to their national legislatures to obtain major system upgrades.<sup>203</sup>

## VI

### CONCLUSION

In his influential study of the Cuban Missile Crisis, Graham Allison lamented the limits of our understanding of how much institutional arrangements (what he called “bureaucracy”) contributed to the failure of governments to achieve good policy results.<sup>204</sup> To bridge the gap between expectations and actual performance, Allison called for a redirection of effort by students of public administration: “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 preferred solution and actual performance of the government.”<sup>205</sup>

The challenge Allison posed forty-five years ago applies powerfully to the modern expansion of competition law. The design and successful implementation of law reform are difficult tasks in any legal system. They are inherently even more difficult in developing and transition economies, dozens of which have adopted competition laws in the past twenty-five years.

Generally, the path to success for new competition systems has been a process of incremental improvement. The best experiences have taken place in jurisdictions that have pursued gradual increases in the tempo and difficulty of projects undertaken. The need for a deliberate, phased approach is most acute in

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200. *Id.*

201. *See supra* notes 34–37, 65–69 and accompanying text.

202. *See supra* notes 34–37 and accompanying text.

203. *See supra* notes 65–69 and accompanying text.

204. GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 266 (Little Brown & Co. 1971). On the major impact of Allison’s study on the analysis of bureaucratic decisionmaking, see Barton J. Bernstein, *Book Review*, *FOREIGN POL’Y*, Spring 1999, at 121.

205. ALLISON, *supra* note 204, at 267–68.

countries with unfavorable initial conditions—badly funded agencies, weak political support, and thin human capital.

Our analysis of implementation programs to date suggests the value of greater emphasis on institution building as a dimension of competition law reforms. It also calls for patience in setting expectations about what most regimes are likely to be able to accomplish.

The future development of competition law in newer systems requires a mix of realism and ambition. Competition agencies and their external constituencies must approach the establishment of the new regulatory regime with realistic expectations about what it takes to build an effective system in light of what jurisdictions have accomplished to date. Realism is an antidote to the disappointment and frustration that can set in when good results do not emerge in the early years of a law's implementation. To develop a new system of effective economic regulation is a long-distance event, not a 100-meter sprint.

Realism must be accompanied by ambition to press ahead and achieve the gradual improvement in institutional quality and operational methods that supply the foundation for good policy outcomes. Clear-sighted appreciation of implementation difficulties does not warrant surrender. As a number of new competition agencies have shown, the sustained commitment to a virtuous cycle of experimentation, assessment, and improvement can yield steady incremental improvements that build superior institutions—the foundation for superior policy performance.