

[Slide 1: Project Selection]

MR. KOVACIC: My name is Bill Kovacic, and I'm delighted to participate in this further edition to the Training On Demand series of modules prepared by the International Competition Network.

Today, I'm going to talk about project selection, the way in which agencies can improve their effectiveness in picking projects that will fulfill their aims and to achieve the results intended by their mandate.

Just a bit of background, I come to the subject from several perspectives. I'm the former chair of the U.S. Federal Trade Commission. I'm an academic. I'm a visiting professor at King's College London and a professor on the faculty of the George Washington University Law School in Washington, D.C. I've also had the opportunity to work with a number of competition agencies around the world, and, most recently, as a non-executive director with the United Kingdom's Competition and Markets Authority.

Through all these experiences, I've developed a better sense of what it takes to make wise decisions about what projects to begin. And in this module, I'd like to offer you some views based upon my own experience, but also my experiences in other jurisdictions about how to do this well. In doing this, I'm not speaking on behalf of the Competition and Markets Authority, but in many ways, my observations most recently are informed by what I have learned about how the CMA does its work. And the framework that I'll be laying out for you is heavily influenced by my experiences with the CMA.

[Slide 2: Competition Agency Program]

Why is the subject important? If you look at the substance of a competition agency's program as a whole, it's an accumulation of many discrete projects, projects involving the

prosecution of cases, projects involving the preparation of advocacy matters, projects involving the preparation of reports, and in many instances, publicity programs to make known what the agency does, to promote compliance, to gain broad social support and political support for its programs.

What the agency does is the sum of all of these things. For most agencies, not a day goes by when it does not make a decision about initiating one or more of these projects. And the key question for an agency is, in building an effective program, is how to make wise decisions about each of these individual matters that collectively form the heart of what the agency is and what it does.

[Slide 3: Aims of This Module: Improved Project Selection and Agency Effectiveness]

In this module, I'd like to talk about ways to improve project selection, and by doing that, to enhance agency effectiveness. The specific sub-objectives are to assist the agency in achieving its priorities through good project selection.

Second, more generally is to build a respected coherent brand, to enhance the agency's reputation and to treat its reputation, its brand, as being crucial assets that define its ability to deliver programs successfully and to build needed support for its programs.

Third, how to improve the completion of mandatory tasks, as well as discretionary tasks. We can define an agency's mandate into two parts. There are those tasks which the law requires the agency to do. There's a mandate that takes away its discretion. It must do certain things. But even for those things that are mandated, for which it has no choice but to allocate some resources, good program selection can assist in deciding how many resources to devote to those efforts.

Fourth, and maybe most important for the entire talk, the single-most significant lesson I

think we can derive from larger experience, good project selection puts a premium on matching commitments to capabilities. To make sure, as the agency launches new matters, that it has the capacity internally, the people, the administrative infrastructure, resources for out-of-pocket expenses, to perform the project well.

And, last, having a good program selection process in place sets a necessary foundation for assessing results. That is, the development of an effective evaluation program rests very heavily on the development of a good project selection program because, indeed, the beginning of evaluation often resides in the project selection decision itself.

[Slide 4: Agenda: Eight Questions for Each Proposed Project]

Today, we're going to look at eight questions which I think will assist an agency in making good choices about new projects. I'm going to suggest that there are eight inquiries which, if they're made in a careful way at the beginning of each project, will increase the agency's ability to get the results that it hopes to. I'm not going to argue that answering these questions invariably yields good outcomes. I am going to suggest that it increases the likelihood of getting those kinds of results.

These questions are derived in many ways, again, from my experience with the Competition and Markets Authority. This framework, to a large extent, goes back to work done by Philip Collins and John Fingleton and the Office of Fair Trading, and carried forward in the modern era by Lord David Currie and by Alex Chisholm at the CMA.

The eight questions are, and we'll look at each of these in more detail:

- Is the new project consistent with our system of priorities?
- Second, what are the gains we expect to realize from the project if it works?
- Third, what are the risks associated with going ahead?

- Fourth, who's going to do it? Who within our institution, or perhaps in collaboration with others outside the institution, are going to carry out the project?
- Fifth, what's it going to cost?
- Sixth, how long is it going to take?
- Seventh, how does this project fit within our existing portfolio of projects?
- And, last, how will we know if it worked? By what measures will we be able to detect whether we're achieving the aims that we hope to accomplish?

We'll look at each of these in more detail.

[Slide 5: ICN Resources]

Before starting out, I want to direct your attention to a rich body of resources that ICN already has prepared that deals with many of these subjects. ICN has prepared a number of reports and manuals that provide significant guidance for attempting to answer these questions and provides valuable context for an agency in deciding what to do. And I strongly suggest in refining and enhancing an agency's own project selection mechanism, that it take a close look at what the ICN has already done.

And, in particular, I want to draw your attention to its agency practice manual, which has three chapters, in particular, that I think will be informative: one on strategic planning and prioritization, one on effective project delivery, and one on knowledge management. These and other resources can be obtained on the ICN's website, internationalcompetitionnetwork.org, a very valuable mechanism for enriching the agency's own capacity.

In short, before I would start out in a new direction, I'd start here, because a lot of the valuable thinking has been done already and you can take these materials and adapt them to your own needs.

[Slide 6: Overall Program Coherence: Consistency with Agency Priorities]

To begin, the first question to be asked in looking at a new project -- and, again, in thinking about a new project, I'm thinking about a proposed case, proposed investigation, a proposed market study, a proposed advocacy matter, a proposed publicity program. Where do you start? I think the first place to start is to ask how does this fit within our existing set of priorities?

Now, in asking that question, I'm assuming that the agency has an existing set of priorities, and to step back for a moment, if your agency doesn't have one, it's a good time to get one. In order to decide what to do to build a coherent program, it's vital to start out with a map that tells us where we're going. And the process of setting priorities is an indispensable starting point for preparing that map. But with that map in hand, that is where we decided what we're trying to do, a valuable question to ask with each individual project is this -- does this advance our priorities and in what way? And we can pose this question, most directly, of course, to discretionary resources where we decide ourselves what to do, but I think we can also pose this question for so-called non-discretionary tasks as well.

If we're supposed to look at mergers, and we're mandated to look at them, well, which should we look at more carefully? If we're supposed to look at horizontal agreements involving direct rivals, then which of these should we focus on, in what sectors? Where should we focus our attention in both instances?

As part of looking at the priorities and matching up the project priorities, where does the project fit in? Which of our stated goals does it help us to accomplish? Now, this isn't to say that a good project, a good proposal that doesn't fit in the existing scheme of priorities ought to be disregarded. No set of human beings can come up with a completely farsighted and prescient

assessment of everything that will be important. Circumstances change. Unanticipated developments require a re-think. So, simply because a great idea doesn't fit in the existing scheme of priorities does not mean it should be cast aside.

So, necessarily, this fitting between the new project and the existing set of priorities must have flexibility, adaptability, to take into account a new idea that doesn't fit in the existing framework. And the agency must have the ability and the wisdom to decide when to add new things to the mix.

[Slide 7: Anticipated Gains]

The second basic question, what do we expect to get from this? Why are we doing this? It's astonishing to see how often an agency doesn't think carefully through this, and I think there are basically four things that an agency might seek to obtain by reason of pursuing a specific project. There are others, but let me mention the four most important.

One reason to do the project is that we think it will have a significant impact on the economy. That is, there are huge gains for consumers to be realized if our project is successful. If we are successful in bringing a case against a specific cartel, it will generate tremendous benefits to society. If we are successful in carrying out an advocacy program in front of the legislature, it will discourage them from adopting a law which would impose massive costs on society with few offsetting benefits.

A second reason to bring the case, to pursue a matter, is that we want to change doctrine or you want to either clarify an existing doctrinal principle that's ambiguous or, in some sense, to push the boundaries of the system outward by making clear that the law applies to circumstances that have not been captured in previous cases.

So, a second reason to bring a case is, especially of course for litigation, is we want to

reset or clarify the legal boundaries within which we operate.

A fourth reason to bring a case is for the purpose of deterrence and to encourage compliance. Let's suppose there are areas in which legal doctrine is quite clear. In some sense, building a framework of competition law is like constructing a fence. The fence tells observers where the property line starts and where they are expected to stay out. Fences fall apart over time, and it's necessary to walk the boundaries of the property to see whether or not the fence is well-constructed. Same thing with legal doctrine. There may be instances in which the doctrine, in subtle ways, has eroded. Earlier doctrinal principles may have been established so far in the past that business people today are not aware of them. So, periodically, it's important to bring cases to reinforce the principle that the agency is going to mandate compliance with certain areas of the law and to refresh in the minds of business decision-makers that these principles are alive and will be subject to agency enforcement.

And a fourth reason to bring a case, which I see is subsidiary to the other points, is to build the experience and capability of the agency. That is a useful byproduct of bringing a case, is that it's an opportunity to build the capacity, the forensic skills, and the investigative skills of the agency team. Competition agencies are no different from other organizations. They operate in part by what is known as a learning curve. They get better at doing certain things as they do more of them.

When you're a very junior person starting out doing your first investigation, doing your first investigational hearing, you're at a disadvantage. I remember that from my own experience over 35 years ago as a junior staff attorney, a case handler, at the Federal Trade Commission. When I did my first interview, it was a massacre. I was barely able to get the witness to state her name and address and her professional background. By the time I did the twentieth interview, I

was much better at it. In many ways, experience in a case is a way for the agency to build the capability of its staff. I'm not suggesting here that you would bring a case simply for the purpose of building experience. But a collateral benefit of bringing certain cases at certain times is that it gives you an opportunity to take more junior people and less experienced people and put them on a platform that will enable them to succeed in the future. When an agency evaluates a project, it's useful to think why are we doing the project what do we expect to get?

[Slide 8: Potential Risks]

At the same time that you ask, "What do we expect to gain, what are the benefits?" it's important to have in mind what the risks are, and there are several. The doctrine -- the doctrinal principle at issue may be a difficult one. Indeed, it may be one that imposes a great burden on the agency itself. And because the doctrine is foreboding or uncertain, there's a chance that you will lose that case. I think that every time you walk into a courtroom with any case, there's a 20 percent chance that you're going to lose because of the vagaries with which judges and other human beings make decisions. But if you know in advance that the doctrinal principle is either somewhat adverse to you or ambiguous, you know in advance this is going to be a harder case to win.

Second, the substantive issues themselves may involve great analytical complexities, which, as a related point, will impose greater demands on the agency to collect and interpret information. In a sense, if this were an examination problem for a student, this is a harder question. There's some questions that are more difficult because they're more complex to answer, more factors, more considerations.

A fourth concern is political resistance. You can take it as a theorem of law enforcement for a competition agency or in writing reports and doing advocacy, that the more you challenge

or endanger entrenched economic interests that benefit from measures that suppress competition or from public policies that suppress competition, the more you endanger those interests, the more powerfully they will seek to retain them. And one way to retain them is to fight for them through the political process. This is not a suggestion to back off of politically-sensitive matters. It is a suggestion, however, to realize that the agency every day works in a political environment, to anticipate political challenges, and to think of ways to diffuse them when they come up. In going through these risks, the aim of looking at the risks is to provide a competent basis for balancing gains and risks. It's not an injunction not to take risks.

In so many instances, I don't think that the good things a competition agency does are ever riskless. There are always risks. The point is to have a thoughtful assessment of what they are. If you're going to cross a body of water that has navigational hazards, it's important to know what they are in advance, to know that there's a reef here, that there's a sunken ship in another area, and to use that as a way to pilot your ship through the obstacles to get to the harbor, to get to the berth that you want to occupy. You're not doing yourself a favor if you don't try to map out and take account of what those hazards are.

And there's a big difference between taking a calculated risk that looks very carefully at what you expect to accomplish, looks very carefully at the hazards that lie in your path in getting there, but taking a calculated risk that decides to go ahead as opposed to just taking what I'm saying would be a reckless gamble, and the reckless gamble involved, simply ignoring the risks or failing to think through how hard it's going to be to accomplish the project.

[Slide 9: Who Will Do the Project?]

Fourth crucial question, who's going to do it? If you're going to play a very complicated and wonderful musical competition, you want a musical performer who's very good at what they

do. There are a variety of wonderful pieces of music in the work. Indeed, if I were to come to you and ask would you like to go to see a performance of Beethoven's Eroica symphony with me tonight, a question you might ask is, "Who's playing?". Suppose I tell you it's a middle school ensemble that has limited talent, but they're truly earnest and they try so hard. You might say, "I have a thousand and one other things to do and I can't make it." But if I tell you it's the Berlin Philharmonic Orchestra, you might say, "When and where do we meet?". So much depends on who's playing. And if you're going to initiate a project, it's crucial to ask, do we have the skills to perform that composition?

Sometimes those skills can be found in the house, inside. We have them already. Sometimes to do the project, it means going outside to bring them in, either to recruit people to come and join or to contract out specific tasks. In either case, the crucial aim is to match commitments to capabilities. Now, an agency can quite comfortably decide to operate above, in some sense, its capacity. You can make a machine, an organization, work at 110 percent of its capacity, and in many ways, it will perform effectively. Indeed, with human organizations, trying to do a bit more than you're able to do right now forces you to stretch your ability, you grow. It's healthy, in a sense, to set ambitious targets. If you try to make a person operate at 200 percent of their ability, that's a formula for breaking down, and a machine will break down if you make it do the same. So, the aim here is to match the demands of the project with our ability to deliver. And if you notice that you don't have the ability to deliver, there are two solutions. Either you go and create the ability or you think very seriously about whether or not you want to pursue the project, because the risk of taking a project that overwhelms your ability to deliver is that you end up with a project that becomes a catastrophe.

[Slide 10: How Much Will It Cost?]

Next key question, how much is it going to cost? One cost is the time of our personnel. How many people for how long do we think the project will run? What out-of-pocket investigation expenses are we going to incur? Are we going to have to do dawn raids in a number of different cities, which means sending our people to different cities? The simple cost, logistically, of carrying out an inquiry. Are we going to have to hire external experts to provide testimony or evidence to support our position? In a number of instances, these can be expensive outlays. For each project, it's very useful to create a budget that is regularly revisited. Here's our initial assessment, here's how much it's actually costing, and to ask how the project that we're looking at now is going to affect the overall agency budget.

Seen this way, the project assessment focuses attention on what you're going to give up to do this project and to make tradeoffs across different areas of the agency's work to decide what one will do. I'm not suggesting, in any sense, that this is an easy tradeoff to make, but it's very helpful to know what the tradeoffs are and to have a clear sense of what the cost to the agency will be in proceeding.

[Slide 11: How Long Will It Take?]

Another key concern is to ask how long the project is going to take. I'm not proposing to you that it's possible to identify a perfect schedule for the program, a schedule that will be followed precisely in all instances. But one wants to develop, for example, in the instance of a lawsuit or a proposed law enforcement matter, how long it's going to take to do the investigation, how long will it take to prepare the decision to prosecute, to assemble recommendations, to write a statement of objections for the decision-making tribunal to make a decision to go ahead, and how long will the adjudication process take, including appeals which will challenge decisions

taken below?

Once this provisional timetable is set up, it is especially important, if you give a green light to the project, to track progress, to track whether or not the program is unfolding on the timetable you expected, to identify delays, to assess the significance of delays, and to decide what has caused a slippage in the schedule. Maybe the project has become more complex because new issues have been identified. By tracking and monitoring, the agency is in the position to decide whether to accept greater complexity and to continue the project.

And most of all, to identify projects that have become -- what are called legacies. They've stayed on the agenda because no one has taken a look to ask in a serious and critical way, "Do we want to continue them?". And in many agencies -- I'd even assert most -- you will find certain projects that have lived on well beyond their useful life. A well-disciplined program of tracking and monitoring puts the agency in a position to ask whether or not it wants to commit more resources to projects already undertaken.

[Slide 12: How Does It Fit Within the Existing Portfolio of Projects?]

It's important not to evaluate proposed projects in isolation. Instead, a vital inquiry is to ask, "How does the new project fit in our entire portfolio of projects?". New projects are offered against a backdrop of other commitments. Unless the agency is literally on day one of its existence, it has an inventory of other projects and commitments it's taken on. It's already doing market studies; it's got cases in litigation; it has advocacy projects in front of other agencies or legislative bodies; it's preparing reports; it's already doing a number of things.

That portfolio, including the new project, should be evaluated on a recurring basis from several perspectives. One way to look at the portfolio is according to risk, much like an investor would look at the risk in an investment portfolio. A good investment portfolio is not risk-free. It

has a mix. Certain investments that are more risky, but promise a higher return; other investments at the other end of the spectrum that involve relatively small returns, but involve small risks; and an intermediate category of matters that involve modest risks for modest returns. A good agency portfolio has all three of these ingredients.

And as one adds a new project, you want to ask, “How does it affect the balance of risk in the portfolio?”. One doesn’t want to mechanically keep approving risky projects without thinking about the effect of those projects in the whole portfolio. When I was a junior case handler at the Federal Trade Commission in the 1970s, an enormous source of grief for the agency was the failure to engage in this exercise, with the result that the portfolio became very heavily weighted with highly risky projects that outran the agency’s ability to deliver. Because this is related to a crucial aim of the entire exercise: again, to make sure that the commitments that the agency is making correspond well to the skills that it has to deliver effectively.

So, the trap to avoid here in deciding, “Do we undertake this project?” is to fail to take account of how it fits into the larger body of commitments that the agency’s already made. Because sometimes, taking on a new, ambitious project, means that resources will have to be withdrawn or diverted in part from other projects, and to understand the tradeoffs that are being made. How does it fit into the larger portfolio?

[Slide 13: How Will We Know It Is Working?]

Last question, question number eight: how will we know it’s working? By what benchmarks will we see that we’re succeeding? And how do we define those benchmarks? Are we expecting a better doctrinal outcome? Are we getting that? Do we think economic performance is going to be enhanced? If so, is there something happening in the market that tells us that that’s taking place? Are prices going down? Is quality going up? Are government

procurement authorities, in the case of bid rigging, getting better results because cartels are not so easily formed and advanced? What do we think we are getting? Why did we do this, and what do we look to see that we've succeeded?

This sets the foundation for a crucial exercise for every agency, and that's called evaluation. How do we know it worked? What were the outcomes? Substantively, is our process effective? A simple way to do this, which starts with the project initiation phase, is to compare our assumptions about what we want to achieve, what we think is happening in the market, to the actual experience that we observe as we go ahead. A simple before-and-after comparison that tests our prior assumptions against actual experience. To do this well as part of project selection, we have to record what those assumptions are. We have to be candid in the decision to prosecute in spelling out what we think we will gain, and what assumptions we're making about the market, and how our remedy is going to make things better. Thinking about these eight things puts the agency in a much better position to make good decisions about each project and to improve its portfolio.

[Slide 14: Contributions of the Framework]

The framework does several things. Maybe most important, it directs attention to investments that have to be made to perform new, ambitious projects. To realize what outlays the agency has to make on a regular basis to be in a position to provide what are called deliverables: the cases, the market studies, the reports, the advocacy memos.

It does this, in part, by putting projects in a larger context so that we don't use tunnel vision to examine individual projects. Instead, we're aware how it affects our entire body of work. And it gives us greater coherence. This framework improves our ability to define what our agency does, to create what a commercial enterprise would call a brand. The brand is the

distillation of the agency's objectives and its ongoing efforts to fulfill them. Wise program selection reinforces a positive brand and it strengthens our reputation for competence. If we're ever questioned, "Why did you do this, how did you decide to allocate resources here?". It's a question posed perhaps by a parliamentary committee. Maybe it's a question posed by a journalist. Maybe it's a question posed by academics on the outside. Having this framework puts us in a position to answer those questions in a much more confident and thoughtful way, and in doing that, it builds our reputation for competence.

And I think a reputation for competence is closely related to what we call fairness due process. Why? The outside world is likely to have more confidence in our judgment and in our decisions if they have the sense that we're taking those decisions in a well-reasoned way. In many ways, these project selection criteria are a valuable element of what we might call quality control. And the better an agency's visible quality control mechanisms are, the more confidence, I think, affected parties on the outside have in the process by which it does its work, more respect for the way in which the agency operates.

[Slide 15: Why Investment Matters]

Let me underscore why I think investment is so important and taking account of needed investment is crucial to what the agency does. Because investment informs the three things the agency does. An agency, on a regular basis, has to do three things. It has to make a diagnosis of commercial behavior that it observes, and this is very hard to do, especially in technologically dynamic markets. It has to make the decision to intervene. That is, can we make things better by taking action? And, last, if it decides to act, it has to decide how. What remedies do we want and what is the appropriate timing for those?

[Slide 16: Necessary Investment Focal Points]

All of these forms of activity require investments in building skilled teams of people. That's the human capital of our agencies. Building an administrative infrastructure to support them effectively. That infrastructure can include, for example, building a good IT network that helps -- information technology network -- that helps our people do their job well; that keeps records in an informative, confidential form where necessary; that builds knowledge, the equivalent of research and development by which an agency becomes wiser about what it should do; that improves its quality control system as a whole and, where necessary, builds cooperative frameworks, links with other public institutions at home and abroad that enable it to do its work.

These are areas -- these are species of investment -- that make the diagnosis of behavior, the decision to intervene and the choice of remedies well-informed.

[Slide 17: The Blind Side]

And, in particular, by focusing on the match between commitments and capabilities, which is the heart of the eight-step framework, the agency avoids what I would call the blind side. And the blind side is the failure to build the capability to deliver projects effectively. It goes back to my question, who's going to do it? The who's going to do it question is vital because it focuses intensely on our reservoir of skills. And there's too often a tendency, I think, to launch new projects without careful attention to who's going to carry them out. The result being two things: one is that the projects, as a whole, are so demanding that it overwhelms the agency's ability to deliver, and, the projects, as a whole, arouse such broad-based political opposition, the crippling limitations on the agency's ability to function. Its budget, its authority are imposed by elected officials.

Going through the framework I've suggested, make sure that one is making the

investment that builds the ability to carry out projects effectively, and in answering the question in the project selection criteria, “Who’s going to do it?”.

[Slide 18: Improved Understanding of Basis for Policy Success and Failure]

Let me finish with a final thought about how good project selection figures in to the improvement of an agency over time. By looking at individual projects in detail in this way and testing them against the criteria that I’ve outlined in the module, I think the agency gets a better understanding of what accounts for project success over time, why projects work and why they didn’t. Because for most agencies, the process of improvement is not a vector that goes directly up into the stratosphere, a pure vertical climb at a rapid rate. For most agencies, progress is the accumulation of effort and experience over time. It is a gradual upwards sloping curve. And good project selection, good project tracking, good project monitoring helps the agency not only pick individual matters that assist in that gradual ascent, but also identify why things work and why they don’t.

A corollary element of this is good data collection and reporting. That is, in looking at these individual episodes in isolation, not necessarily so interesting, but if you collect and record data for the whole group, you develop a mosaic, a larger picture of what’s happened that gives you a better sense of where you’re going in the future.

In short, it becomes part of what many have described as the virtuous cycle of implementation that has three steps. You experiment with individual matters. New projects are experiments. You’re always testing. A new idea testing an older idea, but maybe extending it, trying to reinforce an older idea, taking on a new and ambitious challenge to an economically significant body of harm that you’re trying to correct. In many ways, the agency is always engaged, in some ways, in experiments.

These experiments are valuable. It adds vitality to the system, but they work best only if there's a process to ask how they turned out. No scientist does experiments without assessing effects. So, the second crucial element of experimentation of this virtuous cycle is assessment. That's what I mean by evaluation. And it's set in place by having a clear sense of what one is trying to achieve, a clear identification of expectations and assumptions, and then testing them against actual experience.

And then, in light of what we've learned, the third element of the cycle is refinement, making adjustments in what one is doing in the mix of projects that one has undertaken and the process for getting there.

An agency that does all three of these things on a continuous basis: experimentation, assessment and refinement, is on the path to becoming a great agency, and not just getting on the path, but staying there is well. This is advice relevant to an agency old and an agency young and agencies in between.

Thank you.