Effective Institutions: Competition Agencies and the Political Process

William E. Kovacic

George Washington University & King's College London
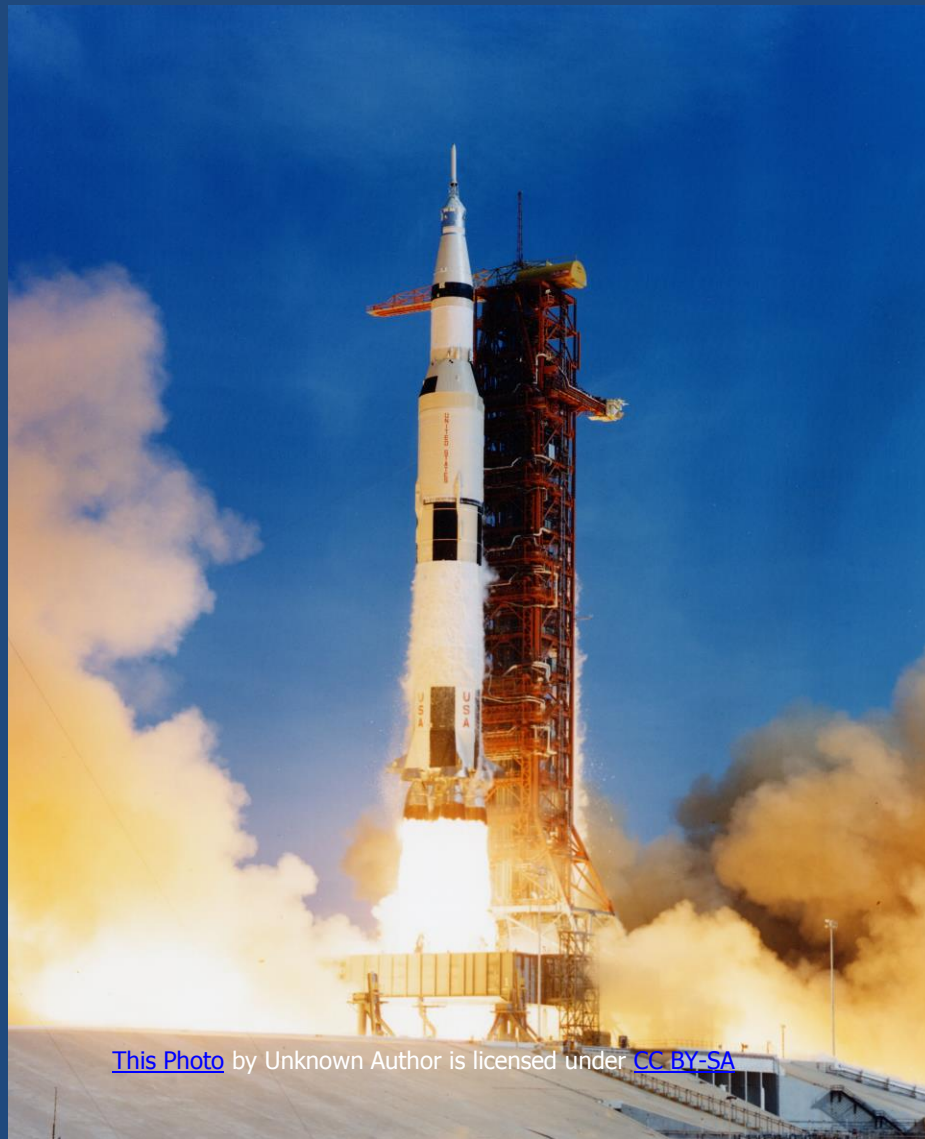
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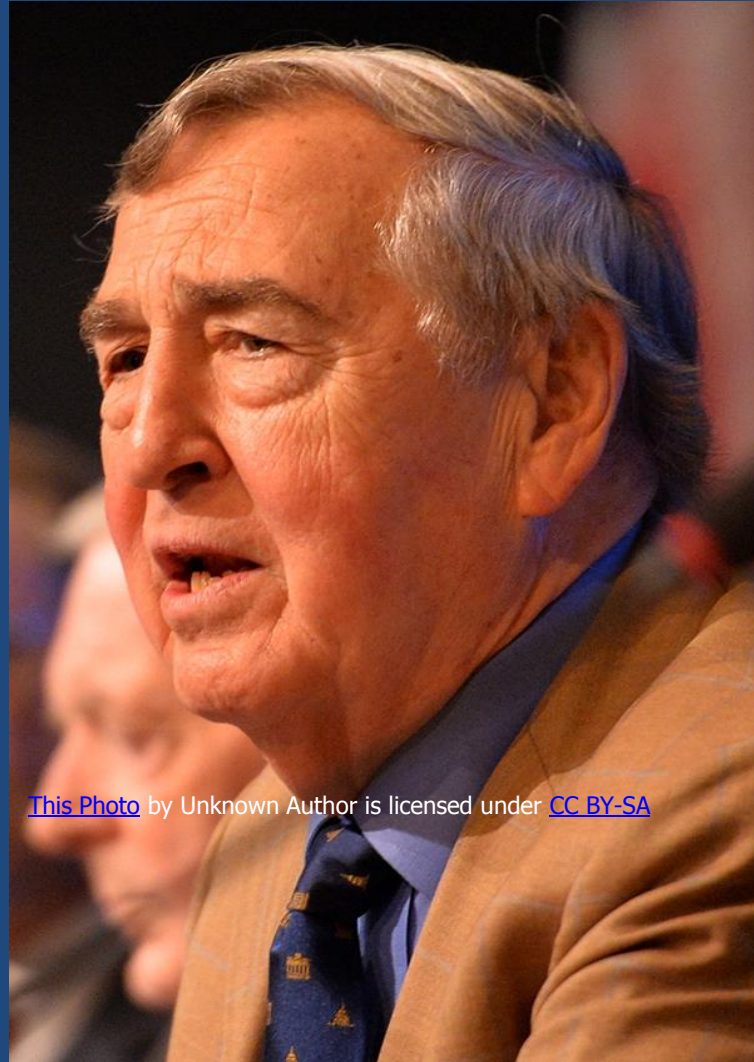
Competition Law: Physics and Engineering

- Traditional Focus of Study
  - Doctrinal standards
- Emerging Concerns
  - Why are big policy aims unfulfilled?
  - How does structure shape substance?

Good Physics + Good Engineering

Graham Allison, Harvard University Kennedy School of Government

Allison's Policy Challenge: *The Essence of Decision* (1971)

- "If analysts and operators are to increase their ability to achieve desired policy outcomes, ... we shall have to find ways of thinking harder about the problem of 'implementation,' that is, the path between the preferred solution and actual performance of the government."

Optimal Institutional Design

- How Do Specific Design Characteristics Improve or Retard Effectiveness?
- No Clear Answers, But Better Efforts to Understand and Answer the Question

Seven Major Design Issues

- Relationship to Political Process
- Governance Mechanism
- Location of Agency in Public Sector
- Diversification of Enforcement Agents
- Assignment of Policy Functions
- Portfolio of Policy Tools
- Integration of Decision Functions

Agenda

- Focus: Relationship to the Political Process
- Some Tentative Conclusions
- wkovacic@law.gwu.edu
- Caveat: Personal Views Only

Resources

- Hyman & Kovacic, *Competition Agency Design: What's on the Menu?*, 8 EUROPEAN COMPETITION LAW JOURNAL 527 (2012)

- Kovacic & Lopez-Galdos, *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes*, 79 JOURNAL OF LAW & CONTEMPORARY PROBLEMS 85 (2016)

- Kovacic & Winerman, *The FTC as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA LAW REVIEW 2085 (2015)

Is There Political Pressure in the Application of Competition Law?

- Political Scrutiny Is Inevitable
  - Agency's economic significance
  - Accountability for budget and powers
- Real Issue: How to Deflect Harmful Impulses and Channel Beneficial Forces?

Autonomy, Legitimacy, and Effectiveness: Trade-Offs

- Autonomy: Minimize Interference in the Decision to Prosecute

- Legitimacy: Accountability for Policy Choices

- Effectiveness: Ability to Obtain Recourses and Powers and to Act as Policy Advocate

How "Independent" Are "Independent" Agencies?

- Personality of Leadership
  - How independent do you want to be?
- Political Pressure Points
  - Appointments
  - Budget
  - Investigations
  - Routine oversight

Gaining Essential Autonomy: "Hard" Autonomy Safeguards

- Limits on Removal of Top Leadership
  - Only for good cause
- Dedicated Income Streams
  - Example: Fees

Gaining Essential Autonomy: "Soft" Autonomy Devices

- General: Building a Respected Brand

- Disclosure: Plans, Guidelines, Decisions

- Shrewd Project Selection

- Process: Internal and External Checks
  - Example: Robust judicial review

- Technical Proficiency

- Evaluation

Trends

- Start-Up Phase
  - Closer political control
- Progression: Toward Greater Autonomy
  - But all systems encounter external political shocks
  - Needed autonomy must be built every day
- Side-Effects of Advocacy

Location of the Competition Authority in Public Sector

- Self-Contained, Stand-alone Body
- Subunit of Larger Government Department

Relationship of Competition Authority to Other Public Institutions

- Coordination Mechanisms
  - Determined by legislation
  - Networks
- Multi-function Competition Agencies

The Remarkable Transformation: November 1989

The Past 30 Years

- Creation of Competition Law Systems
  - By 1989: About 30
  - Today: About 130
  - By 2025: >135
- Diversity/Experimentation in Design
- Question: What Configuration Yields Best Policy Outcomes?

Changing Views of Institutional Development

- Common Advice in 1990s
  - One chance to get things right
- Experience in Past Twenty Years
  - Regular upgrades are attainable
  - Sustained success builds upon gradual, improvements and experience

Common Learning

- Pooling of Design Experience
- Exchange of Know-How
  - Responding to politicians
  - How to create supporting coalitions?
- Support from International Bodies
  - Adherence to widely-shared global norms