

The Design of Competition Policy Institutions for the 21st Century—The Experience of the European Commission and DG Competitionⁱ

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I. INTRODUCTION

All competition policy and enforcement systems consist of essentially two components: the legal instruments ('rules') governing both substance, competences and procedure, and the administrative structures and processes through which the legal instruments are implemented. Each of these is necessary for the success of the system as a whole. Good rules remain a dead letter if there is no efficiently run organisation with the processes to implement them. Conversely an efficiently managed authority cannot compensate for fundamental flaws in the rules which it is to implement.

The analysis and design of these components are also interdependent. The management of the processes within the organisation has to be adapted to the rules which it has to apply. And the rules must be shaped in a way that they can be implemented within the real world constraints to which the organisation is subject—such as limited resources.

Academic attention focuses mainly on the legal instruments and not so much on the organisational side. One reason for this is probably that competition policy and enforcement is still mainly a subject for lawyers. Another reason could be that it is not easy for outsiders to obtain detailed and comprehensive information about the interior workings of a competition authority. Finally, it is perhaps assumed that the management of a competition authority does not pose any different challenge than the management of other public or private institutions with a comparable mission and size.

Before starting I need to make a preliminary point that will be obvious to many, but which is none the less important. The competition authority in the European Union is not DG Competition, but the European Commission. The European Commission is a collegiate institution composed of 27 Commissioners from the 27 Member States of the European Union. It is this College of Commissioners that, on a proposal of the Commissioner for Competition, adopts final decisions in individual competition cases as well as on policy documents such as guidelines and notices, and legislative proposals to the Council. On the basis of a delegation of powers from the College (so-called empowerment), the Commissioner for Competition can herself directly adopt certain preparatory or intermediary acts such as a Statement of Objections, as well as final decisions in less important cases, such as a merger dealt with under 'simplified' procedure. The decisions taken by the College and the Commissioner are prepared and implemented by one of the departments of the Commission, in the case of competition, the Directorate General for Competition, which currently has around 800 staff.

I do not intend in the remaining sections of this article to give further attention to the classical institutional issue of the degree of independence of a competition authority, and in particular of the

Commission as a competition authority. However some remarks on our general approach to this question may be useful.

The European Commission finds itself in a substantially different position to a national authority. In the first place, its institutional independence should not be in question. As reflected in the EU treaties, its independence from national and political interests is fundamental to its mission of promoting the ‘common interest’ of the European Union as a whole.

Secondly, the Commission has delegated fully its powers to investigate a case, and manage the due process, to DG Competition. The Commissioner for Competition is in addition empowered to take decisions on cases and problems which raise no significant policy issue. These arrangements offer a solid guarantee of the integrity and impartiality of investigations and their conclusions, while reserving all key decisions on cases and policy for the college of Commissioners as a whole.

Thirdly, a competition authority certainly needs to be independent and impartial. But it should not be isolated or uninformed. It needs to be fully aware of the market and regulatory environment around competition law enforcement. And it needs to be in a position to influence legislators and regulators, particularly when competition problems can be better addressed by new or amended regulation. This only underlines the advantage for EU competition policy of having the work of the Competition Commissioner and DG Competition fully embedded within the Commission. Finally it is worth underlining again that the Commission as an institution, and not just DG Competition, retains the role of Europe’s competition authority.

II. HOW TO DESIGN A MODERN COMPETITION POLICY AND ENFORCEMENT SYSTEM

Independently of whether we speak about merger control, antitrust or State aid control, a competition authority should ideally intervene at the right time, on the right markets, in relation to the right problems and with the correct remedies. At the same time, its intervention should be predictable, correct, and have a measurable positive impact.

In the real world, however, external constraints—resulting from limited resources and the institutional context—often disrupt this ideal. No competition authority has the resources to do all possible cases. Some form of prioritisation is necessary.

Moreover, there are inevitable trade-offs, for example, there may be a need to resolve a competition problem in a given market quickly to bring some form of anti-competitive conduct to an end. But there is obviously a parallel pressure to achieve correct (no error) outcomes in each and every case. Similarly, hard and fast per se rules provide a higher degree of predictability of outcomes, but can lead to more type 1 or type 2 errors when compared to effects-based rules.

Against this background what should a modern competition authority try to achieve? I see several basic requirements:

(1) Policy, rules and individual enforcement actions must be based on sound law, economics and market knowledge. Legally, enforcement must be—and be seen to be—subject to the rule of law, due process requirements, and effective judicial control. As to economics, the long-term legitimacy of any competition enforcement system rests on the economic story which it tells in each case. Any competition enforcer should be able to explain why and how its enforcement actions contribute to the wider public interest, and in particular to consumer welfare, whether in the short or longer term. As regards market knowledge, the authority must have effective investigative powers to gather relevant data and to set priorities and focus its use of its legal instruments accordingly.

(2) The enforcement system must be designed in a way that guarantees coherence and predictability for business: coherence ensures equal treatment. Predictability allows firms to plan for compliance. To achieve this, ex-ante rules and individual enforcement decisions should be based on a common methodology, clear and publicised enforcement objectives and an in-depth knowledge of how markets function. Again, there is a certain trade-off between predictability and the need to deal with each case on its merits. Based on empirical evidence, some structures or conducts have almost always produced outcomes which are harmful to competition and to consumers. As a result it may be possible to establish some clear ex-ante rules which offer a high level of predictability. However, where past evidence is mixed, the most that can be done to provide a degree of predictability is to indicate what assessment methodology will be used. Usually, an effective enforcement system will be based on a mix of ex-ante (per se) rules and an analytical framework for a case-by-case effects-based analysis.

(3) The system should allow the competition authority to concentrate its limited resources on specific priorities. The authority must be able to determine those priorities on the basis of the expected direct and indirect effects of its action. The system should make it possible to concentrate resources on the potentially most harmful conducts and on precedent-setting cases. This depends crucially on knowledge of markets and the capacity to focus on key issues without the need for repetitive indepth investigations on individual cases.

Notification thresholds, block exemptions, de minimis rules and graduated decision-making procedures must allow the authority to deal quickly, and with limited resources, with unimportant and simple cases.

(4) As to the length of investigation procedures, any effective competition system must enable a public agency to take decisions in a time-frame which is relevant to the problem it is supposed to remedy. Being well-informed on market developments before cases arise is again important here. Precedents must also be set at a moment when they still have the intended wider policy impact. This means that procedural rules and internal best practices should ensure timely investigation and rapid internal decision making.

(5) Last but certainly not least, enforcement must always go hand-in-hand with an effective communication of its benefits, for consumers and for business. Public intervention cannot depend on some abstract rule or unsubstantiated theory of problems, but must explain why and how it contributes to the wider public interest.

III. MODERNISATION OF THE LEGAL INSTRUMENTS

Although the fundamentals of competition law set out in the Treaty of Rome have essentially remained the same for the past fifty years, the legal instruments implementing them have been continually reassessed and amended.

A. *Antitrust*

The substantive antitrust rules have been progressively reviewed in order to reflect developments in economic thinking, reduce the regulatory burden on companies and improve the speed and efficiency of enforcement. In addition to legislative rules, the Commission has adopted various non-regulatory documents such as notices and guidelines, explaining in more detail the policy of the Commission on a number of issues and interpreting legislative antitrust rules.

On 1 May 2004, a new enforcement system for Articles 81 and 82 EC of the Treaty entered into force, abolishing the notification system and empowering national competition authorities and courts to participate fully in the application of Articles 81 and 82 EC. It also introduced new and more effective ways of addressing competition problems, such as the possibility for the Commission to make commitments binding on undertakings, when such commitments meet the concerns expressed by the Commission in antitrust proceedings. Regulation 1/2003 also gave the Commission wider investigative powers by expanding its inspection rights.

As a complement to Regulation 1/2003, the Commission adopted the ‘modernisation package’ consisting of a new Regulation on details of its antitrust procedures and six Notices aimed at providing guidance on a range of issues. In parallel, the Commission increased the transparency of competition procedures and expressed its commitment to due process and the parties’ rights of defence. In 2001 it strengthened the role of the Hearing Officer by attaching it directly to the Competition Commissioner and by making its report available to the parties and publishing it in the Official Journal of the EU. In 2005, it revised its rules for access to the Commission’s files by parties involved in its merger and antitrust cases by updating its previous notice from 1997. The revised Notice also increased procedural efficiency by confirming that access to the file can be granted either electronically or on paper.

Evaluating procedural and substantive rules is, and should be, a permanent task.

For example, the Commission has earlier this year introduced a form of direct settlements for cartels through which companies that acknowledge their responsibility in a cartel infringement can benefit from a

shorter administrative procedure and receive a reduction in the amount of fines. This settlement procedure opens up the prospect of more rapid prosecution of cartels and a more effective use of scarce enforcement resources.

Similarly, facilitating private enforcement would help ensure that those damaged by infringements of EC competition law can exercise their right to compensation, as well as adding to overall sanctions and deterrence, as a complement to public enforcement. As a follow-up to its Green Paper of 2005, the Commission published a White Paper on antitrust damages actions.

Finally, work is ongoing on the review of Article 82 EC with the dual aim of strengthening the legal and economic underpinning of unilateral conduct cases as well as providing greater policy coherence and predictability.

B. Merger control

The Merger Regulation, first adopted in 1989, created a one-stop shop where companies apply for regulatory clearance for mergers and acquisitions above certain worldwide and European turnover thresholds. The recast Merger Regulation, adopted in 2004, introduced some flexibility into the investigation timeframes, while retaining a much praised degree of predictability. It reinforced the ‘one-stop shop’ concept, and clarified the substantive test so that the Commission now has the power to investigate all types of harmful scenarios in a merger, from dominance by a single firm to coordinated and non-coordinated effects in oligopolistic markets.

The 2004 Regulation also introduced a new streamlined referral system in order to put in place a more rational corrective mechanism of case allocation between the Commission and Member States. It ensured that the authority or authorities best placed to carry out a particular merger investigation should deal with the case. Amendments to the referral system have been complemented by a new Notice on the principles, criteria and methodology upon which referral decisions should be based.

Furthermore, a set of best practices were adopted on the conduct of merger investigations to provide guidance for interested parties on the day-to-day conduct of EC merger control proceedings. These best practices were designed to streamline and make more transparent the investigation and decision-making process, ranging from issues of economic indicators to rights of the defence.

The 2004 Merger Regulation was complemented by Guidelines on the assessment of horizontal mergers. These Guidelines set out the analytical approach the Commission takes in assessing the likely competitive impact of mergers and reflect the re-wording of the substantive test for the competitive assessment of mergers in the 2004 Merger Regulation. The objective was to provide guidance to companies and the legal community alike as to which mergers may be challenged.

In addition, with the aim of providing guidance to undertakings, a 2001 Notice on remedies describes

the main types of commitments that have been accepted by the Commission, the specific requirements which proposals of commitments need to fulfil in both phases of the procedure, and the main requirements for the implementation of commitments. A revised Remedies Notice has been adopted recently that adapts the 2001 Notice in the light of an extensive study undertaken by the Commission into the implementation and effectiveness of remedies, recent judgments of the European Courts and the 2004 Merger Regulation.

In 2007 the Commission also approved Guidelines for the assessment of mergers between companies that are in a so-called vertical or conglomerate relationship. The Guidelines provide examples, based on established economic principles, of where vertical and conglomerate mergers may significantly impede effective competition in the markets concerned, but also provide 'safe harbours', in terms of market share and concentration levels below which competition concerns are unlikely to be identified.

C. State aid control

Following reforms of legal and interpretative instruments in the field of antitrust and mergers, the Commission engaged in the first comprehensive modernisation of both substantive and procedural rules in the area of State aid control. The State Aid Action Plan (SAAP), launched in 2005, aims at an increased efficiency of State aid control. It is based on four guiding principles: i) less and better targeted State aid, ii) a refined economic approach, iii) more effective procedures, better enforcement, higher predictability and enhanced transparency and iv) shared responsibility between the Commission and Member States.

Since 2005 a number of legislative and interpretative instruments have been adopted that reflect the new approach to State aid policy, including a package on Services of General Economic Interest, guidelines for Regional aid, Risk Capital, R&D, Innovation aid short-term export-credit insurance.

A General Block Exemption Regulation has been adopted with the aim to simplify and consolidate into one text five existing block exemptions for aid to SMEs, research and development aid in favour of SMEs, aid for employment, training aid and regional aid. The new Regulation also allows the block exemption of three new types of aid: environmental aid, aid in the form of risk capital and R&D aid also in favour of large enterprises. This comprehensive review of the substantive rules will be accompanied by improvements in the way the Commission deals with the State aid notification procedures. Procedural reforms should aim at shortening procedures, improving transparency, ensuring that State aid is duly notified or recovered if implemented illegally and improving administrative efficiency, among others, by allowing an easier collection of relevant sectoral information.

IV. RESOURCE AND CHANGE MANAGEMENT INSIDE DG COMPETITION

In parallel to the reforms of the legal instruments, over the last years DG Competition has changed its mission, internal structures and processes to align it more closely with the requirements of a modern framework for competition policy.

A. *Past culture and traditions*

For the years up to around 2000, the mission of DG Competition was essentially defined as ‘promoting competition, thereby promoting an efficient allocation of resources’. Enforcement was necessarily reactive, as it was driven largely by notifications and complaints. This was also reflected in the internal structures and processes of the DG.

Work was focused on the development of the various legal instruments, with lower priority given to economic analysis and market knowledge. With the exception of the Merger Task Force, resources were mostly allocated on a unit by unit basis within each directorate, often resulting in ring-fencing of staff within the boundaries of both the legal instrument and the market sector concerned. There were very few examples of a case-handler in the telecoms antitrust unit working on either a telecoms merger case, or a media antitrust case.

In addition, there was limited priority-setting or planning of cases and other initiatives. Negative priorities—Drucker’s ‘posteriorities’—were almost non-existent. Without positive and negative priorities, it was difficult to deploy resources effectively. This led to some very lengthy antitrust and State aid investigations which stretched out well after the moment at which the final decision on the case would have had most impact.

DG Competition also had a reputation for a rather inward-looking culture vis-à-vis the rest of the Commission and national competition authorities. Although a high value was placed on professionalism, intellectual rigour and integrity, there was at least a perceived tendency towards a monopoly of the truth in external relationships. The DG rarely involved itself in an analysis of competition issues in the work of other Commission departments.

Around 2002 there were signs that the platform on which DG Competition was operating needed to be stabilised. A series of merger prohibitions were reversed by the Court of First Instance for inadequate legal reasoning and economic analysis by the Commission and procedural errors. Outside criticism targeted the DG’s formalistic approach, as well as the lack of transparency and long delays in State aid control.

B. *Change management*

There are a number of general success parameters that are key to managing change effectively in any organization such as DG Competition (be it a public body or a private undertaking).

Most importantly, there is the need to establish objectives. The role, mission and core values of the organization need to be clearly defined. Competition authorities should not shy away from regularly reassessing their role as a public institution and from redefining their mission in light of changes to the environment. Debate about the mission also helps to devise a clear strategy. Multi-annual forward looking strategic planning is essential to the success of the organization and the system as a whole. The strategy, in

turn, should translate into operational objectives together with planning and monitoring of results to be achieved. Strategic goals have to be broken down into operational objectives that can be planned in advance, monitored during their execution, and evaluated afterwards.

Secondly the organizational structure should target resources towards these objectives. Such structure should reflect the core values of the organization and help mobilize resources to achieve the objectives.

Thirdly the organization needs people with the right skills and experience. The biggest asset of a competition policy institution is its staff. An efficient management and development of people is fundamental.

Fourthly, an organizational culture must be created which promotes values crucial to the success of the organization such as ethical standards, integrity, intellectual rigour, objectivity, public- and client-service culture, and results-orientation.

Finally, within every organizational structure there is a need to establish the right processes which help make things happen. These can include, for example, decision-making procedures, 'liturgies' of meetings or IT systems.

C. *Defining objectives*

1. A new mission: making markets work better

If competition policy is to make a significant contribution to a policy of sustainable economic growth, a narrow law enforcement and instrument-based approach which focuses only on the preservation of existing competition is not sufficient.

Competition policy must therefore act on a number of fronts at the same time. First, it must enforce competition law whenever there are harmful effects on Europe's citizens or businesses. But second, it must also ensure that the regulatory environment fosters competitive markets. It needs to screen proposed and existing legislation. Thirdly, it must help shape global economic governance through promoting the convergence of substantive competition rules, strengthening cooperation with other jurisdictions and promoting a shift of emphasis from trade regulation to competition regulation in the WTO. Finally, it must develop a competition culture in the society in which it operates. This is in itself one of the principal elements which can guarantee the competitiveness of an economy in the longer term.

Ultimately competition policy must make markets work better for consumer and businesses in Europe.

2. Consumer and social welfare objectives

Competition policy institutions must also make clear, in economic terms, whose interest they are there to

protect.

In the Commission's view, the ultimate objective of its intervention in the area of antitrust and merger control should be the promotion of consumer welfare. Under EU antitrust and merger control the aim is to ensure that consumers are not harmed by anti-competitive agreements, exclusionary and exploitative conduct by one or more dominant undertakings, or by mergers that significantly impede effective competition. A good example is the Commission's prohibition decision in the Ryanair/Aer Lingus merger case, which prevented a reduction in choice and, most likely, higher prices for more than 14 million EU passengers using one of the 35 routes operated by both parties.

However, a consumer welfare standard cannot be transposed directly to the world of State aid. In fact, beyond any justification it may have in terms of allocative efficiency, State aid can be justified on the basis of non-economic grounds such as reducing social disparities which consumer welfare does not measure. Whether the rationale for State aid is efficiency or equity, the correct welfare standard for State aid policy—expressed in economic terms—would seem to be the social welfare of the European Union, which is equivalent to the notion of common interest found in Article 87(3) of the Treaty.

The concept of consumer welfare should also be interpreted dynamically in the sense of the effects of any structure or conduct on price, choice, quality and innovation in the short and long term. Sometimes these effects are immediate and measurable. However, often the effects are difficult to quantify and the only way to protect consumer welfare in the longer term is by safeguarding the process or dynamic of competition on the markets. In this sense, there is convergence between the German and Anglo-Saxon antitrust traditions.

Most theories of harm do not require sophisticated econometric or simulation modelling. Usually the economic 'story' behind a case is simple to explain and simple to test against the evidence drawn from a market investigation. It is also sometimes impossible to carry out indepth analysis within the confines of the legal deadlines of a merger investigation. However, in some cases, detailed econometric tests have been applied with success.

3. A more economic and effects-based approach

Following the legislative and policy changes described in more detail above, the Commission now uses an 'effects-based approach' both in merger control and in antitrust, which focuses on the actual and likely effects on consumer welfare. This means that a framework is needed to establish a theory of consumer harm, and this framework should also come up with hypotheses which can be tested. For example in the Oracle/ PeopleSoft merger case in 2004, we examined with econometrics the extent to which Oracle's bidding behaviour was affected by the specific identity of the rival bidders in the final rounds of a given bidding contest.

In line with the State aid Action Plan, the Commission is also moving towards a more economic approach in State aid policy. Assessing the compatibility of State aid is fundamentally about balancing the

negative effects of aid on competition and trade with its positive effects in terms of the ‘common interest’. However, economic analysis in State aid cases is more challenging than in antitrust and mergers: first it is not just concerned with competition between firms, but also with negative effects of an aid on trade within the EU Single Market, or location decisions and secondly equity considerations (jobs, benefits for the environment) need to be balanced against efficiency considerations.

4. Focusing limited resources on the most harmful practices in key sectors

The objective of making markets work better requires, in the first place, carefully selected priority sectors. DG Competition’s action therefore focuses on sectors that are key for the functioning of the internal market and for the Lisbon agenda for growth and jobs. For example, public monopolies established to provide telecommunications, post, energy and transport services have not always proved efficient and able to satisfy consumers’ needs in the best possible way. Gradually opening up these markets to competition and making sure that they remain open not only allows consumers to benefit from new, cheaper and more efficient services but also reduces significant input costs for companies. The Commission’s antitrust decisions against Deutsche Telecom and Wanadoo in 2003, against Telefónica in 2007 and its ongoing investigations following the sector inquiry into the gas and electricity sector are but a few examples of this focus.

The more harmful anti-competitive practices for the European economy and consumers are, the greater the need there is for competition policy to intervene. As cartels are clearly the most harmful restrictions of competition, high priority is given to the prevention and deterrence of cartels, as evidenced by the imposition of fines in excess of €3.3 billion in 2007. Similarly, abuses of dominant position with a clear negative effect on consumer welfare must remain in the spotlight of enforcement. Finally, erecting barriers to market entry through special or exclusive rights, granting distortive State aid or restricting take-overs of national companies often result in serious restrictions of the competitive process and therefore also warrant priority.

There may also be alternative ways or remedying a market failure. Proper priority setting should be based on a ‘competition obstacle’ approach. This approach is based on identifying the main competition problems in a sector and subsequently selecting the most effective instrument(s) to tackle those problems. These instruments may be i) competition enforcement by the Commission, by national competition authorities or by both, ii) the adoption, modification or abolition of legislation at the Community level, at the national level or at both levels, iii) action by a sectoral regulator, iv) self-regulation by the industry or v) a combination of these. The way the Commission has been challenging unjustified public obstacles to takeovers, for example in the E.On/Endesa case, jointly through its competition and internal market rules is a good example of this ‘competition obstacle’ approach.

D. Reforming the structures

1. Two major reorganizations of DG Competition in 2003 and 2007

Against this background of the progressive reorientation of EU competition policy, there have been two major reorganizations of the structure of DG Competition, complemented by a number of other incremental changes in between.

In 2003/2004 we created for the first time a matrix structure by integrating Merger Units with antitrust units in directorates dedicated to enforcement action in key sectors of the EU economy such as energy, telecoms, transport, financial services and information technology. The 2007 reorganisation goes one step further and integrates State aid units with antitrust and merger teams in five 'market and cases' directorates.

The advantages of this more sectoral organization are evident. It pools and increases market knowledge so that investigations are more informed and effective. It allows for more flexible use of staff across the policy instruments (antitrust, mergers, State aids) and helps spread best practices. It establishes closer links between competition policy and other EU sectoral policies and allows for more effective competition advocacy. It also makes sector enquiries easier to organise and run. Finally it helps the dialogue with other DGs within the Commission and with national competition authorities and national regulators both within and outside the EU.

On the other hand, there are areas where market knowledge is not as important as instrument knowledge and where therefore an instrument based organization is more effective. The Cartel Directorate, created in 2005 and specifically dedicated to the enforcement and development of competition policy in relation to cartels, remains instrument based. This structure brings economies of scale and consolidates the Commission's cartel expertise in one directorate. Similarly, the content and procedures of horizontal state aid work, such as regional aid or aid for R&D&I, are more difficult to integrate into sectoral directorates and warrant an instrument-based directorate.

2. Creation of a Chief Competition Economist function

In line with the objective of strengthening the economic assessment of cases and new policy initiatives, a Chief Competition Economist function was created in 2003. The Chief Competition Economist reports directly to the Director General and is assisted by a team of 20 PhD economists. First of all he provides guidance on the economic methodology in competition investigations. Secondly, he also gives guidance in individual competition cases from their early stages. Thirdly, he provides detailed guidance in key competition cases involving complex economic issues, in particular those requiring sophisticated quantitative analysis. Fourthly, he contributes to the development of general policy instruments.

In addition, the creation of the Chief Competition Economist function has contributed to the wider dissemination of economic expertise in DG Competition. He acts as a focus for economic debate within DG Competition, in liaison with other Commission services and in association with the academic world. Members of his team organise training sessions on economic issues and give advice on studies of a general economic

nature, as well as on market monitoring.

3. Project-based allocation of resources

Setting priorities has no meaning unless priorities determine the use of scarce staff resources. Resources need to be flexibly allocated to cases or other projects. But the Commission's administrative structure (Directorate General composed of directorates which are themselves composed of units) can create rigidities. So it has become standard practice in DG Competition to allow for 'décloisonnement' of staff to be assigned to any priority project with a 'case manager', reporting directly to a Director, who may come from any unit within a directorate. In addition, case teams can be created by bringing together staff from different directorates but who are skilled in antitrust merger or state aid investigations. It is also becoming general practice to assign to a case team a secretary who is specialized in the type of investigation concerned (mergers, antitrust or State aids), who is given overall responsibility for the case's administrative aspects of the case.

So project-based resource allocation is used both within a Directorate (each member of the Cartel Directorate can work for different case-managers under the single authority of a Director) and across Directorates (a member of a merger unit can work with colleagues from a merger unit from another Directorate within the 'Merger Network'). This project-based approach is applied not only for case work, but also for policy projects requiring the participation of staff having different sector- or instrument-specific expertise.

E. Reforming the processes

1. Introducing a two-stage procedure in antitrust

Following the entry into force of Regulation 1/2003 and as a part of the efforts to streamline and increase the efficiency of the working methods in the field of antitrust, in 2005 we introduced a two-stage procedure. The goal of this procedure is to allow the Commission to discriminate quickly and effectively between those few cases that deserve an in-depth investigation and to which resources should be allocated and the other cases that are not a priority and that should be closed as soon as possible and with the least use of resources. The procedure is also designed to properly plan investigations in order to achieve results within specific target deadlines.

As a result, all antitrust cases now start with a first-phase investigation of usually no more than 4 months, after which a decision is taken as to the theory of harm identified and whether there are reasons to regard the case as a priority for the Commission. If the case is considered a priority, in principle a Commission decision to initiate proceedings is adopted and an in-depth investigation is carried out.

The theory of harm on which an eventual investigation is based must be robust and there must be prima facie, facts-based indications of the alleged infringement. This solid foundation reduces the risk of

subsequent delays in the procedure.

The criteria on the basis of which it is decided whether there are sufficient grounds to carry out an in-depth investigation include, among others, the extent and likelihood of consumer harm, the strategic nature of the policy area or the sector concerned, the significance of the impact on the functioning of competition in the internal market, the extent or complexity of the investigation required, the possibility for bringing the case before a national court in a Member State and whether the potential infringement investigated has terminated or is still ongoing.

2. Focus on investigative techniques

Given the increased focus on effects, investigations are becoming more fact-intensive and case files are growing bigger. This requires new approaches and skills in the handling of antitrust, merger and **State** aid cases. DG Competition is constantly trying to improve its practices in collecting evidence and presenting facts in decisions.

Efficient investigative techniques (i.e. how to best gather reliable evidence) are essential for the success of any antitrust procedures. In order to focus investigations and reduce case handling time, we try to plan the details of the investigation at an early stage of the proceedings, i.e. i) the quality and quantity of evidence needed to prove the case, ii) the identification of possible sources where the evidence is located, and iii) the resources to be assigned to this task.

Best practices in drafting (i.e. how to best present evidence to construct a sound decision) are another important tool. In order to discharge the burden of proof imposed on the Commission, case teams must thoroughly and accurately incorporate the results of the investigation into the final decision, demonstrating that the standards of proof are met. The final decision must address all the relevant issues the Commission investigated during the proceedings, incorporate all the relevant evidence gathered during the investigation, and lay down the reasoning of the Commission in a clear and consistent fashion.

3. Organising Peer Review Panels

In order to ensure the quality of its interventions, DG Competition applies a particular form of scrutiny for major antitrust, merger or State aid cases, from their factual basis through the legal reasoning to economic analysis. It consists of organizing a Peer Review Panel at key points during the investigation, e.g. after the sending of the Statement of Objections and the hearing, where a peer review team looks at all aspects of a case with a 'fresh pair of eyes'.

The primary objective of this exercise is to provide assistance to the case team in particularly complex cases with a view to ensuring that the foundations of the case are robust. The Peer Review Panel may identify areas where further work is necessary to sustain an objection and how this might be carried out.

4. **Advocacy and competition screening of legislative proposals by other Commission departments**

As a result of internal advocacy and communication efforts competition policy and our objective of making markets work better for the benefits of consumers and businesses play an increasing role in Commission overall economic policy.

A competition test was included in the Commission's revised Impact Assessment Guidelines of 2005. All legislative and policy initiatives included in the Commission's annual work program must pass this test.

The basic 'competition test' applied in the context of competition policy screening involves asking two fundamental questions at the outset. First: what restrictions of competition may directly or indirectly result from the proposal (does it place restrictions on market entry, does it affect business conduct, etc.)? Second: are less restrictive means available to achieve the policy objective in question? This screening exercise may result in the choice of less restrictive regulatory or market-based methods to achieve certain policy objectives, thereby helps avoid unnecessary or disproportionate restrictions of competition.

V. **CURRENT MANAGEMENT CHALLENGES**

A. *Measuring performance and impact*

It is impossible to know whether objectives are correctly set, whether the institutional structures and processes are well defined and ultimately whether the actions of a competition authority produce the desired outcome if the performance of the institution is not measured in one way or another.

Working back from the overall objective of making markets work better for the benefit of consumers and business, we intend to use for the measurement of our performance the following three performance dimensions:

Productivity: this dimension tries to measure the efficiency of the organisation; it indicates whether we are successful in coping with the incoming workload, in minimising inputs and in maximising output. For that purpose we compare on a regular basis on the one hand workload (incoming cases) and inputs (resources,...) with, on the other hand, outputs (decisions, texts adopted,...)

Quality: for a competition enforcer such as DG COMP to achieve its public interest objectives, the quality of its output is arguably at least as important as productivity. There are different sub-dimensions to that. We look at (a) the legal and economic soundness of our enforcement, (b) the timeliness of our procedures, (c) compliance with due process, and (d) how well we communicate on our enforcement.

Impact: in order to really know whether we achieve our ultimate objective of making markets work better, we need to measure the impact of our decisions on those markets. For that purpose we intend to

distinguish between the measurement of the direct impact of our action on markets and on the different stakeholders (consumers, competitors...) and of the indirect effects (precedent effect, deterrence ...).

As a first step, a Unit dedicated to the ex post evaluation of DG Competition's enforcement activity was set up in 2007 as a part of the Policy and Strategy Directorate of DG Competition.

B. Demonstrating the added value to citizens

Closely linked with measuring performance is the challenge of demonstrating the added value of competition policy to ordinary people. It is not sufficient to know what the impact of competition policy action is: the benefits need to be communicated effectively.

We have recognized that communication is core business. Communicating effectively about our work has a preventive effect. We can explain the law and highlight the penalties for not respecting the law. In addition, explaining what DG Competition, entrusted with public resources and powers, does, ensures its accountability. Communication is also about good policy making. Through dialogue, DG Competition can learn to re-evaluate the things it is communicating about. Finally, external communication on concrete actions of competition policy can demonstrate a Europe of results.

These simple principles are the core of our proactive communication strategy for which we have also recently created a dedicated Communications Policy unit.

C. Resources

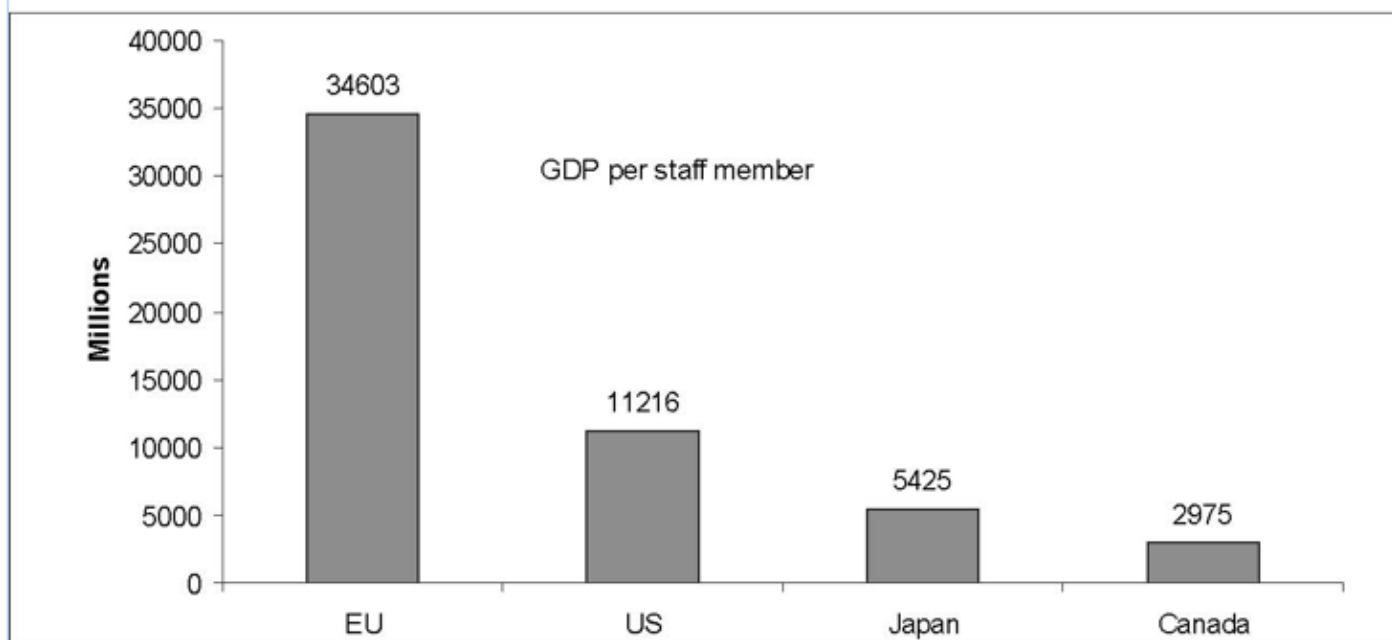
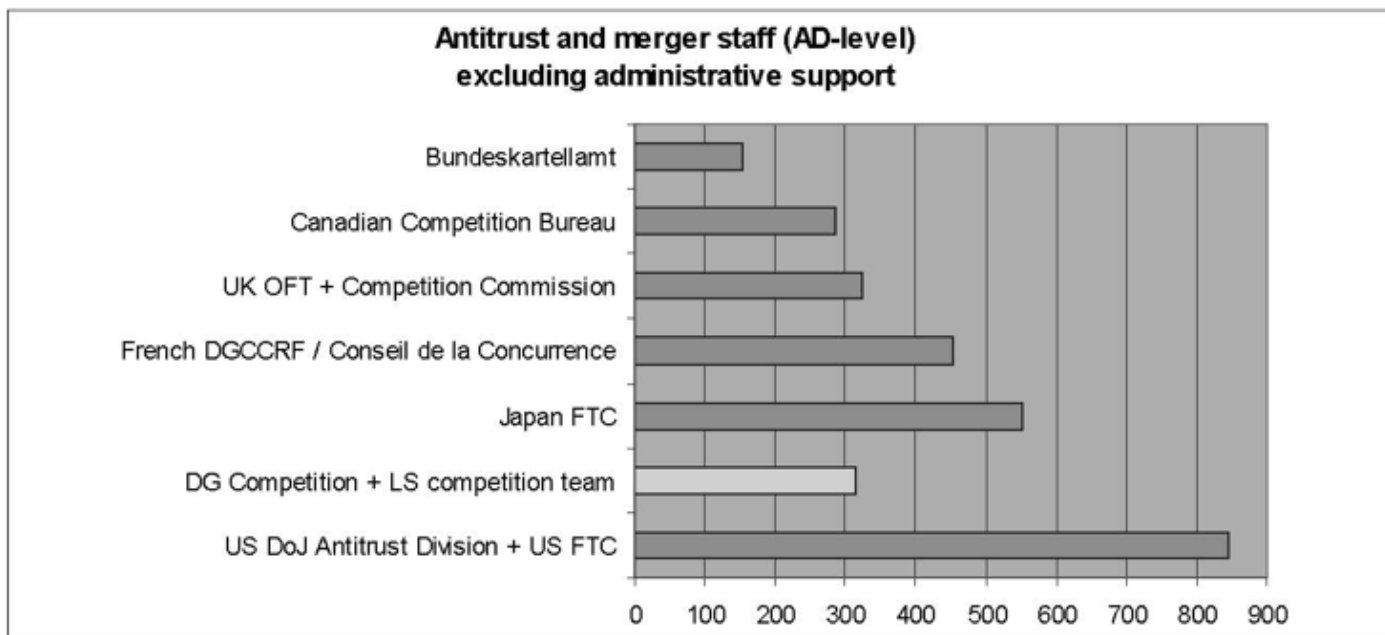
1. The COMP 2010 project

In 2006 Commissioner Kroes and I set up an internal working group to take stock of where the Commission's competition policy, as well as DG Competition's organization and resources stand now, and where they should go in the medium term, i.e. until 2010. The working group produced a report which (i) provided the Commissioner and the management of the DG with a detailed picture of current work and output, (ii) identified relevant trends for the next years, (iii) determined the likely impact of those trends on work and output and (iv) discussed options how the challenges can be addressed.

The working group found that the enforcement architecture and internal organization stemming from the 2003 and 2007 reforms produce reasonably good results in terms of focusing resources where DG Competition can bring the greatest added value.

However, based on the analysis of expected trends that influence competition policy and on comparisons with other competition agencies, it identified a resource gap between what DG Competition should, and will have to, do in the future and what it is able to do on the basis of its current resources.

One of the main findings is that DG Competition is understaffed when compared to other competition authorities, such as the US Department of Justice and Fair Trade Commission or the Japan Fair Trade Commission. The understaffing is even more evident if account is taken of DG Competition’s responsibility for State aid issues.



2. Human Resource Strategy

The issue of resources is not only about mechanically increasing staff numbers. It is more and more challenging to attract, improve and keep talent. DG Competition is focusing on very specific staff, i.e. lawyers specializing in competition law and economists specializing in industrial organisation. For both of these categories, DG

Competition is competing on the labour market with law firms and economic consultancies which are offering salary packages much higher than the Commission can do. Organising Commission competitions for higher entry level grades could somewhat reduce this salary gap, at least during the first years of the career. Organising Commission competitions specifically addressed to candidates having the right profile (i.e. not lawyers or economists in general, but having a specific competition background) could also improve recruitment. Accelerating recruitment procedures is a further challenge.

It is essential to ensure that staff recruited continues to have the skills and competences required to meet DG Competition's quality standards. This is guaranteed by a training programme adapted to real needs. Knowledge areas that are strategically relevant for DG Competition and hence should be the focus of training programmes are law and procedures, economics and accountancy, sectoral knowledge, investigative techniques, drafting, communication, languages and IT. The process of training, the internal training offers of DG Competition and the use of external resources must continue to be improved.

Finally, keeping talent is only possible through a transparent and motivating career development system. Within the constraints of Commission-wide staff regulations, we currently plan to introduce additional systems of recognition of expertise (through, for example, job titles for experienced case handlers and assistants), to activate a Career Guidance Function within DG Competition to give factual information to staff on career opportunities and to facilitate the identification and building of career paths. It is particularly challenging to find a correct balance between promoting staff mobility to sustain motivation and the needs of DG Competition to guarantee the stability and continuity of its activities.

3. Managing knowledge better

One of the key assets of DG Competition is its accumulated knowledge of the markets as well as its expertise in applying the legal instruments at its disposal. Managing knowledge, so as to keep it up to date and accessible to all those who need it, is a major challenge for the DG. This will be of key importance if DG Competition is to better contribute its market knowledge to policies developed in other DGs within the Commission.

The organizational structure which has been described earlier is instrumental in fostering exchange of knowledge between colleagues. However, further action will be required to improve the management of in-house knowledge through updating the existing document management systems and case management applications.

VI. CONCLUSION

The growing number of competition policy institutions in the world reflects the need for public institutions to safeguard and promote competition in an economy that is becoming increasingly global. In order to fulfil their role effectively these institutions must constantly assess and re-assess their mission, objectives, structures,

processes and performance. It is only through realising and adapting to changes in their environment and through carrying out the corresponding improvements that their competences, powers, budget and ultimately existence can be justified before a wider public. ▲

ⁱ This article was published in (3) Competition Policy Newsletter (2008). The original article notes that it is an abridged version of an article that was published in Competition Policy in the EU: Fifty Years On from the Treaty of Rome, (Professor Xavier Vives, Ed., 2009).

ⁱⁱ At the time, this article was written Philip Lowe was Director General of the Directorate-General for Competition at the European Commission. The original article notes that “The views expressed are personal to the author and do not necessarily reflect those of the European Commission.”