

Brooklyn Journal of International Law

Volume 23

Issue 2

Symposium:

Creating Competition Policy for Transition

Economies

Article 4

12-1-1997

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Recommended Citation

William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 Brook. J. Int'l L. 403 (1997).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol23/iss2/4>

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GETTING STARTED: CREATING NEW COMPETITION POLICY INSTITUTIONS IN TRANSITION ECONOMIES

*William E. Kovacic**

INTRODUCTION

Since the late 1970s, nearly forty transition economies have created new competition policy systems or retooled dormant antimonopoly laws.¹ A dozen or so other nations seeking to replace central planning with market processes also are considering the adoption of new competition legislation.² Encouraged by multinational donors and advisory bodies such as the World Bank, the Organization for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD), and motivated to participate in international agreements such as the Asian Pacific Economic Cooperation, still more transition countries are likely to follow.³

* Professor, George Mason University School of Law. I am grateful to Kathryn Fenton, Eleanor Fox, Robert Lande, Armando Rodriguez, Luis Tineo, Michael Trebilcock, and Spencer W. Waller for many useful comments. I also am indebted to James Anderson, John Bentley, Linda Boner, Roger Boner, Charles Cadwell, Cynthia Clement, Karen Turner Dunn, Andrew Gavil, Gary Kelly, Shyam Khemani, Georges Korsun, Robert LaMont, Gerald Meyerman, Larry Morgan, Karen Mills, William Nielsen, Mancur Olson, Malcolm Russell-Einhorn, Ben Slay, Robert Thorpe, and Thomas Timberg, who have shared their insights while collaborating on projects to design and implement competition and consumer protection laws in transition economies. The Center for Law and Economics at the George Mason University School of Law generously supported the research for this Article.

1. Mark Palim's study of new competition policy systems identifies 39 countries that meet this description. See Mark R.A. Palim, *The Growth of Competition Law in the Global Economy 185-205* (1997) (unpublished Ph.D. dissertation, George Mason University) (on file with author). These are Albania, Algeria, Argentina, Belarus, Brazil, Bulgaria, Chile, Czech Republic, Dominican Republic, Estonia, Gabon, Georgia, Hungary, India, Ivory Coast, Jamaica, Kazakhstan, Kenya, South Korea, Latvia, Lithuania, Mexico, Moldova, Mongolia, Panama, Peru, Poland, Romania, Russia, Slovak Republic, Slovenia, South Africa, Sri Lanka, Taiwan, Thailand, Tunisia, Ukraine, Venezuela, and Zambia.

2. In Latin America and the Caribbean alone, these countries include Bolivia, Ecuador, El Salvador, Guatemala, Nicaragua, Trinidad, and Tobago. See LUIS TINEO, *COMPETITION POLICY & LAW IN LATIN AMERICA: FROM DISTRIBUTIVE REGULATIONS TO MARKET EFFICIENCY 8-9* (Monterey Inst., Ctr. for Trade & Com. Dipl., Working Paper No. 4, 1997) (on file with *Brooklyn Journal of International Law*). Other candidates are Egypt, Indonesia, Malaysia, Morocco, and Vietnam.

3. See Palim, *supra* note 1, at 87-88 (describing role of international organi-

The effort given to adopting competition statutes in transition economies has obscured the grave difficulties that most nations have experienced in implementing them. Few countries have created vibrant competition policy institutions or executed effective enforcement programs. Resource-starved enforcement agencies often are assigned to execute ambitious legal commands amid powerful economic and political opposition. The new enforcement authorities seldom can tap a large body of indigenous competition policy expertise, and their work must withstand review before courts with little or no understanding of market processes. Because foreign donors often treat passing a new statute as the chief benchmark of progress in law reform, and commonly view implementation as an afterthought, many new competition systems have been dead or are gasping on arrival.

Adopting moribund competition laws with no means or realistic strategy for effective implementation is not a harmless exercise. In transition economies, the process of drafting and enacting hollow legal commands consumes precious human and political capital that otherwise might be used to solve pressing problems of transition.⁴ Establishing unenforceable or erratically applied laws increases uncertainty and risk for private entrepreneurs operating in what already are precarious and unpredictable business conditions. For the public, empty legal reforms feed cynicism about the rule of law and the value of economic and political decentralization.

This Article explores how transition economies can design

zations in promoting the adoption of competition laws in transition economies).

4. In many transition economies, a relatively small number of government officials are responsible for administering economic reform programs that involve a wide array of initiatives. See William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DEPAUL L. REV. 1197, 1213 (1995) [hereinafter Kovacic, *Competition and Consumer Protection Reforms*]. Officials assigned to deal with matters related to competition policy might handle issues involving antitrust, consumer protection, foreign investment, intellectual property, and trade. Managing this demanding portfolio involves participation in frequent meetings with multinational committees and task forces, regular consultation with representatives of donor organizations and other foreign advisors, preparation of specific reform measures, and navigating reforms through the transition country's political process. This places heavy burdens on the cadre of transition economy officials who have experience with and formal training in market economics and related legal policies. The time of these officials is precious, and distractions are costly. I am indebted to Luis Tineo for this point.

and implement effective competition programs in the face of strong political opposition, limited legal and economic expertise, and resource austerity. The Article draws on two principal sources of information. The first is my experience with drafting and implementing competition and consumer protection laws for transition economy governments.⁵ The second consists of discussions with transition economy experts who have shared their views about designing or implementing new competition systems.⁶

The Article begins by identifying institutional foundations for effective competition programs in Western countries whose advisors have helped design new systems for transition economy governments. A review of conditions that facilitate successful programs in established market economies helps illuminate obstacles that transition governments are likely to encounter in creating their own competition policy systems.

Part II of the Article examines barriers to implementation that transition economy law drafters and their external advisors should consider in preparing new competition laws. In contrast to the Western countries whose laws often provide models for new competition statutes, transition economies feature few of the institutions that support effective policymaking and enforcement. Transition economy governments often must build the requisite institutions from the ground up.

Part III considers how an assessment of obstacles to implementation should influence the design of new statutes for transition economies. Part III proposes that new competition laws properly account for the likely ability of new government entities to enforce them effectively. For most transition economies, such an approach would dictate use of a gradualist strategy by

5. Since 1992, I have participated in competition or consumer protection law projects for the governments of Egypt, El Salvador, Georgia, Mongolia, Morocco, Nepal, Russia, Ukraine, Vietnam, and Zimbabwe.

6. I am indebted to M. Balihyuu, Kul Ratna Bhurtyal, Beatriz Boza, Abderrahim Boazza, Alfredo Bullard, Vladimir Capelik, Mario Cuevas, Claudia Curiel, Dang Duc Dam, Praveen Dixit, Le Dang Doanh, Lorena Duke, Ramesh Dughel, Celina Escolon, Slava Fetalava, Anna Fornalczyk, Eduardo Garmendia, Prakash Ghimire, Shalva Gogiashvili, Phan Thanh Ha, Nguyen Ngoc Hien, Ana Julia Jatar, Kakha Kvitsiani, Ketevan Lapachi, Vazha Maisuradze, Olexander Melnichenko, Svitlana Moroz, Normin Pakpahan, Nguyen Dinh Tai, and Alexander Zavada.

which the country enacts a small number of legal commands and focuses early implementation efforts on building the new competition policy agency, conducting education and publicity programs, and performing case studies. Only after these activities were well underway would the new agency begin a modest program of law enforcement.

In practice, few transition economies have used law drafting and implementation strategies for competition policy that are consciously gradualist. In the typical case, the initial design of competition laws overlooks vital implementation issues and overwhelms transition country institutional capabilities. Part IV suggests how new competition agencies can adapt excessively ambitious statutes to their own implementation capabilities. Part IV also presents a strategy for building needed institutional capability while executing antimonopoly programs that promise to improve economic performance and withstand political counterattacks.

I. INSTITUTIONAL FOUNDATIONS FOR COMPETITION PROGRAMS IN WESTERN ECONOMIES

The substantive requirements and enforcement mechanisms of most transition economy competition laws strongly reflect the influence of Western models.⁷ For example, new competition laws frequently address the full range of behavior treated under Western antitrust statutes and jurisprudence, including horizontal restraints, vertical restraints, single-firm exclusionary conduct, and mergers.⁸ The transition economy

7. See Vladimir Capelik & Ben Slay, *Antimonopoly Policy and Monopoly Regulation in Russia*, in DE-MONOPOLIZATION AND COMPETITION POLICY IN POST-COMMUNIST ECONOMIES 57, 62 (Ben Slay ed., 1996) [hereinafter DE-MONOPOLIZATION AND COMPETITION] (describing Russia's antimonopoly law as "a mixture of European and American competition policies"); Ben Slay, *Industrial De-monopolization and Competition Policy in Poland*, in DE-MONOPOLIZATION AND COMPETITION 123, 134 [hereinafter Slay, *Industrial De-monopolization*] (discussing European Union influence on Poland's antimonopoly law); Derrick McKoy, *Antitrust Law in Jamaica: The Fair Competition Act of 1993*, 5 J. TRANSNAT'L L. & POLY 183, 185 (1995) (observing that Jamaica's Fair Competition Act is modeled after the Sherman Act).

8. See Roger A. Boner, *Competition Policy and Institutions in Reforming Economies*, in REGULATORY POLICIES AND REFORM: A COMPARATIVE PERSPECTIVE 38, 42-48 (Claudio R. Frischtkat ed., 1996) [hereinafter REGULATORY POLICIES AND REFORM] (describing the main elements of transition economy competition laws); Russell Pittman, *Some Critical Provisions in the Antimonopoly Laws of Central*

laws often design their new competition agencies along Western lines and place public enforcement authority in entities that are independent of existing government ministries and the office of the country's chief executive.⁹ In most countries, the judiciary plays an important role in implementing the new laws, either by serving as the decisionmaking tribunal of the first instance or by exercising appellate review over the rulings of the competition agency.¹⁰

The strong Western orientation of transition economy competition systems results largely from the firm encouragement or insistence of Western advisors and donor groups who assist the transition governments in drafting new laws. Funded by multinational bodies such as the OECD, UNCTAD, and the World Bank and by national groups such as the U.S. Agency for International Development (USAID), competition policy experts from Canada, the European Union (EU), and the United States have played a major role in shaping transition economy competition statutes.¹¹ Transition economy governments have incorporated the main elements of Western regimes into their competition systems—including broad-based substantive commands, institutional independence for the enforcement agency, and extensive judicial involvement in the implementation of the statute—because Western advisors and donors have urged them to do so.¹²

and Eastern Europe, 26 INT'L LAW. 485, 487-502 (1992) (describing substantive prohibitions in Central and Eastern European antitrust laws); Tineo, *supra* note 2, at 15-23 (describing substantive provisions of Latin American antitrust laws).

9. See Slay, *Industrial De-monopolization*, *supra* note 7, at 123, 134-35 (describing the status and structure of the Polish Antimonopoly Office); Tineo, *supra* note 2, at 26-27 (describing status and structure of Latin American competition agencies).

10. See Capelik & Slay, *supra* note 7, at 65 (describing appellate review in Russia's antimonopoly system; noting concern of Russian antimonopoly officials that decisions of reviewing courts "are frequently made in ignorance of the basic requirements of competition policy (not to mention basic economics)"); TINEO, *supra* note 2, at 30-31 (describing process for judicial review in many Latin American competition systems).

11. See TINEO, *supra* note 2, at 4-5 (describing foreign technical assistance for the development of competition policy systems in Latin America).

12. For example, the European Union (EU) has shaped the development of competition laws in Central and Eastern Europe by its insistence that countries desiring membership in the EU enact statutes that follow the EU competition model. See JOHN FINGLETON, ELEANOR M. FOX, DAMIEN NEVEN, & PAUL SEABRIGHT, *COMPETITION POLICY AND THE TRANSFORMATION OF CENTRAL EUROPE* 54-57 (1996) (discussing the EU's influence on competition laws in the Czech Re-

In suggesting that transition governments embrace Western models, Western advisors often overlook two important features of Western experience with competition law. First, Western advisors sometimes presume that the transition country already possesses, or readily can construct, the institutional foundations on which successful Western competition systems rest. As discussed in Part II below,¹³ many of these institutional foundations are feeble or nonexistent in transition economies.

Second, Western advisors lose sight of how long it took for competition systems to take root in their own countries. In many Western countries, new competition policy systems grew slowly and experienced serious difficulties in their formative years. The failure to account for problems in establishing new regulatory regimes in any national setting leads foreign donors and their consultants to develop unrealistic expectations about how quickly transition economy governments can establish new competition systems.

By underestimating the magnitude of the implementation task, Western donors invest too few resources in long-term projects to train and counsel new competition agencies and to assist transition governments in building collateral institutions on which an agency's success depends. The discussion below addresses important aspects of Western experience that receive inadequate attention when Western donors and consultants advise transition economies about creating competition systems.

A. *Institutional Foundations for Western Competition Law Systems*

Western competition agencies derive their effectiveness from a number of conditions that directly and indirectly determine their ability to devise and execute competition programs.¹⁴

public, Hungary, Poland and Slovakia); Palim, *supra* note 1, at 58-65 (documenting how the EU has induced countries in Central and Eastern Europe to modify their competition laws to copy the EU model); Carolyn Brzezinski, *Competition and Antitrust Law in Central Europe: Poland, the Czech Republic, Slovakia, and Hungary*, 15 MICH. J. INT'L L. 1129, 1149-56 (1994) (describing how the prospect of EU membership has reshaped competition laws in Central Europe).

13. See discussion *infra* Part II.

14. See Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 582-90 (1994) (cau-

1. Substantial Resources

A vital condition supporting the maintenance of robust competition systems in Western countries is that public enforcement authorities receive substantial funding for personnel and facilities. Resource levels vary across national enforcement agencies, and Western agencies are not immune from funding cuts that curtail the scope and volume of their enforcement programs.¹⁵ Nonetheless, Western competition authorities typically receive legislative appropriations or user fees that permit them to hire large numbers of capable professionals and administrators and maintain a substantial, credible enforcement presence in the business community.¹⁶

2. Academic Infrastructure

Competition systems in Western countries depend heavily on academic institutions for two contributions to the implementation of antitrust laws. First, Western universities train many students in the law and economics of competition policy. Several hundred Western universities have law schools that teach sophisticated courses in antitrust or have economics departments or business schools that teach undergraduate and graduate courses dealing with microeconomics and industrial organization. Instructors in such courses can choose from a multitude of teaching materials that incorporate the latest developments in analytical techniques and policy. Western competition agencies recruit numerous entry-level attorneys

tioning against efforts to export U.S. antitrust laws to other countries, explaining that U.S. antitrust law reflects a distinctive social and legal vision that cannot readily be transferred to other nations); Andrew I. Gavil, *Competition and Cooperation on Sherman Island: An Antitrust Ethnography*, 44 DEPAUL L. REV. 1225, 1232-49 (1995) (describing how distinctive cultural features have shaped competition policy in the U.S.).

15. See William E. Kovacic, *Public Choice and the Public Interest: Federal Trade Commission Antitrust Enforcement during the Reagan Administration*, 33 ANTITRUST BULL. 467, 499-500 (1988) (discussing impact of Reagan-era budget cuts on Federal Trade Commission antitrust activity).

16. For Fiscal Year 1996, President Clinton's budget request for the antitrust activities of the Department of Justice and the Federal Trade Commission (FTC) totalled \$143.3 million, including \$96.5 million that the two agencies receive in premerger notification fees. See *President Proposes Increased Funding for Both Antitrust Enforcement Agencies*, 68 ANTITRUST & TRADE REG. REP. (BNA) 168 (1995).

and economists from these programs.

As their second contribution, Western universities generate large amounts of research and commentary that address phenomena relevant to competition policy. Supplementing the work of universities are countless institutes and think tanks. Numerous scholarly journals publish papers on antitrust and industrial organization topics, and such journals are widely accessible to government officials and practitioners. The academic community is the equivalent of a large network of competition policy research and development laboratories that supplies the antitrust system.

3. Accessible Information Networks

Western competition agencies rely on sophisticated information systems to disseminate policy guidance and report enforcement activities. Government agencies in Western countries routinely publish enforcement guidelines, advisory opinions, and various forms of educational material.¹⁷ Such material is distributed through a variety of information conduits, including an expanding array of electronic media. Western countries have numerous publications that regularly report on developments in competition policy and other forms of business regulation. In short, Western enforcement authorities have relatively little difficulty making their enforcement preferences and decisions known to key external constituencies such as the business community and their advisors. Moreover, the diversity and inquisitiveness of media organizations inject an important element of transparency and accountability into the operation of competition policy agencies.

4. Professional Associations

To operate effectively, government agencies must inform affected constituencies about the requirements of the law and their enforcement intentions. Knowledge of the law helps consumers and business operators to understand their obligations and assert their rights. In Western countries, professional associations supply valuable networks through which govern-

17. See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 637-39, 724-27 (4th ed., 1997) [hereinafter ANTITRUST LAW DEVELOPMENTS] (describing the advisory activities of FTC and the Justice Department).

ment enforcement agencies transmit information about competition law developments to firms and consumers.

Professional groups such as bar associations and industry associations provide valuable links between competition agencies and external communities, including business managers. Bodies such as the American Bar Association (ABA) and its Section of Antitrust Law provide important networks through which the Justice Department and Federal Trade Commission (FTC) antitrust officials convey information about current and contemplated enforcement initiatives and policies. In the United States alone, professional associations and other non-government organizations each year sponsor dozens of seminars on competition policy at the national, state, and local levels. Federal antitrust enforcement officials regularly speak at these programs, whose attendees include numerous attorneys and business managers. The organized bar and other professional groups perform a valuable function in the antitrust system by disseminating information about government policies and instructing business operators about how to comply with the law. Such groups also facilitate a continuing process of critical discourse about antitrust policy that makes the rationale and effects of government enforcement decisions more transparent.¹⁸

5. Sound Judicial System

The judiciary plays a major role in antitrust enforcement in most Western countries, either by deciding cases in the first instance or reviewing appeals from rulings by administrative competition commissions.¹⁹ In the United States, for example, federal antitrust cases are tried before federal judges who decide many cases involving business issues, including compe-

18. On the importance of professional bodies in disseminating antitrust policy information and fostering debate about competition issues, see William E. Kovacic, *Creating Competition Policy: Betty Bock and the Development of Antitrust Institutions*, 66 ANTITRUST L.J. (forthcoming 1997).

19. See ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 468-72 (4th ed. 1994) (discussing the judiciary's role in elaborating antitrust standards in the United States); Thomas M. Kauper, *The Justice Department and the Antitrust Laws: Law Enforcer or Regulator?*, 35 ANTITRUST BULL. 83, 90 (1990) ("Antitrust has a large cast. The central role is played by the federal courts and, more particularly, the Supreme Court of the United States").

tition policy disputes. Episodes of corruption or misconduct involving federal judges are exceedingly rare. Both the government and the business community generally regard the courts as honest and fair forums for adjudicating antitrust cases.

6. Legal Process Safeguards

Western competition authorities operate by elaborate systems of procedural rules that require transparency and ensure fairness in the formation and execution of policy.²⁰ Western agencies follow long-established traditions of seeking public commentary on contemplated adjustments in enforcement policy.²¹ Antimonopoly agency personnel also are bound by a large collection of laws that prohibit corrupt behavior and otherwise seek to remove incentives for government officials to exercise their discretion in ways that betray the public interest.²²

7. Accessibility and Availability of Business Records

Western antitrust law enforcement agencies have extensive power to compel private firms to submit records or other data for examination.²³ Compulsory process is a vital element of law enforcement in Western countries.²⁴ Although firms

20. For example, the FTC is bound by various procedural rules that seek to ensure fairness and integrity in its administrative adjudicatory activities. See ANTI-TRUST LAW DEVELOPMENTS, *supra* note 17, at 613-18 (reviewing FTC adjudication procedures). Both U.S. federal antitrust agencies must abide by transparency safeguards when settling cases. See *id.* at 618-19, 690-92 (describing procedures governing settlements by the FTC and the entry of consent decrees in antitrust cases brought by the Justice Department).

21. See Federal Trade Commission, *Staff Report of the Federal Trade Commission on Competition in the 21st Century* (May 1996) (presenting results of FTC hearings in 1995 to solicit views about appropriate adjustments in enforcement policy concerning global competition, efficiency, and innovation issues); European Commission, Green Paper on Vertical Restraints in EU Competition Policy, COM(96)721 (Jan. 1997) (EU policy paper soliciting views on possible changes in EU policies governing distribution practices) (visited Aug. 4, 1997) <<http://europa.eu.int/en/comm/dg04/entente/en/96721en.htm>>.

22. See, e.g., 5 C.F.R. § 2635.202 (1997) (limiting the receipt of gifts by U.S. government officials); 5 C.F.R. § 2635.402 (1997) (addressing financial conflicts of interest involving U.S. government officials); 5 C.F.R. § 2635.801 (1997) (restricting outside activities by U.S. government officials).

23. See ANTI-TRUST LAW DEVELOPMENTS, *supra* note 17, at 664-76 (describing the Justice Department's information-gathering powers in antitrust matters).

24. See generally Symposium, *Twenty Years of Hart-Scott-Rodino Merger En-*

sometimes destroy or conceal data subject to legitimate government requests, episodes of such misconduct seem to be relatively uncommon. Having a legal tradition by which government information requests ordinarily are honored, subject to occasional challenge and review before the courts, greatly facilitates effective law enforcement. The development of sophisticated accounting and information systems within companies also increases the likelihood that data provided in response to compulsory process requests will supply a meaningful perspective on the operation of the firm.

8. Political Environment Conducive to Market Processes

Competition agencies in Western countries operate in a political environment where price controls, public ownership of enterprises, and government controls on the entry of new firms are exceptional rather than routine. In most Western countries, competition authorities enjoy the benefit of a broadly-based political and social presumption that rivalry among private enterprises is the best guarantor that consumers will receive "fair" prices, satisfactory quality, and adequate information on which to base purchasing decisions. Western economies sometimes depart substantially from reliance upon market processes, and competition authorities in these countries devote resources to discouraging government intervention that substitutes central direction for business rivalry as the organizing force in the economy. Nonetheless, compared to their transition economy counterparts, Western competition authorities are compelled to spend considerably less energy defending the basic premises of a market system.

B. Expectations About the Speed of Implementation: Perspectives from Western Experience

Western technical assistance programs usually underestimate the effort required to establish new competition systems. This miscalculation results partly from a tendency to forget the time and effort required for new competition institutions to

forcement, 65 ANTITRUST L.J. 813 (1997) (articles discussing the operation of the U.S. premerger notification mechanism and the importance of mandatory information disclosure requirements for U.S. merger enforcement).

take root in many Western countries. Western advisors and the donors who fund them sometimes appear to assume, at least implicitly, that transition economy governments can build in a few years institutions which Western countries required decades to establish as effective law enforcement bodies.

Studying the experience of well-established market economies in creating new competition systems would help Western advisors develop realistic expectations for their transition economy clients. The United States provides an informative illustration. Early government enforcement of the Sherman Act²⁵ encountered ominous judicial resistance and suffered from executive branch indifference. In 1895, in its first interpretation of the Sherman Act, the Supreme Court handed the Justice Department a stunning defeat in *United States v. E.C. Knight Co.*,²⁶ which threatened to eviscerate the statute's ban against monopolization.²⁷ The government did not achieve Supreme Court victories in applying the Sherman Act's prohibitions against agreements in restraint of trade²⁸ and monopolization²⁹ until 1897 and 1904, respectively.³⁰

More striking is the turbulent beginning of the FTC, whose independent status often is proposed by Western advisors as a model for transition economy competition enforcement bodies. Formed in 1914, the Commission was afflicted from the start by insipid leadership. Louis Brandeis, the FTC's

25. 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1994)).

26. 156 U.S. 1 (1895).

27. In *Knight*, the Supreme Court rejected the government's challenge to a series of mergers that combined 98% of the country's sugar refining capacity. The Court ruled that "manufacturing" was not "commerce" under the statute and the Sherman Act thus did not apply to the mergers. 156 U.S. at 12. Commentators interpreted *Knight* to permit mergers to monopoly in manufacturing industries. See ALFRED D. CHANDLER, JR., *THE VISIBLE HAND* 333 (1977). The outcome in *Knight* pleased the head of President Grover Cleveland's Justice Department. In a letter to a friend, Attorney General Richard Olney said "[y]ou will observe that the government has been defeated in the Supreme Court on the trust question. I always supposed it would be, and have taken the responsibility of not prosecuting under a law I believe to be no good" ALAN NEVINS, *GROVER CLEVELAND: A STUDY IN COURAGE* 671 (1932).

28. 15 U.S.C. § 1.

29. *Id.* at § 2.

30. In two cases involving railroads, the Supreme Court struck down a horizontal price-fixing agreement under § 1 of the Sherman Act in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 341-42 (1897), and invalidated a merger under § 2 of the statute in *Northern Securities Co. v. United States*, 193 U.S. 197, 325-54 (1904).

chief architect, called President Woodrow Wilson's early appointments to the agency "a stupid administration."³¹ The Commission's inability to pursue a substantial antitrust program in its first decade led contemporary observers to view the agency as ill-suited to perform a useful competition policy role.³²

In the few instances in which the Commission used its powers aggressively, it encountered hostility in Congress and the federal courts. In the early 1920s, Congress condemned the FTC for issuing a study that accused the nation's largest meatpackers of various anticompetitive acts.³³ Congress threatened the FTC's existence and withdrew its jurisdiction to address competition concerns involving meatpackers.³⁴ The episode demonstrated the political hazards to a new competition policy institution of using its authority to challenge politically powerful economic interests.³⁵

The most sobering feature of the FTC's early experience was its unwelcome reception in the courts.³⁶ The FTC was the federal government's second independent regulatory commission,³⁷ an innovation in public administration that combined functions previously dedicated to the executive branch, the judiciary, and the legislature. In Section 5 of the Federal Trade Commission Act,³⁸ Congress gave the agency a broad mandate to proscribe "unfair methods of competition"³⁹ and intended that the FTC use a broad mix of policymaking tools, including

31. Arthur S. Link, *WOODROW WILSON AND THE PROGRESSIVE ERA 1910-1917*, at 74 (1954).

32. *See id.* at 75.

33. *See* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 *TULSA L.J.* 587, 623-25 (1982) (discussing congressional reaction to the FTC's meatpacking investigation and report).

34. *Id.* at 624.

35. *See* E. PENDLETON HERRING, *PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST* 118 (1936) (congressional reaction to the FTC's meatpacking study provided "a concrete illustration of the political and administrative problems involved in attempting to regulate a powerful industry").

36. *See* Kovacic, *supra* note 33, at 611-16 (discussing pattern of FTC defeats in the federal courts in the 1910s and 1920s).

37. The Interstate Commerce Commission, created in 1887, had been the first.

38. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified at 15 U.S.C. §§ 41-58 (1994)).

39. 15 U.S.C. § 5. The aims of Congress in adopting this provision are analyzed in Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 *B.C. L. REV.* 227, 231-38 (1980).

administrative adjudication and the publication of reports, to establish new principles of competition policy.⁴⁰

Ambitious congressional expectations about the FTC's competition policy role were soon dashed in the courts. In its early years, the FTC received little sympathy from a federal judiciary that found scant evidence of superior expertise in the Commission's sketchy opinions and otherwise begrudged vesting broad adjudication responsibilities in the new institution.⁴¹ From the early 1920s through the mid-1930s, the federal courts issued decisions that severely limited the FTC's power to define new standards of commercial conduct, to compel the production of business records, and to impose remedies to restore competition.⁴² Not until the 1960s, fully fifty years after the Commission's creation, did the FTC obtain Supreme Court rulings that clearly sustained the broad grant of policymaking authority embodied in the 1914 statute.⁴³

An important lesson from Western experience is that creating new competition policy institutions can be a difficult, gradual process, particularly where the institutions alter the government's political structure and redistribute power among government bodies. Forming new entities for public administration is difficult under the best of circumstances, much less in an environment lacking the supporting institutions—such as well-established professional associations, a broad reservoir of relevant substantive expertise and research, and deeply-in-

40. Senator Francis Newlands, one of the chief sponsors of the FTC Act, observed during the legislative debates on the statute that it was "expected that as a result of investigation and as a result of long experience [the Commission] will build up a body of information and of administrative law that will be of service not only to them but to the country itself, and that gradually standards will be established that will be accepted and will constitute our code of business morals." 51 CONG. REC. 11083 (1914) (statement of Senator Newlands).

41. See CARL MCFARLAND, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION, 1920-1930*, at 92-99 (1933) (describing how federal courts embraced restrictive interpretations of the powers of the FTC). McFarland's study shows that the ICC faced similar judicial opposition when it sought to perform its assigned adjudicatory responsibilities. *Id.* at 102-24. The FTC's poor record in the courts was attributable partly to its failure to provide well-reasoned rationales for its decisions. See GERARD C. HENDERSON, *THE FEDERAL TRADE COMMISSION: A STUDY OF ADMINISTRATIVE LAW AND PROCEDURE* 334 (1924).

42. See Kovacic, *supra* note 33, at 611-16 (describing judicial decisions from 1920 through 1934 that narrowed the FTC's authority).

43. See *id.* at 616 & n.143 (describing Supreme Court decisions in the 1960s that adopted a more expansive view of the FTC's authority).

grained traditions that favor market processes—that help a new competition agency prosper. It is difficult to imagine that transition economy governments could significantly improve upon the timetable by which new competition bodies have taken shape in Western countries.⁴⁴

II. OBSTACLES TO IMPLEMENTATION IN TRANSITION ECONOMIES

Most transition economy competition laws are breathtaking in their complexity and scope. New transition economy statutes often include the full range of antitrust prohibitions found in Western systems,⁴⁵ and many laws curb business torts, misappropriation of intellectual property, deceptive advertising, and fraudulent market practices.⁴⁶ The impulse to do everything at once results from pressure from donor organizations and foreign advisors who think it best to build a comprehensive framework from the start, and from fears the transition country reformers will have one chance to get the law

44. I have used the example of the United States, but the antitrust histories of Australia and Canada also would demonstrate the point. Australian antitrust policy originated in 1906 with a law aimed at foreign producers of agricultural equipment. Early judicial rulings rendered the measure ineffective. Antitrust policy in Australia remained dormant for decades. In the 1960s the government required the registration of restrictive business practices, and in 1974 Australia adopted its current law, the Trade Practices Act. See Roger A. Boner & Reinald Krueger, *The Basics of Antitrust Policy: A Review of Ten Nations and the European Communities* 41-42 (World Bank Technical Paper No. 160, 1991). Canada enacted an antitrust law in 1889, but enforcement under the statute was infrequent and ineffective until passage of a new statute in 1986. See Michael J. Trebilcock, *The Evolution of Competition Policy: A Comparative Perspective*, in *THE LAW AND ECONOMICS OF COMPETITION POLICY* 1, 3 (Frank Mathewson et al. eds., 1990); Paul Collins & D. Jeffrey Brown, *National Antitrust Laws in a Continental Economy: A Comparison of Canadian and American Antitrust Laws*, 65 *ANTITRUST L.J.* 495, 497-503 (1997).

45. See *supra* notes 7-8 and accompanying text.

46. See Capelik & Slay, *supra* note 7, at 68-69 (describing responsibility of Russia's antimonopoly agency for monitoring protection of intellectual property rights and implementing measures to protect consumer rights); William E. Kovacic & Robert S. Thorpe, *Antitrust and the Evolution of a Market Economy in Mongolia*, in *DE-MONOPOLIZATION AND COMPETITION* 107, 100-01 (describing consumer protection and intellectual property provisions of Mongolia's antimonopoly law); Adam Torok, *Competition Policy and De-monopolization in Hungary After 1990*, in *DE-MONOPOLIZATION AND COMPETITION* 24, 34 (describing consumer protection duties of Hungary's Office of Competition); Roger W. Mastalir, *Regulation of Competition in the "New" Free Markets of Eastern Europe: A Comparative Study of Antitrust Laws in Poland, Hungary, Czech and Slovak Republics, and their Models*, 19 *N.C. J. INT'L L. & COMM. REG.* 61, 74-75, 81-82 (1993).

right and therefore should include everything the first time around. Execution of the ambitious legal commands usually is entrusted to a new agency having none or few of the institutional advantages of the Western countries on whose laws and regulations the transition country's statute was modelled.

It is foolish to devise substantive legal commands without accounting for the environment in which the commands will be applied. Law drafters must make reasonable assumptions about the current adequacy of institutions whose functioning is essential to implementing the new legal commands. Where the requisite institutions do not exist or are feeble, competition agency enforcement programs will be unsustainable if they outrun the development of supporting institutions.

A. *Unfavorable Initial Conditions*

Transition economy competition laws often are enacted in circumstances that make it difficult for a new antitrust agency to implement the statute's commands in a way that promotes economic growth.⁴⁷ Several initial conditions of the typical reform environment impede the emergence of effective competition policy systems in transition economies.

1. Resource Austerity

Most transition economy governments have few resources to fund new competition agencies. The leadership and professional staff often are paid meager wages, making it difficult for the agency to retain skilled employees.⁴⁸ New enforcement institutions depend on assistance from foreign donors to acquire suitable office space and purchase basic office equipment such as telephones, fax machines, copiers, and computers. Developing a rudimentary communications and information processing network for a new antimonopoly service can cost

47. See Boner, *supra* note 8, at 40 (observing that "in many reforming economies, market mechanisms and institutions may be absent or otherwise less effective."); A.E. Rodriguez & Malcolm Coate, *Limits to Antitrust Policy for Reforming Economies*, 18 HOUSTON J. INT'L L. 311, 338-45 (1996).

48. See William E. Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U. J. INT'L L. & POLY 437, 441-43 (1996) [hereinafter Kovacic, *Competition Policy Entrepreneur*] (discussing low wages paid to employees of transition economy competition agencies).

\$80,000 to \$100,000.

The Antimonopoly Service of the Republic of Georgia provides a useful example. Established by presidential decree in 1992 as a department of the Ministry of the Economy and reconstituted by statute as an independent agency in 1996, the Antimonopoly Service (AMS) currently operates out of a single, unheated room in a government office building in Tbilisi. Some 65 staff members rotate in and out of the cramped quarters, which contain a few desks, chairs, and a single computer. The national government has promised to relocate the AMS to larger office space in Tbilisi, and two foreign donors have committed themselves to supply additional office equipment. Until these promises are fulfilled, the new agency's ability to function effectively will be severely hampered.

2. Limited Indigenous Substantive Expertise

New transition economy agencies do not enjoy a vast pool of specialists with academic training or practical experience in the law or economics of competition policy.⁴⁹ At best, a new agency can hope to start with a handful of professionals with relevant expertise who can guide the activities of colleagues who are completely new to the area. A new agency will be forced to devote great effort to training the professional staff and coping with whirlwind turnover as private sector employers recruit agency lawyers and economists who have acquired some familiarity with the legal and economic framework of a market economy.

3. Frail Academic Infrastructure

The scarcity of competition policy expertise results substantially from the absence of an academic infrastructure that teaches students about competition policy and generates research that informs government decisions. Universities in many transition economies have only begun to retool their curricula to incorporate market-oriented courses, hire instructors who understand the new fields, and produce teaching materials in the host country's language. The establishment of

49. See *id.* at 452-60 (discussing limited background of many transition economy antimonopoly employees in law and economics of competition policy).

a market-oriented academic system will proceed slowly where incumbent faculty members and administrators oppose changes that will liquidate intellectual capital invested in mastering the theory and practical techniques of a central command and control economy. In many instances, the most expeditious and effective path for training the next generation of scholars, teachers, and public administrators will consist of sending promising candidates for graduate training in Western universities.

4. Weak Professional Associations and Consumer Groups

Transition economies usually lack strong networks of professional associations and consumer groups through which information about the content and process of a new legal regime ordinarily is disseminated in Western countries. In the early stages of the transition process, there will be few indigenous lawyers with knowledge of business law. In the pre-transition period, bar associations, other professional bodies, and consumer groups often were instruments of political control rather than independent forums for analyzing and debating legal developments. The transformation of bar associations and other professional groups into strong networks for assimilating and distributing information about competition policy will take place only gradually over time.

5. Deficient Judicial Systems

The courts in most transition economies are inadequate forums for resolving business disputes. Few transition economy judges have any familiarity with market-oriented legal principles, much less an awareness of basic industrial organization concepts that underpin competition policy.⁵⁰ Courts in transition economies also are beset by extraordinary delays and irregularities in processing cases.⁵¹ Some judicial systems are

50. Some noteworthy exceptions exist. See William E. Kovacic, *Competition Policy, Economic Development, and the Transition to Free Markets in the Third World: The Case of Zimbabwe*, 61 ANTITRUST L.J. 253, 261-63 (1992) [hereinafter *Zimbabwe*] (describing aspects of Zimbabwe's judiciary and commercial law jurisprudence that would facilitate implementation of a competition policy system).

51. See Sergio Garcia-Rodriguez, *Mexico's New Institutional Framework for Antitrust Enforcement*, 44 DEPAUL L. REV. 1149, 1177 (1995) (observing that Mexico's "judicial system is perceived by many as plagued with considerable de-

deeply infected with corruption, and outcomes in litigated disputes often hinge on the payment of bribes to judges and court administrators.

A new competition system can compensate for these deficiencies partly by trying to minimize participation by the existing judiciary in the application of the law. This can be accomplished by giving the competition agency's decisions the force of law and allowing affected parties to stay the operation of the agency's orders only by appealing them to a higher tribunal. A second approach is to create a special competition policy tribunal or business court to hear antitrust disputes. A third method is to establish special divisions within the existing judiciary to handle antitrust matters. In no event can (or should) the judiciary's involvement be eliminated, and all judicial participants in resolving antitrust cases—including members of special antimonopoly tribunals or business courts—will require training. The urgency to provide training is especially acute where the competition law provides a private right of action to enforce the statute.⁵²

6. Inadequate Limits on Administrative Discretion

The discretion of government agency decisionmakers in transition economies seldom is confined by the collection of rules that promote transparency, ensure fairness, and suppress corruption in public administration in Western countries. Public officials in transition economies often operate with broad grants of discretion and have no obligation to submit contemplated or completed policy actions for public review and commentary. Conflict of interest restrictions are relatively rare, and small salaries induce many civil servants to accept second jobs to supplement their government incomes. New competition

lays, institutional corruption and a lack of independence"); see also generally JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN (Malcolm Rowat et al. eds., World Bank Technical Paper No. 280, 1995); John Bentley, "Egyptian Legal and Judicial Sector Assessment" (1994: Report prepared for the U.S. Agency for International Development).

52. Some transition economy competition laws allow private parties to enforce antitrust prohibitions directly in the courts. See William E. Kovacic, *Recommended Action Plan for Implementing Georgia's Antimonopoly and Consumer Protection Laws* 10 (Center for Economic Policy and Reform, Analytical Report No. 9: May 1997) [hereinafter *Recommended Action Plan*] (describing private cause of action under Georgia's antimonopoly law).

agencies in transition economies sometimes find themselves attempting to develop not only new substantive principles of law, but also acting as test beds for procedural codes that promote honest public administration.⁵³

7. Strong Political Opposition to Economic Reform

Transition countries typically contain powerful political forces that wish to retard the development of a market system and to impede the dismantling of government and business institutions that centralized economic power in the state.⁵⁴ Anti-reform constituencies can apply strong pressure on a new antimonopoly agency to pursue an enforcement agenda that reduces growth and otherwise inhibits economic liberalization.

Debilitating political opposition emerges from two major sources. The chief anti-reform impulse flows from state-owned enterprises and the government ministries that oversee their operations.⁵⁵ With prodding from organizations such as the World Bank and the International Monetary Fund, transition governments have adopted measures to diminish state ownership of business enterprises and establish a legal regime favoring private entrepreneurship. Despite such initiatives, relatively few transition governments have substantially reduced the role of state-owned firms in their economies.⁵⁶ Government ministries and state-owned firms that derived economic and political benefits from central planning have waged effective

53. See Roger A. Boner & William E. Kovacic, *Antimonopoly Policy in Ukraine*, 31 GEO. WASH. J. INT'L L. & ECON. (forthcoming 1997) (describing creation of a "codex" of administrative procedures for the Ukraine Antimonopoly Committee).

54. See Kovacic, *Competition and Consumer Protection Reforms*, *supra* note 4, at 1203-05; Kovacic, *Competition Policy Entrepreneur*, *supra* note 48, at 439-41.

55. Vladimir Capelik and Ben Slay identify strong resistance by state-owned enterprises and state ministries to market reforms in Russia and offer the following assessment of prospects for competition policy: "Further progress in Russian competition policy may . . . require the creation of a different political context, in which reformers will not be chronically overmatched against large state enterprises that use market and political power to resist privatization, restructuring, and market competition." Capelik & Slay, *supra* note 7, at 84.

56. One influential study by the World Bank offers the following assessment: "Despite more than a decade of divestiture efforts and the growing consensus that governments perform less well than the private sector in a host of activities, state-owned enterprises (SOEs) account for nearly as large a share of developing economies today as twenty years ago." WORLD BANK, BUREAUCRATS IN BUSINESS: THE ECONOMICS AND POLITICS OF GOVERNMENT OWNERSHIP 1 (1995).

campaigns to resist implementation of market-oriented economic reforms. One should not underestimate their incentive and ability to oppose liberalization measures, including efforts by a new competition agency to enforce nominal prohibitions against government discrimination against private entrepreneurs.

A second source of political opposition comes from domestic producers who want the government to adopt protectionist policies that tighten restrictions on imports. As trade barriers are reduced, low-cost imports will capture sales from high-cost domestic suppliers. In many transition economies, import competition generates demands from domestic producers that the antimonopoly agency bring predatory pricing or anti-dumping suits against importers.

8. Unrealistic Expectations About Competition Policy

The creation of transition economy competition systems often coincides with the relaxation of central controls over prices. The public and elected officials may perceive the antimonopoly law as insurance against higher prices in the post-decontrol period.⁵⁷ Price increases that follow the government's formal decontrol of prices can arouse social demands that the competition agency subject "monopolist" producers to price ceilings. Some transition economy antitrust laws allow the competition agency to set prices for dominant firms,⁵⁸ and the competition agency may encounter strong pressure to use this authority widely to recreate the type of pricing limits that prevailed during the era of planning. A competition agency that lacks formal power to set price limits for dominant firms nonetheless may face demands that it use its enforcement authority to roll back prices.⁵⁹

57. See Ana Julia Jatar, "Competition Policy in Latin-America: The Promotion of a Social Change" 12 (Jan. 1995) (paper by the former head of Venezuela's competition agency discussing "exaggerated expectations by the political system and by public opinion about what can be reasonably expected" in transition economy competition policy: noting that "inflation is usually confused with monopoly pricing and pressures exist on the agency to punish companies for raising prices").

58. See Capelik & Slay, *supra* note 7, at 70-76 (explaining operation of Russia's monopoly register); Boner, *supra* note 8, at 48-49 (describing transition economy antitrust laws that allow the competition agency to control prices for monopolists).

59. See Jatar, *supra* note 57, at 14 (in many transition economies, new com-

9. Institutional Novelty

Western advisors often propose that transition economies create independent competition authorities that have no links to existing government ministries.⁶⁰ The requisite independence most often is to be achieved by creating a new commission modeled along Western lines and possessing the power to issue binding decisions subject to judicial review. In principle, this structure promises to be the most effective enforcement mechanism. Independence gives the new agency a single-minded focus on promoting competition. By divorcing the agency from government bodies that oppose or are indifferent to reform, independence provides a sturdier platform for challenging government impediments to competition.

In practice, one should not underestimate the problems associated with creating a new "independent" government institution. This is particularly true where the new competition agency assumes an institutional form, such as an independent regulatory commission, that lacks a predecessor in the transition economy's structure of government. In no case can one reasonably expect existing government bodies to cede power willingly to the new competition authority. Consistent with experience with public institution innovations in Western countries, a new institution is unlikely to be incorporated into the transition economy government without friction. The inherent fragility of a new institution should be taken into account in deciding how ambitious an enforcement agenda the new agency should be asked to execute amid inevitable resistance from other government bodies who regard the agency as a threat.

10. Weak Access to Antitrust-Relevant Business Data

In August 1996, during a conference in Lima on competition policy in Latin America, experts from Western competition agencies showed a video produced by the European Union that recreated a visit by EU antitrust officials to the premises of a

petition agencies "are under high political pressure to act against price increases, something they are not empowered or designed to do").

60. See R. Shyam Khemani & Mark A. Dutz, *The Instruments of Competition Policy and Their Relevance for Economic Development*, in *REGULATORY POLICIES AND REFORM*, *supra* note 8, at 16, 28 (suggesting that "[t]he competition agency should be independent and insulated from political and budgetary interference").

corporation. In the video, the EU officials arrive at the firm's office and present a document identifying records that the antitrust officials wish to inspect. A business manager briefly examines the document and soon leads the EU investigators to a filing room. The investigators examine the records, make copies of some items, offer a cordial farewell to the business manager, and leave the offices. The video's dramatization was designed to suggest the role that document requests play in Western competition enforcement, and to provide a glimpse of how such document requests are carried out.

For the Latin American competition agency officials in the audience, or for antitrust agencies in most transition economies, the EU video presented an alien reality in which enforcement agency access to business records is routine and relatively frictionless. New competition agencies in transition economies seldom will enjoy ready access to business data needed to prove that antitrust prohibitions have been violated. In some instances, business managers in many transition economies simply will refuse to respond to compulsory process requests, or may assert falsely that the information demanded does not exist. Many transition countries lack smoothly functioning judicial systems that expeditiously review and enforce compulsory process requests. It may take years of litigation for the new competition agency to establish its right to obtain business records and to convince businesses that the country's courts will sustain the use of compulsory process and punish efforts to conceal or destroy records subject to a document request. At least in the early years of a new competition agency's operations, compulsory process is likely to be an unreliable tool for obtaining important business records.

Weak access to business data has important implications for a competition agency's choice of enforcement initiatives. Most competition laws in Western countries and transition economies prohibit agreements among competitors to fix prices or restrict output.⁶¹ To enforce a ban on collusion by competitors, an antitrust agency first must prove that the challenged conduct results from collective action.⁶² In some transition

61. See Boner & Krueger, *supra* note 44, at 50-53 (describing the treatment of horizontal restraints); Boner, *supra* note 8, at 42-43 (describing transition economy horizontal restraints prohibitions).

62. See William E. Kovacic, *The Identification and Proof of Horizontal Agree-*

countries, evidentiary standards may require the introduction of a writing to establish the fact of concerted conduct.⁶³ Other countries that allow competition agencies to introduce spoken communications to prove the fact of concerted action may not permit the expansive use of surveillance techniques, such as wire tapping, that have become indispensable to the prosecution of covert collusive schemes in the United States.⁶⁴ Difficulties in obtaining documentary records that reveal an agreement or in introducing evidence of a spoken exchange of assurances may impede the transition economy competition agency's enforcement of prohibitions on horizontal restraints.

For some types of antitrust cases, gaining access to business records will not necessarily improve the competition agency's ability to detect and prosecute violations of the competition law. Even when a firm complies voluntarily with a competition agency's information request, the firm's records may shed little light on market conditions or the firm's competitive position. In many state-owned firms or recently privatized entities, internal accounting data and other business records offer no economically meaningful perspective on the firm's activities. Few enterprises, especially state-owned firms, maintain financial accounts that conform to internationally recognized standards or compile strategic plans, market analyses, or competitor assessments of the type or quality that Western competition agencies routinely use to decide whether to prosecute.

The recent successful challenge by the FTC to the merger of Staples, Inc. and Office Depot, Inc.⁶⁵ illustrates the point. The FTC's case and the district court's decision relied heavily on internal company documents in which officials of Staples

ments Under the Antitrust Laws, 38 ANTITRUST BULL. 5, 7 (1993) (describing the importance to horizontal restraints enforcement of demonstrating that the conduct at issue results from concerted action rather than unilateral behavior).

63. See Capelik & Slay, *supra* note 7, at 65-66 (explaining that Russian courts have ruled that the country's competition agency can sustain a claim of illegal collusion under the antimonopoly law only if the agency produces "written documents unambiguously proving the existence of an agreement").

64. See Judy Whalley, *Priorities and Practices—The Antitrust Division's Criminal Enforcement Program*, 57 ANTITRUST L.J. 569, 571 (1988) (describing Justice Department's increased use of wiretapping and electronic surveillance to gather evidence for price-fixing prosecutions).

65. *Federal Trade Commission v. Staples, Inc.*, Civ. No. 97-701 (TFH), 1997 U.S. Dist. LEXIS 9322 (D.D.C. June 30, 1997) (granting preliminary injunction).

discounted the competitive influence of retailers such as Wal-Mart, indicated that office "superstores" constituted a distinct product market, and said that Staples enjoyed considerable discretion to raise prices in geographic areas containing no other office superstore.⁶⁶ Without these "hot documents," the FTC is unlikely to have attacked the transaction. The Commission also built its case on econometric estimates of the merger's price effects. The raw material for the econometric analysis consisted of data that the merging parties compiled on a weekly basis for an 18-month period covering over 400 Staples stores located in more than 40 cities.⁶⁷

In most transition economies, competition authorities in the short and medium term seldom will be able to build cases on internal business records that helped the FTC analyze the Staples transaction. Many transition economy companies today lack internal market assessments and strategic plans because there was no need to prepare such materials in the era of planning. Many companies still use pre-reform accounting systems that do not accurately measure the firm's financial condition or economic performance.

Where companies produce marketing studies or accounting data pursuant to a discovery request, the competition agency may find that the firm's assessment of industry conditions distorts rather than clarifies the state of competition. During a trip to Georgia in 1996, I participated in an interview with the manager of a state-owned firm that distributes fertilizers. The manager gave a glowing and, it seemed, sincere assessment of his firm's capital stock, its research and development capability, and its sales force. He said no new entrant could overcome the incumbent's advantages and survive in the same market. Our own research suggested that his firm's physical capital was decrepit and its human resources were not unique. With modest investment, a new entrant could capture substantial sales. An internal market study that committed the state-

66. See *Staples*, 1997 U.S. Dist. LEXIS 9322, at *38; see also *Hogan's Heroes*, CORPORATE CONTROL ALERT 5 (July/Aug. 1997) (describing the proceedings in the *Staples* preliminary injunction case).

67. See Jonathan B. Baker, *Econometric Analysis in FTC v. Staples*, 1997 ABA SEC. ANTITRUST L. REP. 6-7 (presentation before the Economics Committee of the ABA Section of Antitrust Law, Washington, D.C.) (describing FTC's use of econometric analysis in developing and prosecuting the *Staples* case).

owned enterprise manager's buoyant assessment of his firm's position to paper would offer Georgia's Antimonopoly Service a misleading view of the industry.

In time, firms in transition economies will generate meaningful accounting data and will prepare informative analyses of the market. The shift to a market system will introduce pressures (including competition from new entrants and monitoring by investors) that compel firms to measure firm activity accurately and to monitor and evaluate market developments carefully. Improvements in firm-level accounting systems and market analysis will unfold over a period of years. Until that happens, new competition agencies cannot expect that even unfiltered access to a company's records will routinely provide useful material for evaluating business behavior and developing cases.

11. Uncertain Donor Support

Transition economies cannot count on foreign donors to provide sustained assistance to support the implementation of competition policy systems whose creation the same foreign donors advocated. Foreign donors often display short attention spans, and their commitment to supporting implementation of new, market-oriented laws is unpredictable and intermittent.⁶⁸ A new antitrust agency cannot assume it will receive substantial foreign assistance to build the institutional prerequisites for executing its law enforcement duties.⁶⁹ This compels the competition agency to devise internal, self-sustaining mechanisms to perform training and other activities needed to create and preserve institutional capability.

68. See Kovacic, *Competition Policy Entrepreneur*, *supra* note 48, at 446 (describing how the U.S. Agency for International Development's termination of technical assistance to Mongolia's antimonopoly program retarded implementation of Mongolia's antimonopoly law).

69. Such assistance sometimes is forthcoming in the form of long-term, in-country programs by which donors place Western antimonopoly experts inside transition economy antimonopoly agencies. See Kovacic, *Competition and Consumer Protection Reforms*, *supra* note 4, at 1218-20 (describing benefits of long-term, in-country technical assistance).

B. *Understanding the Requirements of a Competition System*

A review of initial conditions reveals the true magnitude of the challenge confronting transition economies that desire to create an effective competition policy system. Correctly understood, the establishment of a competition policy system in a transition setting involves four major tasks, each of which may require substantial changes in the country's economic, political, and social environment. The transition economy must:

- Create a new enforcement institution, equip it with adequate physical and human capital, and develop an agenda that promotes economic liberalization and can withstand political opposition;
- Establish new administrative procedures that control the discretion of public officials;
- Increase the business law acumen, administrative efficiency, and honesty of the courts; and
- Build collateral institutions, such as universities and professional associations, that support the operation of the competition policy system.

In short, the development of a competition policy system involves not only the formation of a new enforcement institution (sometimes a public administration innovation such as an independent commission) but also requires a transformation of the country's courts, the establishment of a new body of administrative law, and the formation of other institutions of civil society that determine the effectiveness of the rule of law.

III. DRAFTING AND IMPLEMENTING A MANAGEABLE LAW

The appropriate cure for the mismatch between ambitious substantive commands and frail institutional capabilities is to embrace a gradualist policy that rolls out a competition policy system in phases.⁷⁰ One way to do this is to begin with an

70. On the possibilities of implementing a competition policy program in phases, see Kovacic, *Zimbabwe*, *supra* note 50, at 258-65 (describing phased approach for creating a competition program for Zimbabwe); ZIMBABWE MONOPOLIES COMMISSION, *STUDY OF MONOPOLIES AND COMPETITION POLICY IN ZIMBABWE* 95-104 (Sept. 1992) (presenting plan for phased implementation of a competition program in Zimbabwe).

austere law that emphasizes the establishment of implementing institutions, promotes competition advocacy, and imposes few enforcement duties. The austere law can be augmented over time with more expansive enforcement commands as the requisite institutional capabilities are developed. Experience in several transition economies suggests that it is unnecessary to pack everything into the original competition statute, and that later legislative enhancements are feasible.⁷¹ A second approach is to include a comprehensive set of commands in the original statute, but provide that the enforcement of such commands be introduced gradually over time to allow the institutional foundations for the competition policy system to be established first.

Whichever approach is taken, implementation concerns warrant careful attention throughout the design of a new competition law. The drafting of a law should follow efforts to study the major sources of market failure and to identify distinctive institutional conditions that affect the choice of strategies for correcting such failures.⁷² At each step of the law drafting process, the host country and its foreign advisors should reveal and defend their assumptions about how the new legal commands will be put into effect.

A. *The First Phase of Implementation: Institution-Building*

Whether adopted by a series of legislative measures or specified in a single original enactment, a gradualist approach would have two phases. The first phase would focus on five tasks: establishing the competition policy agency, carrying out an education and publicity program for the new competition policy system, formulating a substantive research agenda,

71. See Boner & Kovacic, *supra* note 53 (discussing the gradual amendment and legislative elaboration of Ukraine's antimonopoly law); Kovacic, *Recommended Action Plan*, *supra* note 52, at 3-4 (reviewing Georgia's progression from a presidential decree on competition policy to legislative adoption of new competition and consumer protection laws).

72. See Kovacic, *Competition and Consumer Protection Reforms*, *supra* note 4, at 1202-14 (discussing importance of studying existing transition economy conditions as basis for drafting new laws); Spencer Weber Waller & Rafael Munte, *Competition Law for Developing Countries: A Proposal for an Antitrust Regime in Peru*, 21 CASE W. RES. J. INT'L L. 159, 165 (1989) (concluding that "a sophisticated political and economic analysis of the activities carried out by the enterprises in a national economy is an important aid in designing competition legislation for that country").

initiating a competition advocacy program, and enhancing the capability of collateral institutions that are important to implementing substantive legal commands.

1. Establishing the Competition Agency

The chief priority for the first phase of implementation is to build the competition agency. Building the agency has several dimensions.

a. Recruiting and Training the Professional Staff

The new agency must begin by acquiring the human capital to do its job well. The initial aim should be to hire a small number of capable professionals with exposure to the law or economics of competition law. The new agency need not begin with a large complement of personnel. Transition economy officials such as Beatriz Boza (Peru), Anna Fornalczyk (Poland), Ana Julia Jatar (Venezuela), Vazha Maisuradze (Georgia), and Alexander Zavada (Ukraine) have shown that it is possible to build a new competition agency around a small number of carefully chosen professionals and use the core team to oversee the expansion and training of the agency's staff.⁷³

An important and sometimes overlooked need is to hire a small number of attorneys with litigation experience and a sound knowledge of administrative law and civil procedure. Particularly in its early years, a competition agency will be required to convince the courts that its cases are procedurally sound and substantively meritorious. Soon after it is established, the agency may be forced to litigate cases involving crucial enforcement issues such as the validity of its interpretation of substantive antitrust commands, the scope of its power to compel the production of business records, and the bounds of its remedial authority. Because the outcome of the first litigated cases can have lasting effects on the agency's reputation and effectiveness, it is vital that the agency be ready to address and prevail on these issues from the very start.

Failure to attend to technical legal details could prove

73. See Kovacic, *Competition Policy Entrepreneur*, *supra* note 48, at 452-60, 469.

costly in jurisdictions, such as many civil law countries, where courts are likely to focus on irregularities in process. Some transition economy courts have extensive knowledge about administrative procedure, but few have any familiarity with market economics or an understanding of the principles underlying the operation of an antitrust system.⁷⁴ Because they are attuned to matters of process, judges reviewing antitrust matters for the first time tend to focus chiefly on an enforcement agency's adherence to procedural formalities and to ignore the merits of a case.⁷⁵ In anticipating the possibility of litigation, the new competition agency would be wise to ensure that its first initiatives comply perfectly with procedural requirements and administrative formalities. Early, extensive involvement by lawyers specializing in administrative law and civil procedure is necessary to achieve this end.

The agency will need to begin immediately to increase the intellectual capital of top management and to train new employees in the concepts and practical techniques of competition law. In substance, the agency needs to undertake two types of training. The first consists of a basic introduction to the microeconomic principles and legal concepts underlying the operation of a competition policy system. The second takes the form of workshops in which the agency's professionals participate in role-playing, problem-solving exercises based on competition problems that commonly arise in the host country or transition

74. See TINEO, *supra* note 2, at 35:

The courts [in Latin America] are not prepared to administer laws of this kind. Judges are highly trained in, and take very seriously, their role of guarding against legal defects in the actions of administrative agencies, *i.e.*, they are well-placed to exert control over powers of intervention, but not to rule on the substantive aspects of competition law. In light of the history of State abuse, the courts have given preeminence to the formal over the substantive, as a means of disciplining the State and protecting individual rights and constitutional safeguards.

75. In discussing Latin America's competition policy systems, Luis Tineo emphasizes this point as follows:

Given the history of official arbitrariness and disregard for due process, the acts of the competition agencies are highly vulnerable to the application of strict legal standards. Just as the courts tend to give precedence to form over substance, so the agencies are for their part very apt to favor substance over form, with the result that efforts to ensure the proper functioning of markets are often frustrated by failure to understand the circumstances in which the law is to be enforced.

Id. at 32.

economies generally.

One means for training is for the new agency to take advantage of instruction provided by bodies such as the OECD and UNCTAD. In discussions with transition economy antitrust officials, I have found that the greatest need for training is for detailed instruction in the practical techniques—the know-how of antitrust analysis—for conducting investigations, applying a conceptual framework to the facts of an industry, and designing remedies. Managers in new antimonopoly agencies want foreign experts to describe how commonly-accepted analytical methodologies can best be applied to the typical transition economy setting of fragmented, unreliable, and often inaccessible business data, poorly developed investigation and discovery techniques, and limited expertise in antitrust law and industrial organization economics. Especially in antimonopoly offices created in the early 1990s, many professional staff members have at least a basic understanding of essential antitrust ideas such as the conceptual framework for delineating relevant markets and measuring market power. Such officials need hands-on exercises and practical protocols for putting these concepts to work in their own countries.

Foreign training programs must be supplemented with internal training exercises that draw on foreign experience and problems based upon the country's own economy. Regular internal training exercises are necessary elements of a larger effort to create self-sustaining mechanisms for enhancing analytical capability and transmitting the agency's accumulated know-how to new personnel. The likelihood of rapid turnover in the junior professional staff places a premium on the agency's ability to train newly-hired economists and lawyers. The optimal mix of training should consist of participation in:

- Training exercises organized and presented by foreign donors and competition policy organizations;
- Occasional conferences and seminars held in-country and conducted by a mix of senior antimonopoly agency officials and foreign advisors, including experts from other transition economies; and
- Regular internal training exercises conducted by agency personnel in its headquarters and regional offices.

The latter form of training should develop standardized exer-

cises the agency can revise and use repeatedly over time.

b. Obtaining Adequate Office Resources

To function effectively, a new agency requires phone, fax, copier, and computer capability, along with an information network that links its offices. Initial priority should be given to obtaining, from the national budget and foreign donors, information systems hardware and software. Internet access is a valuable tool for transition economy agencies to collect data on business developments and enforcement activity in other nations, and to inform external constituencies about their work. Foreign donors that are keen on having transition economies create new competition policy systems should incorporate funds for equipment into their technical assistance budgets from the beginning.

Sensible programs to support the acquisition of office equipment will occur only if donors collectively exercise better judgment than they have in the past about technical assistance priorities. Donors too often waste resources by providing assistance—for example, preparing comparative studies or conducting certain types of training exercises—that other donors already have supplied adequately.⁷⁶ A competition agency can buy a substantial amount of office equipment for the cost of bringing two foreign experts to town for a week of superficial seminars or fact-gathering that simply repeats the work of earlier teams of foreign advisors.

c. Organizing the Agency

The new agency must promptly create the organizational framework that will govern the allocation of responsibilities and control its flow of work. Important organizational priorities include:

- Creating operational bureaus with clearly defined responsibilities;

76. See Kovacic, *Competition Policy Entrepreneur*, *supra* note 48, at 448-50 (describing needless duplication of donor technical assistance to transition economy competition authorities).

- Developing central administrative units, including an office that oversees the training of new employees and a secretariat that collects and maintains the agency's records.
- Establishing a public affairs office to educate external constituencies about the new competition law and the agency's activities.

Priority should be given to functions for which an institutional failure might be most damaging to the agency. For example, before the agency begins collecting business records, it must institute safeguards to ensure that such records can be retrieved readily and that confidential information will not be disclosed. A lapse in such safeguards early in the agency's existence could raise fatal doubts about its competence.

d. Designing Internal Procedures

Related to constructing the agency's architecture is the creation of procedures that describe how the agency will function internally and will deal with external bodies. A crucial priority for creating internal procedures is to define, for professional staff, the process the agency will follow to approve investigations and cases. Important aspects of the agency's external procedures include statements of the responsibilities of each office of the agency and explanations of how citizens or economic agents can file complaints with the agency or otherwise make formal requests of the agency.

An additional dimension of process-oriented institution building is to establish agency policies that ensure that agency employees execute their responsibilities honorably and that the agency is perceived externally as a firm but fair champion of the nation's competition laws. The agency can serve as an important prototype for testing restrictions on conflicts of interest and other requirements that diminish opportunities for corruption and build a reputation for administrative integrity. Efforts to curb conflicts of interest and corruption—for example, by limiting outside employment—are closely related to salaries. It is better for the agency to retain a small number of capable, well paid employees than to hire a large number of staff members who will feel compelled to hold a second job.

e. Designing Guidelines and Protocols

Transition economy competition laws vary in their specificity, but most statutes contain general substantive commands and give the competition agency extensive discretion to determine whether business practices fall within the statutes' prohibitions. The laws articulate basic principles and rely on administrative rules to supply operational content. Two forms of administrative clarification will be necessary to execute individual statutory provisions in a manner that provides suitable guidance to affected parties, redresses truly harmful behavior, and does not deter desirable business conduct.

The first level of elaboration consists of presenting a conceptual framework that defines how the substantive command will be applied in practice. The competition agency in many Western countries publishes this conceptual framework as a guideline to inform the business community and its own professional staff about how the agency will exercise its discretion.⁷⁷ Transition economies should follow a similar practice.⁷⁸ The effort to prepare such guidelines forces the antimonopoly agency to understand and resolve issues associated with defining a relevant market or enforcing a ban against predatory pricing. For agencies with a mix of competition and consumer protection duties, the development of guidelines can assist the agency in attaining consistency between its competition and consumer protection policies—for example, by avoiding overly restrictive limits on advertising that raise the costs of entry and entrench the position of incumbent suppliers.⁷⁹

The second step is to translate the conceptual framework into operational criteria by which the competition authority's

77. See U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (Apr. 2, 1992) (policy statement describing the federal government's methodology for evaluating horizontal mergers), reprinted in 4 TRADE REG. REP. (CCH) ¶ 13,104.

78. See William E. Kovacic & Ben Slay, *Recommended Guidelines for Implementing Georgia's Antimonopoly and Consumer Protection Laws* (Center for Economic Policy and Reform, Analytical Report No. 8: Apr. 2, 1997) (presenting proposed enforcement guidelines for Georgia's Antimonopoly Service).

79. For a recent attempt to provide a conceptual framework that would enable competition agencies to harmonize their antitrust and consumer protection activities, see Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997).

staff can apply the framework in practice. Prepared in the form of internal agency protocols, the operational criteria would consist of methodologies, check-lists, and other highly practical guides for the staff to use in gathering and interpreting information about specific practices. For example, the agency could prepare an investigation protocol that an attorney or economist might use to determine the dimensions of the relevant market in a merger or monopolization case. The protocol would suggest questions that the staff might pose in an interview with industry participants, or identify data sources that the staff should consult.

f. **Creating an Institutional Memory**

Competition agencies must cope with substantial turnover within the top management tier and the professional staff. In a number of new agencies, the first generation of leaders and professional staff members have moved on to private sector jobs in which they appear before the competition authority or the courts on behalf of business clients. Because personnel can change frequently, it is important to develop mechanisms to ensure that valuable institutional know-how does not leave the agency with every retirement or move to a new job. Early in its existence, the agency should create manuals containing relevant laws, regulations, organizational data, policy statements, and operational protocols. The manuals should be updated regularly and made available to all new employees.

g. **Building Relationships with Foreign Competition Authorities and Donors**

A new agency can increase its effectiveness by drawing on the experiences and resources of foreign competition policy bodies. Multinational bodies such as the OECD and UNCTAD subsidize training activities and provide useful data on competition policy trends in transition economies. Individual Western competition bodies frequently supply short-term technical assistance to transition economy competition agencies, and some Western groups have funded long-term projects that place Western experts in the offices of their transition economy counterparts.⁸⁰

80. See Kathleen E. McDermott, *U.S. Officials Provide Competition Counseling*

New competition agencies should develop relationships with a wide array of Western antitrust bodies and donors. For two reasons, diversification helps increase the new antimonopoly agency's access to foreign assistance. First, because the ability of any single foreign entity to provide assistance may change over time, maintaining numerous relationships increases the prospects of receiving foreign technical assistance. Second, individual national bodies sometimes compete to gain influence in shaping foreign laws.⁸¹ Sustaining ties with several national groups can stimulate rivalry that increases the resources available to the transition economy agency.

Foreign competition authorities from transition economies can be an especially valuable resource. Far more than their Western counterparts, current and former transition economy antitrust officials can provide insights about solving the distinctive problems associated with establishing new competition institutions and developing enforcement programs in the transition environment. Participation in regional working groups or associations also can provide venues for transition economy agencies to share information on enforcement trends and to lay a foundation for cooperating in enforcement activities that address transnational competition problems.

2. Establishing an Education and Publicity Program

A central contribution of new competition agencies is to educate consumers, business leaders, and government officials about the competition policy system and help them understand the rationale for relying on market rivalry as the organizing principle for economic activity.⁸² Among other measures, the new agency should develop ties with media organizations to inform the public about the content and enforcement of the country's competition and consumer protection laws.⁸³ As not-

to *Eastern Europe*, 6 ANTITRUST 4, 4-7 (1991) (describing placement of teams of Justice Department and FTC antitrust economists and lawyers in antimonopoly agencies in Eastern Europe).

81. See Kovacic, *Competition Policy Entrepreneur*, *supra* note 48, at 448-51 (describing donor rivalry to influence design of transition economy competition systems).

82. See Jatar, *supra* note 57, at 13 (observing that "[c]hanges in conduct and attitudes must be considered one of the major goals in competition policy" in transition economies).

83. Compare Capelik & Slay, *supra* note 7, at 80 ("Despite the fact that it is

ed below, an education and publicity program can help establish the antimonopoly agency as the government's preeminent advocate for pro-competitive liberalization measures.⁸⁴

3. Formulating a Research Agenda

The new agency should begin performing research on obstacles to market rivalry. Case studies can serve valuable substantive and methodological objectives. Performing studies can enrich the agency's understanding of market phenomena that it must analyze and address in applying its enforcement powers. Case studies also serve important methodological ends. A study can be seen as an opportunity for the agency's staff to develop skills that are instrumental in investigating possible violations of the law and building cases.

Case studies deserve donor support and should be viewed as important ingredients of technical assistance. Collaboration between the agency and foreign advisors can be effective elements of the agency's training program. In performing case studies, the agency's professional staff can acquire familiarity with the analytical tools and information-gathering methodologies that will be needed to enforce the competition law.⁸⁵

4. Developing a Competition Advocacy Program

The education, publicity, and research activities provide the basis for the agency to serve as an advocate for competition throughout the government. Part of the early institution building effort is to identify (through research) the major impediments to market rivalry, including government policies that suppress competition. Well before it begins bringing cases, the

one of the most important institutions for promoting competition, [Russia's antimonopoly agency] has not worked effectively with the mass media. Indeed, information on competition policy is not provided to either the general public or outside experts in an open, transparent manner").

84. Compare Slay, *supra* note 9, at 143 ("Perhaps the [Polish] Antimonopoly Office's most important (and least-discussed) function has been the advocacy of liberal, pro-competitive solutions to economic policy problems during the Polish transition").

85. See Kovacic & Thorpe, *supra* note 46, at 89 (describing the usefulness of case studies as means for foreign experts to transmit analytical know-how and information-gathering techniques to transition economy economists and lawyers); Kovacic, *Competition Policy Entrepreneur*, *supra* note 48, at 471 (same).

competition agency can use its education, publicity, and research activities to criticize government restrictions on entry and market access. Particularly for a new agency facing severe resource constraints, advocacy provides a way to promote the adoption of pro-competitive policies without the extensive commitment of personnel that the prosecution of cases often entails.

5. Building and Enhancing Collateral Institutions

The last ingredient of the initial implementation phase is to establish and enhance collateral institutions whose effectiveness will facilitate the success of the new competition policy agency. The most important institution-building priority outside the enforcement agency is to train judges in the principles of market economics and competition law. In most transition countries, the courts will play a major role in interpreting the law's requirements and reviewing agency decisions. In some systems, the antimonopoly law allows a private cause of action as a safeguard against government agency corruption or sloth. With rare exceptions, transition economy judges lack even the most basic substantive expertise to perform this task. Unless such judges are trained early in the implementation process, there is a grave risk that they will issue perverse interpretations of the law.

A second priority is to educate and work with nongovernment organizations such as consumer groups, bar associations, and trade associations. With assistance from donors, the antimonopoly agency can give speeches and organize seminars for these groups. The agency also should develop liaison arrangements to encourage nongovernment groups to inform their constituencies about the competition law and the agency's enforcement programs.⁸⁶ Cooperation with outside organizations can also help stimulate critical discussion and debate that ultimately promotes the development of sound competition policies.

A third activity is for the antimonopoly agency to create relations with university departments in economics, business,

86. See Capelik & Slay, *supra* note 7, at 80 (urging Russia's antitrust agency to "work more closely with mass media and consumer protection organizations in the enforcement of antimonopoly law").

law, and public administration. The goal is to encourage these departments to develop competition policy courses and to interest faculty members in writing about competition issues. Over time the university community will provide employees for the agency and generate useful research about competition policy.

B. The Second Phase of Implementation: Developing a Positive Enforcement Agenda

The second phase of implementation would consist of expanding the competition agency's law enforcement responsibilities to supplement advocacy, publicity, and research initiatives. Enforcement and advocacy efforts in the second phase would have three major focal points.

1. Promoting New Business Entry

The first priority of transition economy antimonopoly enforcement should be to remove artificial obstacles to entry by new entrepreneurs, particularly where such obstacles are imposed by government bodies. Major elements of a pro-entry program would include advocacy and enforcement initiatives to prevent government ministries from imposing unjustified curbs on entry and giving discriminatory advantages to incumbent state-owned enterprises. An attractive feature of many transition economy competition laws is that their prohibitions apply to behavior by government ministries and state-owned firms and can serve to challenge a wide range of entry-limiting behavior by public instrumentalities.⁸⁷

A "government first" program to eliminate public policies that suppress rivalry has several advantages. First, government intervention is the greatest source of trade restraints in transition environments, and challenges to public entry barriers promise to yield the greatest benefits in increasing competition and improving consumer well-being.⁸⁸

Second, opposition to government interference with market processes can help the competition agency gain private sector

87. See Kovacic, *Recommended Action Plan*, *supra* note 52, at 7 (discussing Article 10 of Georgia's antimonopoly law, which forbids various forms of government conduct that diminishes competition).

88. See Kovacic & Thorpe, *supra* note 46, at 93 (describing competition-suppressing state policies in Mongolia).

support and establish the agency's credibility when it seeks the cooperation of the business community in obtaining voluntary compliance with provisions of the antimonopoly law.

Third, enforcement directed at government restraints on competition typically will pose the least difficult problems of proof for the new agency. Suspect forms of government intervention usually will involve well-documented overt acts—such as issuing a contract that includes an exclusive license—whose existence and purpose are relatively easy to establish without extensive discovery. Compared to challenging a subtle, covert price-fixing arrangement, which requires broad access to company records and the cooperation of witnesses, attacking government barriers to competition will impose fewer informational demands on the agency.

Fourth, the agency's efforts to dismantle government barriers to competition are likely to coincide most closely with what foreign donors believe to be the best form of competition policy in transition economies. Such initiatives are most likely to elicit donor support for activities (such as investments in training and equipment) needed to increase the agency's effectiveness.

Fifth, challenges to government impediments to competition can facilitate efforts to reduce corruption in public administration. Ministry decisions involving matters such as licenses, permits, and subsidies sometimes result from corrupt agreements between public officials and business managers. Transition economy antitrust provisions that deny government agencies discretion to grant or withhold certain rights and privileges in effect allow antimonopoly agencies to deny enforcement of corrupt arrangements. By preventing government ministries from delivering on their promises to exclude competitors in return for bribes, the application of the antimonopoly law may help discourage the formation of such agreements in the first place.

Challenging public restraints on rivalry is not costless or risk-free.⁸⁹ The greatest potential disadvantage is that a program aimed at government-imposed trade restraints will align the competition agency against formidable political opponents, notably alliances between state-owned enterprises and their

89. I am grateful to Michael Trebilcock for this point.

patrons within the government. An enforcement agenda that repeatedly pits a new and fragile institution against powerful foes may elicit a crushing political backlash. David might defeat Goliath in a single, winner-take-all contest, but Goliath's odds of vanquishing his diminutive opponent improve steadily as the number of encounters increases.

2. Preserving the Benefits of Privatization

Privatization programs raise a number of competition policy concerns. For some sectors subject to state ownership, it may be possible to structure privatization plans to establish viable competing firms rather than simply sustaining organizational structures that vested all productive activity in one enterprise. The competition policy agency can play a useful role by advocating consideration and implementation of privatization solutions that tend to maximize opportunities for competition in the post-privatization period.⁹⁰

Where privatization yields competing entities in a given sector, the newly-established private firms may seek through mergers or the formation of holding companies to recreate the unified organizational structure that prevailed during the era of state ownership. Some consolidation will enhance efficiency, as firms seek to eliminate redundant capacity and realize economies of scale and scope. Nonetheless, competition agency scrutiny of mergers will be appropriate to ensure that proposed consolidations do not reestablish monopolies, such as holding companies that control all producers in the relevant market. The possibilities for mergers to create or reinforce market power will be greatest in service sectors in which imports, even in a liberalized trade regime, do not supply an effective competitive constraint.

3. Opening Strategic Bottlenecks to Competition

In choosing enforcement targets, the agency should focus on economic activities where increased competition in one sector generates large economic benefits by expanding output

90. See Capelik & Slay, *supra* note 7, at 61 (describing role of Russia's State Committee on Antimonopoly Policy in promoting disaggregation of Russia's construction industry as part of the privatization process).

in other sectors that consume inputs of the first sector. Major examples would include transportation, financial services, energy, and communications. Increased competition in these areas would improve the functioning of networks that deeply influence the rate of economic growth.

Transportation provides an illustration. Cartels involving trucking companies, airport service firms, and port facilities are common in transition economies. By lowering the costs of moving goods into, out of, and across the country, increased competition among transportation firms can reduce the delivered prices of many goods, make previously insulated geographic markets contestable by distant sources of supply, and reduce the cost of exporting. An effort to challenge cartels among transportation firms could generate substantial gains for the transition country economy.

4. Synthesis: An Early Enforcement Agenda

An enforcement agenda designed to cope with the institutional weaknesses that beset most new antimonopoly agencies might have the following ingredients. One element would be challenges to overt agreements that impede competition and lack offsetting benefits. One such set of enforcement targets consists of formal grants of exclusive licenses by government ministries to incumbent business operators. The fact of the exclusive license would be easy to establish, because both the grantor and the holder of the exclusive right ordinarily invoke the license to deny permission for new firms to enter. In one of its early cases, Georgia's small and thinly-funded antimonopoly agency succeeded in voiding a decision by the Cabinet of Ministers to make one firm the exclusive supplier of insurance to traders who must buy insurance to carrying out certain import activities. The decision preserved opportunities for other insurance companies to compete in a market that influenced the cost of conducting trade in Georgia.

A second type of suspect overt agreement consists of trade association practices that are remnants of the central planning era. To carry out national planning aims, trade association by-laws sometimes contain provisions that restrict new entry, allocate business opportunities, or otherwise curtail rivalry

among industry participants.⁹¹ Even where the government abandons its support for such measures as part of economic liberalization, private enforcement of competition-suppressing by-laws may persist. Such agreements are easily proven and clearly violate most transition economy prohibitions on horizontal restraints.

A second category of cases would consist of efforts by government ministries to consolidate recently privatized, independent firms into industry-wide holding companies subject to ministerial oversight. Particularly in nontradeable service sectors, such industry-wide amalgamations seldom have compelling efficiency rationales and often have strong potential to create durable monopoly power and deprive the country of the benefits of a privatization program. In a number of cases, Georgia's antimonopoly agency has successfully opposed efforts by government agencies to cartelize specific industry sectors by merging all industry participants into single holding companies or forcing such participants to operate under the supervision of quasi-government trade associations.

A third focal point of early enforcement would consist of opposing efforts by government ministries, often acting at the behest of incumbent state-owned enterprises, to withhold approvals for new entrants or discriminate in favor of incumbent suppliers. Government denials of licenses and permits can be powerful barriers to new competition. National, regional, or local officials sometimes withhold necessary approvals from private entrepreneurs because the market in question "contains too many firms" or suffers from "excess capacity." In other cases, government bodies direct one state-owned firm to channel needed inputs to another state-owned firm and to terminate or interrupt supply contracts with a private firm that consumes those inputs.

Here again the experience of the Georgian antimonopoly agency provides an illustration of what a nascent enforcement body can accomplish. Georgia's agency successfully opposed efforts by government officials in Tbilisi to restrict a small bakery to making sales in selected areas of the city. The local

91. See Kovacic, *Zimbabwe*, *supra* note 50, at 260 & n.24 (describing competition-suppressing provisions of by-laws of Zimbabwean construction industry trade association).

officials had sought to delineate an exclusive sales territory for an incumbent state-owned bakery that was losing business to many new bakeries that had sprung up in the course of liberalization and were offering more attractive product lines. The antimonopoly agency's intervention permitted the bakery to compete for sales in other areas of the city. Beyond its unambiguous efficiency virtues, this type of case has a clear appeal to consumers and helps the antimonopoly agency position itself as a champion for the country's emerging private sector.

IV. MAKING AN UNMANAGEABLE LAW WORKABLE

Transition economy competition statutes rarely are designed to establish new institutions and implement legal commands in phases. Instead, such laws usually establish far-reaching substantive prohibitions and create new bodies that must be built from the ground up at the same time that the new agencies are expected to carry out their enforcement obligations. Georgia's competition policy system again provides an example.

Georgia has some of the newest transition economy competition laws. In 1996 Georgia adopted a Law on Monopolistic Activities and Competition and a Consumer Rights Protection Law and created an Antimonopoly Service, which began operations in January 1997.⁹² The 1996 statutes gave the Antimonopoly Service responsibility for enforcing three distinct legal regimes:

- Traditional antitrust controls on horizontal restraints, vertical restraints, dominant firm behavior, and mergers;
- Prohibitions on unfair business practices such as misleading advertising, misappropriation of intellectual property, disparagement of competitors, and fraudulent nondisclosure of information in sales transactions; and
- Consumer protection prohibitions on various seller failures to fulfill mandatory product quality, information disclosure, and delivery terms.

92. See Kovacic, *Recommended Action Plan*, *supra* note 52, at 1-5 (discussing origin and content of Georgia's antitrust and consumer protection laws).

To implement any one of these legal regimes successfully would be a substantial undertaking for a new government institution. To implement all three simultaneously is an enormous challenge, even where the public enforcement body is well-funded and the nation's courts are experienced in the resolution of commercial disputes. Georgia's Antimonopoly Service faces acute resource constraints, and the Georgian courts have little knowledge of concepts essential to resolving disputes involving competition and consumer protection issues. It is hard to overstate the magnitude of the task that the 1996 laws assign to the Antimonopoly Service and Georgian judges.

Where the legal framework, like Georgia's, does not expressly mandate phased implementation, the new competition agency must, in effect, create and execute a phased implementation strategy if it is to survive and flourish. The agency must give priority to institution-building while carrying out a minimalist enforcement program that does not outrun the agency's institutional capability. At the same time, the agency must demonstrate its commitment to execute its legal obligations and thereby establish a credible presence as an enforcement institution.

The discussion below suggests how a competition authority and supporting donor organizations can establish a sound institutional infrastructure and begin to enforce the law. In its first year of operation, a new competition agency should seek to accomplish three basic goals. The first priority is to build the institutional capability of the competition agency and other institutions (such as the courts) whose activities will influence the implementation of the country's competition law. The second aim is for the agency to educate business managers, government bodies, nongovernment organizations such as bar associations, universities, and consumers about the aims and requirements of the new law, and to publicize the agency's efforts to carry out its duties. The third goal is for the agency to design and apply a substantive enforcement program that establishes the credibility of its enforcement powers, accounts for existing institutional constraints, and deflects political demands for counterproductive enforcement approaches.

A. *Building the Competition Agency and Related Institutions*

The chief priority for a new competition agency in its first year should be to build the institutional foundation for carrying out substantive enforcement programs. This means conducting the institution-building activities discussed in Part III above.⁹³ The new competition agency may feel pressure to invest minimal effort in institution-building and to emphasize the prosecution of cases that it can hold out to external constituencies as evidence that it is a vital, functioning body. The agency may experience a great tension between satisfying external demands for "action" and accomplishing more mundane but vital administrative and organizational tasks that are necessary to get the new institution on its feet. Institution-building does not have the same apparent pay-off as the prosecution of a highly visible case, but it is fundamental to the ability of the agency over the medium-term and long-term to use its enforcement authority effectively. Attending to organizational and administrative details in the first year will pay handsome benefits in the future.

B. *A Suggested Program of Education and Publicity*

The second goal for the first year is to educate external constituencies about the competition law and to publicize the agency's work. Education and publicity will help acquaint various constituencies with competition law principles and with the agency's functions and operations. The education and publicity program can help establish a perception of the agency as the nation's champion for competition policy and market processes.

Education and publicity program should have several elements. One is to publish booklets and brochures that describe the agency's activities and explain its powers.⁹⁴ These should address all of the agency's external constituencies. A second element is to appear in mass media fora. A third is to

93. See discussion *supra* Part III.A.1.a.

94. This should include the preparation of an annual report that surveys the agency's activities. A number of transition economy competition agencies publish exceptionally informative annual reports or other regular compendia of official decisions and policy statements. These include Chile, Mexico, Peru, Poland, Ukraine, and Venezuela.

cooperate with business groups, consumer organizations, and other nongovernment bodies to explain the agency's work. A fourth element is to regularly inform legislators and other government officials about the agency's work.

C. A Suggested Program for Competition Enforcement

The combination of expansive responsibilities and austere funding compels transition economy competition authorities to make the best possible use of the limited resources at their disposal. By necessity, new competition agencies must be highly selective in their choice and phasing of enforcement activities. New agencies must develop an analytical framework for identifying serious market failures and pursuing remedial strategies that achieve the maximum consumer benefit with the smallest possible outlay of resources. Creating such a framework and devising operational criteria to apply the framework should be central priorities in the first year.

Another element of selectivity is the need to develop a strategy that allows the competition agency to anticipate and dissipate political pressure to pursue matters (*e.g.*, antidumping cases) that would diminish business rivalry. Antimonopoly agencies throughout the world routinely are given legal mandates whose exercise can arouse powerful political opposition. To be effective and survive, antimonopoly enforcement officials must carefully build political capital and spend it wisely.

A new competition agency can expect to be criticized for doing too much and too little. Some enforcement efforts (particularly those attacking government efforts to suppress competition) will endanger incumbent enterprises and their ministerial patrons. Beneficiaries of the status quo may use their economic and political power to seek to prevent the agency from pursuing matters that promote the national interest. On other occasions, by refusing to challenge certain behavior (such as competition from imports that offers consumers superior products at lower prices and reduces the sales of domestic producers), the agency may attract demands to bring cases that would retard growth or diminish consumer well-being. No agency operates in a political vacuum, and each must choose cases with an eye toward developing political support that will help it pursue initiatives that strengthen the market process, and to

resist political demands that it take action that would reduce competition and restrict consumer choice.

To cope with political realities, the transition economy competition agency should copy the practice of its Western counterparts and build an enforcement portfolio that diversifies against political risk. The portfolio should contain three types of matters. The first and largest part of the portfolio should consist of initiatives that can be depicted as constituting "mainstream" enforcement because they increase economic welfare and seem clearly consistent with international competition policy standards and promote attainment of national economic liberalization goals. In its publicity and education activities, the agency should strive to define its work as falling within this mainstream.

The second ingredient is a small number of cases that are politically popular (and perhaps inevitable), such as anti-dumping matters, and have adverse welfare effects. With some effort, the agency may be able to identify cases of this type that will satisfy insistent political constituencies but also have neutral or only mildly negative welfare effects.

The last element is a small number of cases that promise large welfare improvements and pose great political risks. The agency can bring a few of these cases but must pick its spots carefully. Operating in this region of the enforcement spectrum too often could endanger the new institution, especially in its first years.

A new competition agency has a number of tools at its disposal for obtaining compliance with the law. The term "enforcement" sometimes connotes the prosecution of cases in the courts. A properly conceived enforcement program uses a variety of devices to correct existing violations, encourage future compliance, and otherwise accomplish the objectives of the competition statute. The portfolio of agency enforcement efforts in the early phase of operations should include three distinct types of activities.

1. Studies and Competition Advocacy

Most transition economy competition laws authorize the agency to perform competition advocacy functions.⁹⁵ Perform-

95. See, e.g., TINEO, *supra* note 2, at 24-25 (observing that the laws of Brazil,

ing studies of important legal and economic impediments to competition can be a valuable means for fulfilling this role. Performing studies can help the agency to accomplish several institutional and substantive goals. In terms of institution-building, the process of conducting a study—reading the relevant literature, gathering and analyzing data, and interviewing informed observers—can help the agency's staff learn the concepts of competition policy, gain experience in applying concepts to the facts of specific industries, and acquire an understanding of specific business sectors and public policies. In terms of substance, publishing carefully prepared studies can be a valuable way to draw attention to and stimulate the correction of market failures and to establish the agency's reputation as an authority on competition policy.

2. Voluntary Compliance

For the first year of operations, the agency should encourage business enterprises and government entities to voluntarily abandon practices that violate the law. In education and publicity activities, the agency should indicate its awareness that the new law represents a new direction for economic policy, and that a necessary step in applying the new legislation is to inform business and government officials about the law's requirements and give them an opportunity to change behavior that contradicts the laws. One benefit of an education campaign is to dispel the notion that the agency abruptly and "unfairly" punished firms for conduct that the government encouraged or mandated in the pre-reform period.⁹⁶ The agency may be able to reach agreements with government bodies or businesses to discontinue illegal acts and adopt procedures for

Chile, Costa Rica, Mexico, Panama, and Peru authorize competition agencies to issue non-binding opinions to other government bodies challenging anticompetitive regulations or proposed regulations).

96. Pre-reform government policy in communist and socialist countries either compelled or urged producers to form agreements on prices or other terms of trade. See Jatar, *supra* note 57, at 13:

Since firms do not feel they are doing anything wrong when they negotiate prices or market share, the enforcement of pro-competition legislation requires important promotion and educational efforts in order to make punitive actions understood and accepted. In fact, the first firms to be prosecuted feel persecuted by the pro-competition agency. Managers feel that "after all, they are acting like everybody else does."

ensuring future compliance with the law.

3. Compulsory Enforcement

The first year of operations should feature limited use of compulsory enforcement techniques to stop clear violations of the law and to show the agency's willingness to use compulsion where voluntary compliance is not forthcoming or effective. The agency need not bring large numbers of cases to demonstrate its seriousness. A reasonable goal for the first year is to bring one case involving a clearly illegal episode of behavior that affects a widely purchased consumer good or service. The goal is to select a case that plainly harms competition, is readily understandable by the public and business community, and is certain to withstand review in the courts. The agency should widely publicize and explain the case to increase understanding about the competition system and build a reputation for openness.⁹⁷

CONCLUSION

Implementation is the achilles heel of competition law reform in transition economies. Foreign donors and transition economy governments tend to slight implementation concerns in preparing new antitrust legislation. Successful implementation requires not only the careful design of substantive prohibitions and the construction of an effective competition enforcement body, but also entails improvements in other institutions such as courts, professional associations, and universities that influence the direction and impact of competition policy. The institutional ingredients that make ambitious competition systems feasible in Western economies rarely exist now in transition settings and will take decades to build.

This Article proposes that new competition policy programs be introduced in phases that correspond to the development of institutional foundations on which robust, substantial

97. *See id.* at 14:

[t]he actions initiated by the competition agency require an important communicational effort: opinions and decisions must be given to the public with a clear analysis of the relevant issues. If these efforts are not taken seriously and the emphasis is placed on punitive actions, the competition agency runs the risk of mistakenly positioning itself as an inquisitive tribunal and running the risk of losing political support.

antitrust systems rest. The first phase should emphasize the construction of the new agency, the development of its physical and human capital, the training of judges, and the education of consumers, business operators, and government officials in the rationale for and content of the antitrust statute. In the second phase, the agency would begin pursuing an enforcement agenda that concentrates on redressing readily proven, publicly-imposed impediments to rivalry.

