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COMPETITION AGENCIES, INDEPENDENCE, AND THE POLITICAL PROCESS

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16. Competition agencies, independence, and the political process

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1. INTRODUCTION

A common assumption in the design of competition policy systems is that public enforcement agencies should be politically ‘independent’.¹ A jurisdiction is said to achieve the requisite independence by ensuring that the competition authority can make decisions free from the influence of elected officials (e.g. heads of state or legislators) or appointees subject to their control. In principle, the condition of independence improves policy outcomes by enabling the enforcement agency to exercise its authority according to widely accepted competition policy principles and to resist demands that it serve special interests at the expense of the larger public welfare.

At a very general level, there seems to be a rough consensus about what political independence ought to mean in practice. A competition agency should not exercise its power to prosecute – to open files, to issue complaints, to impose sanctions – to satisfy the preferences of legislators, presidents or departmental ministries. At the same time, competition agencies should be accountable for their decisions – accountable to the public and subject to checks and balances (such as judicial review) that press public officials to operate within boundaries of authority set by constitutions and statutes and to exercise their delegated powers wisely. There is an inherent tension between the preservation of an acceptable level of independence and the attainment of necessary levels of accountability. Measures that ensure complete freedom from interference from political forces also can diminish accountability and effectiveness.

Beyond these broad prescriptions, discussions about a competition agency’s separation from, or links to, the political process often do not come to grips with difficult issues associated with a competition agency’s place in its jurisdiction’s political environment. Discussions about the

evolution of competition systems sometimes suggest that a sign of a system's maturity and sophistication is the absence of actual political influence and, even more strongly, the cessation of efforts by elected officials to shape the competition agency's decisions. This conception of public administration is a fiction. The question is not whether competition agencies operate in an environment that features political pressure. Most certainly do. For the typical competition agency, old or new, pressure from the political branches of government is ubiquitous and relentless. The real issue is how the competition agency – even an agency bolstered by mechanisms designed to ensure independence as a matter of form – can deflect political pressure that otherwise could infect its operations or destroy it.²

This chapter explores the relationship of a competition agency to the political process. It focuses on three principle questions. What is the meaning of political independence? In actual practice, how much do competition agencies that ordinarily are classified as 'independent' in theory achieve insulation from political pressures? How much independence from the political process is desirable if the competition agency is to be effective in carrying out its responsibilities? It addresses these questions mainly by reference to the experience of the US Federal Trade Commission (FTC), which commonly is referred to as an independent regulatory commission. Through the FTC case study, this contribution treats many of the problems that arise in defining the appropriate balance between accountability and independence from inappropriate political interference.

2. THE SOURCES OF POLITICAL PRESSURE

The intensity of political pressure that might be brought to bear upon a competition agency depends heavily upon the nature of the functions the agency is assigned to perform and the sanctions it may impose to enforce the law. As the agency's powers expand, so too will increase the desire of political officials to determine how such powers are applied. Power and its exercise seize the attention of the political branches of government. An inherently feeble public institution seldom draws their interest.

The FTC's experience illustrates the point. The Commission's relations with the US Congress have featured major episodes of volatility in the agency's nearly 100 years of experience. The volatility stems in the first instance from the nature of the FTC's statutory mandate. Adopted in 1914, the Federal Trade Commission Act calls upon the FTC to operate in comparatively risky political terrain. This section explores the formative influence of the agency's role by reference to two views of what functions the FTC should perform. It considers the Federal Trade Commission Act

and examines the political implications of the tasks the agency's original sponsors wanted the FTC to undertake.

2.1. The FTC's Charter

Two features of the FTC's original statute have particularly significant political implications. The first is Section 5, which gave the FTC broad power to proscribe 'unfair' commercial conduct. By this measure Congress intended the agency to have considerable flexibility to determine the appropriate bounds of business behaviour. A famous passage from the Senate Interstate Commerce Committee's Report on the Federal Trade Commission Act explained:

The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] . . . or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.³

The broad, open-ended quality of Section 5 has two major consequences for the Commission's relations with the political process, especially the legislature. First, the Section 5 mandate gives legislators a basis for insisting that the FTC use this flexible device to attack behaviour that escapes the reach of more explicit statutory prohibitions or prevailing judicial doctrine. For example, to a legislator frustrated by the constraints of conventional Sherman Act or Clayton Act antitrust doctrine, Section 5 can seem to offer a wishing well of enforcement possibilities.⁴ Thus, in exercising congressional oversight authority, committees and individual legislators can urge the Commission to use this elastic provision to reach beyond existing antitrust principles. Second, by relying on Section 5 in its enforcement activities, the Commission exposes itself to attack (by affected companies and legislators sympathetic to their concerns) for departing from 'conventional' or 'accepted' interpretations of the law. Thus, the existence of Section 5 can induce Congress to direct the FTC to pursue expansive enforcement ventures, but the Commission's efforts to apply the provision can be characterized as undesirable forays into the unknown.

A second politically noteworthy feature of the 1914 statute is its grant of extraordinary information gathering and reporting powers.⁵ The Commission's congressional sponsors expected that these tools would play a pivotal role in shaping the agency's choice of cases (especially cases that would use Section 5 to reach beyond existing doctrine) and in permitting

the agency to give policy guidance to Congress and the President. The exercise of these powers, however, can be politically hazardous. As Robert Cushman (1941) noted in his study of independent agencies, '[T]he authority to investigate . . . mammoth business concerns . . . is a power loaded with political dynamite. It is bound to arouse the bitter antagonism of those being investigated and to set in motion powerful political pressures.' When an agency moves beyond the prosecution of cases to gather facts and advocate precompetitive policy solutions to economic problems, it can sacrifice some of the political insulation that elected officials accord to the exercise of law enforcement duties. In the eyes of the political branches of government, an agency acting as a policy advocate may be seen as performing a policy-making role that makes it fair game for pressure from or intervention by elected officials. In a number of major instances, the FTC's efforts to use its investigation and reporting powers without explicit congressional approval have unleashed debilitating political opposition (Cushman 1941: 220).

Some commentators (Mayhew 1974: 134–135, Faith et al. 1982, McChesney 1987, Yandle 1987 and Kovacic 1988) have noted that the grant of broad authority creates important rent-seeking opportunities for individual legislators and helps explain the form of legislative intervention into the affairs of the Federal Trade Commission and other regulatory agencies. In the rent-seeking model, legislators seek to generate electoral resources (chiefly, votes and campaign contributions) by influencing the FTC's choice and disposition of specific enforcement initiatives. The Commission affords members of Congress a variety of credit-claiming opportunities. A legislator can demand that the FTC attack the behaviour of firms whom important constituencies of the legislator wish to restrain; she can intervene to protect favoured economic interests from 'over-reaching' FTC programs; or she can tentatively indicate support for or opposition to a pending Commission initiative to signal her receptivity to contributions from economic interests affected by the agency's contemplated course of action.

The rent-seeking model helps to explain why Congress has left Section 5 of the FTC Act, with its expansive prohibition on 'unfair methods of competition', intact despite the urging of many observers that it narrow the agency's mandate. A broad grant of authority gives legislators more repeat occasions to push the Commission toward specific enforcement ventures or to shield firms on an ad hoc basis from an 'out of control' agency. A decisive narrowing of Section 5 would allow members of Congress a one-time opportunity to claim credit for reining in a 'runaway' agency, but such an approach would sacrifice future chances to exploit the FTC's use or non-use of its powers. Thus, in reacting to the Commission 'excesses',⁶ Congress has not chosen to rewrite the agency's mandate and

instead has relied on measures – e.g. piecemeal exemptions for individual industries or temporary limits on the agency’s use of funds – that preserve a fuller collection of future rent-seeking options.

The rent-seeking model acknowledges that the FTC enjoys significant discretion in its choice of individual enforcement matters, but suggests that the level of discretion is hardly accidental or inadvertent. Rather, Congress has given the FTC what it believes to be a roughly optimal level of discretion. The existing mix of statutory powers and oversight devices affords legislators an agreeable set of opportunities either to press the FTC to embrace a recommended enforcement proposal or to insist that the agency abandon a disfavoured ongoing or contemplated matter.⁷

In reviewing these aspects of the FTC’s creation and subsequent operations, one comes to see that it is somewhat misleading to call the Commission an ‘independent’ agency unless one interprets the meaning of that characterization in light of congressional expectations.⁸ Congress intended the FTC to be independent from the Executive Branch, but not from the legislature. A central aim that motivated Congress to create the FTC in 1914 was to restore the legislature’s primacy in controlling anti-trust policy. Beyond initial concerns about the substantive content of the ‘rule of reason’ announced in *Standard Oil Co. v. United States*,⁹ Congress established a mechanism for administrative enforcement ‘to prevent subversion of the legislative intent by district courts that either were unsympathetic or otherwise preoccupied’ (Averitt 1980: 233). In language that later generations of legislators would adopt in various forms, Senator Francis Newlands reacted to the *Standard Oil* decision by declaring the need to create an administrative enforcement mechanism ‘as the servant of Congress’.¹⁰

In devising the new agency, Congress contemplated a substantial role for legislative oversight to ensure that the Commission used its authority wisely. Congress knew it was about to give the agency an unusually broad range of powers and substantial discretion. Senator Albert Cummins, a leading sponsor of the FTC Act, underscored this point during the debates leading to enactment of the statute. ‘I realize’, Cummins said, ‘that if these five men were either unfaithful to the trust reposed in them or if their economic thought or trend of thought was contrary to the best interests of the people, the commission might do great harm’.¹¹ In exchange for a generous grant of authority, Congress would ensure that the agency accounted to it for its policy decisions. ‘I would rather take my chance with a commission at all times under the power of Congress, at all times under the eye of the people’, Cummins explained. ‘If we find that the people are betrayed either through dishonesty or through mistaken opinion, the commission is always subordinate to Congress. . . . Congress can always destroy the

Commission; it can repeal the law which creates it.¹² In the century that followed the FTC's establishment, congressional committees often have reminded Commission nominees that they owe a special fidelity to the legislature.¹³ And, following their confirmation by the Congress, many Commission members have expressed awareness of that circumstance.¹⁴

2.2. Implications for Law Drafting and Institutional Design

One factor to consider in the design of a law's substantive commands and in the formulation of an implementation strategy is political risk. In identifying a preferred role for a competition agency, one must ask if that role is politically feasible. The political feasibility of a statutory mandate also depends on the political skills of the competition agency's leadership. Government bodies do not excel through technical proficiency alone. Political adroitness frequently assumes equal importance in determining success. As one student of administrative behaviour (Rourke 1972: 2) has noted, '[E]ach agency must constantly create a climate of acceptance for its activities and negotiate alliances with powerful legislative and community groups to sustain its position. It must, in short, master the art of politics as well as the science of administration'.

3. THE MEANING OF INDEPENDENCE

We can imagine a number of measures that a jurisdiction might take to ensure that a competition authority is insulated from the political process when it sets policy or considers whether to pursue specific matters. Safeguards that would tend to ensure insulation from political control would include:

- Legal commands or customs that impede the head of state, government ministries, or the legislature from taking direct or indirect steps to shape broad policy or to determine how the agency exercises its power to prosecute cases or adopt secondary legislation.
- An absence of judicial review of agency decisions, or requirements that courts abide by a highly deferential standard of oversight.
- The absence of, or severe limits upon, the ability of citizens, non-government bodies, or commercial entities to influence the agency's agenda or to monitor its operations by having access to the agency's records or by participating in its activities.
- Sources of funding that do not depend upon the exercise of discretion by the head of state, executive ministries, or the legislature.

A jurisdiction would achieve the highest level of independence for a competition agency by embracing all of these measures.

To adopt the complete roster of independence safeguards would come at a substantial cost in accountability. The loss of accountability likely would be seen as a grave defect if the agency's powers were formidable. It is impossible to imagine that a jurisdiction would give broad powers to a competition agency without also adopting measures that constrain the agency's exercise of discretion. Thus, we can posit that the complete insulation from external influence suggested in the roster of protections listed above would be viewed in most systems as illegitimate and unsupportable. To speak of an acceptable balance between independence and accountability requires a less expansive definition of what constitutes appropriate insulation from external influence.

A more suitable definition of independence focuses on the agency's exercise of its power to prosecute cases or to enact secondary legislation, such as rules that set binding standards of conduct. Independence safeguards should discourage political branches of government from intervening to guide or force the initiation or disposal of cases or rules. Such safeguards should not prevent political institutions from offering guidance or recommendations about larger issues of policy. By this standard, it would be inappropriate for political authorities to have the capacity to prevent, by direct mandate or by persuasion, an agency from blocking a specific merger. It would be appropriate for political authorities to offer their views more generally – for example, in a legislative hearing – about whether an agency's approach to merger review is too tolerant or too strict.

4. ORGANIZATIONAL CHOICES THAT CAN DETERMINE INDEPENDENCE

Jurisdictions can influence the level of a competition agency's independence through a variety of choices that concern its structure and operations. These choices create tendencies that favour greater or lesser degrees of insulation from political interference in decisions about cases or rules. By themselves, the choices concerning organization and operations do not govern the level of independence an agency enjoys in practice. A variety of informal customs, norms, and habits can either increase or decrease the amount of independence that formal organizational structures and operating procedures might indicate.

The organizational structure often thought to be most consistent with independence from political interference is an administrative body that stands outside existing government ministries. In most instances, this

administrative body is a commission whose members are appointed to fixed terms and who cannot be removed from office except for good cause. Many jurisdictions stagger the terms of appointees. One common model for the selection of board members is a sequence that involves nomination by the head of state and confirmation by the legislature.

In theory, an additional degree of independence can be provided by a requirement that the political backgrounds of board members be diverse. For the FTC, no more than three of the five members of the board can be members of the same political party. This has two possible effects that, in theory, promote independence. First, the diversification of political backgrounds, combined with appointments that are staggered by years, tends to diminish abrupt adjustments in policy – including adjustments that the political branches of government demand. Second, when the board reaches a unanimous decision in the resolution of visible, difficult issues, there may be a greater sense outside the agency of political legitimacy arising from the attainment of a consensus outcome. To the extent that such outcomes increase respect for the agency, the agency's stature and independence may be enhanced.

The model often seen as least consistent with political independence is to place the competition agency within a ministry of the executive branch. In this model, the head of the competition authority has no tenure; she can be removed at the discretion of the head of state. In some jurisdictions, the head of the agency must be approved by the legislature. Judgments about the actual degree of independence that these organizational models yield in practice require a careful examination of norms, customs, and habits that shape the actual operation of institutions within the jurisdiction. Some of these may be readily apparent, and some are not. For example, the FTC is a stand-alone commission with five members appointed by the president and confirmed by the US Senate. FTC commissioners may be removed from office only for good cause. Owing to these characteristics, the FTC routinely is called an independent agency.

This begs the question: independent from whom? From the view of the US Congress, the FTC is deemed to be independent from the executive branch of government, but not from the legislature. Legislators often describe the Commission as an agent of the Congress and intend for the Commission to be responsive to congressional preferences. As one indication of the nature of this relationship, the FTC's procedural rules permit FTC officials, pursuant to a vote of the Commission, to give confidential briefings to the chairs of committees and subcommittees about pending law enforcement matters, including investigations of mergers. Members of Congress routinely request and receive such briefings.

At first glance, the Antitrust Division of the Department of Justice

appears more subject to direct political influence than the FTC. The Antitrust Division is part of an executive branch ministry, and the Assistant Attorney General for Antitrust can be dismissed at the will of the president. This initial impression requires two qualifications. As a matter of custom developed over a period of decades, the Antitrust Division has developed a substantial degree of insulation from the president. Reported episodes of direct political interference to shape the disposition of cases are rare, and there are important instances in which the Antitrust Division has proceeded with major cases despite the vehement opposition of other executive branch ministries.¹⁵ The Antitrust Division also is less inclined to respond to congressional demands for information. For example, contrary to the practice of the FTC, the Antitrust Division does not provide confidential briefings about law enforcement matters to members of Congress.

5. UNIVERSAL PRESSURE POINTS FOR POLITICAL CONTROL OR INFLUENCE

Regardless of the organizational form given to the competition agency, there remain pressure points that political branches of government can exploit to control or influence the institution. These pressure points exist in most jurisdictions even if the competition agency is created as a stand-alone commission and its members have tenured appointments. These pressure points demonstrate that complete insulation from the political process is unattainable. Thus, in considering how to attain institutional autonomy for the competition agency, the analysis should focus on how and whether to reduce political interference rather than upon how to eliminate it.

One or more of the following pressure points inevitably limit a competition agency's freedom from political influence: the need to appoint board members, the need to obtain funding, the possibility that the legislature will amend the law to curb the agency's powers, the ability of the legislature to impose significant costs upon the agency through demands for information and hearings, and the dedication to third parties of power to set the agency's agenda and shape its allocation of resources. These measures can be used individually or in combination to increase the agency's responsiveness to the preferences of political actors outside the institution.

5.1. The Appointments Process

The selection of agency leaders is an opportunity to choose individuals who are likely to be sympathetic to the wishes of the head of state,

executive ministries, or the legislature. The nominating entity (often the executive branch) and the approving entity (often the legislature) can use their power as gatekeepers to filter out candidates who seem certain to ignore external political preferences and appoint individuals who, by reason of background and experience, are more likely to share the views of one or more political organs of government. The desire to appoint individuals with shared values is evident in the frequency with which appointees to the FTC have been former members of Congress, members of the White House staff, or members of congressional staffs.¹⁶ Screening on the basis of these attributes do not ensure fidelity to executive branch or legislative preferences, but it can create a common understanding by which the appointee anticipates or responds favourably to those with whom the appointee shares a professional background. The proceedings that lead to approval by the body entrusted with the confirmation of the candidate also provide opportunities for the confirming body to extract commitments (subject, of course, to renegeing by an individual after a tenured appointment is approved) for future action. In a system that allows reappointment for additional terms, the desire to please the entity that appoints and the entity that approves can induce a board member to alter behaviour.

5.2. Funding

Every competition agency requires funding to operate. A major determinant of whether an agency prospers or founders is the adequacy of its resources. One can imagine a system in which the agency's source of funds is, to some degree, insulated from the political process. For example, the legislature could give the agency authority to collect and retain user fees associated with merger filings or to keep all or part of the fines it collects from firms which violate the competition laws.

In one sense, none of these funding mechanisms is entirely sheltered from the political process. A legislature always can decide to alter the means of financial support if it is truly unhappy with the agency's performance. Moreover, each of these autonomous funding techniques has serious difficulties. User fees tied to specific forms of activity depend upon the level of relevant activity, and a substantial drop in chargeable events (e.g. merger filings) can confront the agency with a large revenue shortfall. For example, user fees for merger filings can provide robust funding for an agency when stock markets are booming and parties can use appreciating share prices to purchase other companies. Amid a recession, the filings and the funding diminish dramatically. Allowing an agency to fund itself from the fines it collects can create perverse incentives that undermine sound

public administration. Agencies may be tempted to strain to ‘discover’ infringements of the law and accept settlements that fund operations but have questionable substantive merit.

The most common method of funding for competition agencies consists of regular legislative appropriations that are set annually or for a period of years. The need for the agency to obtain regular appropriations creates two possible pressure points. If the agency must submit its budget estimates through an executive branch ministry, the process gives that ministry the ability to reward or punish the competition agency for past behaviour. If the legislature is the final gatekeeper for budget approval, the agency must consider how legislators might take the agency’s behaviour into account in deciding how to vote on the budget. The legislature can remind the agency regularly during the course of the fiscal year that the agency’s fidelity to its preferences will influence next year’s budget. Not only can the legislature augment or reduce the overall budget, in some jurisdictions it can specify the purposes for which funds must be used or shall not be used.

The threat to slash a budget can have powerful effects. In January 2002, the FTC and the Justice Department announced a new plan for allocating matters that came within the jurisdiction of both agencies. The reforms to the agencies’ ‘clearance’ procedure involved some redistribution of industries based on earlier customs that the FTC and DoJ had followed. The Chairman of the Senate Commerce Committee, Ernest Hollings, scorned the proposal. In words that would have made a gangster proud, Hollings said he wanted to ‘eliminate’ Timothy Muris, the FTC’s Chairman.¹⁷ At the time, Hollings also served as the chairman of the Senate Appropriations Subcommittee responsible for the budgets of the Justice Department and the FTC. Hollings threatened to reduce the appropriations for the DoJ and the FTC if the two agencies implemented the clearance process reforms. Due to the committee leadership positions Hollings held in the Senate, this was a credible threat. DoJ withdrew from the agreement, and the proposed reforms foundered (Albiniak 2002: 12).

5.3. Legislative Changes to the Agency’s Charter

Political institutions that are displeased with a competition agency’s work can threaten to advance legislation that will withdraw authority. The credibility of this threat depends on how difficult, as a matter of law and custom, it is within the jurisdiction to amend existing legislation. At a minimum, a promise to consider a reduction in authority will force the agency to expend considerable resources to make the case against a retrenchment of its powers. It may be possible to create a competing

enforcement agent by establishing a new institution or making a grant of overlapping authority to an existing government body. In general, it may be necessary for the legislature to amend existing statutes only occasionally to get the agency's attention and to consider more carefully whether future initiatives will elicit this form of backlash.

5.4. Routine Oversight

A legislature can impose substantial costs upon an agency through methods that fall well short of amending legislation or threatening to do so. Legislators can demand that agency officials appear before them in hearings. Such events tend to require extensive preparation within the agency and compel top leadership to devote substantial effort to preparation. A legislature also can submit demands that the agency assemble and present information about its operations. Here, also, the collection and assimilation of records can consume a great deal of staff time. The political branches of government also may have the ability to direct government authorities (such as the US Government Accountability Office) to audit the competition agency and prepare reports on the agency's work.

5.5. Setting the Form of Judicial Review

The political branches of government can constrain a competition agency's discretion by delegating oversight tasks to the judiciary. Political constraints can be applied in the form of legislation that directs courts to engage in careful, painstaking review of agency decision-making. For example, if the legislature is dissatisfied with the agency's choice of cases, it can alter the agency's statutory mandate to set a more demanding standard of judicial review. Such a signal can be particularly confining if the agency already experiences difficulty in obtaining deference from the courts.

5.6. Increased Monitoring by External Parties

A competition agency's freedom of action is determined partly by the extent to which external parties – individual citizens, nongovernment organizations, private companies, academics – can obtain information about the agency's operations or force the agency to take certain forms of action. If they impose expansive disclosure requirements, freedom of information laws can give third parties broad access to agency records and supply an important tool for monitoring agency performance. A competition law or an administrative procedure statute can shape the agency's

agenda by forcing it to open a file in response to all complaints from external parties; to explain all decisions to prosecute or not to prosecute; and to subject the agency to lawsuits by external parties who believe the agency's justifications for action or inaction are inadequate. Legislators also can enact statutes (such as the US Government in the Sunshine Act) that require many types of administrative agency deliberations to take place in public or limit the agency's ability (such as the US Federal Advisory Committee Act) to convene groups of outsiders to provide guidance. A further mechanism is to establish procedural requirements that force the agency to permit the participation by outsiders in deliberations that could lead to the adoption of secondary legislation or in proceedings that resolve litigated disputes by settlement.

5.7. The Trade-off between Accountability and the Breadth of Delegated Authority

A legislature's judgment about how much power to delegate to a competition agency is likely to depend in part on the legislature's views about the adequacy of devices to ensure that the agency is accountable to legislators and the public for its policy choices. The more insulated the competition agency is from the political process, the narrower will be the powers that a legislature is likely to entrust to the agency. It is difficult to imagine that a jurisdiction would give broad powers to a competition agency – for example, to gather business records, to review a wide range of business behaviour, and to impose strong sanctions – without also creating some mechanisms that press the agency to exercise its powers in ways that serve society's interests.

5.8. Summary: Significance of the Pressure Points

The political branches of government have a variety of measures to influence competition agencies to consider and respond to their preferences, even when the competition agency is established as an administrative body that stands outside any government ministry and is headed by a board whose members have fixed terms and can be removed only for good cause. In many jurisdictions, executive bodies and legislatures have shown their willingness to use these techniques.

Actual or threatened recourse to pressure points has major implications for the operations of a competition agency. No agency can prosper unless it takes account of these pressure points and considers how to manoeuvre through the external political environment. The formulation of an agency's strategy requires consideration of political consequences. Every

day, an agency acquires or spends political capital. New projects should be considered in light of their political costs in several respects. The agency should identify how it can amass political support – for example, through the media – for projects that are certain to arouse political opposition. The agency also should be careful to avoid choosing so many politically sensitive targets at any one time that a critical mass of opposition will form and overwhelm the agency.

6. HOW MUCH INDEPENDENCE IS DESIRABLE IN PRACTICE?

The discussion above has indicated that complete autonomy from the policy process is unlikely to be attainable in practice for a competition agency. Several considerations also indicate that it may not be desirable, for purposes of agency effectiveness, to seek the greatest possible insulation from political forces. More complete forms of insulation from the political process may deny the agency the ability to be an effective advocate for competition when it uses policy tools other than litigation. Public institutions outside the competition agency take a number of decisions that determine the form and strength of competition. These include the choices of sectoral regulatory bodies regarding entry and pricing; legislative decisions about matters such as subsidies and trade protection; and actions taken by authorities at the regional and local level concerning matters such as the issuance of licenses to operate in the market. If a competition agency has no connection to the political process, it runs a risk that its voice will not be heard when these and other decisions are made.

A second and closely related concern is that the political branches of government will find ways to bypass the competition authority. Suppose that the competition agency has expansive powers and enjoys significant insulation from the political process. It has authority to make choices that deeply influence economic performance, but it is largely shut off from the views of other public institutions (e.g. legislators, government ministries) about how its power should be exercised. If other public authorities believe that the competition authority is inattentive to their concerns, they are likely to find ways, directly and indirectly, to diminish the importance of its decision-making role.

There are a number of means to this end. One important technique is to increase the importance of other policymaking tools to override or limit the scope of the competition agency's decisions. A legislature could enact laws that either divest the competition agency of specific powers or

could give other government bodies authority to take decisions that trump the choices of the competition agency. The scope of authority of other government bodies with closer links to the political process (e.g. sectoral regulators) could be expanded to offset what the legislature regards as the ‘unresponsiveness’ of the competition authority. As new issues arise and require legislative intervention, the legislature may decide to assign new regulatory tasks to institutions other than the competition agency.

These considerations require a more cautious answer to the question of how much independence is appropriate. Implicit or explicit in many discussions of independence are conditions that represent a sensible core domain of decisions that are shielded from political interference. The most important of these is the exercise of law enforcement authority which can lead to the imposition of significant sanctions upon juridical persons and natural persons. The political branches of government ought not to be able to (a) dictate, by rule or by custom, which entities an agency investigates; (b) determine whether the agency will prosecute such parties; or (c) influence how specific disputes will be resolved, including the choice of punishments for alleged wrongdoers. These conditions assume greater importance as the severity of the agency’s power to punish increases.

Law enforcement often is perceived to be the most formidable of the agency’s policy making tools regarding the power to gather information, to prosecute cases, and to impose sanctions. The same observations made here for law enforcement would apply, however, to other exercises of the agency’s authority, such as the issuance of rules that implement statutory commands and the preparation of reports. A basic test is whether the form of attempted intervention from external bodies diminishes, in fact or in appearance, the capacity of the agency to exercise independent professional judgement in the administration of its responsibilities.

There are a variety of ways to ensure that the agency is accountable for its decisions without interfering in its decision to investigate, to prosecute, to punish, or to exercise other powers. A legislature can hold periodic hearings at which legislators can ask the agency’s leadership to explain its action in completed matters and to discuss general trends in policy. An agency can issue statements that provide useful information about specific decisions to prosecute or not to prosecute. An agency can maintain and disclose data sets about its activities to permit informed external debate about its allocation of resources. An agency can implement a program of *ex post* assessment by which the consequences of individual initiatives are measured.¹⁸ All of these techniques make the agency accountable for its policy choices without permitting the political branches of government to determine how power will be exercised in specific matters.

7. CONCLUSION: MEANS TO PRESERVE NECESSARY DEGREES OF AUTONOMY

Longevity for its own sake is not a worthy aim. There is little evident value in maintaining a competition agency that ensures its survival by committing itself to unobtrusive law enforcement and declining to confront important and potentially controversial market failures. If a competition agency is to retain an economically significant enforcement role, one must ask how the agency is to perform that role without (a) succumbing to pressure that undermines its capacity to make merits-based decisions about how to exercise its power to bring and resolve cases or use other instruments in its policy-making portfolio and (b) losing the accountability and effectiveness that requires some connection to and engagement with the political process. What measures might enable a competition agency to resist suggestions that it undertake fundamentally flawed initiatives? How can one protect meritorious enforcement programs from political attack and intervention by political branches of government as such programs come to fruition? Presented below are some possible solutions.

7.1. Greater Specification of Authority

One approach is to avoid extremely open-ended grants of authority whose application invites objections that the agency has overreached its mandate or inspires political demands that it use seemingly elastic powers to address all perceived economic problems. A fuller specification of powers and elaboration of factors to be considered in applying the agency's mandate can supply a more confident basis for the authority's exercise of power and a stronger means to resist arguments that it enjoys unbounded power.

7.2. More Transparency: Reliance on Policy Statements and Guidelines

Greater transparency in operations can increase the agency's perceived legitimacy and supply a useful barrier to destructive political intervention. Competition agencies can usefully rely extensively upon policy statements and guidelines to communicate their enforcement intentions and delimit the intended application of their powers. One purpose of such statements is to suggest how the agency defines the bounds of the more open-ended and inevitably ambiguous grants of authority contained in its enabling statutes. For example, the Federal Trade Commission's policy statements in the early 1980s concerning, respectively, consumer unfairness and deception were important steps to define how the agency intended to apply its generic consumer protection powers.¹⁹ By articulating the bases upon

which it would challenge unfair or deceptive conduct, the Commission strengthened external perceptions (within the business community and within Congress) that it would exercise its powers within structured, principled boundaries. The FTC has never issued a policy statement concerning its authority to ban unfair methods of competition, and the failure to do so has impeded the effective application of this power.

A second important use of policy statements is to introduce plans for innovative enforcement programs. Before embarking upon a new series of initiatives, the competition agency would issue a policy statement that identifies conduct it intends to examine and, in stated circumstances, proscribe. Here, again, the FTC's experience provides a useful illustration. Policy statements would be useful when the agency seeks to use Section 5 of the FTC Act to reach beyond existing interpretations of the Sherman and Clayton Acts or to apply conventional antitrust principles to classes of activity previously undisturbed by antitrust intervention. By issuing a policy statement before commencing lawsuits, the FTC would afford affected parties an opportunity to comment upon the wisdom of the agency's proposed course of action and to adjust their conduct. Such an approach likely would increase confidence within industry and within Congress that the Commission is acting fairly and responsibly (Hobbs 1986: 477).

7.3. Strengthen the Agency's Procedural Safeguards

A frequently asserted basis for political intervention in a competition agency's affairs is that the agency's existing procedures deny respondents fair treatment. This concern is especially acute where the exercise of the agency's authority has major consequences – for example, in the decision to prosecute a case or to set sanctions. One way to increase perceptions of the agency's fairness is to adopt one of many possible measures that give parties more information about the theory of proposed enforcement measures and greater opportunities to examine and test the agency's evidence stronger rights of representation.

7.4. Adjust the Focus of the Legislative Oversight Process

A competition agency could use authorization, appropriations, and general oversight hearings to address more explicitly the political feasibility of proposed or ongoing enforcement initiatives. Agency officials could press legislators to consider the political hazards the agency might face in undertaking a long-term program whose success would hinge upon sustained legislative support. The agency likewise could use annual hearings

to solicit approval for continued pursuit of ongoing matters. Agency officials should impress upon authorization and appropriations bodies how the agency's past experiences can illuminate the desirability of undertaking or continuing a given initiative.

Oversight committees also should be encouraged to use hearings to conduct comparatively frequent (biennial) reviews of government anti-trust and consumer protection enforcement policy. Among other subjects, these hearings would address the appropriate focus of competition policy and the institutional forces that shape the agency's allocation of resources and execution of programs. The hearings would emphasize a historical perspective, as current and former agency officials would be called upon to assess current and emerging enforcement trends in light of past experience.

The suggested measures sketched above have a common thread. They place a premium upon the competition agency's willingness to make investments in the development and maintenance of institutional processes for taking stock of past experience and incorporating its lessons into the formulation of current policy. The more difficult question for competition agencies and for other policymaking institutions of government is whether they are capable of learning, retaining, and applying the lessons of their past to improve their future performance. The incentives that guide legislators and agency officials in allocating their resources make it difficult to obtain a middle- or long-term view in what is essentially a short-term policymaking environment. The path to improvement requires a reorientation in agency management that emphasizes greater attention to institution building rather than a calculus that measures agency quality by the sheer number of new program outputs, including the sheer number of new prosecution events.²⁰

NOTES

* Portions of this chapter are adapted from 'Congress and the Federal Trade Commission', *57 Antitrust L.J.* 517(1989). The views expressed in this chapter are those of the author alone.

1. See Khemani and Dutz (1996: 28): 'The competition agency should be independent and insulated from political and budgetary interference.'
2. These phenomena are evident in the oldest and the newest of competition policy systems. On the experience of the US Federal Trade Commission see Kovacic (1987: 93-94 and 1982: 664-667).
3. S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914). The remarks of Senator Francis Newlands, the principal Senate sponsor of the FTC Act, also underscored the logic of enacting a ban against unfair competition. 'My belief,' Newlands said, 'is that this phrase will cover everything that we want, and will have such an elastic character that it will meet every new condition and every new practice that may be invented with a

- view to gradually bringing about monopoly through unfair competition.’ 51 Cong. Rec. 12,024 (1914).
4. The Section 5 ban upon ‘unfair methods of competition’ enables the FTC to proscribe conduct not reached by prevailing interpretations of the Sherman and Clayton Acts. See ABA Section of Antitrust Law (1981: 40–56) and Averitt (1980). Since 1914, the application of Section 5 rarely has extended antitrust doctrine beyond the bounds of Sherman and Clayton Act jurisprudence. See Kovacic and Winerman (2010).
 5. These powers appear in Sections 6 and 9 of the FTC Act, 15 USC. §§ 46 & 49.
 6. Notorious examples of legislative intervention premised on FTC overreaching in the application of the agency’s broad enforcement and information gathering powers include the congressional response to the publication in 1919 of the FTC’s report on the meatpacking industry and the culmination of its efforts in the late 1940s to challenge delivered pricing arrangements in the cement and steel industries. These episodes are discussed in Kovacic (1987: 78–80 and 1982: 623–627) and Latham (1950).
 7. ‘Regulatory statutes’, observes David Mayhew, ‘are the by-products of congressional position taking at times of public dissatisfaction. They tend to be vaguely drawn. What happens in enforcement is largely a result of congressional credit-claiming activities on behalf of the regulated; there is every reason to believe that the regulatory agencies do what Congress wants them to do’: Mayhew (1974: 134–135).
 8. The same can be said for other US regulatory commissions such as the Federal Communications Commission.
 9. 221 US 1 (1911).
 10. 47 Cong. Rec. 1225 (1911). Newlands was one of the FTC Act’s principal sponsors in the US Senate.
 11. 51 Cong. Rec. 13,047 (1914).
 12. *Id.* at 13,047–48.
 13. See, e.g., Nomination of Caspar W. Weinberger to be Chairman of the Federal Trade Commission: Hearings before the Senate Committee on Commerce, 91st Cong., 1st Sess. 5, 31 (1970) (Senator Vance Hartke to Chairman-designate Weinberger: ‘Let me make it perfectly clear to you, that under the Constitution and under the law which created it, the [FTC’s] responsibility is only to the Congress . . . this is an arm of the Congress’); Nomination of Sigurd Anderson to be a Federal Trade Commissioner before the Senate Committee on Interstate and Foreign Commerce, 84th Cong., 2nd Sess. 125, 129 (1956) (Senator Warren Magnuson, Committee Chairman, to Commission nominee Sigurd Anderson: ‘We are constantly reminding people that [the FTC] is an arm of Congress and not an independent agency.’); Nomination of A. Everette MacIntyre to be a Federal Trade Commissioner: Hearings before the Senate Committee on Commerce, 87th Cong., 1st Sess. 1 (1961) (Senator Andrew Schoeppel to Commission nominee Everette MacIntyre: ‘Of course, you are aware that [the FTC] is one of the arms of Congress, are you not?’).
 14. ‘One on One’: Federal Trade Commissioner Chair Jon Leibowitz, Fox News (Apr. 22, 2010) (FTC Chairman Jon Leibowitz: ‘[W]e will do anything that Congress tells us to do, of course. We’re an independent agency and a creature of Congress.’).
 15. William Baxter, who headed the Antitrust Division from 1981 through 1983, pressed ahead for the restructuring of AT&T Corp. to resolve the Justice Department’s monopolization suit against the telecommunications firm despite strong opposition from the Department of Commerce and the Department of Defense.
 16. See Kovacic (1997) documenting the frequency with which individuals with experience as members of Congress or employees of congressional staffs receive appointments to FTC.
 17. James V. Grimaldi, *Hollings and Muris Go Another Round in the Battle of the Merger-Review Titans*, Washington Post, Apr. 22, 2002, at E11 (Senator Ernest Hollings, speaking of FTC chairman Muris: ‘I’m going to eliminate him.’).
 18. The dimensions for a possible program of *ex post* assessment are presented in Kovacic (2006).

19. The Commission issued its Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction in a letter of October 17, 1980 to Senators Wendell Ford and John Danforth, Chairman and Ranking Minority Member, respectively, of the Senate Committee on Commerce, Science, and Transportation, reprinted in 4 Trade Reg. Rep. (CCH) P13,203. The Commission's Statement on Enforcement Policy Against Deceptive Acts or Practices appeared in a letter of October 14, 1983 to Congressman John Dingell, Chairman of the House Committee on Energy and Commerce, reprinted in 4 Trade Reg. Rep. (CCH) P13,205.
20. The importance of a longer term focus on institution building is addressed in Kovacic (2009 and 2010).

REFERENCES

- ABA Section of Antitrust Law, Monograph No. 5 (1981), *The FTC as an Antitrust Enforcement Agency: The Role of Section 5 of the FTC Act in Antitrust*, Vol. 1, pp. 40–56.
- Albiniak, P. (2002), 'Justice Denied as Hollings Prevails; DoJ Won't Get Oversight of All Media Mergers', *Broadcasting & Cable*, May 27.
- Averitt, N.W. (1980), 'The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act', *B. C. L. Rev.*, **21**, 227–300.
- Cushman, R. (1941), *The Independent Regulatory Commissions*, New York: Oxford University Press.
- Faith, R.D., Leavens and R. Tollison (1982), 'Antitrust Pork Barrel', *J. L. & Econ.*, **15** (25), 329–342.
- Hobbs, C. (1986), 'Antitrust in the Next Decade – A Role for the Federal Trade Commission?', *Antitrust Bull.*, **31**, 451–480.
- Khemani, R.S. and M.A. Dutz (1996), 'The Instruments of Competition Policy and Their Relevance for Economic Development', in C.R. Frischtak (ed.), *Regulatory Policies and Reform: A Comparative Perspective*, Washington, D.C.: Private Sector Development Department, The World Bank.
- Kovacic, W.E. (1982), 'The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement', *Tulsa L. J.*, **17**, 587–671.
- Kovacic, W.E. (1987), 'The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective', in R. MacKay, J.C. Miller III and B. Yandle (eds), *Public Choice and Regulation: a View from Inside the Federal Trade Commission*, Stanford, CA: Hoover Institution Press.
- Kovacic, W.E. (1988), 'Public Choice and the Public Interest: Federal Trade Commission Antitrust Enforcement During the Reagan Administration', *Antitrust Bull.*, **33**, 467–504.
- Kovacic, W.E. (1997), 'The Quality of Appointments and the Capability of the Federal Trade Commission', *Admin. L. Rev.*, **49**, 915–961.
- Kovacic, W.E. (2006), 'Using Ex Post Evaluation to Improve the Performance of Competition Policy Authorities', *J. Corp. L.*, **31**, 503–547.
- Kovacic, W.E. (2009), 'Rating the Competition Agencies: What Constitutes Good Performance?', *George Mason U. L. Rev.*, **16**, 903–926.
- Kovacic, W.E. (2010), 'The Digital Broadband Migration and the Federal Trade Commission: Building the Competition and Consumer Protection Agency of the Future', *J. Telecomm. & High Tech. L.*, **8**, 1–24.
- Kovacic, W.E. and M. Winerman (2010), 'Competition Policy and the Application

- of Section 5 of the Federal Trade Commission Act', *Antitrust L.J.*, **76** (2), 929–950.
- Latham, E. (1950), 'The Politics of Basing Point Legislation', *Law & Contemp. Probs.*, **15**, 272–310.
- Mayhew, D. (1974), *Congress: The Electoral Connection*, New Haven, CN: Yale University Press.
- McChesney, F. (1987), 'Rent Extraction and Rent Creation in the Economic Theory of Regulation', *J. Legal Stud.*, **16** (1), 101–118.
- Rourke, F. (1972), *Bureaucratic Power in National Politics*, 2nd edn, Boston, MA: Little Brown and Company.
- Yandle, B. (1987), 'Regulatory Reform in the Realm of the Rent Seekers', in R. MacKay, J.C. Miller III and B. Yandle (eds), *Public Choice and Regulation: A View from Inside The Federal Trade Commission*, Stanford, CA: Hoover Institution Press.