



THE LIFECYCLES OF COMPETITION SYSTEMS: OBSERVATIONS ON THE EVOLUTIONARY PATHS



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INTRODUCTION

Since the late 1980s, the number of jurisdictions with competition laws has soared from fewer than 15 to over 125,² and more are on the way. Never before has a system of economic regulation gained such widespread global adoption in so short a time. Despite the abundance of new competition systems, there is relatively little comparative analysis on the evolutionary paths of those systems. The implementation of these competition systems merits an in-depth analysis that permits the compilation of lessons learned through diverse experimentation with competition law across jurisdictions.

In this Article, we preview the results of a more detailed inquiry into the lifecycles of competition law systems.³ We focus on how well various jurisdictions have created the institutional predicates for effective policy implementation. Our approach here is part of a larger examination of trends in institutional design at the George Washington Law School's Competition Law Center (CLC),⁴ and it reflects our view that improvements in institutional arrangements serve to strengthen policy outcomes.

We begin by setting out what we believe to be realistic expectations about how long it takes for a jurisdiction to set the essential foundations for effective policy implementation. The Article then describes three lifecycles that have characterized the development of new systems and presents examples of each. We conclude with some observations about the factors that determine which lifecycle a competition law system will experience.

REALISTIC EXPECTATIONS

When can we form reliable views about the quality of institutional arrangements and the capacity of an agency to perform assigned policy duties? Our research suggests that it takes twenty to twenty-five years to gauge progress in a meaningful manner. Put another way, for most jurisdictions it takes at least this long to construct and set the system's institutional footings — to adopt and refine the initial statutory scheme, to obtain judicial interpretations of the law's substantive commands and procedural features, to build capacity within the



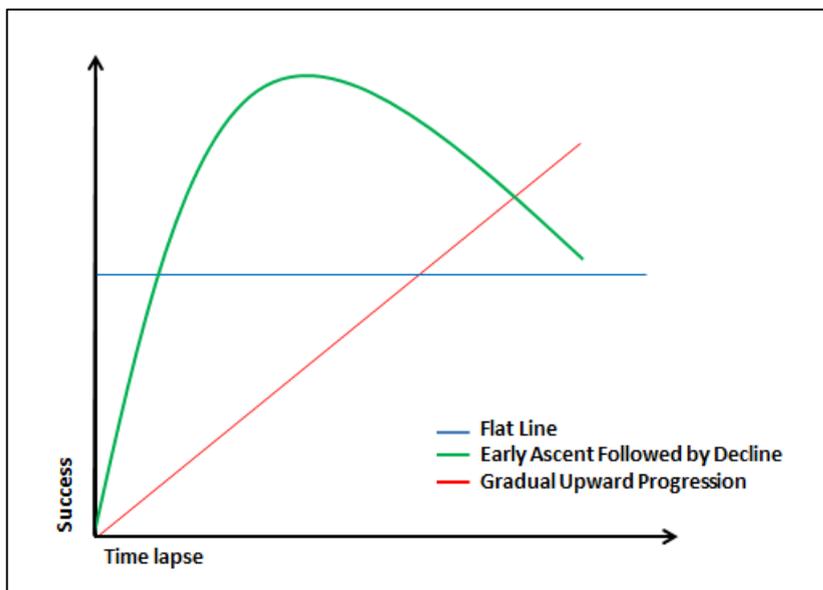


competition agency, and to foster improvements in collateral bodies (e.g., universities) whose contributions are necessary to sustain an effective system.⁵

Some systems during their first years are often not identified as fast-rising stars. For example, in Latin American in the mid-1990s the competition regimes of Chile and Mexico were not seen as obvious candidates for success. Over time, however, they showed steady improvement and grew resilient by reason of better resourcing, staffing, program selection, and political support. Others were leaders in their regions, such as the case of Venezuela in the early and mid-1990s, but eventually crashed into the ground. Visibly, anti-market political movements and other political turmoil have deeply impacted on the evolutionary path of some competition systems.

I. THE LIFECYCLES OF COMPETITION SYSTEMS

Based on intensive analysis of trajectories of evolution of different competition systems, competition systems may be classified into three groups using metaphoric vectors, namely: (i) Early ascent followed by decline; (ii) Flat line; and (iii) Gradual upward progression.



Each of these groups comprises the following evolutionary paths:

A) Early Ascent Followed by Decline: Competition systems that fall under this category are those that have risen early and then entered a sustained period of decline. A common ground that applies to agencies that fall under this category is that in the early years, such agencies often are heralded as success stories. Nonetheless, there are discernable differences that are worth exploring to fully comprehend the circumstances that affect systems' evolutionary tracks as it will be analyzed below.

B) The Flat Line: A second vector 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.

C) Gradual Upward Progression: The third vector is a path of gradual upward progression. The slope of progress can vary — some steeper (e.g., Brazil, Singapore, South Africa), and some more gradual (e.g., Chile, Indonesia, Kenya, Latvia, Lithuania, Mexico). The vector usually is not an unbroken upward arc, as the agency encounters successes and setbacks along the way.





II. EXAMPLES OF THE THREE PRINCIPAL EVOLUTIONARY PATHS

Venezuela is a good example that fits the profile of a competition system that had a sharp vertical ascent followed by a descent as dramatic as the initial climb. Ana Julia Jatar, as the first-generation leader of the agency, propelled the sharp ascent. Her formula consisted on attracting superior talent into the agency that allowed the agency to build strong technical cases unlikely to resolve without the necessary human capital.

Differently, other systems included under the same category such as Argentina or Peru, did not crash into the ground. Rather, the level of the agencies' performance derived to very low levels by comparison to its initial accomplishments, that the agencies became irrelevant in practice.⁶

In all the foregoing jurisdictions, there were various factors that impacted the decline of the agency such as the departure of the first generation charismatic leader or a regime change in national leadership and ascent of political philosophies that question the value of giving market-oriented reforms a decisive role in national economic policy (e.g., Argentina).

Finally, in some other instances, political upheaval is the main mechanism that debilitates agencies. Cases in point include Egypt and Ukraine. The political crisis in Ukraine over the past two years now threatens to destroy a competition system that was formed in the early 1990s and had shown gradual progress in its first two decades.⁷ In mid-2015, the government reconstituted the ACMU with a new chair and a new board. To a significant degree, the institution is being re-created from the ground up.

Similarly, Egypt's competition system enjoyed a promising start with good funding and inspired leadership. The country's political turmoil following the Arab Spring placed the competition policy system into virtual suspension during which 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.

Under the category of the flat line fall those systems that were created by law, but in reality were never active such as the case of Thailand, Paraguay or those systems in jurisdictions that suffer severe poverty and do not enjoy financial support from external support i.e., from national aid agencies or multinational donors.

For example, in Paraguay, although the competition authority exists, the lack of political support has stalled implementation. In Dominican Republic, the competition agency still awaits (five years after its creation) awaits the appointment of an official who, by law, must approve the initiation of law enforcement proceedings. The new agency trains its people and engages in advocacy measures such as public education, but it is unable to apply enforcement powers that, on the surface, were a major reason to create a competition regime

Armenia represents an example of why these agencies should not be considered as irretrievably failed. Indeed, Armenia's competition authority has shown signs of overcoming badly inadequate funding levels and a most unfavorable political environment to take steps that could establish a useful program. These changes may put the competition system on a path of upward progression.

Finally, Mexico represents a leading example of how to achieve successful progressive evolutionary path. Since the creation of the first Mexican competition agency to the recent developments creating COFECE with the parallel improvement of the competition policy statutory frameworks, Mexico has been able to follow a continuous successful evolutionary path, though not without challenges.





FACTORS DETERMINING THE SUCCESSFUL IMPLEMENTATION

Various factors determine the successful implementation of competition systems. The degree to which each of these elements affects jurisdictions varies from country to country. Nonetheless, it is worth compiling the obstacles that impede the upward progression of systems to understand in more detail the reasons behind the diverse evolutionary paths of systems.

The first and most obvious factor impacting the evolution of competition systems is that of political support. As explained earlier, the political turbulence that happened in jurisdictions like Egypt, Ukraine, and Venezuela dampened the prospects of their respective competition systems. Weak political support or episodes of severe political instability inevitably lengthen the period for effective implementation of the competition law.

Hand in hand with the factor of political support is that of funding. Well-funded agencies generally outperform poorly resourced regimes. For example, Singapore and South Africa enjoyed robust financial support from the beginning, and are two examples of agencies that have undergone gradual, steady improvements in implementation.⁸ Others such as Colombia and Mexico the gradual ascent of the competition system has benefited from periodic substantial increases in outlays. We note here that good results can be achieved by agencies with 15-20 employees when the agency develops a rigorous process for choosing priorities and selecting projects.

Resourcing, in turn, deeply influences a third 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.⁹ 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.

As suggested above, resource limits place a premium on the agency's discipline in matching program commitments to delivery capacity. This is the main reason why poorly financed agencies face bigger challenges when prioritizing programs. Failure to set priorities carefully places agencies at the risk of becoming so ambitious that the capacity of staff is overrun. Badly overextended agencies also tend to experience the spillover effect of failing before the courts. It is often the case that new agencies operate at a tempo that exceeds, to some extent, its ability to complete all of its projects successfully. At the same time, 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.

Pakistan illustrates elements of the foregoing scenario. The first generation of the reformed agency's leadership undertook an agenda of high profile challenges in major sectors of the economy. Nonetheless, within years, it has become apparent that the CCP lacked the capacity to manage a large number of ambitious projects capably, especially in the face of stout resistance from the affected businesses, which enmeshed the agency in protracted, indeterminate litigation in the country's courts.¹⁰

The effort to avoid mismatches between commitments and capacity requires attention to the agency's experience level. 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.

The underestimation of difficulty is especially pronounced for action-forcing mechanisms that compel the competition agency to devote resources to certain types of matters. There is a chronic tendency to underestimate the administrative burdens imposed by some requirements such as the ones relating to merger review. This has been true for even well-resourced agencies in undertaking new programs. There is a lengthy learning process by which agencies adapt to cope effectively with these and similar mandates.





An informative example involves 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. Over 60 jurisdictions have established variants of this process, and many have underestimated the administrative burdens it entails. Severe early implementation difficulties with mandatory reporting systems have beset newer systems¹¹ and older regimes, alike.¹²

The implementation of competition law depends heavily on the quality of collateral institutions — bodies that 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.

Lastly, engagement with other jurisdictions — either through bilateral programs of technical assistance or agency-to-agency cooperation, or through participation in international regional alliances or 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.

CONCLUSION

The analysis of the lifecycle of competition systems reveals that managing expectations on what a competition agency might be able to accomplish and patiently building on institutional reputation are key elements to a success path. The right state of mind for a new system is a combination of realism, to avoid disappointment in the face of what may seem at first to be slow progress and substantial resistance, and ambition, to press ahead with institutional improvements and the pursuit of increasingly challenging law enforcement and advocacy projects.

The best experiences have taken place in jurisdictions that pursued gradual increases in the tempo and difficulty of implementation. 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. As such, 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.

Studying the lifecycles of competition systems can assist existing competition agencies to understand what they must do to improve performance, and it can help new adopters to anticipate what they will face in establishing a competition policy system. In sum, to study the lifecycles of various competition systems is to see factors that tend to improve the prospects for successful implementation. In view of future, the foregoing observations and lessons learnt should not be ignored when engaging in competition policy reforms.

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² This estimate is based on a review of the membership data compiled by the International Competition Network, www.internationalcompetitionnetwork.org, and from the data on competition law systems assembled by the Competition Law Center of the George Washington University Law School, www.gwclc.com.





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- ³ William E. Kovacic & Marianela Lopez-Galdox, The Lifecycles of New Competition Agencies: Explaining Variation in Successful Implementation of New Competition Law Regimes, *Journal of Law & Contemporary Problems* (Forthcoming 2016). We also draw upon the observations contained in William E. Kovacic, Competition Lifecycles in Latin America, in *Competition Law in Latin America: A Practical Guide* 7 (Julian Pena & Marcelo Calliari eds. 2016).
- ⁴ Since 2012, the CLC has performed research to benchmark all of the world's competition law systems according to key institutional characteristics. A survey of the results from the benchmarking project will appear later this year in the *Journal of Antitrust Enforcement*.
- ⁵ The institutional prerequisites for effective policy implementation are described in William E. Kovacic, The Institutional Foundations for Economic Law Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement, 77 *Chicago-Kent Law Rev.* 265 (2001).
- ⁶ The waning of political support for the "Washington Consensus" and market-based economic policies (including competition) in Argentina and other countries in Latin American after the mid-1990s is discussed in 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).
- ⁷ In 2014, the economic and political crisis in Ukraine led the government to impose a 70 percent cut in the budget of the Antimonopoly Commission of Ukraine (AMCU). The drastic austerity measure forced most agency officials to take involuntary half-time leave. This caused numerous managers and staff to leave the agency.
- ⁸ 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 part 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.
- ⁹ Building this crucial dimension of capacity has proven difficult in many transition economies. D. Daniel Sokol, The Development of Human Capital in Latin American Competition Policy, in *Competition Law and Policy in Latin America* 13 (Eleanor M. Fox & D. Daniel Sokol eds., 2009).
- ¹⁰ On Pakistan's modern experience, see Fernando Furlan & William E. Kovacic, Peer Review of the Competition System of Pakistan (UINCTAD 2013).
- ¹¹ China greatly underestimated the administrative difficulties that its premerger notification system would present. See William E. Kovacic, China's Competition Law Experience in Context, 3 *Journal of Antitrust Enforcement Supp.* 1, at 2 (2015) (discussing early implementation of China's Antimonopoly Law and its merger review mechanism).
- ¹² On the early difficulties of the Federal Trade Commission in implementing a program of compulsory advance merger notification, see William E. Kovacic, HSR at 35: the early US premerger notification experience and its meaning for new systems of competition law, in *New Competition Jurisdictions* 9 (Richard Whish & Christopher Townley eds., 2012).

