ISSN 1745-638X (Online)

**THE COMPETITION LAW REVIEW**

**Volume 13 Issue 1 pp 9-26** **June 2018**

# Deciding What to Do and How to Do It: Prioritization, Project Selection, and Competition Agency Effectiveness

*William E Kovacic**

The success of a competition agency depends crucially on its ability to define its priorities and to select projects to accomplish them. The clear definition of priorities serves several important ends. It provides vital guidance to the agency's own staff, it clarifies for business how the agency will use its authority, and it increases accountability by facilitating public debate about whether the agency is allocating its resources wisely. Even when statutes contain action-forcing mechanisms (e.g., mandatory advance notification of certain proposed mergers) that shape an agency's program, the agency's leadership still retains an important measure of discretion to decide what the agency will do and how it will do it. Well-designed project selection processes increase the likelihood that the agency will choose effective means to realize its priorities. Good project selection techniques press the agency to take stock of anticipated gains and potential risks, to achieve a good fit between the agency's commitments and capabilities, to assess new project proposals in light of the agency's existing portfolio of projects, and to define how the agency will know, for purposes of evaluation, whether an initiative is fulfilling its purposes. An agency that develops a rigorous project selection mechanism takes a major step toward realizing the goals that inspired the agency's creation.

## 1. INTRODUCTION

No function is more central to the operation of a competition agency[1] than making decisions about what to do with its powers and resources.[2] What cases should the agency bring? Which studies should it perform? Which administrative staff and professionals must it hire to do the job? Which programs do the most good for society?

* Global Competition Professor of Law & Policy, George Washington University Law School; Visiting Professor, Dickson Poon School of Law, King's College London; Non-Executive Director, United Kingdom Competition and Markets Authority. Kovacic served as General Counsel of the U.S. Federal Trade Commission from 2001-2004, was a member of the Commission from 2006-2011, and chaired the agency from March 2008 to March 2009. The author is grateful for many useful comments and suggestions from participants in the Workshop on Competition Law and Enforcement Priorities convened by the Competition Law Scholars Forum and the University College Dublin's Sutherland School of Law in September 2016. The views given here are the author's alone. Contact: wkovacic@law.gwu.edu.

1 As used in this paper, "competition agency" refers to a public authority that enforces prohibitions against anticompetitive conduct and applies other policy tools (such as market studies) that identify barriers to competition and promote the adoption of procompetitive public policies.

2 *See* Malcolm K Sparrow, THE REGULATORY CRAFT – CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE (Brookings, 2011) (hereinafter REGULATORY CRAFT), 2 ("The nature and quality of regulatory practice hinges on which laws regulators choose to enforce, and when; on how they focus their efforts and structure their use of discretion; on their choice of methods for compliance."); Timothy J Muris, 'Principles for a Successful Competition Agency', 72 U. CHI. L. REV. 165, 165 (2005) ("No public institution achieves success without a coherent strategy for exercising its authority and spending it resources wisely.").

Answering these questions requires proficiency in five interrelated tasks: defining goals, devising a strategy to achieve them, setting priorities to implement the strategy, selecting projects consistent with priorities, and learning from experience to do better the next time. A competition agency, or any regulator, that masters these steps increases the likelihood that it will fulfill the hopes that inspired its creation.

This article focuses how on competition agencies can implement policy more effectively by raising their skill at prioritization and case selection. These processes are powerful means to deliver good results. They constitute the central nervous system of an agency – the network that absorbs and analyzes information and transmits directions. A well-functioning system gives coherence and balance to an agency's programs.

Despite their significance, prioritization and project selection too often lack needed attention and structure. The daily urgency for regulators to respond to crises or address immediate needs can consume all of an agency's energies and preclude institutional reflection upon the development of processes that illuminate what an agency should do and how it should do it.[3] Strong prioritization and project selection bring valuable discipline to the development of cases, studies, and the application of other policy tools. Without such mechanisms, the agency resembles a fire department that sends out the trucks when the alarm rings, puts out the fire at hand, and returns to the station to await the next alert. This routine can cause the fire department to lose sight of basic questions that determine its effectiveness: Which fires should we fight first? Are we using the best fire-suppression techniques? Do we have the right equipment? Perhaps most important, what is causing the fires in the first place? Should more attention be devoted to prevention?

Although they underpin good agency performance, prioritization and project selection often generate controversy. One source of dispute is the competition agency's substantive policy choices. No matter how a competition agency has allocated its resources, a sizeable number of observers will say the agency could have done better – by setting other priorities, or using different policy tools. In a number of jurisdictions (especially those with older competition regimes), one finds a persistent narrative – sometimes ascendant, sometimes dormant -- that laments the system's inadequacies.[4] Today, a notable critique of US competition law says the federal enforcement agencies since the 1970s have blundered by allowing, through lax control of mergers and dominant

---

[3] One of the greatest challenges for agency leadership is to step back from the rush of daily events and reflect upon the way ahead. Richard Koch, THE FINANCIAL TIMES GUIDE TO STRATEGY (4th ed. 2011), xii ("[W]ise strategists, in contrast to most of their colleagues, always ensure that they have time to think.").

[4] It is the destiny of academics, advocacy groups, the bar, the business community, elected officials, and journalists to recount deficiencies in government regulators. In competition policy, this commentary tends to overlook what one might reasonably expect of the relevant institutions in light of the legal, political, and institutional constraints that bind them. *See, e.g.*, David A. Hyman & William E. Kovacic, 'Can't Anyone Here Play This Game? Judging the FTC's Critics', 83 GEO. WASH. L. REV. 1948 (2015) (evaluating the work of blue ribbon commissions that have assessed the performance of the U.S. Federal Trade Commission); William E. Kovacic, 'Standard Oil Co. v. United States and Its Influence on the Conception of Competition Policy', 2012 COMP. L.J. 89 (discussing dismal assessment offered by many commentators of the results of the Department of Justice suit to break up Standard Oil).

firms, increased industrial concentration that raises prices, increases income inequality, and depresses wages.[5] The proposed cure? Revise enforcement priorities and pursue initiatives to arrest and roll back concentration.

Another source of contention involves the process of prioritization itself. Setting priorities often means exercising discretion. It should come as no surprise that regulators would exercise discretion in performing this and other functions.[6] The relevant policy question is how law and custom cabin such discretion. On a bad day, prioritization is a hidden means for an agency to subvert the public interest by ignoring valid legal commands or, worse, forming corrupt bargains with interested commercial parties. If exercised in an unprincipled manner, prioritization erodes the legitimacy of the regulatory process.

Recognition of the importance of prioritization and project selection in shaping agency performance, and the increasing interest in how regulatory institutions decide what to do, have generated a new, informative literature on the subject.[7] Notable contributions include papers by government officials and by international organizations seeking to promote the adoption of better practices by regulatory agencies.[8] This body of work fits within a growing trend among academics, practitioners, and public officials, taking up the challenge posed by Graham Allison nearly a half-century ago in his study of the Cuban Missile Crisis,[9] to examine how closer attention to problems of implementation can strengthen agency performance and improve public policy.[10]

This article contributes to this discussion by suggesting how agencies should set priorities and select projects to carry them out. It has three basic aims: (1) to propose how an agency can select priorities in a way that fulfills its legislative mandate and increases the likelihood of achieving good policy results, (2) to offer processes that address concerns

---

[5] For a representative view, *see* Barry C. Lynn, 'America's Monopolies Are Holding Back the Economy', THE ATLANTIC (Feb. 22, 2017) (discussing U.S. antitrust enforcement inadequacies), *available at* https://www.theatlantic.com/business/archive/2017/02/antimonopoly-big-business/514358/.

[6] *See, e.g.,* Mark H. Moore, CREATING PUBLIC VALUE – STRATEGIC MANAGEMENT IN GOVERNMENT (HUP, 1995) (hereinafter PUBLIC VALUE), 63 ("[I]n most cases, there is more discretion than most public managers (and their overseers acknowledge."); Sparrow, REGULATORY CRAFT, supra note 2, at 4 ("Regulatory agencies exercise discretion as a matter of course – and at many different levels.").

[7] Annetje Ottow, MARKET AND COMPETITION AUTHORITIES: GOOD AGENCY PRINCIPLES (2015); Maarten Pieter Schinkel et al., 'Discretionary Authority and Prioritizing in Government Agencies' (2015) (Timbergen Institute Discussion Paper No. 15-058/VII).

[8] See, e.g., Organization for Economic Cooperation and Development, OECD Korea Policy Centre, Asia-Pacific Competition Update (December 2017, Issue 21) 14 (describing discussion of prioritization in context of meeting of high level officials from competition authorities in the Asia-Pacific region).

[9] Graham T Allison, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (1971). Allison wrote: "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 government." Id. at 267-68.

[10] Formative contributions to this literature include Moore, PUBLIC VALUE, supra note 6; Sparrow, REGULATORY CRAFT, supra note 2; and, James Q Wilson, BUREAUCRACY – WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989).

about the legitimacy of priority setting, and (3) to describe the steps an agency can take to ensure that it selects projects well-suited to achieve its priorities.

The article analyzes prioritization in the context of competition law, but its observations apply more broadly to other fields of regulation. Competition law provides an informative illustration, because the substantive provisions of most competition laws are written in general terms and, consequently, confer considerable discretion on the agencies in deciding what commands to enforce and how to enforce them.[11] Jurisdictions vary in how precisely their statutes define forbidden behavior, but even the more fully-specified laws rely on concepts that give agencies significant discretion in implementation.

This article approaches the topic in three parts. It first situates prioritization and project selection in the series of tasks that an agency must perform to formulate and implement policy. The discussion of prioritization identifies difficulties that an agency must confront in setting priorities and in selecting projects to carry them out. The second section describes the administrative mechanisms that agencies can establish to set priorities and select projects. The final section suggests ways to improve prioritization and project selection, including fuller application of comparative study to inform the work of individual agencies.

Several perspectives inform the article. I draw heavily upon my experience in a US regulator, the Federal Trade Commission (FTC), and as a Non-executive Director on the Board of the United Kingdom's Competition and Markets Authority (CMA), which began operations in 2014 following a merger of two predecessor organizations, the Office of Fair Trading (OFT) and the Competition Commission.[12] The United Kingdom's experience is important, for the work of the OFT and CMA have played a uniquely influential role in guiding thinking by competition agencies of how to make resource allocation decisions.[13] I also am guided by my research and writing with David Hyman and Marc Winerman on the design, organization, and management of regulatory authorities.[14] The third source of insight is extensive consultation with numerous competition authorities as part of a project, conducted with Marianela Lopez-Galdos, to study major institutional characteristics of the world's competition agencies.[15]

---

11 See Alison Jones & William E Kovacic, 'Identifying Anticompetitive Agreements in the United States and in the European Union: Developing a Coherent Analytical Framework', 62 ANTITRUST BULL. 254, 255 (2017) (describing generality of competition law provisions of the United States and European Union).

12 Though my experience with the CMA informs my thinking about prioritization and project selection, the views expressed in this article are mine alone.

13 Much of the formative work in this field consists of contributions from John Fingleton and Phillip Collins chair and chief executive, respectively, of the OFT. *See, e.g.*, John Fingleton, 'Strategic planning and prioritization' (Office of Fair Trading, Jan. 22, 2009).

14 *See, e.g.,* David A Hyman & William E Kovacic, 'Why Who Does What Matters: Governmental Design and Agency Performance', 82 GEO. WASH. L. REV. 13446 (2014); William E Kovacic & David A Hyman, 'Competition Agency Design: What's on the Menu?', 8 EUR. COMPETITION J. 527 (2012); Marc Winerman & William E Kovacic, 'Outpost Years for a Start-Up Agency: The FTC from 1921-1925', 77 ANTITRUST L.J. 145 (2010).

15 See William E Kovacic & Marianela Lopez-Galdos, 'Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes', 79 L. & CONTEMP. PROBS. 85 (2016).

## 2. From Goals to Assessment: The Cycle of Policy implementation

Prioritization and project selection are two steps of a cycle of activities, mentioned above, that guide policy implementation: the definition of goals, the design of a strategy to achieve the goals, the identification of priorities to execute the strategy, the selection of specific projects, and the assessment of outcomes to inform future agency decision making. These steps are fundamental to decisions about how to implement an agency's mandate – the equivalent of installing and operating a navigational system that guides a commercial airliner to its destination. Every modern passenger aircraft has such a system, and no plane leaves the gate before the pilots have entered data that identify the destination and the flight path they will take to get there.

One might presume that all regulatory bodies consciously strive to develop strong administrative equivalents of these navigational tools. Actual regulatory practice is often otherwise. In a striking number of cases, a fire station model prevails: the agency is largely reactive, and external forces (e.g., demands for action by elected officials, complaints filed by aggrieved parties) control its agenda. In other instances, the agency's strategy consists largely of doing what it did the year before. Its program is highly path dependent; the agency does not develop approaches to reflect systematically on whether there might be more effective ways to apply its mandate. In other cases, when setting priorities or selecting projects, agencies lose sight of whether they have the ability to deliver on their policy commitments. They add new items to the enforcement cart without considering whether the team has the strength to push the cart to a successful end. Evaluation today attracts growing interest among competition agencies, yet the assessment of completed matters as a tool for future policy development still appears to many agencies to be an unaffordable luxury or a hopelessly difficult and impractical exercise.

Sketched below are the steps that ought to guide agency decisions about how to apply its legal mandate. The literature on management uses a variety of taxonomies to classify the elements of decision making by public and private institutions.[16] Concepts such as "strategy" and "prioritization" sometimes are used as synonyms for the process through which organizations choose a general approach to reach their goals. Classification schemes and terminology differ, but the core functions described in this article are widely seen as the main ingredients of good decision making. The discussion places prioritization and project selection in context. Both activities are important, but the value of each depends significantly on how well the agency performs the other interrelated tasks that comprise policy implementation.

### 2.1. Defining Goals

Ordinarily the principal source of guidance regarding regulatory objectives is the legislation that creates the regulatory regime. In drafting statutes and creating legislative history, legislators usually spell out the purposes the regulator should serve. Thus, in a basic sense, the definition of goals is the province of the legislature. Guided by the

[16] For example, Alfred Chandler's formative study of corporate decision making defined "strategy" as encompassing the identification of the firm's goals, the selection of programs, and the allocation of resources to attain its aims. Alfred Chandler, Strategy and Structure (1962).

legislation's statement of aims, the regulator's responsibility with respect to goals is severely limited -- to devise programs to achieve the stated objectives. The legislation has designated the policy destination; the agency's job is to find the best way to get there.

The translation of legislative aims into policy programs often is more complicated. Several conditions draw the agency into defining goals in ways that are not obvious in a simple principal-agent model in which the legislator-principal instructs the agency-agent about the aims it should pursue. Most important, in competition law and in other regulatory domains, the legislation often spells out multiple goals. A multiple-goals framework is especially problematic when the goals are internally inconsistent (for example, promote economic efficiency and protect small and medium enterprises), and the statute sets out no hierarchy of objectives for the regulator to maximize. The legislature, in effect, tells the regulator - Here are lots of things we want to accomplish, and our aims are not entirely coherent: you sort it out.

The multiplicity and inconsistency are understandable. Legislation embodies compromises struck through a process of debate and negotiation. The final text often contains ambiguous expressions that give every faction in the supportive coalition something to like. With multiple and, frequently, inconsistent goals, the agency becomes the mechanism for reconciliation – a shock absorber that must absorb the force of competing policy impulses and frame a coherent program. In performing this reconciliation role, the agency exercises an important degree of discretion to decide how the mixture of legislative ends will be accomplished, and what emphasis will be given to individual goals.

The agency does not make adjustments in emphasis in a vacuum. In the annual appropriations cycle, many agencies must propose a budget, which links proposed expenditures to categories of projects. Read carefully, the proposed allocation of resources reveals an agency's priorities and, at least implicitly, its current view of which statutory aims deserve emphasis. This gives the legislature an opportunity to object if it perceives that the agency's aims diverge from its own.

### 2.2. Setting a Strategy

An agency's strategy is its conception of how it will use its powers to fulfill the purposes of its mandate. A competition agency often has a number of tools at its disposal to make policy: it can litigate cases, promulgate rules and guidelines, prepare studies, educate businesses and consumers, and advocate the adoption of procompetitive policies before other government institutions. The preparation of a strategy requires the agency to identify how it will employ these tools to realize the goals of the legislation.[17]

The exercise of spelling out a strategy – and the statement of goals that the strategy seeks to achieve – provide valuable discipline for the agency. To prepare a succinct statement of its goals and strategy,[18] an agency is forced to consider alternative ways to use its

[17] Timothy J Muris, 'Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy', [2003] Colum. Bus. L. Rev. 359.

[18] Compare Koch, supra note 3, at 18 ("Most businesses can benefit from describing their strategy – what it is and, especially, what it is not – in 35 words, in a way that could apply to no other firm.").

authority and to defend specific choices made. As described below, the revelation of the agency's strategy can increase its perceived legitimacy in the eyes of affected firms, legislators, and citizens generally. Meaningful disclosure enables discussion about the agency's program and stimulates debate about its policy choices.

One frequently stated aim of competition statutes is to encourage innovation as a means to increase growth. A strategy to accomplish this objective might incorporate the following measures: conducting studies that illuminate public policies and private conduct that retard innovation; litigating cases that challenge efforts by incumbent firms to suppress the emergence of innovative rivals; and preparing reports and convening events that draw attention to how the process for granting intellectual property rights, such as patents, allows the recognition of rights that fail to satisfy standards for eligibility.

As suggested above, the competition agency is foremost mechanism for setting the strategy it will use to implement the law. In doing so, however, the agency rarely operates in isolation. Other government bodies can exercise influence over the choice of strategy. In many countries, the legislature uses hearings and budget proceedings to shape the agency's strategy – e.g., by urging it to bring more cases to challenge the behavior of dominant firms or to enforce the merger control regime more aggressively. This guidance can involve the additional step of singling out specific priorities for special attention, such as by demanding that the agency address high prices for food, health care, or petroleum products. In some cases, the guidance is expressed as a binding command, not merely an aspiration or suggestion. In annual appropriations measures, a legislature can compel the agency to spend a certain amount of its resources on a particular endeavor.

### 2.3. Determining Priorities

Prioritization is the process that determines how an agency will apply its resources to carry out its statutory mandate with the greatest benefit to society.[19] The setting of priorities serves several significant purposes for a competition agency. By spelling out its priorities, the agency provides vital guidance for its own personnel. The priorities inform the decisions of key operating units about what they should be doing. The priorities are important for external audiences, as well – for businesses, legislators, media organizations, and non-government civic organizations. For businesses and their advisors, the statement of priorities helps guide decisions about how to construct compliance programs, and it encourages potential complainants to bring specific types of grievances to the agency's attention. For legislators, media groups, and civic associations, the disclosure of priorities facilitates monitoring of the agency's work and informs debate about whether the agency is making the best use of its resources. In this way, meaningful disclosure of priorities promotes accountability and builds legitimacy for the competition system.

---

[19] Hilary Jennings, 'Prioritisation in Antitrust Enforcement – a Finger in Many Pies', 11 Competition Law International 29 , 30 (Apr. 2015) (Prioritisation is "intended to make it possible to concentrate resources on high-impact sectors or high-significance cases and projects").

### 2.3.1. Who Determines an Agency's Priorities?

Competition systems vary significantly in how much discretion the agency enjoys to choose priorities. By a variety of devices, competition laws and statutes governing administrative procedure determine how much freedom an agency has to set priorities and select projects to achieve them.[20] By statute, legislators can mandate processes (e.g., premerger notification) that in effect compel the agency to spend a given level of resources on a particular form of endeavor (e.g., reviewing merger filings). The annual appropriation of funds for an agency also can earmark expenditures for specific purposes, such as a mandate that an agency spend a given sum of money to study competitive conditions in a particular sector.[21]

Some procedural norms directly empower parties external to the agency to determine what the agency does. One approach is to compel the agency to investigate all complaints filed and to issue a formal response to the complainant. In this taxi rank system, the agency has no capacity to reject a complaint on the ground that it has better things to do; it must take and review each matter in order. To enforce this action-forcing mandate, the jurisdiction typically authorizes complainants to file lawsuits to challenge the agency for closing or ignoring a matter that should have been pursued more vigorously.

Controls on settlement procedures also can serve as a constraint on agency discretion to set priorities or select projects. Settlements provide a way to conserve resources by resolving cases quickly. Settlements sometimes raise concerns that agencies are taking cheap deals that fail to cure underlying competitive problems. To counteract such tendencies, a jurisdiction can establish procedural safeguards that enable third parties to challenge settlement agreements on the ground that the agreed terms are too weak; require agencies to publish provisional settlement terms and accompanying explanations for public comment; or force agencies to obtain judicial approval for settlements in cases which already have been filed in court.

Another set of devices constrains an agency's discretion over priorities and project selection less directly. These include public disclosure laws that require agencies to explain decisions taken or statutes that give the public access to agency records. Such transparency obligations enable external observers to assess agency resource allocation and second-guess choices about priorities and project selection.

By all of the means summarized above, the agency's discretion in setting priorities can be constrained significantly. Systems that impose tight controls regarding prioritization and case selection have major consequences for the routine administration of agency business. They can rob the agency of the capacity to differentiate between matters according to their economic or doctrinal significance, and they may require the expenditure of considerable resources to examine requests for action that deserve prompt, summary rejection. These constraints can impart considerable rigidity to the

[20] See Rachel Barkow, 'Overseeing Agency Enforcement', 84 Geo. Wash. L. Rev. 1129 (2016).

[21] The importance of the budget-setting process as an instrument of legislative control over agency discretion is examined in Maarten Pieter Schinkel et al., "Discretionary Authority and Prioritizing in Government Agencies" (Jan. 2015) (Timbergen Institute Discussion Paper No. 15-058/VII).

competition agency's operations; it loses the ability to respond quickly and effectively to changes in economic circumstances and to new commercial phenomena.

A jurisdiction need not impose all, or even most, of these controls. Systems with looser controls over agency discretion dispense with restrictions that force the agency to investigate all complaints (and issue full explanations of decisions not to prosecute). As a closely related point, these jurisdictions deny complainants standing to challenge agency decisions to close files without taking additional action.

In jurisdictions with looser controls on agency discretion, two mechanisms serve to discipline the agency's exercise of discretion. One of these is political oversight. In loose control systems, elected officials still retain the means to affect the agency's agenda through routine oversight (e.g., holding hearings at which agency leaders present and defend their priorities and programs) and appropriations earmarks. Here, the political process provides the feedback loop that forces the agency to account for its exercise of discretion.

A second important safeguard is achieved by decentralizing the decision to prosecute. In a number of systems, private rights of action also provide a basis for giving the competition agency more control over its agenda. Where the competition agency is the monopolist provider of law enforcement, the decision not to intervene assumes greater significance. If the agency has erred, there is no fallback. By contrast, private rights give aggrieved parties the capacity to enforce the law when the agency stands down for good reasons (it doesn't have the money to do everything, and it has allocated its resources to matters with a greater return for society) and for bad (e.g., corruption). Where private rights are robust, there is less danger that an improvident agency decision to stand down will be harmful. In the United States, a major reason that the Department of Justice and the Federal Trade Commission have broad freedom to reject complaints without explanation is that a strong system of private rights enables complainants to bring their own cases.

Even in systems with tight restrictions on agency discretion, the competition authority still can exercise an important amount of discretion. First, as noted above, competition legislation often embraces a broad collection of goals (sometimes, internally inconsistent goals). In this common circumstance, the agency routinely is forced to make choices about which goals to emphasize, at least in the design of an implementation strategy.

Second, even when the legislation and rules of procedure dictate the agency must engage in certain types of activity, most agencies retain some discretion to determine how thorough the execution of the mandated activity should be, and to decide whether all behavior falling within a class of mandated oversight must be treated with equal attention. Even when legislation imposes an obligation to investigate all complaints, agencies, of necessity, find ways to truncate the required inquiry without facing hostile judicial review. They justify the use of more summary inquiries by documenting their previous experience with specific commercial phenomena.

Third, most agencies enjoy discretion to pick and choose among projects that are not subject to action-forcing mandates. After it has fulfilled all of its mandatory duties, the agency may still have an increment in its budget that is truly discretionary. Here the

agency gets to decide which matters to pursue and how (by what policy tool, or collection of tools) to act.

#### 2.3.2. Is Agency-Based Prioritization Legitimate and Prudent?

At least two objections can be raised about giving competition agencies greater discretion to set priorities and select projects. The first is that prioritization gives agencies excessive freedom to stray from fulfilling the mandates contained in the competition statutes and elaborated in guidance provided by the legislature. In effect, prioritization becomes a tool for the agency to recast the law in its own image. A related concern is that prioritization can be largely a hidden process and therefore resistant to effective oversight. In this view, prioritization reduces the agency's accountability and erodes the legitimacy of its operations.

Doubts about accountability and legitimacy also arise in jurisdictions that have an overarching competition law framework administered by a jurisdiction-wide competition agency, but also have political subdivisions with their own competition systems. In the European Union (EU), the principal competition enforcement instrument is the Directorate for Competition (DG Comp) of the European Commission. The EU's Member States are required to have their own competition laws. The EU's governance principles oblige the Member State competition regimes to abide by EU law and policy in the application of Article 101 Treaty on the Functioning of the EU (TFEU), which governs concerted practices. Member States also must comply with EU law and policy governing the application of Article 102 TFEU, which prohibits the abuse of a dominant position. However, Member States have freedom in their national competition systems to impose requirements that go above and beyond the obligations set under Article 102.

Significant tensions have arisen between DG Comp and some national competition authorities (NCAs) over the application of Article 101 to minimum resale price maintenance (RPM). The European Commission treats RPM as an object offense. Some NCAs regard this approach to be too stringent and have used prioritization as a rationale either for refusing to prosecute instances of RPM, or have established internal case selection criteria that use a more elaborate effects-based standard to determine whether to challenge RPM in specific cases. In this setting, the processes of prioritization and case selection serve as mechanisms to circumvent what otherwise would be binding community-wide policy commands. It is apparent that DG Comp regards this form of policy bypass as an irritant and as an illegitimate exercise of agency discretion.

A second concern, raised most intensely in jurisdictions with weak systems of public administration, is that discretion to set priorities creates dangerous opportunities for corruption. As one competition agency official in an emerging market economy once told me, "In this country, the word 'discretion' is a synonym for 'corruption.'" Without a requirement that the agency investigate all complaints and provide a formal response, and in the absence of a system that allows disappointed complainants to sue the agency for failing to act, each complaint could be an occasion for affected parties to bargain with the agency and to use bribes or other favors to influence the exercise of discretion.

In a jurisdiction in which corruption of public officials is a serious problem, there will be an understandable reluctance to give the agency more leeway to set priorities and decide

which matters to pursue. At the same time, an effort to prevent corruption at all costs can be very costly. In jurisdictions where corruption in public administration is commonplace, severe restrictions on prioritization and case selection can paralyze the competition agency. Each complaint triggers an investigation. Once investigations begin, case handlers, managers, and senior agency leaders hesitate to close matters for fear that a decision to close will be seen as the product of a corrupt bargain with affected parties. Dockets swell with zombie cases that should have been extinguished, but instead live on for years because the agency realizes that closing a file can elicit an anti-corruption inquiry.

There are a number of ways to increase the competition agency's ability to focus resources on matters of genuine economic or doctrinal importance while mitigating concerns about legitimacy and corruption. The appropriate antidote to concerns about legitimacy is meaningful disclosure – through annual reports, policy statements, speeches, and testimony before legislative bodies -- of the agency's overall strategy, priorities, and case selection criteria.[22] Such disclosure makes clear to legislators and other external observers how the agency intends to implement its mandate. This informs legislative oversight of the agency and facilitates a larger public debate about agency policy making. Many well-respected agencies have adopted a custom of making extensive, informative disclosure of their strategy, priorities, and case selection criteria.[23] This is a practice worth emulating, as it creates accountability and legitimacy for the agency's exercise of policy making discretion.

For various reasons, competition agencies may be reluctant to disclose their intentions in an informative manner. One reason is that the agency has not developed a coherent view of what it intends to do. It has no regular process for revisiting the purposes that inspired its creation, it lacks a mechanism for setting strategy or choosing priorities, and the selection of projects lacks a systematic approach. The solution here is to create the requisite mechanisms to perform these essential tasks.

Another obstacle to meaningful disclosure is the agency's anxiety that its program is infirm, and that external observers will perceive its choices to be misguided. If an agency fears that its ideas are too weak to withstand scrutiny and debate, then it is time to get some better ideas. External critiques – by legislators, business entities, professional societies, academics, and others – are not always informative, well-founded, or constructive. After separating the wheat from the chaff, an agency will find that external debate and criticism help it identify and correct weaknesses, see possibilities it overlooked in its internal assessment, and, in general terms, strengthen its policy agenda. The certainty of external scrutiny is a strong stimulus to create the internal analytical processes that bring needed capability and rigor to bear on decisions about what to do. Even if

---

22 See Jennings, supra note 19, at 30 ("Publicly defining prioritization criteria supports legitimacy by providing an objective framework to decide on an agency's activities."); 'International Competition Network, Agency Effectiveness Handbook – Chapter 1: Strategy Planning and Prioritization' (2010) (describing legitimacy benefits of disclosure).

23 Examplars of superior practice include Autorite de la Concurrence, 'The New Generation Economy' (May 2017); Competition and Markets Authority, 'Annual Plan 2018-2019' (Mar. 2018); Commerce Commission of New Zealand, 'Our Vision Strategy 2017-2022' (2017).

external audiences may object to the agency's program, they are likely to gain respect for the agency simply from the fact that the agency was willing to stand before the public to present and defend its views.

A third impediment to meaningful disclosure is more subtle and difficult to address. As suggested above, competition statutes and related guidance from legislators sometimes direct the agency to accomplish multiple and, to some degree, internally inconsistent goals. In other instances, the competition mandate resides within a multi-function agency with other policy duties, such as consumer protection and public procurement. When legislatures expand the range of an agency's policy duties, they frequently fail to add resources commensurate with the additional policy tasks. With broad policy responsibilities and a narrow base of resources, the multi-function agency either must concentrate its resources on some areas of its mandate and attend to them skillfully, or it must spread its resources thinly to implement all of its duties and find itself addressing none of them with distinction.

At some level, legislators probably understand that they have put the competition agency in an untenable position by setting out an incoherent collection of goals or by creating gross mismatches between substantive mandates and the resources provided to fulfill them. As mentioned earlier, the dissonance among goals may be the inevitable result of the compromises that attract coalitions needed to pass legislation. The mismatch between commitments and resources perhaps stems from good faith legislative hopes that needed resources eventually will follow to enable the agency to carry out all of its duties. Alternatively, the mismatch is the consequence of a deliberately cynical legislative strategy to enact popular legal commands, to claim that implementation will be inexpensive, and then blame the agency for underperforming when resource shortcomings predictably lead to implementation failures.

Regardless of the legislative phenomena or motivations that spawn unmanageable goals frameworks or severe imbalances between policy duties and resources, the agency inherits the task of formulating a program that works. Because it knows it cannot do everything, it engages in triage. It makes judgments about how to allocate resources for the greatest positive social impact. At some point, the legislature understands this dilemma and responds in several ways: it can clarify the goals and increase their coherence; it can achieve a better match between the agency's mandate and its resources by shrinking the mandate or expanding the resources; or, it can approve, expressly or implicitly, the agency's judgments about how to perform triage. It is also possible that the legislature is unaware of the incoherence of its goals framework. The legislature also may be blind to the mismatch it has created between statutory commitments and agency resources, and it brushes aside agency pleading about resources as just another manifestation of the tendency of all public bodies to ask for more money.

In any of these scenarios, the agency may be nervous about disclosing its own strategy, priorities, and case selection criteria with clarity. Clear, meaningful disclosure may upset legislative overseers, either by unmasking subtle bargains that the agency and the legislature have struck to implement policy commands that promise results that legislators know to be unattainable at existing resource levels, or by revealing the agency's approach to reconciling contradictory goals and accommodating imbalances between

commitments and resources where legislators do not perceive the contradictions and detect no imbalances. In either scenario, fuller disclosure can endanger the adaptations that enable the agency to function effectively. A lack of transparency arguably may be the necessary means to reconcile tensions that, unless resolved, would cause the regulatory process to seize up and collapse.

This is a genuine concern and problem faced by many competition agencies. Clarity and coherence in statutory goals are not the norm in competition law. Multi-function agencies are commonplace: over half of the world's 130 jurisdictions with competition laws have assigned duties beyond competition law, strictly speaking, to the competition agency. Subtle, nontransparent methods of reconciliating dissonant goals and performing triage in the face of diverse, expansive statutory mandates ultimately come at a great cost. They relax pressure upon legislators to do their job properly – by giving clear guidance about aims, addressing tradeoffs among objectives, and providing resources fit for purpose. They force agencies to operate in the shadows between the nominal commands of legislation and what is possible in practice.

Fuller disclosure poses risks for the agency, but it performs the necessary service of identifying tradeoffs and mismatches and laying out a plan to reconcile conflicts. Uncomfortable though it can be, meaningful disclosure presses a competition law system toward building a broader public consensus about what purposes an agency should serve, and how it should serve them. This is a necessary foundation for the accountability and legitimacy that certify quality in the best of the world's competition systems.

Meaningful disclosure is also a crucial means to alleviate concerns about giving more discretion to competition agencies in jurisdictions where corruption besets public administration. The revelation of strategic plans, priorities, case selection criteria, and the rationale for decisions taken facilitates debate about how the agency functions and permits external observes to test actions against stated policies. An important element of control, discussed below, is ex post evaluation of agency processes and decisions about individual cases. A commitment to a program of ex post assessment, undertaken by agency insiders and outsiders, is a valuable mechanism for an agency to signal the propriety of its decision making processes.

### 2.4. Project Selection

Project selection is the process by which the agency determines which individual projects – cases, studies, advocacy initiatives – it will undertake to achieve its goals and carry out its strategy. Prioritization is an important intermediate step that defines where managers and case handlers should look for projects and suggests the criteria that agency personnel should use to assess the value of project proposals. Case selection is the practical process by which the agency translates its goals, strategy, and priorities into specific projects. Performed well, case selection imparts crucial discipline by pushing the agency to identify why it wants to pursue a specific project, to understand risks, and to match the agency's commitments to its capabilities.

The principal responsibility for project selection resides with the competition agency. As suggested earlier, external bodies also can be said to influence an agency's choice of projects. For example, legislators can guide project selection with annual appropriations

measures that require an agency to perform a study of a specific sector. These and other forms of "earmarks" oblige the agency to perform designated tasks. Softer forms of legislative guidance also can influence project selection. Legislative committees can convene hearings in which they spell out preferred priorities (e.g., "focus on energy prices") or suggest specific projects (e.g., "investigate rising prices of pharmaceutical products"). Legislators can intimate that if the agency is not responsive to these softer forms of guidance, more binding forms of intervention (e.g., appropriations riders) will be forthcoming.

Sound project selection requires an agency to answer nine basic questions about each project proposal. The following framework is inspired by principles established by the United Kingdom's Office of Fair Trading and refined by its successor institution, the UK Competition and Markets Authority.[24]

*What are the anticipated gains?*

A key starting point in project selection is for the agency to define what it expects to achieve if the project succeeds. Is a proposed case a good vehicle for catalyzing improvements in the existing jurisprudence? Will a case or a study have a positive economic impact? Will the matter enhance the capability of the agency's staff? How much will a successful endeavor improve awareness of the agency and strengthen its reputation?

*What are the risks?*

The decision to proceed with a project also requires a clear understanding of potential risks. Do significant doctrinal barriers stand in the way of prevailing in a proposed case? If the case involves high economic stakes, does the agency have the resources and staying power to overcome the strong opposition that affected firms will mobilize in the judicial process? What political backlash might the project arouse if affected firms mount a campaign to lobby elected officials? If the project fails, what reputational costs will the agency incur? The assessment of risks is not a prescription for timidity. It presses the agency toward making a well-informed analysis of possible risks and returns. It is entirely reasonable to accept greater risks if success would yield significant gains.

*Who will do the project?*

It is important for the agency to focus, at the front end of a proposed project, about which personnel will lead and support the project. Is the team to which the project will be assigned equal to the task? There can be a tendency to assume that difficult tasks will be assigned to the agency's best case handling teams – that their capacity to absorb new demanding projects is unlimited. In practice, most agencies do not enjoy an unlimited number of excellent teams. Their best teams can do only so many ambitious projects at one time. It is a serious mistake to undertake an extremely difficult project whose demands will overwhelm the team that likely will carry it out. This element of case

[24] On the CMA's prioritisation framework, see Competition & Markets Authority, 'Prioritisation Principles for the CMA', April 2014.

selection alerts the agency to areas in which it must expand its capability in order to increase its output of more difficult projects.

*What will it cost?*

The project selection exercise must involve the formulation of a rough, provisional estimate of likely costs – to conduct the investigation, to litigate the case, to pay for external experts. Along with the assessment of which team will perform the project, the assessment of likely-out-of-pocket costs gives the agency an idea of the opportunity costs of performing the proposed initiative. It leads the agency to consider the relative costs of different project proposals and to make better informed comparisons among the alternatives.

*Does the project employ the right policy instrument?*

Most competition agencies can address competition problems with a variety of policy tools, including cases, market studies, and advocacy. A number of agencies have the power to apply policy complements, such as consumer protection, to address observed market failures. The project selection process is an occasion to assess whether the agency is bringing the full range of its capabilities to bear most effectively on a specific problem. This is one way to attempt to realize in practice the synergies among policy tools and substantive mandates that were conceptual bases for forming the agency.

*Does the project build on what the agency already knows?*

Over time, an agency acquires a body of experience in dealing with specific business practices, studying individual sectors, and applying specific policy tools. Learning across time is a valuable advantage for a competition agency, and successful agencies improve on the basis of lessons learned from past experience. The project selection process is an opportunity to see that past learning is reflected in new matters – for example, by ensuring that the results of previous cases and market studies are incorporated into the formulation of a new matter in the same sector.

*How does the project fit within the existing portfolio of projects?*

The agency should consider each proposed project not in isolation but in light of its existing portfolio and its stated priorities. Does the project advance the aims the agency has set out for itself in its public statements of strategy and priorities? Maybe the most important contribution of a portfolio-wide perspective is to help align the agency's resources and commitments. A sensible agency portfolio is balanced, much like a sound financial portfolio. It has a mix of projects with high risk and high potential returns, medium risk and medium likely returns, and low risk and low likely return. A portfolio need not be perfectly balanced. It is perfectly reasonable, in certain periods, to undertake a more risk-laden set of projects, or to moderate risks. This should be a conscious choice and not an inadvertent result of adding new projects considered in isolation. In general, an agency should be wary of the persistence of severe imbalances – for example, to mass all of its resources in high risk/high return projects, or to focus all of its attention on low risk/low return initiatives. The assessment of the portfolio-wide impact of a new matter pushes the agency to make realistic judgements about what a project will cost and who will do it.

*How long will the project take to complete?*

Project proposals should come with a predicted timeline for completion, related to any deadlines imposed by law. A key aim in this exercise is to determine whether the agency's intervention will be timely to accomplish intended objectives, especially in dynamic, fast-changing sectors. Once an agency gives a green light to a project, it must track its progress regularly. Good agency practice requires the maintenance of an internal data base that allows mangers and agency leaders to obtain a quick, accurate tracking of the actual progress of matters compared to initial and amended projections.

*How will the agency know the project worked as planned?*

The decision to proceed with a project should include consideration of the appropriate measures of effectiveness. If a key goal is to reshape jurisprudence, the published decisions of the courts will provided a readily available measure of success. If a core anticipated gain is an improvement in economic performance, how will such improvements be measured? Which developments in the economy will suggest how well the project turned out? Setting out these assumptions clearly at the beginning provides a valuable baseline for later evaluations of actual performance and a basis for improving the agency's methods of prediction for the future.

It often will be difficult to give confident answers to the nine questions posed above. Genuine uncertainty about these matters has accompanied many a successful project. An agency that asks these questions of each proposed project can add considerable rigor to its project selection process. Perhaps most important, the effort to answer these questions systematically and carefully increases likelihood the agency has the means to deliver on its promises. This exercise also gives the agency a better idea of where it must improve its powers, resources, and personnel in order to take on more ambitious initiatives. In this way, a good project selection process feeds back usefully into the formulation of its strategy.

## 2.5. Evaluation of Outcomes

Public policy making involves an inherent element of uncertainty and risk.[25] Competition systems achieve greater success over time by testing alternative approaches to implementation.[26] Progress toward better substantive results and superior processes requires deliberate, systematic efforts to learn from past experiments. Has the agency's choice of priorities and selection of projects to fulfill them yielded desired economic or other policy outcomes? Through its own internal assessments, or by work performed by external bodies, the agency measures its effectiveness in meeting its goals. The results of the agency's own evaluation efforts, and reflection on the work of external commentators, should inspire the agency to make appropriate adjustments in its priorities and in its choice of projects.

---

25 Koch, supra note 3, at 17 ("Strategy is risky. . . . There are more luck and guesswork involved in even the most brilliant strategy than anyone realizes. . . . This means that strategy is always provisional. Strategy needs constant refreshment.").

26 On the experimental quality of policy making and the role of experiments in advancing the state of the art, see Philip J. Weiser, 'Entrepreneurial Administration', 97 Boston U. L. Rev. 2011 (2017)

As noted earlier, a commitment to regular evaluation is an important means for the agency to persuade external observers of the legitimacy of giving it greater discretion to set priorities and to select projects. The evaluation process is a form of guarantee that the agency will be accountable for its policy choices. The related commitment to adopt improvements in light of policy results provides assurance to legislators and other external groups that the agency is engaged in a continuous effort to adopt better practices. These steps increase the perceived legitimacy of the agency's operations and policy choices.

## 3. POLICY IMPLEMENTATION: ADMINISTRATIVE ORGANIZATION AND METHODS

An agency's success in setting a strategy, choosing priorities, and selecting projects depends heavily on the quality of the process it establishes for performing these tasks. A number of organizations falter because the needed institutional mechanisms are lacking, or the functions are assigned to the wrong people.[27]

As described above, the processes of prioritization and case selection require the establishment of internal management structures. Agencies with superior methods for setting priorities and selecting projects tend to rely on two mechanisms: an agency wide policy office that devises agency strategy in close consultation with the agency's operating units, and an evaluation or screening committee responsible for case selection. These bodies are supported by administrative units that maintain databases that track all existing matters and their status and record all completed matters, along with the results of efforts to evaluate past initiatives.

In some instances, these overarching policy and evaluation/screening bodies provide the equivalent of consulting services to case handling teams by assigning members of these bodies to work on individual cases, reports, or advocacy initiatives. Intensive periodic engagement on individual projects gives the policy and evaluation units a better understanding of the practical challenges faced by the case handling groups and superior insight into the considerations that should guide the choice of priorities and selection of cases.

The agency-wide policy unit also plays a central role in agency efforts to disclose strategy, priorities, and case selection criteria. Such groups prepare public reports that describe these functions and their outputs. They prepare internal guidance for staff as well as guidelines that formalize agency policy with regard to process or substance. They also organize periodic public consultations that invite comments and debate about the agency's strategy, priorities, and case selection methods.

## 4. CONCLUSION: "PROGRESSIVE APPROXIMATION"

Richard Koch, a leading authority on business management, observes that good process for setting strategy consists of "progressive approximation."[28] By this phrase, Koch

[27] Koch, supra note 3, at 4 ("The sad fact is that strategy development is rarely done by the right people.").

[28] Koch, ibid, at 24-26.

captures the need for firms to engage in continuing, dynamic adjustment of ends and means through ongoing experimentation, assessment, and refinement. The economic, social, and political environment that surrounds a firm changes constantly, and the successful firm adapts continuously.

This insight identifies the practice of successful competition agencies. They have devised internal systems to set strategy, choose priorities, and select projects in light of their statutory mandates and in the face of changing circumstances. Their decision making processes examine new proposals in light of overall agency capabilities and commitments. Good agencies make effective use of past experience in identifying improvements – in authority, personnel, and process – that will enable them to take on new matters and perform more ambitious projects.

Successful agencies tend to enjoy a significant measure of discretion in deciding what to do and how to do it. In exercising discretion, they remain accountable, and their operations preserve political legitimacy, through meaningful public disclosure of strategy, priorities, and case selection criteria, and a custom of exposing completed cases and existing procedures to periodic evaluation. Robust ex post evaluation the needed assurance to the larger society that the agency is exercising its discretion responsibly and for the public benefit. Successful agencies do not claim omniscience or perfection; they do commit themselves to doing better the next time and wringing avoidable errors out of the system.