The Lifecycles of New Competition Agencies: Explaining Variation in Successful Implementation of New Competition Regimes Since the 1980s

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1. Introduction

Since the late 1980s, the number of jurisdictions with competition laws has grown from roughly 20 to nearly 130. At least two basic questions arise from the remarkable modern expansion of a regulatory discipline established in North America in the late 19th Century. First, how successfully have the new adopters implemented their competition laws? Second, what factors account for the relative success or failure in implementation?

In this paper, I address these questions by identifying and explaining lifecycles in the development of new competition law systems. I focus on what it takes to build the institutions needed to apply competition law in a manner that improves economic performance.¹ I do not assess how much the competition systems created over the past quarter-century have served to reduce prices, improve product quality, or stimulate innovation. Instead, I consider how well various jurisdictions have created the institutional predicates for pursuing programs that promise to achieve these aims.

My assumption in taking this institution-oriented approach is that improvements in institutional arrangements tend to yield superior policy outcomes. For much of the 1990s, there was an epidemic failure within the organizations that fostered adoption of competition laws – notably, national foreign assistance programs and multinational donor bodies that advised nations in the formulation of new laws – to account for the institutional arrangements that would be vital to the implementation of new competition laws. Donors often measured their own success by the adoption of a new statute, itself. The enactment of a competition law was a readily observable, tick-the-box index of donor effectiveness. In this context, as in many

¹ Improved economic performance is not the sole aim of most competition laws, yet it is a core stated aim of most of the world’s competition laws.
others, implementation issues were regarded as an afterthought – mere technical details to be sorted out later on.

The slighting of implementation concerns was evident in the drafting of new competition statutes, themselves. External advisors often provided off-the-rack solutions from other jurisdictions with little tailoring to account for local conditions or implementation capabilities. The prevailing wisdom also pressed toward adopting fully-loaded competition regimes that included the full range of policy commands that were the norm in older systems such as the European Union and the United States. This partly reflected the view that transition economies would have a single political opportunity to make basic economic reforms. Because the political will to enact reforms would evaporate, it was thought necessary to pack everything into the competition law from the outset. The possibility for future upgrades or gradual, phased implementation was seen as remote.

Academic scholarship and policymaking over the past fifteen years or so reveal a growing recognition that implementation demands attention demands close attention from the first day of a law reform process. Statutes with grand policy aspirations but no effective means for implementation pointlessly consume resources from public officials and business operators, alike, and they engender cynicism about lawmaking and public administration generally. Among academics, government officials, and practitioners, there is a healthy and growing interest in (a) how to establish and system the institutional foundations necessary to achieve good policy results and (b) how to measure the effectiveness of different institutional configurations.

The paper treats the topic of agency lifecycles and policy implementation in three segment. It first considers at what point in the development of a new competition law system it makes sense to form reliable conclusions about implementation effectiveness. The paper proposes that it takes roughly fifteen to twenty years from the adoption of a law to determine whether a new competition law regime is on the path to successful implementation.

The second section of the paper describes several lifecycles that describe the development of newer systems. The 100 or so competition systems formed since the late 1980s have proceeded along different evolutionary paths. This section of the paper presents four principal evolutionary paths and proposes that the path most closely associated with implementation success is a gradual upward sloping curve of progress.
The third section identifies 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 collateral institutions, such as courts and universities.

Several sources of information inform the paper. Three stand out. One 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. The process of preparing the study has provided a useful opportunity to see how individual systems have evolved. A second source of information includes reports, including “peer reviews,” prepared by the International Competition Network (ICN), the Organization for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD) on matters related to competition law implementation.\(^2\) The third are interviews with current and former competition agency officials and site visits in various countries.\(^3\)

2. The Time for Assessment

When is a good time to take stock of the progress of implementation for a new competition system? In one sense, the evaluation process should be continuous and should begin from the earliest days of the new competition regime. For the new system and for supportive external observers (such as donors or foreign competition agencies that provide assistance), it is sensible to monitor progress from early days and use regular assessments as tools to improve programs or institutional arrangements.

When can we form reliable views about the quality of institutional arrangements and the capacity of an agency to perform assigned policy duties? I would suggest that it takes fifteen to twenty years to gauge progress in a meaningful manner. Put another way, for most jurisdictions it takes at least fifteen to twenty years to achieve a sound institutional footing in terms of statutory authority, judicial interpretation, internal capacity building, and improvements in collateral bodies.

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\(^2\) I have participated in a number of these peer review exercises since 2011 and have co-authored UNCTAD peer reviews for Armenia, Pakistan, and Ukraine.

\(^3\) Since 2011 I have done site visits to the competition authorities of the following countries that adopted competition laws after 1990: Albania, Argentina, Armenia, Barbados, Brazil, Chile, China, Czech Republic, Hong Kong, Ecuador, Hungary, India, Indonesia, Ireland, Israel, Kenya, Malaysia, Mauritius, Mexico, Morocco, Netherlands, Pakistan, Poland, Portugal, Singapore, South Africa, Spain, Taiwan, Thailand, Turkey, and Ukraine.
For five basic reasons, the fifteen to twenty milestone is a valuable point to assess implementation success. First, it provides an adequate opportunity for the competition agency to test its powers – notably, its authority to gather information (for example, through compulsory process and searches of business premises), its mandate to challenge various forms of business behavior (for example, abusive conduct by dominant firms, cartels, and anticompetitive mergers), and its power to impose sanctions. The agency will require time to build internal teams and processes to carry out these functions. Success in performing these tasks requires the accumulation of experience and the development of a sound institutional memory to capture knowledge gained from practice.

Second, it takes a considerable time to see whether an agency has established a reputation that enables it to attract and retain good attorneys, economists, and administrative professionals. Some agencies never succeed in recruiting sufficient numbers of capable staff. Others do well in the early years as 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 become more than what amounts to an executive MBA program that identifies good talent for absorption by the private sector or by other public agencies.

Third, in nearly every jurisdiction, initial efforts to exercise these legal capabilities will elicit stout challenges by affected firms in the courts. It will require 15-20 years to obtain judicial rulings (often from the highest court in the jurisdiction) that either sustain or forestall the agency’s efforts to exercise its legal mandate. Courts in the early period also will focus closely on apparent deviations from procedural requirements established in the competition law or imposed by the jurisdiction’s administrative procedure code.

Fourth, it is important to see 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. Several handoffs will be necessary to see if the government remains committed to appointing high quality officials, 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 see 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.

Fifth, a period of 15 to 20 years allows one to get a rough idea of the depth and durability of political support for the competition law. An initial period of vigorous law enforcement can create political backlash that inspires ministers and legislators to intervene destructively in the competition agency’s work. Changes in economic conditions that erode support for competition as an organizing principle of economic organization. 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.

To a large degree, all of the considerations sketched above reveal the competition system’s resilience. One wants to see if the agency not only has generated positive accomplishments (e.g., cartels successfully attacked and anticompetitive government policies adjusted by reason of effective advocacy), but also has shown its ability to take a punch and keep fighting well. Every competition agency gets tested by a crisis or several crises. These 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. It is important to know if the agency can cope well with adversity and, if it has committed errors, to repair problems and do better going forward.

The factors set out here also caution against embracing unrealistic expectations about what a new competition system is likely to achieve in its first decade or so. As discussed below in Section 4, the performance of a competition system depends crucially on matters such as funding and human capital. Competition agencies that are weakly funded and situated in jurisdictions with a weak pool of talent must proceed more gradually to implement the law than agencies blessed with substantial financial resources and first-rate talent. 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 never has done one. 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

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4 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.
leniency schemes presents extraordinary complexities that can perplex even the most-experienced regimes.

The underestimation of difficulty is especially pronounced for action-forcing mechanisms 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 manifestly insignificant matters in favor of pursuing more economically meaningful priorities). There is a chronic tendency to underestimate the administrative burdens imposed by these types of requirements. There is a lengthy learning process by which agencies adapt to cope effectively with these and similar mandates.

3. Lifecycles

From the accumulated experience of new systems since the late 1980s, we can observe three principle implementation vectors.

*Early Ascent Followed by Decline*

One cohort of systems has risen 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 often are heralded as success stories. The ascent typically is propelled by a strong first-generation leader (e.g., Ana Julia Jatar in Venezuela) who succeeds in bringing superior talent into the agency in its first years. The decline is set in motion by various factors: departure of the charismatic leader without the development of an institutional framework to carry on the agency’s work, a regime change in national leadership that results in a redirection of policy, or a legal dispute that casts doubt on the legitimacy of the framework.

In some instances, the collapse associated with this scenario is not complete, with a noticeable descent from the early period of seemingly effective implementation. Prominent examples in this category are Argentina and Peru. The agency does not crash into the ground, but descends to a level of performance that is decidedly modest by comparison to its initial accomplishments. In this case the agency stalls for some of the same reasons suggested above – e.g., a leadership change that dramatically reorients the agency (e.g., the departure of Beatriz Boza in Peru) or a
judicial ruling that appears to invalidate a key element of the institutional design (e.g., Argentina).

In some instances, political upheaval has proven to be debilitating. The political crisis in Ukraine over the past year now threatens to destroy a competition system that was formed in the early 1990s and had shown gradual progress in its first two decades. The current crisis in Ukraine has resulted in agency officials being placed on involuntary half-time leave, causing numerous managers and staff to leave the agency. There is a strong possibility that Ukraine’s antimonopoly commission will dissolve by the end of 2015.

Egypt’s competition system enjoyed a promising start with good funding and inspired leadership. The country’s political turmoil placed the competition policy system into a holding pattern during which the agency succeeded in retaining many of its best staff, who devoted themselves during the hiatus to research and analysis tasks in anticipation of a future resumption of operations.

The Flat Line

A second vector resembles a flat line. Some new systems never get off the ground. The causes include desperately weak funding that stems from national poverty and poor external support, an absence of political support for competition law that results in poor funding or dismal leadership appointments, or a basic infirmity in the law that established the new mechanism. The later weakness often is made evident in a judicial decision that strikes down a key feature of the system (e.g., Thailand).

These agencies are not irretrievably failed. In some cases, the largely inactive agency has begun to build a program that has promise of putting the system on a path of upward progression. In recent years, for example, Armenia’s competition authority has shown signs of overcoming badly inadequate funding levels and a most unfavorable political environment to build a useful program.

Gradual Upward Progression

The third vector is a path of gradual upward progression. The slope of progress can vary – some steeper (e.g., Brazil and Singapore), and some more gradual (e.g., Barbados, Indonesia, Jamaica, and Chile). The vector usually is not an unbroken upward arc, as 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. A recent change in leadership was accompanied by a wholesale change in senior management (with the departure one year ago of 17 of the agency’s top 18 managers). Restocking the leadership team will take time and will come at some cost in performance in the short term.

In their first years, these systems usually are not identified as fast-rising stars. Over time, however, they show steady improvement and grow resilient by reason of better resourcing, staffing, program selection, and political support.

4. Factors Accounting for Implementation Success

To study the lifecycles of various competition systems is to see factors that tend to improve the prospects for successful implementation.

Funding

Well-funded agencies generally outperform poorly resourced regimes. Singapore and South Africa are two examples of agencies that have undergone gradual, steady improvements in implementation. Each received generous outlays to begin its new competition law regime and has enjoyed strong continuing support. A condition that links many of the least successful systems is a poverty of resources from internal sources and an inability to enlist external donors to fill the gap.

Human Capital

Resourcing, in turn, deeply influences a second vital condition. Well-funded agencies have greater ability to attract and return top rate talent and to spend funds for external consultants. The 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.

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 to carry out successfully. This requires strong discipline in program selection to avoid making commitments to matters that they
agency cannot execute successfully. A common trap in the early years is to begin a large number of highly ambitious matters that outrun the capability of staff and run serious risks of failure before the courts.

Poorly resourced systems should be wary of undertaking programs that involve large, recurring administrative tasks. Merger regimes with mandatory notification and waiting period requirements tend to impose substantial administrative burdens. A system with few resources likely will find itself overwhelmed by a merger review mechanism unless reporting thresholds are set at levels that correspond to the agency staffing.

Learning

The effort to avoid mismatches requires attention to the agency’s experience level. As the competition authority accumulates experience, it can reasonably seek to conduct a larger number of inquiries or undertake individual matters of greater difficulty. The more effective agencies also have made wise use of the learning of other competition law regimes – either directly from individual regimes or indirectly through the work of international bodies such as the ICN, OECD, and UNCTAD.

Political Support

It is extraordinarily difficult to implement a competition policy program in a jurisdiction that is hostile to 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.

Collateral Institutions

The implementation of competition law depends heavily on the quality of collateral institutions – bodies which Allan Fels has called “co-producers.” A nation with a well-functioning judicial system confers a great advantage on the development of the competition regime. A country with feeble or, worse, corrupt courts faces a lengthy process of retooling its judiciary or establishing new tribunals dedicated to competition law.

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

*International Cooperation*

Participation in international programs – bilateral relationships, regional programs, and larger international networks – can help agencies overcome resource limits, accelerate learning, and build political support. To an increasing degree, these mechanisms enable agencies to obtain highly valuable know-how about the substance and process of competition law, and to train agency leaders about how to deal with sensitive issues involving political pressure and relations with other public agencies.

*Periodic Assessment and Upgrades*

The most successful implementation efforts have taken place in jurisdictions that undertake periodic reviews of the competition system. The virtuous cycle one observes in the best systems consists of a three stage process of experimentation, assessment, and refinement. Many authorities (e.g., Brazil, Mexico) have returned to the national legislature to obtain major upgrades in their systems.

5. Conclusion

The design and successful implementation of law reform are difficult tasks in any legal system. They tend to be even more difficult in the dozens of transition economies which have adopted competition laws in the past 25 years.

The path to success for new competition systems generally has been a process of incremental improvement. The best experiences have taken place in jurisdictions that pursued gradual increases in the tempo and difficulty of implementation. The need for a deliberate, phased approach is most acute in countries with unfavorable initial conditions – badly funded agencies, weak political support, and thin human capital.

Better understanding of the path of implementation 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.