FORDHAM UNIVERSITY SCHOOL OF LAW
FORDHAM COMPETITION LAW INSTITUTE

45th ANNUAL CONFERENCE ON INTERNATIONAL ANTITRUST LAW AND POLICY

Fordham University School of Law
Skadden Conference Center, Costantino Room
150 West 62nd Street, New York, New York
Friday, September 7, 2018 — 1:30 p.m.

Closing Remarks

William Kovacic
Global Competition Professor of Law and Policy and
Director of the Competition Law Center,
The George Washington University

MR. KEYTE: Bill Kovacic is going to give us some closing remarks.

Everybody knows that Bill is the iconic leader in the international antitrust community. We are just so pleased to have him share some thoughts to end this 45th Annual Conference.

PROF. KOVACIC: Thank you very much, James, for the opportunity to tie together a couple of themes that have run through the presentations and to talk about a number of issues that bear upon the capacity of agencies to deliver on the promises that lie behind

Verbatim Transceedings, Inc.

the formation of competition systems generally.

My main interest in the field in recent years has been on the basic question of policy implementation.

[Slide] There are two critical tasks that we have been talking about that agencies face.

• The first is: What should they do? The basic question about what collection of values should be brought to bear on policymaking. What should the substantive standards be? What is the nature of the task that they ought to seek to perform in using their resources?

• The second question is, if you have answered the first to yourself: How to do it? These are closely related in discussions about public policy.

[Slide] Those of you who took a tour through a political science course at some point in your graduate or undergraduate studies probably came upon this book. This is a classic text in political

science. This is Graham Allison's book about the decision-making process in the Cuban Missile Crisis.

Allison did not so much try to reconstruct the basic details of what took place, but he was keenly interested in using this case study to examine how bureaucracies behave, how they meet challenges, how they go about deciding what they will do, and how they go about public policy implementation.

The fundamental assessment that he raised was a very gloomy conclusion about public administration.

[Slide] This is the key to it: "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 the actual performance of government."

Allison's assessment of policymaking in the Cuban Missile Crisis extrapolated to other areas of decision-making: Is it a key source of discontent that

one faces in jurisdiction after jurisdiction? Is the

gap between the aspirations of legislation, the

aspirations of public policy, and the actual capacity

of agencies to deliver on the promises, explicit and

implicit, built into that?

Allison's basic observation is that if we

don't spend as much time thinking about how to deliver

policy and everything that goes with it as much as we

think about what to do, we have a formula for failure

— and, indeed, a continuing source of frustration and

disappointment on the part of citizens who were told

"governments will promise in the stratosphere but they

can't deliver at the basic level of the surface of the

planet."

[Slide] He raises three questions in this

inquiry.

• What is a good process? A key matter for

concern throughout the deliberations in this

conference. What do we mean when we say "a good

process?" What are the elements of it?

• How do good projects originate? Take

things that have worked, things that have been

successful; where do they come from? Clearly, if you

had some systematic idea about doing that, you would

do it again and you would replicate that over time.

But it requires some reflection on what you have done

in the past, sorting out the good and the bad, and

understanding how both of them come about.

• What management methods raise

possibilities for good outcomes? That is, if you use

certain techniques, how do those techniques push you

over time towards doing a good job? You'll not have

perfect control over that.

When I was in university, I had a job

working for newspapers and I talked with luminaries,

especially athletes who had come to the campus, and I

would ask them in many instances how it was that they

focused their own energies on getting better.

One prominent golfer, still the greatest

golfer measured by championships achieved over time,

said, "I spend lots of time on technique. I am

fanatic about the technique. I realize that good

technique will not always put the ball where I want.

The wind comes up and blows it into the ocean. It

hits a twig and bounces into the creek. Things that I

can't control will limit my ability to succeed. But

good technique increases the likelihood that the ball

will go where I want. That I can control, so I focus

fanatically on good technique as a way of increasing

the likelihood of success."

A competition agency will never have perfect

success — a perfectly unattainable goal — but by using

good technique I think the faith we can have in an

individual system over time increases the likelihood

that it makes choices that improve economic

performance and achieve the other goals of the system.

That in many ways is why we are so deeply concerned

day-in and day-out about process and decision-making.

What I have to say about this in the next

few minutes is joint work with Marianela López-Galdos.

These are my views, not the views of the

Competition and Markets Authority (CMA) where I serve

as a Non-Executive Director, but I've learned a lot

about how to make these decisions and I would assert

to you that the techniques being developed at the CMA

— and you've heard from one of their principal

creators — are simply the best in class, and lots of

what I have to say is a reflection of what I have seen

at work inside the CMA.

There is still a ways to go to tell whether

those techniques produce the results that I have in

mind, but I have a lot of confidence that they do put

the CMA and would put other organizations in a

position to improve performance.

[Slide] To distill them into a handful —

this comes from work in agencies. Being in one myself

where I worked in the engine room and on the bridge

and in between, but spending lots of times with other

agencies, I am convinced that an agency that asks

these seven things puts itself in a better position to

do well.

• For a given project, for a project that's proposed, what do you expect to achieve? This forces you to wrestle with the question of goals that was featured so prominently in several discussions.

I don't have at this moment a normative recommendation for an agency about what those goals should be. I don't have a formula. But I do think that if you do not contemplate it in a rigorous way at the beginning you have an immediate formula for failure.

If you have six goals that you want to pursue, then you should lay them all out and you should try to identify the exchange rate that you are going to use in decision-making to resolve tensions among them.

And yes, you ought to be able to specify when you announce your matter to the outside world that these are your goals. No hidden goals. No shrouded goals. If you meant to do income inequality

measures, say so. If you're going to use this as a

mechanism to redistribute wealth and to create better

possibilities for disadvantaged groups, you should not

be ashamed to say so. Those cards should be placed

face-up on the table. If someone objects to your

goals, frameworks, and to your aims, then you can have

a debate about that. There's no shame in selecting a

broad array of objectives if that is what the

political leadership in the country expects you to do,

but you should be able to lay that out.

If you don't have a clear idea of what those

aims are at the beginning, you can point to project

after project that ended up on the rocks because the

agency could not clearly define for itself what it

wanted to accomplish.

It's the difference between saying, "I am

traveling west to San Francisco" as opposed to just

"go west."

How many of you would have confidence on a

commercial airliner that once you got on said, "We're

just flying today. We'll see where we end up." That

would create some measure of unease for you,

especially if you had hopes of being in Los Angeles as

opposed to Vancouver.

• What are the risks? What are the hazards

you are going to face? Realizing that the more

ambitious the project you pursue the greater the risk

that it will fail. Namely, what are the doctrinal

hurdles you will have to clear; what are the

analytical hurdles and related data collection

complexities; and last, to what extent will the

project put extreme pressure on the capability of your

people to deliver the job well?

Going through the risks is not a formula for

timidity. But if there are crocodiles in the river

that you're about to swim through, it's good to know

that in advance. Wouldn't you like to know that

before you started swimming?

I suppose in terms of being willing to go it

would be better to be blind to that possibility, but

another source of system failure over time is the

inability to examine carefully what the hazards are

and realizing that many important and successful

undertakings by agencies require taking risks.

For a larger gain an agency properly could

consider taking more risks, but have that clearly in

mind as the project is being teed up — what do we

expect to achieve; what are the hazards we face in

trying to do it?

• An underappreciated element of good

process, and that is who will do the project. How

good is the team? How many good teams do you have?

I think something that agencies overlook

over time — I think they have an intuition about it —

is to focus carefully on how many good people they

have.

The numerator for an agency is really good

people. The denominator is everybody on staff. Those

numbers are different. No agency has unity between

them, but not to focus very carefully on how many good

teams you have is to start assigning projects to

people who have no business doing them.

When we talk about elements of good process,

I think a crucial element of good process is to build

a staff that can do the work in terms of numbers and

in terms of skills.

A painful experience I see in many

discussions with different agencies is the mismatch

between the commitments and the capabilities. Can you

push your people to do more than they are now? Yes.

To go back to my sports analogies, in tennis

how do you become a better tennis player? You play a

better tennis player. You don't play someone who's

just as good as you are or worse. You become a better

tennis player by playing better people than you are.

That's how you push, and you grow.

But if you play someone who is so

demonstrably better than you are that you never win a

point, that's a bit discouraging. It also labels you

as being unwise in your choice of undertakings and

sport and labels you as someone who probably shouldn't

be on the court in the first place.

This in many ways is good process. In my

mind it means that an agency does not undertake

projects that dramatically outrun its capacity to

deliver.

And it means that a crucial element of good

agency decision-making is to build that team to the

point that it can carry out more demanding and more

difficult projects.

The problem that many agencies run into, I

think, is that they assume that their best team will

do all the hard projects. But they can't.

Now, in my past experience at the FTC I had

a sense of how many first-rate teams we had. We had a

number of first-rate teams that would be the match

forensically to any opponent. We did not have an

infinite number of those.

We did not post that number outside the

building saying: "Our two best teams are booked. This

is a good time to take a run at us because the third

one won't be able to handle the case. You'll have a

good chance of running circles around them."

That is a number that we did not put out.

But not to know that number is a formula for danger.

To realize in a cleareyed way about how good your

people are and whether they're a match for what

they're going to face is essential for an agency,

without any illusions or gauzy views about how well

one might be.

If you realize that you don't have the

people you need, that points you in the direction of

what you have to do to build the institution, which is

to get better ones; to take the people you have who

are good and make them great. If you can bring people

in that raise their overall skill level, that's what

you have to do.

• What's it going to cost? In our budget

how much are we going to have to spend?   This is

partly a bigger agency question. But if you're going

to do three mergers and each of them will cost you $2 million or more for the external experts, that's a crucial question in deciding what to do.

We don't have a good metric in our field that helps us predict how much money we are likely to have to spend to get a certain result. We don't think systematically about that so that we can trade off this project that will cost me $5 million versus this one that might cost me $500,000 and to measure the relative results that we get from each. But to have clearly the idea of what it will cost is an essential element of going ahead.

• How long is it going to take, especially if the political forces that shape the larger enabling environment can change? Are you bringing a big case now that will take five years to deliver and in five years the political winds will change dramatically? You were cheered for bringing the case on day one; you were hated for pursuing it on year five. How long is it going to take to deliver?

And by the way, if it's one of these wonderful digital sectors, technologically dynamic, is it going to be the same industry by the time you're done? If not, that pushes us all in the direction of thinking more about interim measures — what kind, how to deliver. We have to move more quickly.

Moving more quickly in itself is not necessarily good enough. I go to my physician and say, "My hand hurts." If he pulls out a hacksaw and says, "I'm going to fix the hand right away, it will never hurt again," I say, "How about a little bit more information, a bit more data, X rays, MRIs, other treatments?"

Moving quickly does not always mean moving wisely, but we have to think of techniques that allow us to do both.

• How does it fit in the portfolio? Not to look at projects in isolation and say, "How's this one going to work out?" but "Let me look at everything I'm doing. How many fights have I picked? How many

demanding major projects have I undertaken? How does

this fit with respect to overall risk and return —

high risk/high return, medium risk/medium return, low

risk/low return?

You can have some imbalance in the

portfolio, but if you look at your whole program and

you notice that you have five major projects that are

"bet your agency" cases each one and you have no

smaller projects that are building your capability to

do tough projects, you have a portfolio that is not

sensibly constructed.

• Last, how will we know it worked? How are

you going to assess outcomes, our success in achieving

the goals that we laid out before, and to spell out

what sorts of things we'll look at as an indication

that we have accomplished the results that we had in

mind?

Asking the last question sets the foundation

for doing evaluation. The evaluation doesn't have to

be in each instance technically precise, but a simple

exercise of laying out expectations, assumptions, and matching them to results observed is a relatively inexpensive and informative way to do good evaluation and assessment.

I think an agency that takes all seven of these things on — and this is an amalgam from what I have seen in many good agencies — really reflects in many ways what Andrea and his colleagues have done at the CMA over the past five years.

An agency that does these seven things thoughtfully with respect to each project is putting itself in a better position to get good results. In many respects this is a foundation for what I would call good agency process.

Thanks again, James, for the chance to do this.

The guards are leaving behind the doors. They're putting away their firearms. You can leave when you choose to.

MR. KEYTE: Thank you, Bill.

It has been a long couple of couple of days or three days for everybody. Thank you so much for your patience.

I just have a few thank-yous that I wanted to give.

First to Julie Smith and her team. This is Julie's first year helping with the conference and she did an incredible job. Let's give her a round of applause even though I don't think she's here.

Of course, to our moderators and speakers. I think many people have observed that this has really been an incredible year for our speakers and our panels. We are so pleased. And that's what it really takes, is to have the enforcers, practitioners, and academics exchanging ideas. There was lively discussion and debate and it made for great programs. So, thank you.

Also, this year we really couldn't do it without the sponsors stepping up a bit more than they have had to in the past. We have twenty-five or

twenty-six heads of authority here, which we cover, so we needed to do a little more with our sponsors. They were fantastic.

I want to just highlight that was Skadden Arps, my former firm; Freshfields, Kirkland & Ellis, The Brattle Group and Compass Lexecon doing the economic workshops; Davis Polk, European Economic and Marketing Consultants, Allen & Overy, Linklaters, Rucellai & Raffaelli, Bates White, and Mayer Brown. Without them we really couldn't have this program. So that is fantastic.

Of course, thank all of you for coming and participating with questions.

Our keynote speakers. Again, that is the foundation. People want to come and hear the agencies, what they have to say. It's fantastic to have a Q&A session. Maureen and others, thank you for that.

Finally, next year it will be in mid-September. I think it's going to be the 11th to the

13th or after. I think that should be very helpful for everybody.

Again, thank you very much. Enjoy the rest of the day. Get some actual food. Safe travels to wherever you're headed.

Thank you.

[Adjourned: 1:55 p.m.]