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CLE Course Materials & Speaker Biographies

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Clifford Aronson  
Partner, Antitrust and Competition, Skadden Arps

Clifford H. Aronson serves as the North American leader of Skadden’s Antitrust and Competition Group. He focuses his practice on advising clients in antitrust matters relating to mergers and acquisitions. He has been involved in numerous high-profile transactions and strategic alliances across multiple industries, including entertainment, consumer products, health care, manufacturing, pharmaceutical, retail and technology. He also has worked on numerous significant criminal and civil antitrust investigations (and resulting civil lawsuits) in various industries, including publishing, auction houses and cement. Listed in the top tier in Chambers USA: America’s Leading Lawyers for Business, he also has been included repeatedly in Chambers Global: The World’s Leading Lawyers for Business, The Best Lawyers in America, Lawdragon 500 Leading Lawyers in America, The Legal 500 and Who’s Who Legal: Competition. Law360 selected Mr. Aronson as one of its “Competition MVPs” in 2012. In addition to transactional matters, he advises clients in other areas of antitrust and competition, including litigation and investigations. Additionally, he represents clients before federal and state antitrust agencies and grand juries. He has been an instructor at the Wharton School at the University of Pennsylvania and is a regular speaker on mergers and acquisitions at Wharton’s Executive Education Program. He also was vice chair of the Mergers and Acquisitions Committee of the Antitrust Section of the American Bar Association.

Isabelle de Silva  
President, Competition Authority of France

Isabelle de Silva was appointed president of the Autorité de la Concurrence on October 14, 2016, by decree of the President of the French Republic. She is a member of the Conseil d’Etat, the French supreme administrative court, which she joined in 1994 after graduating from Ecole des Hautes Etudes Commerciales, the Community of European Management Schools, the Sorbonne University in philosophy (Paris I) and Ecole Nationale d’Administration, the French national school for civil service. After holding different positions as auditeur and then maître des requêtes at the Conseil d’Etat, she became commissaire du gouvernement at the Second and then Sixth Chamber of the Conseil d’Etat, and was later promoted to the rank of conseiller d’Etat and president of the Sixth Chamber. She was an adviser to the Minister of Culture and Communications, in charge of the press and the radio, director of legal affairs of the Ministry of Ecology, Sustainable Development, Transport and Housing, and became a member of the sector regulator for press distribution in 2012. She has, in addition, been a member of the board of the Autorité de la concurrence since 2014. She is an Officer of the French Légion d’honneur, ordre national du Mérite and ordre des Arts et des Lettres.

Horacio Gutierrez  
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Horacio Gutierrez is Spotify’s General Counsel and Vice President of Business and Legal Affairs, based in Spotify USA’s headquarters in New York City. As such, he is responsible for overseeing Spotify’s global legal, regulatory and government affairs, and serves as corporate secretary to its board of directors. In addition, he heads Spotify’s global licensing operations, a business function responsible for commercial licensing activities with record labels, music publishers, performance rights organizations and other rights holders worldwide. He holds an LL.M. from Harvard Law School, which he attended as a Fulbright Scholar; a J.D., summa cum laude, from the University of Miami; a Bachelor of Laws degree from Universidad Católica Andrés Bello in Caracas, Venezuela; and a post-graduate diploma in corporate and commercial law from the same institution.

Matthew Heim  
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Matthew Heim is Vice President and Counsel in Qualcomm’s Government Affairs team. His work focuses principally on European intellectual property rights, standardization, and antitrust policy matters. He is also involved in advising the company on certain international regulatory matters. Prior to joining Qualcomm in 2009, he spent over a decade advising on European political, regulatory, and legal challenges in sectors such as varied as telecommunications, online advertising, software, audio-visual content, chemicals, ship-building, raw materials and bananas. He is also active in a number of competition associations including as a vice chair of the BIAC Representation to the OECD Competition Committee; as a nongovernmental advisor to the International Competition Network; as a member of the EU Law Group of the Honourable Society of Lincoln’s Inn; and as an editorial board member of the IBA’s Competition Law International. He was awarded degrees from both the universities of Bristol and Exeter before being called to the Bar of England and Wales.

Dina Kallay  
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Dina Kallay is Head of Antitrust (IPR, Americas, & Asia-Pacific) at Ericsson. From 2006-2013, she served as counsel for Intellectual Property and International Antitrust at the U.S. Federal Trade Commission, where she worked on antitrust-intellectual property policy and enforcement matters, bilateral and multilateral antitrust issues and Asian competition matters. Earlier on, she practiced antitrust and IP at law firms and in-house, and clerked at the European Commission Directorate General for Competition (DG COMP). She holds a doctorate from the University of Michigan Law School, and is a frequent speaker on international antitrust, IP, and standards policy topics.

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James A. Keyte is director of the Fordham Competition Law Institute and, as an adjunct professor at Fordham Law, teaches the Comparative Antitrust Law and Enforcement course. As a partner at Skadden, he handles a wide variety of antitrust litigation, transactional and advisory matters across numerous industries. In the litigation area, he has handled a number of cases involving alleged price-fixing, monopolization, litigated mergers, other restraints of trade and class actions. In addition, he has handled or played significant roles in a number of sports-related litigations and trials. In the transactional arena, he has represented numerous clients before the Department of Justice and the Federal Trade Commission, as well as parties involved in litigated mergers. Mr. Keyte also counsels on general antitrust matters. He has advised numerous clients on compliance with basic antitrust statutes, including issues relating to competitor collaborations, unilateral conduct and distribution. He also counsels a number of clients on intellectual property matters with antitrust implications. He is the past chair of the Trade, Sports and Professional Associations Committee. He is a former senior editor of the Antitrust Law Journal and a current editor of Antitrust Magazine. He also authors a monthly antitrust column for the New York Law Journal. He holds a J.D. from Loyola Law School and B.A. from Harvard University.
Speakers (continued)

William E. Kovacic  
Global Competition Professor of Law & Policy and Director of the Competition Law Center, The George Washington University

Bill Kovacic is the Global Competition Professor of Law and Policy and the director of the Competition Law Center at the George Washington University Law School. He is also a Visiting Professor at the Dickson Poon School of Law at King’s College London. Since August 2013, he has served as a non-executive director of the board of the United Kingdom’s Competition and Markets Authority. He is co-editor (with Ariel Ezrachi) of the Journal of Antitrust Enforcement. From January 2006 to October 2011, he was a member of the Federal Trade Commission, which he chaired from March 2008 until March 2009. He was the FTC’s General Counsel from June 2001 through 2004. He has advised numerous countries about the design and implementation of economic regulatory systems.

Johannes Laitenberger  
Director-General of DG Competition, EU Commission

Johannes Laitenberger is the Director General of DG Competition since September 2015. Before leading DG Competition, he held key posts as Deputy Director-General in the Legal Service of the European Commission, Head of Cabinet for President Barroso, Head of the Spokesperson’s Service and Speechwriter of the European Commission, and Head of Cabinet for Commissioner Reding. He studied Philosophy at the Portuguese Catholic University in Lisbon and graduated in Law at the Rheinische Friedrich-Wilhelms-Universität, Bonn.

Munesh Mahtani  
Senior Competition Counsel, Google

Munesh Mahtani is a senior competition counsel at Google. At Google, he manages a wide range of competition law and policy matters involving the company, including antitrust investigations and litigation across Europe and Asia. He started his career at Clifford Chance in London and, prior to joining Google, he was an in-house counsel at British Sky Broadcasting in the UK. He is an officer of the antitrust committee of the International Bar Association, a vice chair of the Business and Industry Advisory Committee to the OECD, a nongovernmental advisor to the ICN for the UK, a committee member of the Competition Law Association, and a vice chair of the In-House Competition Lawyers Association for the UK and Singapore. He has also written on aspects of EU and UK competition law, including contributing chapters to the The Law of Cartels, and is a regular speaker at conferences and seminars.

Maureen K. Ohlhausen  
Acting Chair, Federal Trade Commission

Maureen Ohlhausen was sworn in as a Commissioner of the Federal Trade Commission on April 4, 2012, and was designated to serve as Acting FTC Chairman by President Donald Trump in January 2017. Prior to joining the Commission, she was a partner at Wilkinson Barker Knauer, LLP, where she focused on FTC issues, including privacy, data protection, and cybersecurity. She previously served at the Commission for 11 years, most recently as Director of the Office of Policy Planning from 2004 to 2008, where she led the FTC’s Internet Access Task Force. She was also Deputy Director of that office. From 1998 to 2001, she was an attorney advisor for former FTC Commissioner Orson Swindle, advising him on competition and consumer protection matters. She started at the FTC General Counsel’s Office in 1997. Before coming to the FTC, she spent five years at the U.S. Court of Appeals for the D.C. Circuit, serving as a law clerk for Judge David B. Sentelle and as a staff attorney. She also clerked for Judge Robert Yock of the U.S. Court of Federal Claims from 1991 to 1992. She graduated with distinction from Antonin Scalia Law School at George Mason University and with honors from the University of Virginia. She was on the adjunct faculty at the Antonin Scalia Law School at George Mason University, where she taught privacy law and unfair trade practices. She served as a senior editor of the Antitrust Law Journal and a member of the American Bar Association Task Force on Competition and Public Policy. She has authored a variety of articles on competition law, privacy, and technology matters.

Greg S. Slater  
VP and Associate General Counsel, Intel Corporation

Greg Slater is the director of trade and competition policy at Intel Corporation. In this capacity, he is responsible for trade and competitiveness issues affecting the company’s business interests worldwide. In his role as a senior counsel at Intel, he also provides legal and policy advice on emerging laws and regulations that significantly affect the company’s products and manufacturing sites. In addition, he is responsible for all government agreements related to Intel’s factory investments worldwide. Prior to joining Intel in 1997, he was in private practice at Steptoe & Johnson and then at Latham & Watkins in Washington, D.C. He began his law career as a clerk for former Chief Judge Albert Engel on the U.S. Sixth Circuit Court of Appeals after graduating summa cum laude from the J. Reuben Clark Law School at Brigham Young University.

Han Li Toh  
Chief Executive, Competition Commission of Singapore

Han Li To is the Chief Executive and a Commissioner of the Competition Commission of Singapore. He was previously the Assistant Chief Executive (Legal & Enforcement). He has served as a Justices’ Law Clerk to the Chief Justice of Singapore, Deputy Public Prosecutor and State Counsel in the Attorney-General’s Chambers, Senior Assistant Registrar at the Supreme Court and as Registrar and District Judge of the State Courts. He also served on the Military Court of Appeal and the Copyright Tribunal. Han Li read law at Cambridge University, obtained a Masters of Law from the University of Chicago and a Masters in Public Management from the Lee Kuan Yew School of Public Policy. He attended the Stanford Executive Program at its Graduate School of Business and is admitted to practice law in Singapore, England, and New York.
The application of competition policy vis-à-vis intellectual property rights: 
the evolution of thought underlying policy change

Robert D. Anderson and William E. Kovacic

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The application of competition policy vis-à-vis intellectual property rights: the evolution of thought underlying policy change

Robert D. Anderson and William E. Kovacic

Abstract

This paper examines the evolution of national competition (antitrust) policies and enforcement approaches vis-à-vis intellectual property rights (IPRs) and associated anti-competitive practices in major jurisdictions over the past several decades. It focuses especially on the underlying process of economic learning that has, the authors suggest, driven relevant policy changes. Part 2 of the paper outlines the breakthroughs in understanding that have underpinned the evolution of competition policy approaches toward intellectual property licensing arrangements in the US, Canada and the EU. Part 3 elaborates the foundational insights that have motivated competition policy interventions with respect to ‘newer’ issues such as anti-competitive patent settlements and hold-ups in relation to standard setting processes, in addition to the modern focus on mergers that potentially lessen incentives for innovation and on abuse of dominance/single firm exclusionary practices in IP-intensive network industries. Part 4 outlines some of the core policy concerns and insights driving the increased emphasis that leading competition authorities now devote to policy advocacy and research in relation to the scope and definition of IP rights. Overall, the analysis suggests, firstly, that competition policy applications in the intellectual property sphere are matters of fundamental importance for economic advancement and prosperity, having a direct bearing on innovation, growth and the diffusion of new technologies. Indeed, the roles of IP and competition policy are now sufficiently intertwined and interdependent that neither can be well understood or applied in an optimal fashion in the absence of the other. Secondly, the thought evolution described herein implies that successful policy applications require careful study of market structure and behaviour, not in the abstract but with reference to the particular markets affected. Thirdly, it augurs favourably for the prospects of continuing gradual and incremental convergence in national approaches in this area, even spanning developed and developing countries, on the basis of continual learning and informed self-interest.

Key words: intellectual property, patents, international trade and competition policy, antitrust, innovation, mergers, anti-competitive settlements, standards, network industries, competition advocacy.

JEL classifications: K21, L4, L41, L43, O3, O34

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I. Introduction

The treatment of intellectual property rights (IPRs) and associated firm practices by leading
competition agencies has undergone far-reaching changes in the working lifetimes of many current
practitioners, including ourselves. In most jurisdictions, antiquated 'per se' approaches to IPR
licensing practices previously viewed as irredeemably harmful to competition have long given way
to 'rule of reason' or case-by-case approaches that require consideration of potential justifications
and/or ameliorating circumstances or, at the very least, employ structural screens to avoid
unnecessary policy interventions. At the same time, important enforcement actions have been
taken, in diverse jurisdictions, against a broad range of other practices implicating the role of
intellectual property, including mergers deemed likely to undermine incentives for innovation; anti-
competitive settlements in patent litigation cases relating to prospective entry by generic suppliers
in the pharmaceutical sector; 'hold-ups' involving undeclared patents in standard-setting
processes; and unilateral abuses of market power derived (at least in part) from IPRs, in high-
technology industries.3

In addition, following a period in which competition authorities largely deferred to
intellectual property offices with respect to issues concerning the scope and legitimacy of patents
and other IPRs, leading agencies such as the United States Federal Trade Commission (FTC) and
Department of Justice, the European Commission, the Canadian Competition Bureau and others
have devoted significant resources to advocacy efforts aimed at ensuring the integrity of patent
regimes and avoiding the issuance/recognition of ill-founded rights that potentially weaken
competition or impede follow-on innovation without serving valid off-setting purposes.4 The
activities of patent assertion entities (i.e., 'trolls') and other practices have similarly come under
scrutiny.5 Such efforts represent an important complement to the agencies' enforcement actions
particularly in circumstances where the intellectual property system is itself the source of
unnecessary impediments to competition. In such circumstances, direct action to correct the
underlying problem is likely to be a far more efficient solution than the repeated enforcement
actions that might otherwise be necessary.6

On the surface, there might appear to be a random character to these patterns of
intervention and non-intervention by competition agencies in relation to IPRs, akin to perceptions

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2 See, for supporting details, Part 2 below and, more generally, Robert D. Anderson, Anna C. Müller,
Philippe Pelletier, Jianning Chen, Daria Novozhilkina, Nivedita Sen and Nadezhda Sporysheva, 'The Application
of Competition Policy vis-à-vis Intellectual Property: a Comparison of Jurisdictional Approaches', to be
published in Robert D. Anderson, Nuno Pires De Carvalho and Antony Taubman (eds.), Competition Policy and

3 See Part 3, below, and references cited therein.

4 See Part 4, below.

Available at https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-
study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf

Annual Survey of American Law 421. See also Robert D. Anderson, S. Dev Khosla and Mark F. Ronayne, 'The
Competition Policy Treatment of Intellectual Property Rights in Canada: Retrospect and Prospect', in
R.S. Khemani and W.T. Stanbury (eds.), Canadian Competition Law and Policy at the Centenary (Institute for
of 'swinging pendulums' in other domains of competition policy and law enforcement. In this chapter, we take a different view. The evident evolution of competition policies and enforcement approaches vis-à-vis IPRs over the past several decades derives first and foremost, we suggest, from a far-reaching process of economic learning that has taken place during the same period. The learning process has encompassed, in addition to other aspects: (i) improved understanding of the role and effects of vertical licensing practices and single-firm exclusionary conduct, including new understanding of the harmful effects of a range of specific practices associated with the exercise of IP; (ii) a far more subtle understanding of the role of intellectual property itself in relation to market power and its exercise than competition agencies once held; and (iii) a better appreciation of problems associated with IP regimes themselves, and the role that both competition enforcement and advocacy work can play in addressing adverse implications for competition, innovation and the diffusion of new inventions and creative works.

The foregoing interpretation is not particularly original - indeed, as we shall point out, it builds directly on important scholarly work and on new thinking processes in the relevant agencies themselves, beginning now several decades ago. We, nonetheless, believe it is useful to set out in an integrated fashion some of the most important insights underlying the evolution and adaptation of enforcement policies in this area. This is the purpose of this chapter. This is important, in part, to help younger enforcement agencies and competition law jurisdictions to learn from the experiences of older ones and to avoid, where possible, the unnecessary replication of their policy errors. Perhaps, it will also contribute to what we see as an ongoing gradual process of learning-based international convergence in this subject-area.

The issues discussed in this paper are also of direct relevance to the role and application of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), in that recognition of the scope for and role of competition policy in relation to IP is an important part of the flexibilities and balance built into that Agreement. At the same time, the relevant provisions of the Agreement (especially Article 40 and 31) provide relatively little in the way of practical guidance for jurisdictions wishing to implement relevant measures. For this, we must look, at least in part, to WTO Members’ experience at the national level and to related scholarly analysis and reflection.8

The evolution of thinking set out in this chapter carries major implications for the core concerns and premises of the broader volume of which it will form a part. It suggests, firstly, that competition policy applications in the intellectual property sphere are matters of fundamental importance for economic advancement and prosperity, having a direct bearing on innovation and the diffusion of new technologies. Indeed, as we will suggest, the role of IP and related

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8 See Robert D. Anderson and Anna Caroline Müller, 'Competition policy and the WTO TRIPS agreement: an essential platform for policy application, and questions unresolved’, forthcoming in Anderson et al., above note 2, chapter 2.
applications of competition policy are now sufficiently intertwined and interdependent that neither can be well understood or applied in an optimal fashion in the absence of the other.\(^9\) Secondly, the thought evolution that we describe implies that successful policy applications require careful study of market structure and behaviour, not in the abstract but with reference to the particular markets affected. And thirdly, it augurs favourably for the prospects of continuing gradual and incremental convergence in national approaches in this area, spanning developed and developing countries, on the basis of continual learning and informed self-interest as opposed to top-down coordination.

Two important limitations on the scope of the analysis must be noted. First, while the insights and concepts to which we will point have, we believe, broad application, our historical reflections and thinking are informed principally by the experience of the jurisdictions that we know best, namely the United States, the European Union and Canada. This approach is nonetheless valid and illuminating, we submit, in that many of the essential learning processes and policy innovations influencing developments elsewhere initially took place principally in those jurisdictions. This is not to suggest that this will always be the case.\(^10\) Second, the focus, throughout, is on the insights and conceptual breakthroughs that have (in our view) animated policy changes, as opposed to a detailed accounting of policy changes across jurisdictions. Where appropriate, we attempt to remedy this deficiency through references to other chapters of this book and/or other research that (we believe) bears out our underlying premises.\(^11\)

The remainder of the chapter is structured as follows. Part 2 outlines the breakthroughs in understanding that have underpinned the evolution of competition policy approaches toward intellectual property licensing arrangements in the US, Canada and the EU. These have, we suggest, been important not only for the evolution of policy stances toward licensing arrangements in other jurisdictions but also for the treatment of intellectual property rights in those jurisdictions more generally. Part 3 elaborates the foundational insights that have animated competition policy interventions with respect to ‘newer’ issues such as anti-competitive patent settlements and hold-ups in relation to standard setting processes in addition to the modern focus on mergers that potentially lessen incentives for innovation and on abuse of dominance/single firm exclusionary practices in IP-intensive network industries. The key here, we suggest, has been a focus on specific behaviours and contexts associated with intellectual property rights that are likely to have anti-competitive consequences (as opposed to the more generalized scepticism of the role of IPRs that sometimes motivated competition law interventions in the past). Part 4 outlines some of the core policy concerns and insights driving the increased emphasis that leading competition


\(^11\) See, especially, Anderson et al., above note 2.
authorities now devote to policy advocacy and research in relation to the scope and definition of IP rights. Part 5 provides concluding remarks.

II. The early evolution of policy relating to the treatment of licensing arrangements: underlying insights informing diverse aspects of the competition policy-intellectual property interface

The principal early area of evolution in the competition policy treatment of IP in the US, Canada and the EU concerned the treatment of patent and other technology licensing arrangements. The US, followed by Canada, led the process. In broad terms, these jurisdictions transitioned from enforcement approaches that condemned many vertical licensing practices out of hand (‘per se rules’) to a considerably more nuanced approach entailing case-by-case analysis of competing pro- and anti-competitive explanations of the practices in question. Account was also taken of structural conditions (especially, the existence of competing technologies) that, in many cases, limit the possibility of anti-competitive effects.

More specifically, the far-reaching evolution of the treatment of licensing arrangements in key developed jurisdictions – from one of ostensibly strict or ‘per se’ prohibition to a broadly permissive case-by-case approach - reflected, in our view, three fundamental innovations in competition policy and economic thought. First, the treatment of restrictive intellectual property licensing arrangements that are inherently vertical in nature (i.e., they are imposed on/by firms at succeeding levels of particular technology-based production chains) was greatly influenced by the revision of thinking and enforcement approaches concerning vertical market restraints generally. Key elements of this revision in thinking, broadly but not exclusively associated with the ‘Chicago School’ of antitrust analysis, included the realizations that: (i) such restraints, in many circumstances, are capable of serving pro-competitive purposes relating e.g. to the incentivizing of efficient conduct by licensees/downstream dealers; and (ii) where inter-brand competition (i.e. rivalry between competing brands or technologies) exists, the possibility of any harm to the welfare of users (consumers) will at a minimum be reduced or even eliminated.

Applying this logic to the field of licensing arrangements, the 1995 Department of Justice-Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property (the ‘1995 US DOJ-FTC Guidelines’) observed as follows:

Licensing, cross-licensing, or otherwise transferring intellectual property can facilitate integration of the licensed property with complementary factors of production. This integration can lead to more efficient exploitation of the intellectual property, benefiting consumers through the reduction of costs and the introduction of new products. Such

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12 In the US, the transition has been extensively documented by scholars and practitioners and a long recitation of sources is not needed. See, for a comprehensive treatment, Willard K. Tom and Joshua A. Newberg, ‘US Enforcement Approaches to the Antitrust-Intellectual Property Interface’ (1997) 66 Antitrust L.J. 167. With respect to the parallel (somewhat lagged) evolution of policy in Canada, see Anderson, Khosla and Ronayne, above note 6.

arrangements increase the value of intellectual property to consumers and to [intellectual property owners].

The above language is carried over without substantive amendment in the updated version of the DOJ-FTC Guidelines that was released by the two agencies on 13 January 2017 (the '2017 US DOJ-FTC Guidelines'). Similar observations are contained in the Intellectual Property Enforcement Guidelines issued by the Canadian Competition Bureau in 2000 and (in amended form) in 2016 ('Canada's IPEGs').

An important corollary of the above is that, in addition to under-enforcement of national competition policies vis-à-vis intellectual property rights, economic welfare can be reduced by over-enforcement of such policies (i.e. excessively sweeping or per se condemnation of practices that can, in particular circumstances, be welfare-enhancing). In this regard, the position articulated in the 1995 US DOJ-FTC Guidelines is apposite:

Field-of-use, territorial, and other limitations on intellectual property licenses may serve pro-competitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible. These various forms of exclusivity can be used to give a licensee an incentive to invest in the commercialization and distribution of products embodying the licensed intellectual property and to develop additional applications for the licensed property. The restrictions may do so, for example, by protecting the licensee against free-riding on the licensee's investments by other licensees or by the licensor. They may also increase the licensor's incentive to license, for example, by protecting the licensor from competition in the licensor's own technology in a market niche that it prefers to keep to itself.

Again, the above language is carried over without substantive amendment in the 2017 updated version of the DOJ-FTC Guidelines. Similar observations are contained in the Intellectual Property Enforcement Guidelines issued by the Canadian Competition Bureau in 2000 and the 2016.

Second, related to the above and in contrast to previously prevailing thinking, the realization dawned that IPRs do not, in most cases, constitute 'monopolies' in an economically meaningful sense. The reason for this is simple, yet powerful: in many or (possibly) most cases, competing technologies or other IP exist that effectively preclude the exercise of market power by individual rights-holders. As affirmed in both the 1995 and the 2017 US DOJ-FTC Guidelines (in identical language):

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17 See above note 14.
The agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner. Although the intellectual property right confers the power to exclude with respect to the specific product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power.19

Again, a similar declaration is made in Canada's IPEGs. As well, it should be noted that, following early resistance by a majority of the US Supreme Court,20 the US Guidelines' view has now been adopted in US Supreme Court jurisprudence (see Illinois Tool Works, Inc. v. Independent Ink, Inc., 126 S. Ct. 1281 (2006)).

A third logical insight underlying the evolution of policy in this area is that, even where IP rights do, in particular cases, generate market power, they may nonetheless serve the over-riding purpose of promoting competition in a dynamic sense. As stated in the 1995 DOJ-FTC Guidelines:

In this language, the agencies were acknowledging both the importance for economic progress of the 'Schumpeterian' dimension of competition in which, through a process of 'creative destruction', inferior products and processes are continually replaced by superior ones,22 and the legitimate role of intellectual property in propelling this process. The Schumpeterian perspective and, more generally, greater emphasis on the dynamic aspects of competition also underlay, to an important degree, the 1990s literature on 'innovation markets' that motivated and guided competition law interventions to block mergers that threatened to weaken incentives for innovation.23 At the same time, and importantly, competition policy analysis and enforcement measures largely avoided being trapped in an excessively narrow and deferential application of Schumpeterian thinking that would unnecessarily privilege market power or inhibit appropriate enforcement activities by competition authorities where they are, in fact, warranted.24

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19 See the 1995 US DOJ-FTC Guidelines, section 2.2, and the 2017 US DOJ-FTC Guidelines, also section 2.2.
20 See the opinion of Justice Stevens in Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984). See also the strong dissenting opinion of Justice O'Connor in the same case, reflecting the new reasoning referenced above and presaging its ultimate acceptance by the Court.
As a fourth logical element, building on all of the above, the competition agencies of the US and Canada famously embraced the view that, for purposes of competition law enforcement, intellectual property rights can most reasonably be treated as analogous to other forms of property, including real property. As affirmed in the 1995 US DOJ-FTC Guidelines:

The Agencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property. That is not to say that intellectual property is in all respects the same as any other form of property. Intellectual property has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property. These characteristics can be taken into account by standard antitrust analysis, however, and do not require the application of fundamentally different principles.25

Taking account of all of the above, the competition agencies of the US and Canada affirmed the 'common purposes' of the two fields. As stated by the 1995 DOJ-FTC US Guidelines:

The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare. The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. [...] The antitrust laws promote innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers.26

The foregoing view also is now reflected in US appellate jurisprudence.27

One element of the conceptual underpinnings of the 1995 DOJ-FTC Guidelines that was subsequently revisited and reassessed, to an extent, by the relevant agencies was the idea of 'innovation markets'.28 As put forward in the 1995 DOJ-FTC Guidelines:

An innovation market consists of the research and development directed to particular new or improved goods or processes, and the close substitutes for that research and development. The close substitutes are research and development efforts, technologies, and goods that significantly constrain the exercise of market power with respect to the relevant research and development, for example, by limiting the ability and incentive of a hypothetical monopolist to retard the pace of research and development.29

The utility of the idea of innovation markets was met with skepticism on the part of analysts who questioned both its susceptibility to concrete application and whether it added value in comparison to existing analytical tools, notably the concept of potential competition.30 Subsequently, in the 2017 revision to the Guidelines, references to innovation markets were dropped in favor of references to the more concrete concept of research and development markets. Still, the idea of

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27 See, e.g., Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1575 (1990) in which the Court observed as follows: '[T]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition'.
28 See, for relevant background, Gilbert and Sunshine, above note 23.
innovation markets and the literature that it spawned served to galvanize both a very appropriate focus by enforcement agencies on mergers and other practices that weaken or vitiate incentives for R&D-related activities and a lasting interest in the significance of competition law enforcement for innovation and economic progress on the part of practitioners and academics alike.31

Another element of the thought evolution process described above which has been challenged in some quarters concerns the analogizing of intellectual property to other forms of property, including real property. A key insight here is that patent rights are inherently more probabilistic in nature than real property rights. As observed by Lemley and Shapiro:

Virtually all property rights contain some element of uncertainty. The owner of real estate may find that the title to that property is flawed; title insurance exists to deal with this risk. The (careless) owner of a trademark may find that its mark has been used so widely as to become a generic term, thus losing trademark protection. But the uncertainty associated with patents is especially striking, and indeed is fundamental to understanding the effects of patents on innovation and competition. There are two fundamental dimensions of uncertainty: 1) uncertainty about the commercial significance of the invention being patented, and 2) uncertainty about the validity and scope of the legal right being granted.32

As the authors go on to observe, uncertainty regarding the commercial significance of patents is critical when studying the processes by which they are issued. Uncertainty about validity and scope are important in evaluating issues concerning patent litigation and enforcement. As well, both forms of uncertainty impact on (and can materially diminish) the incentives that patents are intended to create.33

An important related insight shared by many current thinkers is that intellectual property rights – perhaps especially patents – arguably exhibit greater incentives for and susceptibility to opportunistic or anticompetitive behavior as compared to most forms of real property. Indeed, differences with other forms of property rights are also acknowledged, to an extent, in the 2017 US DOJ-FTC Guidelines.34 More pointedly, two prominent scholars in the field, Fiona Scott Morton and Carl Shapiro, have made the observation that, while 'it has been popular to assert that intellectual property is not fundamentally different from other assets, [such an approach] does not address fundamental differences between most forms of real property, such as real estate, and questionable patents with vague boundaries'.35 Indeed, these differences between IPRs and real property need to be acknowledged, though defenders of the analogy to 'other forms of property' argue that this can still be done within the Guidelines' approach.36 At a minimum, we would agree

31 See Part 4, below.
33 Lemley and Shapiro, above note 32.
34 The Guidelines observe, for example, that 'Intellectual property has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property'. See 2017 US DOJ-FTC Guidelines, above note 14, section 2.1.
that, in assessing the role of IPRs as a potential source of market power, it is indeed important to bear in mind the characteristics that distinguish them from real property.

The evolution in thinking described above, in any case, eventually animated far-reaching parallel changes in enforcement policies in other jurisdictions, notably the European Union and Japan. In the EU, an early 'Block exemption regulation' for licensing arrangements which was based, to a considerable extent, on legal formalism, intrinsic suspicion of intellectual property rights and the over-riding objective of creating a unified European market gave way, eventually, to the present (2014) regulation,37 embodying a modern, economics-based approach that resembles the US and Canadian approaches in its effects if not in its legal form.38 Likewise, a far-reaching transformation has taken place in Japan’s treatment of intellectual property licensing arrangements under its competition law, from one of legal formalism and an avowed stress on industrial policy objectives to a more economics-based approach recognizing both the potentially benign effects of 'restrictive' licensing arrangements and the importance of competing technologies as a check on market power.39

The foregoing insights and breakthroughs were, we suggest, the core ideas motivating the 'early' evolution of enforcement policies in the area of the competition policy-intellectual property interface (i.e., the adjustments that took place in the US and Canada in the 1980s and 1990s, and in the EU, Japan and other jurisdictions in the 1990s and the early twenty-first century). Policy implementation in this area has, however, certainly not stood still since then. The conceptual breakthroughs and developments underlying policy change in this period (broadly, since the issuance of the 1995 DOJ-FTC Guidelines) are the subject of the next section of this chapter.

III. Insights and improvements in understanding underlying more recent changes in competition enforcement policies

Policy adaptation regarding the competition policy-intellectual property interface has continued apace since the second half of the 1990s. Two principal trends can be identified: first, concerning the enforcement of competition laws, attention and enforcement activity have shifted from licensing arrangements to a range of other specific behaviours and contexts deemed to entail significant risks of anti-competitive consequences (e.g., mergers that threaten to undermine the incentives for innovation in particular markets; anti-competitive patent settlement agreements; patent thickets and arrangements to facilitate their successful navigation; 'hold-ups' in the context of arrangements governing access to standard-essential patents and single-firm exclusionary


39 See, for supporting commentary and qualification, Anderson et al., above note 2.
abuses of dominant position in network industries). Perhaps to a surprising degree, these trends were driven by learning processes in academia and/or in the enforcement agencies themselves. These developments are the focus of this section of the chapter.

To highlight up front the theme of this section, vital to the results achieved has indeed been a focus by the relevant enforcement agencies on particular behaviours and market contexts that threaten to diminish incentives for innovation, as opposed to the more generalized efforts to limit the role of intellectual property rights in the market economy that, in some cases, characterized earlier competition policy interventions and stances. In this way, enforcement authorities also avoided succumbing to excessive deference to the 'Schumpeterian' idea that a degree of market power or even an outright monopoly may be conducive to innovation. The key insight here is that well-constituted competition policies do not blindly oppose an appropriate degree of market concentration or even the emergence of dominant positions where this serves valid efficiency-related purposes or reflects superior business acumen. Rather, competition policy interventions can be targeted precisely at market configurations and firm practices that are most likely to retard innovation, while leaving intact those that are unlikely to do so. As observed aptly by Jonathan Baker:

[...] antitrust is not a general-purpose competition intensifier. Rather, antitrust intervention can be focused on industry settings and categories of behavior where enforcement can promote innovation. The modern economic understanding about the relationship between competition and innovation goes beyond Schumpeter and Arrow by suggesting ways for antitrust rules and enforcement efforts to target types of industries and types of conduct. Through such selection, antitrust intervention can systematically promote innovation competition and pre-innovation product market competition, which will encourage innovation, without markedly increasing post-innovation product market competition, and, thus, without detracting from the pro-innovation benefits.

As discussed below, competition law enforcement efforts vis-à-vis intellectual property rights reflect, to an important degree, just such an effort to target practices that impede or undermine incentives for innovation while acknowledging the role of practices and market configurations that are necessary for the efficient organization and operation of markets.

(1) An enhanced focus on mergers that potentially weaken the incentives for innovation and thereby impede economic progress

As already discussed, at the same time as the 1995 DOJ-FTC Guidelines were being developed, the maintenance of incentives for innovation also became a more central guiding principle for horizontal merger policy in the US and other jurisdictions. This was an important, lasting impact, inter alia, of the 1990s literature on innovation markets. The preservation of incentives for innovation was a core consideration, for example, in the assessment of pharmaceutical industry mergers that have been reviewed by the US competition agencies in

40 In the US, this notion dates back at least to the 1945 opinion of Judge Learned Hand in U.S. v. Aluminum Co. of America, 148 F.2d 416 (2nd Cir. 1945).
41 Baker, above note 24.
42 An important example would be the role of patent pools and cross-licensing arrangements in overcoming the entry-deterring effects of patent thickets.
recent times. And, of course, this focus had a direct bearing on intellectual property, to the extent that the pace of innovation would be manifested by patenting activity.

The new focus had a measurable impact on US merger enforcement policy. As observed by one of the pioneers of this approach, Richard Gilbert, in 2006:

Merger enforcement statistics illustrate the increased importance of innovation concerns in antitrust policy. Until the mid-1990s, the DOJ and the FTC rarely mentioned innovation as a reason to challenge a merger. As shown in Table 1, from 1990 until 1994, the DOJ and the FTC alleged adverse impacts on innovation in only about 3% of all merger challenges. From 1995 to 1999, the agencies cited adverse innovation effects in 18% of merger challenges. The agencies’ concerns about innovation effects continued to increase in the first part of the new century. From 2000 to 2003 the DOJ and FTC mentioned innovation effects as a reason to challenge the merger in 38% of merger challenges.44

As a further, tangible connection to the world of intellectual property, in many of the relevant cases, the divestiture or mandatory licensing of IPRs constituted an important element of the remedies applied. This is not a particularly new development: in fact, compulsory licensing has been an important element of antitrust remedies in mergers and monopolization cases for decades.45 Still, the enhanced focus on innovation generally has highlighted the importance of such remedies. A key related insight is that a simple transfer of patent rights may be insufficient to enable a competitor to become commercially viable, if related know-how is not also made available.46

(2) New focuses of enforcement activity driven by improved understanding of/experience related to specific IPR-related practices

Beyond the increased focus on innovation-threatening mergers, the period since the issuance of the 1995 DOJ-FTC Guidelines witnessed an important further rebalancing toward specific firm practices associated with the use of IPRs that, for the most part, had not been a significant focus of enforcement activity in the past. As developed below, four such practices or sets of practices were: (i) anti-competitive patent settlement agreements; (ii) patent thickets and arrangements to facilitate their successful navigation; (iii) ‘hold-ups’ in the context of arrangements governing access to standard-essential patents; and (iv) single-firm exclusionary practices and other abuses of a dominant position in network industries.

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43 This is not to suggest that the agencies always made the right calls. See, generally, William S. Comanor and F.M. Scherer, ‘Mergers and innovation in the pharmaceutical industry’ (2013) 32.1 Journal of Health Economics 106-113.
(a) **Anti-competitive settlements of patent infringement suits**

Since the year 2000, an important new focus of competition law enforcement activity in relation to intellectual property has concerned anti-competitive settlements in patent infringement cases that thwart entry by generic competitors. A key early research contribution underlying policy innovation in this area was Shapiro's pioneering work on patent settlements. That work highlighted that:

> [...] the legal rules governing the resolution of [intellectual property] disputes are of first-order importance. This importance is not confined to high-tech industries, much less to the software and Internet sectors, but extends to all industries where intellectual property rights are significant. In a very real sense, the rules governing settlements affect what is truly meant by the patent grant itself. In fact, in many fast-moving industries, the rules governing patent litigation and settlements are arguably far more important to patentees than the single variable on which economists have traditionally focused, namely patent length.\(^{47}\)

A specific and highly influential context in which concern arose (first in the US) with respect to patent settlements involved the use of settlement agreements to deter entry by generic competitors in pharmaceutical markets. To an extent, the concern derived from incentives for generic entry – notably a 180 day statutory exclusivity period for the first generic entrant to enter a particular market – that were built into relevant US legislation, the 1984 Hatch-Waxman Act. As Majoras explains, under the US legislation:

> By increasing the potential economic value of generic entry, the statute also increased the incentive for brand and generic manufacturers to conspire to share rather than compete for the expected profits generated by sales of both brand and generic drugs. For example, a brand manufacturer and generic pharmaceutical company now have an incentive to divide up the profits from the Hatch-Waxman 180-day generic exclusivity period -- a period that did not exist prior to the passage of the Act. In nearly any case in which generic entry is contemplated, the profit that the generic anticipates will be much less than the profit the brand-drug company would make from the same sales. Consequently, it will often be more profitable for the branded manufacturer to buy off generics.\(^{48}\)

Of course, ‘buying off’ potential generic competitors is likely to be strongly contrary to the interests of consumers – hence, the concern for competition agencies.

Carrying forward the concern expressed in Majoras' statement, the role of patent settlements in the pharmaceutical industry was the subject of a series of enforcement actions by the Federal Trade Commission in the first decade of the 21st century.\(^{49}\) The policy concerns articulated by the Commission were, for the most part, validated by the majority opinion of the US Supreme Court in its 2013 opinion in the leading case of *Federal Trade Commission v. Actavis*,

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\(^{49}\) An early case, in which the Commission’s view did not prevail, was *Schering-Plough Corp. v. Fed. Trade Comm’n*, 402 F.3d 1056, 1072 (11th Cir. 2005).
Inc., et al., 133 S. Ct. 2223, notwithstanding that the Court declined to hold such agreements per se unlawful as the FTC had proposed.\(^{50}\)

While the specifics of the US Hatch-Waxman Act provided the context for early enforcement action in this area, the underlying concern has subsequently been adopted and carried forward by other leading competition agencies. For example, pharmaceutical patent settlement agreements are an important focus of both monitoring and enforcement activity in the European Union. In a first pay-for-delay case, the Commission imposed significant fines on a Danish pharmaceutical company, Lundbeck, and on several producers of generic medicines who agreed to delay the market entry of cheaper generic versions of Lundbeck's branded citalopram, a high-sales antidepressant.\(^{51}\) Similarly, pharmaceutical patent settlement agreements are noted as a specific area of concern in Canada's IPEGs. As well, competition law safeguards against anti-competitive settlement agreements appear relevant to measures being taken to facilitate effective responses to public health emergencies at the global level.\(^{52}\)

\(\text{(b) Navigating patent thickets, the role of standards, and 'hold-ups'}\)

Patent thickets are situations in which an overlapping set of patent rights requires firms seeking to commercialize new technology to obtain licenses from multiple patentees. Such situations are common today in industries such as semiconductors, computing and telecommunications, although they are by no means limited to those sectors. As Shapiro explains:

\[\text{[...]}\] thoughtful observers are increasingly expressing concerns that our patent (and copyright) system is in fact creating a patent thicket, a dense web of overlapping intellectual property rights that a company must hack its way through in order to actually commercialize new technology. With cumulative innovation and multiple blocking patents, stronger patent rights can have the perverse effect of stifling, not encouraging, innovation.\(^{53}\)

Patent pools and/or cross-licensing can be an efficient response to these phenomena in many cases. This is notwithstanding that they also raise potential competition law concerns.\(^{54}\) A key insight, in this regard, is that pools or licensing arrangements combining complementary patents are generally efficiency-enhancing; whereas pools comprised of substitute patents can indeed create market power and are a legitimate focus of competition policy concern.\(^{55}\) This important and useful rule, nonetheless, does not dispose of all related issues, in that particular patented technologies will often be both complements and potential substitutes.\(^{56}\) This, in turn,

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\(^{50}\) See, for commentary, Robert D. Anderson and Anna C. Müller, 'Reverse patent settlement agreements in the pharmaceutical sector from a competition policy perspective: enforcement and regulatory issues', forthcoming in Anderson et al., above note 2, chapter 19.


\(^{52}\) Anderson and Müller, above note 50.


\(^{55}\) Shapiro, above note 53.

\(^{56}\) Heimler, above note 46.
points toward the importance of correcting problems, where possible, at the level of the patent issuance process itself.57

The impact of patent thickets is heightened by the risk of 'hold-ups' – that is, the danger that new products will inadvertently infringe on patents issued after the products were designed.58 As explained by Kovacic:

Hold-up typically arises when a patentee asserts its patent after the accused infringer has sunk substantial costs into design, development, and commercialization without knowledge of the patent. The threat of an automatic injunction following expensive patent litigation increases the patentee’s leverage in the licensing negotiations beyond the value of the patent’s inventive contribution and leads to higher royalties. This dynamic can be especially problematic when the patented invention is only a small component of the infringing product.59

A context in which hold-ups are likely to raise particular concerns is that of standard-setting organizations (SSOs). Such organizations provide a forum for the development of new standards through the sharing of information on pertinent inventions as they are developed. Their role is particularly important in industries where the need for standardization is recurring, for example, because there are many players and technology evolves rapidly.60 However, once a standard is adopted and related investments have been made, firms implementing the standard may find switching technologies to be costly, creating a situation potentially facilitating the exercise of market power. As Renata Hesse, then US Deputy Assistant Attorney General for Antitrust, explains:

Because implementing the standard necessitates reading on the standard’s incorporated patents, those patents become standards essential patents or SEPs for short. Standards essential patent holders may seek to take advantage of the market power that standardization of their patented technology creates by engaging in hold-up. They may, for instance, exclude a competitor from a market or obtain an unjustifiably higher royalty than would have been possible ex ante; that is, before the standard was set. This type of hold-up raises particular competition concerns when alternative technologies that could have been included in the standard were instead excluded from it.61

Not all observers agree on the extent of the threat posed by hold-ups in relation to standard setting organizations. Indeed, some argue that 'hold-out' - infringement of the SEPs themselves - is a greater problem.62 While further experience and evaluation may indeed be needed with

57 See related discussion, below.
58 Majoras, above note 48.
respect to the relative magnitude of these concerns, the importance of these issues as a focus for reflection and analysis is not in doubt.

(c) Single-firm exclusionary conduct in network industries more generally

The concerns articulated relate particularly to the role of intellectual property in network industries. Such industries include telecommunications, computer hardware and software, and many other industries that are building blocks of the new, information-based economy. These industries often require common access to unique facilities, and are prone to the possibility of ‘tipping’ or ‘locking into’ inefficient standards. As a result, the risk of undue exercise of market power through anti-competitive licensing and other practices is particularly high in these industries.

In the light of these concerns, some authors have suggested that assets protected by intellectual property which are critical to accessing a network should be capable of being treated as ‘essential facilities’ under competition law and, therefore, subject to mandatory rights of access in circumstances where a refusal to license meets the general requirements of the essential facilities doctrine. This position is controversial, however, in that, in the US and some other jurisdictions, the right to refuse to licence is generally viewed as being intrinsic to the grant at least of a patent, if not to other types of intellectual property. A specific related concern is that excessive scope for invocation of the essential facilities doctrine as a tool for accessing specific technologies could erode commercial incentives for development of alternative technologies.

The bundling of technology-embodying products, or of technologies themselves – in which the sale of one product (or the licensing of a particular technology) is conditioned on the purchase of another – has been a recurring concern in multiple jurisdictions. In its famous Microsoft case initiated in 1998, the US Department of Justice alleged that Microsoft, by bundling access to the Windows operating system with Internet Explorer, was excluding Netscape and other potential entrants from the browser market and was extending its monopoly in personal computer operating systems into internet browsing software. The case was concluded in 2001 with a settlement between the Department and Microsoft which, inter alia, imposed on Microsoft a requirement to

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65 As set forth in the leading case of MCI Communications Corp. v. AT&T, 708 F.2d (7th Cir. 1983), cert. denied 464 U.S. 891 (1983), application of the essential facility doctrine requires proof of four elements: (a) control by a monopolist of a facility or resource serving the monopolist's market, (b) the inability of an entrant to practically or reasonable duplicate the facility, (c) the denial of the use of the facility to a competitor or entrant, and (d) the feasibility of providing access to entrants.
provide software developers with the interfaces needed to inter-operate with the Windows system – thereby enabling them (potentially) to compete effectively with Microsoft.\(^{67}\)

Subsequently, competition authorities in a number of other jurisdictions initiated cases against Microsoft built on broadly similar concerns. For example, bundling of the Windows operating systems with the ‘Media Player’ function was deemed abusive in a 2004 EU case. In that case, the European Commission determined that Windows was dominant in the tying market of operating systems and that there were no economies flowing from integration with the tied media player market because ‘distribution costs in software licensing are insignificant [and] a copy of a software programme can be duplicated and distributed at no substantial effort.’ On the other hand, the Commission argued, ‘the importance of consumer choice and innovation regarding applications such as media players is high.’\(^{68}\)

Apart from the issue of bundling, other practices of Microsoft have also been attacked. As described by Arhel, the firm was prosecuted for deliberately restricting interoperability between Windows PCs and non-Microsoft work group servers. To address this concern, the Commission ordered Microsoft to disclose information which would allow non-Microsoft work group servers to interoperate with Windows PCs and servers. This finding was subsequently confirmed by the Court of First Instance. At trial, Microsoft relied on the fact that the technology concerned was covered by IPRs. It argued that, if it were required to grant third parties access to that technology, this would weaken incentives for further innovation. However, the Court ruled that ‘the fact that the communication of protocols covered by the Commission’s decision, or the specifications for those protocols, are covered by IPRs cannot constitute objective justification within the meaning of [the two leading precedents of] Magill and IMS Health.’\(^{69}\)

In an important further example of the European Commission’s readiness to intervene with respect to perceived single-firm abuses of a dominant position in network industries, in June 2017, the Commission fined the Google Corporation €2.42 billion for breaching EU antitrust rules. The basis of the decision was the Commission’s view that ‘Google abused its market dominance as a search engine by promoting its own comparison shopping service in its search results, and demoting those of competitors [...]. It [thereby] denied other companies the chance to compete on the merits and to innovate. And most importantly, it denied European consumers a genuine choice of services and the full benefits of innovation’.\(^{70}\) Initial commentary on the decision has emphasized how difficult it would be to bring a similar case in the US, given prevailing differences of competition law doctrine and evidentiary standards. As noted in an early media account:


\(^{68}\) Anderson and Heimler, above note 67.

\(^{69}\) See, for a more detailed treatment, Arhel, above note 51.

Pursuing a U.S. case against Google would be more complicated than in Europe, antitrust experts said, because of a higher standard of evidence needed to prove wrongdoing by the search giant. Rather than go to court, the FTC closed a similar investigation against Google in 2013 in exchange for Google’s changing some of its business practices.71

To summarize, in the foregoing and other recent decisions in the area of abuse of a dominant position in network industries (often also implicating IPRs), the European Union has clearly gone beyond the enforcement approaches and degree of activism that is manifested in this area in the US. The reasons for this would appear to lie in both differing judicial precedents and competition policy philosophies. According to Kovacic:

The European Union has not encountered the limitations faced by the U.S. antitrust agencies in using its law enforcement powers to address claims of exclusion involving intellectual property. EU doctrine governing abuse of dominance sets more stringent limits upon companies than prevailing judicial interpretations of the Sherman, Clayton, and FTC Acts. In Microsoft and Intel, the European Commission obtained remedies notably more substantial than DOJ or the FTC attained in their cases, respectively. In Google, the European Commission seems poised to gain concessions related to search practices that emerged from the FTC’s inquiry unscathed.72

IV. The increasing focus on competition advocacy in diverse jurisdictions, and the underlying insights and policy concerns

Recent experience also underlines the importance of advocacy activities by competition agencies aimed at ensuring that patents and other forms of intellectual property rights are not awarded unnecessarily or cast in overly broad terms.73 As explained by Kovacic:

One of the most important contributions of a competition policy system is to serve as an advocate within the government, and the country at large, for reliance on pro-competition policies. This is true, for instance, when the root of an observed competition policy problem resides in other government regulatory programs that distort the competitive process. In that case, the competition agency's aim should be to identify first-best solutions, which may involve reforms to the other regulatory regimes.74

The importance of targeted competition advocacy activities is, perhaps, particularly salient in the area of intellectual property. As Kovacic also observes, '[...]' problems [...] observed in the competition policy realm [often] have their roots in the intellectual property rights-granting process. First-best solutions to competition problems would consist of improvements in the rights granting process. The prosecution of antitrust cases—for example, the application of

73 Majoras, above note 48; see also William E. Kovacic, ‘The Future of US Competition Policy’ (September, 2004) The Antitrust Source. Available at https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Sep04FullSource.authcheckdam.pdf. Such activities can include public education activities, studies and research undertaken to document the need for market-opening measures, formal appearances before legislative committees or other government bodies in public proceedings, or behind-the-scenes lobbying within government.
74 Kovacic, above note 6.
monopolization concepts to expand access to IP rights—may be a crude, second-best solution to cure weaknesses that reside in the rights granting process’.75

To be sure, the importance of competition agency advocacy and research activities bearing on intellectual property issues is not new. In Canada, the Competition Bureau and its predecessor agencies have long sought to exercise influence on the substance and content of IP policy, precisely as a means of addressing competition problems 'at their root'. Prominent examples include substantive, research-based interventions before public inquiries into matters including the operations of copyright collectives and the terms of patent protection in the pharmaceutical industry.76 In addition, the Bureau has sponsored two significant scholarly volumes addressing the competition policy-intellectual property interface more generally.77

An obvious concern animating competition advocacy and related research concerning IPRs is the expansion of patentable subject matter that has occurred in many jurisdictions, over time. In the US, beginning in 1980, a series of decisions of the Supreme Court and the Federal Circuit Court of Appeals added genetically engineered bacteria, software and business methods to the set of inventions that are considered to be patentable.78 As a consequence, Lemley and Shapiro argue that inventors can potentially be expected to file patent applications even in areas that are not currently eligible for protection, simply as a way of 'hedging their bets'.79

An important and highly pertinent example of a competition policy advocacy activity in the specific area of intellectual property is the 2003 report of the US Federal Trade Commission entitled To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy.80 This report provides a penetrating discussion of the harmful effects on competition that can flow from the awarding of unjustified patents (or patents that are cast in overly broad terms), and puts forward a range of proposals to address these problems.

The FTC Report references, and was heavily influenced by, the post-1995 academic literature e.g. on patent thickets; on tools for navigating such thickets (i.e., patent pools and licensing); on standards and hold-ups; on anti-competitive settlements in the pharmaceutical sector; and on other matters. With respect to all these matters, it documented and elucidated the interdependency of intellectual property and competition law and policy. Summarizing a key theme of the Report, Kovacic observes as follows:

75 Kovacic, above note 9.
76 See, for pertinent details, Anderson, Khosla and Ronayne, above note 6, and references cited therein.
77 See Anderson and Gallini, eds., above note 64, and Marcel Boyer, Michael Trebilcock and David Vaver, (eds.), Competition Policy and Intellectual Property (Irwin Law, 2009).
79 Lemley and Shapiro, above note 32.
To optimally foster innovation, patent and competition policy must work together. Errors or systematic biases in how one policy’s rules are interpreted and applied disrupt the other policy’s effectiveness. It is important to note that the FTC Report confirms that patents play an important role in promoting innovation. Nonetheless, it also raises concerns about the ability of those patents of questionable quality—those that are invalid or overly broad—to distort competition and harm innovation in several ways.81

To address these concerns, the Report put forward specific recommendations relating to diverse aspects of the US competition policy system. These included:

- Recommendations to minimize the issuance of questionable patents, notably through strengthening of the statutory requirement of non-obviousness;
- Recommendations to facilitate the elimination of questionable patents once they have been issued, for example through the creation of new administrative procedures for post-grant review and opposition;
- Recommendations to bolster the disclosure function of patents. Specifically, the Report recommended that Congress enact legislation to require publication of all patent applications eighteen months after filing; and
- Recommendations to strengthen the role of economics in intellectual property policy making generally.

The above-summarized recommendations have had an important impact on policy-making in the intellectual property area, as manifested both by legislative proposals in Congress and by the Report’s citation in a series of subsequent Supreme Court opinions.82

More recently, in 2016, the FTC completed a further significant report implicating the interface of intellectual property and competition policy, this time on the subject of patent assertion entities (PAEs), colloquially known as ‘patent trolls’. As defined in the Report, these are businesses that acquire patents from third parties and seek to generate revenue by asserting them against alleged infringers. PAEs monetize their patents primarily through licensing negotiations with alleged infringers, infringement litigation, or both. In other words, PAEs do not rely on producing, manufacturing, or selling goods. When negotiating, a PAE’s objective is to enter into a royalty-bearing or lump-sum license. When litigating, to generate any revenue, a PAE must either settle with the defendant or ultimately prevail in litigation and obtain relief from the court.83

In terms of its substantive findings, the Report emphasizes that infringement litigation plays a legitimate role in protecting patent rights. It finds, nonetheless, that ‘Nuisance infringement litigation, however, can tax judicial resources and divert attention away from productive business behavior.’ To strike the right balance, the Report proposes reforms to: 1) address discovery burden and cost asymmetries in PAE litigation; 2) provide courts and defendants with more information about the entities that file infringement suits; 3) streamline overlapping cases brought against defendants on the same theories of infringement; and 4) provide adequate notice to defendants of such infringement theories.84

81 Kovacic, above note 6.
82 Kovacic, above note 6, and references cited therein.
83 US Federal Trade Commission, above note 5.
84 US Federal Trade Commission, above note 5.
An important focus on competition advocacy activities relating to intellectual property has also been evident at the US Department of Justice. As outlined by Hesse:

[...] the intersection between intellectual property rights and antitrust law has been an important priority for the Division’s competition advocacy program. [Three specific intellectual property-related topics on which the Division has focused are]: standards-essential patents, patent assertion entities, and prospective antitrust guidance regarding intellectual property through guidelines and business reviews. Our competition advocacy on IP topics has resulted in vigorous dialogue, improved rules and regulations, and more competitive outcomes in key IP-driven industries. 85

The EU Commission has been similarly active in research-based competition advocacy work relating to IPRs, particularly in the context of the pharmaceutical sector. A major report completed in 2009 identified settlement agreements as being among the causes of a noticeable decline in the number of novel medicines. Still, the Commission highlighted that 'any assessment of whether a certain settlement could be deemed compatible or incompatible with EC competition law would require an in-depth analysis of the individual agreement, taking into account the factual, economic and legal background'. 86 According to Arhel, the inquiry report has already produced positive effects: a monitoring process initiated by the Commission in 2010 showed that the number of potentially problematic patent settlements in the pharmaceutical sector fell to 10% of total patent settlements in the sector in the period July 2008 to December 2009, compared to 22% in the period covered in the preceding year's inquiry. Subsequently, the number of problematic patent settlements was confirmed to have stabilized at that low level. 87

The impact of the foregoing advocacy activities has, we suggest, not at all been limited to the jurisdictions in which they have been carried out. Rather, these efforts have resonated and influenced the evolution of policies around the world. To cite possibly the most obvious example, concern over the impact of anti-competitive patent settlements in the pharmaceutical industry – initially developed in the academic work of Carl Shapiro and then in the 2003 FTC Study – has become a focus of competition law enforcement, advocacy activity and or competition policy enforcement guidelines in jurisdictions around the world. 88 Likewise, concern over hold-ups in relation to standard-essential patents has been taken up in diverse jurisdictions. This is, we suggest, a clear testament to the power of ideas in the increasingly inter-connected competition policy world of the twenty-first century.

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87 See Arhel, above note 51.

88 Anderson et al., above note 2; and Muris, above note 80.
V. Concluding remarks

This chapter has attempted to sketch the main contours of the evolution in competition policy thinking that has, we believe, driven policy changes and applications in this area in the past several decades, across multiple jurisdictions. We began with the breakthroughs in understanding that underpinned the early evolution of competition policy approaches toward intellectual property licensing arrangements in the US, Canada and the EU. These have, we suggest, been important not only for the evolution of policy stances toward licensing arrangements in other jurisdictions but also for the treatment of intellectual property rights in those jurisdictions more generally.

Subsequently, the chapter has examined the foundational insights that have animated competition policy interventions with respect to 'newer' issues such as anti-competitive patent settlements and hold-ups in relation to standard setting processes in addition to the modern focus on mergers that potentially lessen incentives for innovation and on abuse of dominance/single firm exclusionary practices in IP-intensive network industries. The key here, we have suggested, has been a focus on specific behaviours and contexts associated with intellectual property rights that are likely to have anti-competitive consequences (as opposed to the more generalized scepticism of the role of IP rights that sometimes motivated competition law interventions in the past). Consideration has also been given to the core policy concerns and insights driving the increased emphasis that leading competition authorities now devote to policy advocacy and research in relation to the scope and definition of IP rights.

As we have pointed out, the focus on specific behaviours and advocacy work has enabled competition agencies to give due attention and weight to the 'Schumpeterian' dimension of competition in which, through a process of 'creative destruction', inferior products and processes are continually replaced by superior ones, and the legitimate role of intellectual property in propelling this process. At the same time, and importantly, competition policy analysis and enforcement measures have largely avoided being trapped in an excessively narrow and deferential application of Schumpeterian thinking that would unnecessarily privilege market power or inhibit proactive enforcement actions by competition agencies where they are, in fact, warranted.

The evolution of thinking set out in this chapter carries, in any case, major implications for the core concerns and premises of the broader volume of which it will form a part. It suggests, firstly, that competition policy applications in the intellectual property sphere are matters of fundamental importance for economic advancement and prosperity, having a direct bearing on innovation and the diffusion of new technologies. Indeed, the role of IP and related applications of competition policy are now sufficiently intertwined and interdependent that neither can be well understood or applied in an optimal fashion in the absence of the other. Secondly, the thought evolution that we describe implies that successful policy applications require careful study of market structure and behaviour, not in the abstract but with reference to the particular markets affected. And thirdly, it augurs favourably for the prospects of continuing gradual and incremental
convergence in national approaches in this area, even spanning developed and developing countries, on the basis of continual learning and informed self-interest.
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.¹ For nearly a century after the adoption of the first national statutes in the late nineteenth century,² competition law, or antitrust, was largely an American idiosyncrasy.³ This is no longer the case. Since

¹ See Umut 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).


the late 1980s, the number of jurisdictions with competition laws has soared from roughly thirty to more than 130, and more are on the way. 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.

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. 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. Though its Anti-Monopoly Law only took effect in August 2008, China already is a peer of the European Union and the United States in its capacity to shape global norms of


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/ [https://perma.cc/T77S-L98Y] (noting adoption by the Netherlands of its first competition law in 1998); www.agcm.it/en/ [https://perma.cc/TD2A-WSWH] (describing enactment of Italy’s first competition law in 1990).


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).

business behavior. In the years to come, regional alliances such as the Association of Southeast Asian Nations may achieve the same stature.

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—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.

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.


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 50TH 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. 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.

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. Rather than assess whether recently-created competition systems have reduced prices, improved product quality, or stimulated innovation, 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. 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
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.19

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.20 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.21 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.22 At the same time, the

19. See infra Part V.
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.23

To a striking degree, policy implementation issues were seen as mere technical details to be sorted out once the competition law had been passed.24 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.25 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.26 This development partly reflected the view that transition economies would have a single political opportunity to make basic economic reforms.27 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.28

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.29 Statutes with grand policy aspirations but weak means for implementation can pointlessly consume resources from both public officials and business operators.30 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.31 But implementation is increasingly getting the attention it deserves from academics, government officials, and practitioners. With greater

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 [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.


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 as well as how to measure the effectiveness of different institutional configurations.

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. 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. 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. Agencies that embrace a virtuous cycle of experimentation, assessment, and refinement greatly boost their prospects for success.


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).


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.\(^{38}\) 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.\(^{39}\) 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.\(^{40}\) 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.\(^{41}\)

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.\(^{42}\) 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.\(^{43}\)

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\(^{38}\) 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 [https://perma.cc/YJJ2-4SSM]. The UNCTAD peer reviews appear at www.unctad.org [https://perma.cc/3GAF-LACB].


\(^{42}\) 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; practitioners occasionally grind axes to express unhappiness arising from an adverse result in a matter before a competition authority; and academics periodically scold agencies for not embracing their policy recommendations. 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. 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. 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. Simply drafting legal commands and procedural mechanisms without these pillars begs failure.
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.51 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.52 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.53

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


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 5th 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-pozenspeaks-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. An agency that does nothing to apply its powers properly can be regarded as a failure. 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. 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. 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.

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. 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. As capability increases, the agency can pursue a more ambitious program. This

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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).


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. 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.

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. 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. 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. 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. 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.


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. 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. 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.

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 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. 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. The early success these systems enjoyed in...
building exceptional teams of professionals and articulating a vision of policy implementation appeared to set a foundation for even better days to come.\(^{76}\)

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.\(^{77}\) At the same time, the performance of Latin American systems that seemed less promising in the mid-1990s has improved steadily.\(^{78}\) 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.\(^{79}\) Chile and Mexico now stand with Brazil as cases of largely successful policy implementation.\(^{80}\) Colombia’s competition regime, begun over a half-century ago, has also made notable progress in recent years.\(^{81}\)

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.\(^{82}\) 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.\(^{83}\) As a result of Poland’s strong commitment to the

\(^{76}\) 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 Aries (Nov. 20, 2015).

\(^{80}\) See Aydin, supra note 63 (detailing Mexico’s progression).


\(^{82}\) 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.84 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.85 In April 2013, the Office hosted the International Competition Network’s Annual Conference, the largest annual gathering of the world’s competition agencies.86

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.87 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.88 But in December 2015, new political leadership announced its intent to dismiss Jassar as soon as his replacement could be arranged.89

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.90 It is still more unsettling when the political intervention causes the

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).
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. 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,92 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.93 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.

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 Fugimori, the country’s president. Fugimori 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).

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. 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. Legislators often seek to achieve a wide range of objectives in passing a competition law. The competition agency is left in the difficult position of reconciling the varied—and sometimes contradictory—policy aims and formulating a coherent program.

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. 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 Dragan 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).


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).

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.99 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.100

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.101 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.102 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.103

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

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, 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. 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. 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.

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. With experimentation comes a mix of success and failure. There is no shame in failure—only in making a habit of it.

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 ENF’T 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).
especially the repetition of past missteps. Successful agencies progress because they learn: they improve through a three-step process of experimentation, evaluation, and refinement.\(^{109}\)

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\(^ {110} \)—did not occur instantaneously or with immediate success.\(^ {111} \) 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.\(^ {112} \) 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.\(^ {113} \) 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

\(^{109} \) 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 2005.114 Public administration in Singapore features a longstanding tradition of superb public institutions staffed by highly qualified personnel and governed by stringent standards of integrity.115 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.116 To obtain the necessary expertise to implement competition laws, Singapore recruited senior managers and advisors from countries with extensive experience in competition law.117 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.118 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.119 Serbia’s competition agency recently reached its tenth birthday, and the institution has made considerable progress in raising the professionalism of its staff.120

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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. 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. Here, too, the formation of these capabilities from scratch is an important but difficult and lengthy process.

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. 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. It can easily take two decades or

121. See Kovacic, Institutional Foundations, supra note 1, at 272 (describing importance of indigenous academic bodies).
122. Id.
123. Id.
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.\footnote{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].}

In most jurisdictions, courts in the early implementation period are likely to regard the competition law with wariness or ambivalence.\footnote{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).} Few judges will have any previous familiarity with competition law concepts.\footnote{Id.} 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.\footnote{Id.} 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.\footnote{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”).} 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
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. 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. 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

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.\footnote{133}

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.\footnote{134} Changes in economic conditions can erode support for competition as a principle of economic organization.\footnote{135} 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.\footnote{136} 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.\footnote{137}

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.\footnote{138} 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.\footnote{139} Over a period of years, many countries with new systems have been willing to give the competition agency greater autonomy.\footnote{140} Thus,

\begin{itemize}
  \item \footnote{133}{\textit{See generally William E. Kovacic, Congress and the Federal Trade Commission,} 57 \textsc{Antitrust} \textsc{L.J.} 869 (1988) (discussing periodic legislative assaults on FTC’s authority and specific enforcement matters since 1914).}
  \item \footnote{134}{\textit{See Kovacic, Congressional Oversight, supra note 126, at 623–27, 664–67 (describing episodes of destructive congressional intervention in FTC’s programs).}}
  \item \footnote{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. \textsc{Tony A. Freyer, Antitrust and Global Capitalism, 1930–2004}, 8–59 (2006); \textsc{Tony A. Freyer, Regulating Big Business: Antitrust in Great Britain and America 1880–1990}, 196–232 (1992).}
  \item \footnote{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.}
  \item \footnote{137}{\textit{See infra} note 146 and accompanying text.}
  \item \footnote{138}{\textit{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).}}
  \item \footnote{139}{This also could be seen as a willingness of a country to provide political support for the new institution. \textit{See Aydin & Büthe, supra note 1, at 29–32.}}
  \item \footnote{140}{\textit{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.141 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.142 Brazil combined the competition responsibilities of three distinct bodies into a single authority.143 Ireland merged its competition agency and consumer protection authority into one institution.144 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.145

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

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.
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.146

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.147 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.148 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.149 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.150

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

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. 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. In the early years, such agencies are often heralded as success stories. 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. The decline is set in motion by various factors: the charismatic leader’s departure without the development

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).


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.\textsuperscript{155}

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.\textsuperscript{156} 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,\textsuperscript{157} or in response to the emergence of political philosophies questioning the value of market-oriented reforms as in Argentina.\textsuperscript{158}

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.\textsuperscript{159} 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.\textsuperscript{160} In 2014, economic and political

\begin{thebibliography}{99}
\bibitem{pena} See Julian Pena, \textit{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).
\bibitem{venezuela} This arguably describes the situation faced by competition authorities in countries such as Venezuela and Zimbabwe.
\bibitem{ukraine} The largely successful launch and early implementation of Ukraine’s competition system is recounted in Roger Alan Boner & William E. Kovacic, \textit{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. \textit{See UNCTAD Ukraine Peer Review, supra} note 41, at 7–8, 23–24 (reviewing accomplishments of Ukraine’s

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turmoil pressed the Antimonopoly Committee of Ukraine to the edge of its existence. 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. In mid-2015, the government reconstituted the Antimonopoly Commission with a new chair and a new board. 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.

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. Additionally, there are promising signs of improvement in Peru, a country whose system once stood atop the ladder in Latin America and is now striving to regain that position. At this year’s Annual Conference of the International Competition Network in Singapore, Peru’s competition agency was honored for 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, ANTITRUST SOURCE 6 (July 2016). 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 Guinea, Jordan, and Egypt, 4 N.Y.U.J. INT’L L & P. 1227, 1245–50 (Summer 2016). See also Waled 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-2USY].


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.167

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.168 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.169 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.170 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.171 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.172 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.173


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, Dominic 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-SA4Y]. 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. 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. The Antimonopoly Committee of Ukraine is in the early stages of rehabilitation following a political crisis that nearly destroyed the agency.

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.

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).
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.179

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.180 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.181 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.182 In other

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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. 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. An agency’s ability to establish effective law enforcement or advocacy programs hinges largely on its human capital. 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. 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.

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

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 Yevgenev, Chairman, Antimonopoly Committee of Ukraine, Kiev, Ukraine (July 22, 2016).
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? 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. 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. 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.

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. 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. In order
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.194

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 build195—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.”196 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.197

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.198 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.199 This goal can be

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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.

accomplished through bilateral programs of technical assistance, agency-to-agency cooperation, or through participation in international regional alliances or larger international networks.\textsuperscript{200} 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.\textsuperscript{201} The virtuous cycle one observes in the best systems consists of a three-stage process of experimentation, assessment, and refinement.\textsuperscript{202} Many of these states, including Brazil, Mexico, South Korea, and Taiwan, have returned to their national legislatures to obtain major system upgrades.\textsuperscript{203}

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.\textsuperscript{204} 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.”\textsuperscript{205}

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

\textsuperscript{200} Id.
\textsuperscript{201} See supra notes 34–37, 65–69 and accompanying text.
\textsuperscript{202} See supra notes 34–37 and accompanying text.
\textsuperscript{203} See supra notes 65–69 and accompanying text.
\textsuperscript{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.
\textsuperscript{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.