AUTORIDADEDACONCORRÊNCIA

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Portuguese Competition Authority

The Competition Authority and its stakeholders: Majors: government, courts, enterprises and consumers. Instrumentals: lawyers, economists and media.

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Portuguese Competition Authority

Introduction

In most of the European Union countries, National Competition Authorities (NCAs) are administrative bodies, with different levels of independence from the Executive branch of the Government, responsible for the implementation and enforcement of competition laws. In other countries they have the characteristics of courts. They are public organizations that are in charge of regulating (promoting) competition, sanctioning anti-competitive behaviour and limiting market power that constitute market failures. These agencies are part of the national network of regulators and are part of the European Competition Network.

This paper addresses the various interfaces as public agencies, between NCAs and their stakeholders. Let us look at another type of organization, as an inspiration for analysing these complex issues: corporations that are also organizations, but in this case private. Their main stakeholders are the shareholders – to whom they have to deliver an expected rate of return to the capital they invest in the company; the consumers – a modern corporation shows a high level of awareness to consumer needs; workers – offering an environment conducive to a high level of work effort and a challenge for a carrier path. They should also be concerned with their relationship with the society at large: issues of governance and reputation, and with their relationship with the government, by respecting their laws and regulations.

We will select seven types of stakeholders for the NCAs. First the major four stakeholders that represent the different type of audiences that NCAs have to satisfy:

(i) The Executive and Legislative Branches of Government, which are the elected bodies in a democratic country, and from which NCAs derive their legitimacy. First, because their statutes and the laws that they enforce are approved by the Legislative Branch, and second, because their Board is appointed by either or both of the above. The relationship between NCAs and governments is usually one where governments define broad competition policy and provide the means for NCAs to enforce the law. For the regular discharge of their duties there should be independence of NCAs

from government,[1] but on the other hand they should be accountable to the Government and subject to regular auditing.

(ii) Decisions of NCAs are subject to judicial control of the Courts: control for questions of facts and matters of law. Often the judicial control is entrusted to specialized courts or high level courts (second instance courts). Legal procedures are quite different according to competition and other laws: in some countries it is a civil/administrative process and in others criminal procedures may be used;

(iii) Since competition laws regulate the level-playing-field among enterprises, NCAs deal with enterprises on a daily basis. They receive complaints from some enterprises, or initiate investigations by their own initiative. They also supervise the markets and may initiate sector inquires. When they initiate a procedure against one or more enterprises for violation of the law they have to have investigative instruments adequate to build the case. Finally, NCAs control mergers. However, the efficacy of their action largely depends on their reputation. It is theoretically impossible to detect and to punish all violations, so the efficacy of NCAs largely depends on the dissuasion of unlawful behaviour. How do NCAs achieve more bang for the resources that they use, in terms of dissuasion? How to get the message across more efficiently?

(iv) It is becoming more evident that the ultimate aim of competition policy is to improve consumer welfare. But consumers do not usually have a powerful lobby and have a muted voice in political matters. Moreover, in most of our societies they are not aware of the importance of competition. How should NCAs promote a culture of competition? How should they raise awareness of competition in their daily lives? What role should consumer associations play?

And now the three type of audiences with which NCAs deal in an instrumental way:

(v) NCAs interact with enterprises usually through their lawyers. Merger cases are as well prepared as the knowledge of lawyers. In restrictive practices cases lawyers intervene defending the cases for the accused and intervening for the enterprises that have been harmed.

(vi) Competition cases rest on market analysis, so economic analysis is recognized more and more to be central in the work of NCAs. This means that economists should also be involved in the teams that deal with anticompetitive cases and merger cases. Furthermore, outside economists may interact with NCAs, either in merger or in restrictive practices as counsels. Far apart: what is the role of universities and economic research think tanks?

(vii) Finally, media is the conduit between NCAs and most of the above stakeholders, especially society at large. NCAs need to build a good relationship with the media, in order to carry their messages to consumers, enterprises and politicians. Although regulators are not subject to elections or polls, they are closely scrutinized by public opinion. That is why NCAs

[1] Although in some few cases the NCA is still an agency under Government direct supervision.

have to put a constant fight against powerful interest groups that oppose our actions when a harmful merger is rejected or they are condemned for entering a cartel or abusing a dominant position. To succeed requires patience and perseverance and a lot of effort in advocacy.

We will analyse some aspects of the relationships described above in order to extract some best practices and lessons. Finally, we will enunciate some issues for further discussion. This is very much an ongoing exercise and we welcome comments and hope that from these discussions we could identify issues for future ECA work.

I. Governments: the Executive and Legislative Branches

Competition laws are the responsibility of the Executive and/or Legislative Branches of the Government. Competition Authorities are always entrusted with the enforcement of competition laws. However, there are some differences in the way final decisions are reached. In most cases final decisions are taken by Authority Boards, being appealed only to Courts, but in some countries merger decisions are decided by the Government. Also in the merger area, there are cases of merger decisions taken by the NCA being also appealed to Government in limited cases (Germany, Portugal, and Romania).[2]

Responsibility for broad competition policy formulation rests usually with the Government. However, NCAs play a role in specifying both sector priorities and carrying out investigations. In Netherlands, the NCA consults the enterprise and consumer associations before formulating the annual activity plan. In Portugal and Ireland, NCAs formulate a 3-year business plan that provides the broad guidelines for the annual plan. In Netherlands and Portugal annual plans and budgets are submitted to approval by Ministers of Economy and Finance. For some sectoral regulators there is a Consultative Steering Committee that must meet to discuss and approve the annual plan and budgets.

At the end of the year, the Portuguese NCA is required to send the annual activity report to the supervising Ministries, as well as to the Parliament. The NCA President is called to a hearing by a specialized Parliamentary Commission on Economy and Finances to present the annual report and to respond to questions put by participating MPs. In The Netherlands, this role belongs to the Minister of Economy.

In several countries, Governments appoint NCA Board Members. Board Members cannot be dismissed, except in exceptional circumstances, and a fixed term (five years), sometimes renewable once. In Portugal a proposal has been made by the opposition party to change this rule, subjecting Board Members to a previous hearing by a special Parliamentary Commission[3], and the appointment would be made by the Government and subject to approval by the President of the Republic.[4]

[2] In the case of UK sectoral regulators have concurrent powers in the application of competition laws. See Annex I for a summary of institutional arrangements in the case of merger decisions.
[3] The Government is free to follow the opinion given by this Commission.
[4] In Portugal the Board of the media regulator is appointed by the Parliament. The outcome is that each of the major parties nominates one member. The problem with this type of nomination in the past was that

These types of arrangements have given NCAs institutional and administrative independence vis-à-vis the Executive branch. However, NCAs are usually dependent on the Government for budget resources and budget approval. In countries with lower awareness of competition policy, this may restrict the independence of NCAs.[5] Moreover, NCAs are also subject to annual external auditing, as well as to the surveillance of the Auditing Court.

The role of NCAs in assessing legislative acts from a competition viewpoint differs significantly from country to country. At the minimum, NCAs should have the possibility to issue opinions on the current legal framework as well as on drafting proposals, namely Recommendations to the Government in order to change legislation that unduly restricts the efficiency of the market. More broadly, in other countries, like in the UK, NCAs play a major role in performing a Competition Impact Assessment, sometimes as part of the Regulatory Impact Assessment process.

There are no national provisions providing NCAs with the right to challenge administrative decisions taken by the Government that conflict with competition law. NCAs can disapply national laws in case they conflict with Community Law, under CIF ruling , but it has been rarely applied. Only in the case of Poland, the NCA can challenge Government decisions in court.

In most of the legislations where NCAs are independent, they are forbidden to consider directives or other instructions given by Government members on specific cases. However, Governments can reverse prohibition of mergers by NCAs in Germany, Romania and Portugal[6], in the name of public interest, which is specified in general terms, and needs to be justified for each individual case. The UK has largely eliminated that provision in the 2004 reform.

Issue 1. Independence of NCAs vis-à-vis the Executive Branch: NCAs should be independent to ensure an appropriate level-playing field, to ensure that their decisions are reached on technical grounds only and not subject to the political cycle, as well as to ring fence their decisions from powerful interest groups. Independence should be guaranteed through a fixed term in office of Board members, typically five years; their nomination by the highest level of the Government; and administrative and financial autonomy.

Issue 2. Accountability: Therefore, their decisions should be subject to checks and balances, guaranteeing the right of appeal to the courts of all their decisions. Their

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the Board tends to reach decisions more on a political than a technical basis. Commentators have questioned this type of regulation.

[5] In Portugal the NCA is financed by sharing in the transfers collected by sector regulators from the regulated firms, which has given her a steady source of resources. However, the NCA is still required to submit a budget and all admissions of personnel have to be pre-approved by the Ministers of Economy and Finance and the NCA is subject to the same accounting and auditing rules as all the public institutes.

[6] This ruling introduces a bias in decisions, since firms may prefer a rejection than to accept strong remedies, if they expect the Minister to reverse the NCA decision. Moreover, the definition of public interest is too broad and gives a large latitude for a purely political decision.

overall performance should also be subject to regular evaluation by Parliament. Additionally, the impact of their decisions should be independently evaluated ex-post, in order to access primarily their effects market efficiency and consumer welfare.

Issue 3. Policy recommendations to Government. NCAs should be entrusted with the possibility to issue, at their initiative, recommendations to Government in cases where their decisions, laws, measures or regulations interfere with the efficient functioning of the markets. There are different instruments for these policy recommendations: (i) competition impact assessments built into the legislative and regulatory processes with NCA participation; or (ii) issue recommendations on their own initiative.

II. Courts: the judicial review

Courts play a dual role in the enforcement of competition law: on the one hand, courts allow for the private enforcement of competition law by means of actions brought by private parties grounded on the breach of competition rules by other parties[7]. On the other, courts act as judicial review bodies of decisions taken by competition authorities. Courts are therefore both direct enforcers of competition law acting in parallel to competition authorities and reviewers of administrative enforcement by competition authorities. In a few countries courts can also be the body that decides on competition issues, like in Ireland.

Further to the Modernization exercise launched by the European Commission, Regulation 1/2003 provides for the full applicability of EC competition law by national competition authorities and courts. Therefore, the dual role played by courts when applying competition law is relevant not only in respect of national law but also as regards EC law. However, differences in national law still play a major part in shaping the way in which courts intervene as competition law enforcers.

One such major difference may arise from the Competition Law institutional framework. While in some EU Member States competition rules present an essentially administrative nature, other Member States have chosen to criminalize a number of behaviours. The criminal nature of competition rules implies significant specificities as regards the investigation, prosecution and adjudication of an alleged infringement. In the case of criminal procedures are the courts the leaders of the process and NCAs take only a cooperating role.

In this later case there is a clear separation between instruction and decision in the procedural rules. However, in other cases, and especially when there is a single NCA, arises a serious problem: Creation of “chinese walls” between the two procedures may be a solution, but courts in some countries have been particularly concerned with that separation. There have been instances were important cases have been annulled, because that separation has not been secured.

II. 1. The investigative powers of the NCA

The main task of all NCAs is the fight against cartels. Since they are secret organizations, they are difficult to detect and to gather evidence is often an extremely

[7] See *Green Paper – Damages Actions for Breach of EC Antitrust Rules*, COM (2005) 672 final, 19.12.2005, Commission of the European Communities.

difficult task. That is why dawn raids are the single most important investigative tool of NCAs. An average type NCA needs to carry out from 5 to 10 dawn raids a year. Usually an NCA cannot carry out a dawn ride unless it has a mandate from a public prosecutor or a judge. In order to obtain the mandate the NCA needs to gather sufficient initial information, which may not be easy. The actual carrying out of the dawn raid needs special expertise on how to conduct the inspection. E.g. nowadays it is fundamental to carry out inspection of computers and recent cases have shown the importance of access to PDAs and personal memory support devices like pens.

Several NCAs have relied on the several types of police in order to help the Authority. What type of police should be involved? How to share responsibility? Other NCAs have a special department for conducting dawn raids.

Protection of privacy of persons has limited the scope of dawn raids, which presents serious problems. E.g. in some countries a closed e-mail cannot be apprehended, and raises a problem of electronic search. In others, private residences cannot be searched, because antitrust behaviour has not been criminalized, which excludes inspections to. company managers and employees.

Leniency is certainly an important and major tool for fighting cartels, the problem is their efficacy. Experience in several countries has shown that cartel participants do not come forward, since the deterrence effect does not outweigh the current benefit of the cartel. This shows the importance of building up a solid number of cartel cases with significant amounts of fines. We have here a chicken and egg problem.

Criminalization will certainly increase the investigative power of NCAs, with additional tools, like easedroping, private home down raids. The problem is that it requires a higher standard of proof by the courts, which again may be difficult to gather in cartel cases, and requires public prosecutors trained in antitrust and collaboration between the NCA and the public attorney office. Anyway, it certainly makes sense to start criminalization with public bid auctions.

II.2. NCA representation in court

NCAs have to face a choice whenever they require to be represented in court (mostly in appeal cases): to be represented by in-house staff or hiring external counsel.
The upside of being represented by in-house staff requires the creation of a litigation department. However, possessing an in-house litigation department might prove an invaluable asset as time evolves. Apart from the specialization in litigating exclusively competition cases, in-house lawyers will have a proximity to the cases and the case-handlers which no external counsel will ever be able to replicate. Furthermore, early-on involvement of the litigation department in the building-up of a case might render it stronger in case of an appeal.
The downside of in-house counsel might relate to lack of experience of the members of staff at stake, a problem which might prove all the more serious if they are to face in court highly experienced lawyers hired by the companies appealing against a NCA decision. Experience, as well as reputation, might indeed be the most valuable elements for a NCA of being represented in court by outside counsel. The “fresh eyes” factor

resulting from no prior involvement with the case under appeal might also be regarded as a positive feature of outside counsel.

II.3. Appeal court specialization

Competition law is probably the paradigmatic field of "law & economics". A competition economist who doesn't know his/her case law is useless and a competition lawyer who doesn't master the fundamentals of micro-economics is no competition lawyer at all. In most cases, it takes long years until a competition practitioner has gained sufficient insight of both law and economics such as to be able to properly work through a competition issue. Judges can't avoid this sometimes troubling fact.
The problem with judicial review therefore often lies in the lack of economic education and/or experience of judges. It is probably unwise to expect this problem to be solved at the education level: this is an issue which should be left to universities to solve within the framework of their academic programmes, which necessarily means that any solution can only come about in the long-term. This does not mean, however, that the problem must rest unsolved.
Specialization in competition matters might provide judges with the required experience in order to properly adjudicate competition cases. This, however, should not be the fruit of chance but rather the result of a proper institutional framework providing for the specialization of courts.

The French Conseil de la concurrence and its relation with national courts

1. Appeals against enforcement decisions of the Conseil de la concurrence

All enforcement decisions of the French competition authority (prohibition and sanction, commitments, interim measures, rejection of complaints) can be appealed by the parties or by the minister of economy before the Court of appeal in Paris. The Conseil de la concurrence as well as the minister of economy may file a motion with the court and make oral communications at the court's hearing. The legal service of the Conseil is entrusted with the representation in the court procedure. The Conseil may also make oral statements at the hearing.

Between 20 and 30 appeals are brought before the Paris Court of appeal each year on average (around 30 % to 40 % of the final decisions are challenged with increasing trend since the beginning of the decade). In 2006 the Court of appeal of Paris ruled 24 cases, of which 17 rulings were on substantive matters. Until now, most decisions have been upheld on substantive matters with decreasing trend in the recent past (7964 % over the las 3 yearsin 2006, 84 % in 2005, 91 % in 2004). Appeal judgements can be challenged on points of law before the Court of cassation.

2. Criminal prosecution of antitrust offences

The French Conseil de la concurrence can refer criminal cases to the public prosecutor if evidences are collected about natural persons who can be presumed to have fraudulently taken a personal and decisive part in the conception, organisation or implementation of anticompetitive practices. Antitrust criminal offences can be punished by a prison sentence of four years and a fine of €75 000. This provision is rarely applied by the competition authority given the high standard of proof required by the courts to sentence natural persons. Between 1994 and 2005, only 7 cases (mainly relating to bid rigging) were brought to criminal courts, of which only 2 have been concluded with a sentence (3 cases are still pending and 2 cases were closed by the public prosecutor without trial). This limited number of proceedings following an action of the competition authority does however not cover all criminal investigation of antitrust cases since the public prosecutor can also trigger a judicial inquiry upon request of the ministry of economy (DGCCRF) or on its own following a complaint. Judicial inquiries are conducted by an independent investigating magistrate, who may request the DGCCRF to perform investigation measures by means of rogatory letters.

On the other hand, pursuant to the competition rules of the Commercial code, the investigating magistrate may also pass on collected evidences to the competition authority upon request. The Conseil de la Concurrence has for instance recently imposed fines totalling 48 million euros on 34 major building and civil engineering companies for entering into bid rigging agreements covering public procurement contracts in the Ile-de-France area. The Conseil began proceedings ex officio following criminal prosecution of several individuals which started in 1994, but which was halted in November 2002 when the cases against the accused were dismissed. The Conseil's findings were based on papers and documents passed on to it by the investigating magistrate; in particular the inquiry report carried out by the DGCCRF, which was requested by letters rogatory. An important issue to be solved in this case, for which an appeal is pending, relates to whether the transmission of a criminal file to the competition authority interrupts the limitation period for the administrative procedure before the competition authority.

Another issue may be raised by the threat of criminal prosecution that might have a deterrent effect on companies willing to apply for leniency. The French leniency programme requires that the Conseil de la concurrence will not pass on to the public prosecutor a case file in which natural persons belonging to the undertaking which has been granted leniency, would be liable to be the subject of a criminal proceedings.

3. Amicus curiae

In addition to the procedure provided by Article 15 of the EC Regulation 1/2003, civil and administrative courts can seek advice from the Conseil de la concurrence under the French competition rules. Such requests for consultation remain limited but cases concerned are important (7 opinions have been delivered by the Conseil de la

concurrence between 2000 and 2006). In 2005, the Conseil de la concurrence was for instance consulted by the Conseil d'Etat (supreme administrative court) on the impact of a merger between specialized software companies and a consultation on gas price regulation is ongoing. The same year, it was consulted as well by the tribunal de grande instance of Paris (county court) on market definition in the sector of automotive components and on the market position of a major OEM supplier to car manufacturers.

4. Specialized courts

Since the law review of December 2005, 8 specialized civil and 8 commercial courts have exclusive jurisdiction for private litigation in competition cases. Appeal against their rulings is concentrated within the Court of appeal of Paris. The French procedure provides for an information of the competition authorities about the rulings based on the application of Art. 81 and 82 of the Treaty and corresponding national provisions. However, no judgement has been brought to the knowledge of the authorities yet. This situation confirms again the need to further improve the conditions for antitrust damages claims as underlined in the Commission's green book and the opinion of the Conseil de la concurrence on class actions of 21 September 2006. Some measures have already been taken to develop the private enforcement of competition rules. Specialized training programmes for judges are for example proposed by the Court of cassation and by the Ministry of justice. The Conseil de la concurrence has been developing its relationship with civil and commercial courts and plans to foster them further.

5. Some issues relating to the parallel dealing of cases

The fact that the Conseil de la concurrence may deal with cases referred in parallel to a court raises several issues. First, even though the competition authority is not bound by the judicial decision, it may take the ruling into account in its own assessment. For instance, the Conseil de la concurrence had to assess the impact of a refusal to license a numbering system developed by the dominant publisher of postage stamp valuation catalogues after a ruling of the Paris court of appeal on the same facts. In its assessment, the competition authority had to take into account the recognition of IP rights of the dominant company by the court and settled the case by accepting carefully designed commitments that were able to prevent an abuse of dominance without violating the protection of the property rights. The solution found was to accept to grant licenses on correspondence tables between the numbering system of the dominant company and other systems in exchange of the payment of reasonable royalties and in due consideration of the need to protect the IPRs. IPR litigation cases are in particular often brought in parallel to complaints against abuse of dominance. If the judicial settlement occurs at first, the plaintiff sometimes withdraws its request. Although the competition authority may pursue the case ex officio, such withdrawal may lead to an administrative closure of the case without solution for future litigations.

Another issue is raised by applications for summary judgements before courts, which may also interfere with requests for interim measures before the Competition authority. This was notably the reason why the Conseil dismissed such a request in a telecom case.

Source: Conseil de la Concurrence; France

II.4. Need for a timely judicial decision

No matter how serious the matter at stake, litigating parties have interiorized the fact that in most cases it takes a long time until judgement on a competition matter is delivered, especially in South European countries. The complexity of the facts under assessment provides the most frequent justification, but the lack of specialized courts or judicial systems overburdened with cases compound the problem.
In anti-trust cases (articles 81 and 82 EC or the national equivalent), the duration of proceedings usually meets greater tolerance on the part of litigating parties given that the assessment is carried out on past behaviour and has no direct bearing on the parties' plans for the future. In merger cases, the duration of proceedings may become the deciding factor as regards the materialization of an operation and might therefore imply significant costs for the litigating parties.
The issue at stake relates to the possibility of national law leaving room for the creation or application of an accelerated judicial procedure whenever a merger case is at stake, allowing for a reduction in the time required for a judgement to be delivered. The Court of First Instance of the European Communities (Luxembourg) has created such a "fast-track" procedure and may apply it upon request by the parties.

II.4. Training of judges and public prosecutors

The importance of courts in the enforcement of competition law necessarily leads to the issue of training for judges and prosecutors and to the question about which role a NCA should play in that respect.
Seminars and conferences organized by NCAs might prove extremely useful not only in familiarising judges and prosecutors with the technicalities of competition law but also with the work and difficulties faced by NCAs, fostering a degree of understanding which might otherwise not come about.
The EU Commission has launched an initiative that finances the training of judges. The OECD has carried out seminars for judges in Hungary, and Fordham University has launched a refreshing course for judges. There has been a proposal for a Network. of Competition Judges by Judge Bellamy but it has had difficulties in getting from the ground.

In Portugal, the NCA has carried out, with the support of the EU Commission, two to three seminars a year for judges and public prosecutors. The NCA in Portugal has also entered into a MoU with the School for the Training of Judges, including a one-day initiative on competition legislation.

Other collaboration between NCAs, judges and academics in competition law is covered by several seminars. In Germany, the NCA carries out an annual seminar with all those parties to discuss closed cases.

Issue 4. Need of fast and efficient decisions by the Courts. This requires specialized courts, or specialized sections in courts, for competition enforcement, with enough resources for dealing with competition cases.

Issue 5. NCAs should be appropriately represented in Court procedures. In some countries, NCA decisions follow civil/administrative procedures and in others they are closer to penal procedures. Public prosecutors are usually entrusted with NCA representation. Collaboration between NCAs and Public Prosecutors is at a premium. What is the role of in-house lawyers and out-side lawyers of the NCAs in complex court cases?

Issue 6. Standard of proof in judicial review. Criminalization of competition law violations should come at a stage in which society is already aware of the costs involved with those violations, and the judicial system internalizes the seriousness of those violations. This is a prerequisite, since the standard of proof required is much higher, and judges tend to apply harsher standards of proof. Timing and sequencing: we should not rush to criminalize violation of competition law, unless courts and society recognize its seriousness, otherwise the rate of condemnation of courts and deterrence may be compromised.

Issue 7. Level of investigative powers entrusted to the NCAs. The higher the standard of proof required the more extensive and intrusive should be the investigative powers available to NCAs. This obviously implies higher due process guarantees.

III. Leveraging the impact on company behaviour

Since competition laws regulate the level-playing-field among enterprises, NCAs deal with enterprises on a daily basis. They receive complains from some enterprises, or initiate an investigation by their own initiative. They supervise the markets and require information from enterprises. When they initiate a procedure against one or more enterprises for violation of the law they have to have investigative instruments adequate to build the case. The efficacy of their action largely depends on dissuasion of unlawful behaviour.[8] How do NCAs achieve more bang for their resources spent in that dissuasion? How to get the message across more efficiently? What role enterprise associations should play?

OFT's evaluation work

[8] Even in the USA, which has a long tradition of antitrust, only about 13% of cartels are detected and prosecuted.

- The OFT's evaluation team was set up 18 months ago, and now comprises three people with access to a small research budget. It evaluates both the competition and the consumer work of the office.
- The OFT's evaluation team aims to meet two needs:
  - External accountability: to evaluate whether the OFT delivers its objectives and does so cost effectively to the taxpayer and Parliament; *and*
  - Internal management: to help us prioritise, conduct, and follow up our work to ensure we maximise our impact.
- We have agreed with HM Treasury that we will achieve consumer benefits of at least five times our budget.
- The evaluation team conducts in-depth evaluations of discrete projects, develops frameworks to help project teams estimate impact at both the prioritisation and evaluation stages, and commissions research into wider issues related to the impact of the office. Over time the team aims to embed the majority of the project specific evaluation work within project teams.
- Through surveys with legal advisors and in-house lawyers we are examining whether our competition work has a deterrent effect. Preliminary results suggest that for every one merger prohibited by the UK's Competition Commission, six others are either abandoned or significantly modified due to competition concerns without the OFT ever becoming aware of them. The ratio for cartels is 1:4. The ratio for abuse of dominance is substantially lower at 1:2.
- We are currently looking at more sophisticated methodologies for estimating the benefits of our competition work. After a successful internal pilot we are utilising merger simulation techniques to assess some of our merger interventions. We are also investigating the use of recent econometric analysis of cartel duration to better estimate the impact of our Competition Act interventions.

Source: OFT, UK

Cartels are difficult to detect. Leniency regimes are an important instrument, but time and again the evidence is that its efficacy depends on the rate of deterrence. At the top of any agency agenda is the fight of cartels. But where do we start in an economy prone with collusive behaviour? We should start with a roadmap for our investigation. Sectors with a small number of players and protected from international competition are more likely to have cartels than sectors with large players with strong external competition. For example, cement, mobile telephony and large scale public works are more prone to cartels than textile or furniture manufacturing. Public sector procurement is a major area of concern, and should be a priority area for cartel detection. Experience has shown that sectors like supplying pharmaceutical products and public works have proved to be some of the sectors with periodic agreements.[9]

[9] NCAs should be careful in crafting their case load in order not to bias it against small or medium enterprises and avoiding to fight violations of the law by big firms or multinationals. Although they have larger resources and can mobilize the best lawyers, it should not deter the NCA.

Abuses of dominant position are more difficult to deal with, and they usually require a higher level of legal and economic analysis than is usually available at NCAs. However, it is important to invest resources in a few and well chosen cases usually in recently privatized state monopolies that still have bad old habits! And they sometimes engage in predatory behaviour to block the entry of new small players. This has been sometimes the case of telecoms and energy companies in several countries.

Before establishing priorities in what concerns new cases, NCAs should undertake sector inquiries and sector studies. Although they are costly and time consuming the pay-off is quite high. First they should help characterize the markets and company behaviour, benchmark prices and quality, identify the competition problems and recommend the competition measures to solve those structural problems. They are usually data intensive exercises and require the intervention of very good IO economists.

One of the major problems NCAs confront is to get good and accurate information. So far the experience of several NCAs is that penalties should be used in order to oblige firms to contribute voluntarily the information required for sector studies, restritive practice cases and merger cases. Questionnaires should be well prepared. However, sometimes NCAs are confronted with the problem of Chinese walls between those departments and information cannot be used from one case to another, because the right of self-defence.

Merger control is without doubt the exercise that requires most contact between firms and NCAs. Firms want a fast and competent merger decision. This is probably the most single important service that enterprises recognize from NCAs. However, there is an intrinsic trade-off. Enterprises want a fast service and want theirs M&As approved.[10] NCAs stand to defend public interest and undertake a competent and thorough analysis in merger controls, in case they may create or reinforce a dominant position or lessen competition in a substantive and sustained way. Previous to all the work the criteria for merger notification should be objective, and easy to verify by both enterprises and NCAs. Morever, most of the work by NCAs should be concentrated in those cases that present a serious threat to an effective competition. Second, the NCA should design a simplified system for cases that do not raise any concerns. And third, for the few cases (1 to 2%) that require an in-depth analysis the NCA should allocate enough resources and use all its skills to deal with such difficult cases.

How do we know how good are the services provided to enterprises? The OFT used to conduct two annual surveys to measure (i) business awareness and knowledge of competition legislation, awareness of the OFT and knowledge of consumer rights legislation, and (ii) consumer awareness, knowledge and confidence in using consumer rights. However, opinion poll surveys are expensive and can tend to be very broad in scope. The OFT is now implementing a programme which is targeted towards business engagement and education.

[10] The timing of mergers is even more acute in cases of take-over bids.

Business associations, like industrial or professional groups may be useful to spread the competition culture. Some NCAs have cooperated with them in order to organize seminars for debating sectoral competition issues. This was the case in Portugal for discussing the problems of small producers and large retailers.

Issue 8. Where do we start in an economy prone with collusive behaviour? Practice shows that public procurement should be given priority. Leniency may help, but first some well publicized cases have to be made and enterprises condemned in order for the deterrent effect to be effective, as discussed above.

Issue 9. Cases of abuses of dominant position are difficult to identify and make. However, NCAs have to invest periodically on sector studies in order to identify structural competition problems, especially in sectors recently or soon to be liberalized.

Issue 10. The single most important service enterprises demand from NCAs is a sound and speedy merger control. How to strike a balance between a competent merger analysis and a speedy decision? The ability of the NCA to negotiate remedies depends largely on its reputation. And, as Central Banks that have to raise interest rates when inflationary pressures flur up, NCAs also have to have a history of mergers that were blocked due to its negative impact on competition. Those cases should be well publicized, in order for entrepreneurs and consumers at large to feel that the NCA stands to protect consumer welfare. Moreover, the NCA should constantly revaluate their criteria for mergers: are they too tight or too lenient?

IV. Gaining the confidence of consumers

Two main reasons explain why consumers are the *raison d´être* of any NCA. First, competition policy aims at passing on to consumer's benefits in terms of product price, quality, and innovation. That is indeed a key rationale for NCA existence. Second, consumers are, in fact, the most powerful allies of NCA decisions, over and above governments, firms or any other institutions. The problem is that they have no organized and powerful lobby in any country.

A consumer focus may be particularly important to the younger NCAs, when powerful interest groups – enterprises being threatened with prosecution, or mergers rejected. The problem is how to give a voice to consumers. This is why the media is extremely important in these occasions: and media groups that are not captured by those interests. In fact, the ultimate test is: if consumers do not support NCA decisions the NCA is loosing the battle.

Consumer associations could play a major role in representing the class in cases carried out by NCAs, however they are at different stages of development among EU countries. In France, decisions on mergers by the Minister that conflict with the opinion of the NCAs are usually challenged in courts by consumer associations. Consumer associations could also play an important role during the analysis of mergers, presenting their views to NCAs about the impact of anti-competitive mergers, and their impact on public opinion should not be underestimated. However, in some countries they are not

completely independent from the Government or major enterprise groups, either because they have financial difficulties or not a broad representation.

One important way to gain the confidence and increase dramatically the awareness of the NCA is to have a class action based on a case prosecuted by the NCA. This process will also show how the antitrust case benefits directly the consumer. This shows the importance of having a workable private enforcement system in place.

Issue 11. What role Consumer Associations should Play? E.g. should they be an interested party on mergers? Should they be able to appeal an NCA decision to the Courts that they consider harming the consumers?

Issue 12. What role should class actions play? Can government institutions (Consumer Protection Offices) put class actions?

V. Interface of lawyers with NCAs

V.1. In-house legal privilege

As regards the interface of lawyers with NCAs, one major debate has waged since the European Court of Justice ruled in the *AM & S* case in 1982[11] that legal advice given by in-house lawyers within their company does not benefit from legal privilege in EC competition proceedings and that legal privilege only applies to communications between a company and its external legal advisers qualified in one of the Member States. As the law stands, in-house legal advice must therefore be disclosed to investigators in EC competition proceedings.

The debate has resurfaced as result of an interim order given by the President of the Court of First Instance in October 2003[12] suggesting a reversal of the *AM & S* ruling and recognition of in-house legal privilege in certain circumstances. However, in September 2004, the President of the European Court of Justice overturned the order given by the President of the CFI[13], leaving the matter as it was until a decision in the main case is rendered.

By abolishing the prior notification system and transforming the application of Articles 81 and 82 EC into a legal exception regime, Regulation 1/2003 and the accompanying "Modernization Package" has increased the need for companies to self-assess the legality of their agreements under EC competition rules, thereby enhancing the role of counsels in competition compliance. Similarly, the strengthening of the Commission's powers of investigation (e.g. by allowing employees to be called as witnesses) has raised questions concerning rights of defence and due process.

[11] Judgement of the ECJ in case 155/79, *AM & S v Commission* [1982], ECR 1575.
[12] Order of the President of the CFI of 30 October 2003 in joined cases T-125/03 and T-253/03 R, *Akzo Nobel and Akros Chemicals v Commission* [2003].
[13] Order of the President of the ECJ of 27 September 2004 in case C-07/04 P (R), *Akzo Nobel and Akros Chemicals v Commission* [2004].

Nonetheless, in the light of the Community courts' case law, the law as it stands in respect of EC competition proceedings is clear, as said above. The same, however, cannot be said in respect of proceedings in which national competition law is applied or national competition authorities apply EC competition law. Given the increasing role played by national competition authorities in the application of EC law as result of "Modernization", it is only reasonable to expect them to be confronted with the issue of legal privilege in the course of investigations carried out in respect of companies suspected of infringing competition law.

Legal privilege for in-house lawyers is recognised in several – but not all – Member States, with the consequence that only in some Member States are competition authorities bound to respect the confidentiality of advice from in-house lawyers when investigating alleged infringements while. This circumstance might lead to disparities within the EC as regards the application of competition law and create problems as regards the exchange of information allowed for by Regulation 1/2003. Disparities might result *inter alia* from the fact that it is up to the Member States to regulate the extent to which information received from the Commission or a competition authority from another Member State can be used in national proceedings.

The application of Articles 81 and 82 EC at national level by either national competition authorities or courts in this respect, under national procedural rules, might therefore lead to divergences in the application of EC competition law. In the light of the likely increase of cases to be dealt by national competition authorities under EC law, one might wonder whether rules on legal privilege should be harmonised across the Community such as to avoid differences in treatment of in-house advice between the Member States and the European Commission.

Inspections in Netherlands

The Antitrust Department of the Netherlands Competition Authority houses a specialised Investigations and Intelligence Unit. Detectives with this unit and case handlers cooperate in preparing and executing dawn raids.
Preparatory work involves legal aspects, logistics and information gathering, all of which are outlined in a plan of action.

Legal aspects
The most important issue of consideration is whether a dawn raid is proportional, in other words: is there a strong enough suspicion to justify the impact of a dawn raid on a company? If so, this consideration is exemplified in a formal dawn raid order, signed by a member of the Board to ensure sufficient impartiality.

Logistics
The logistical part of organising a dawn raid is often underestimated. Making sure that we not only have enough staff, but - equally importantly – that we have sufficiently capable staff is essential. For a successful dawn raid we need the right mix of people: case handlers, detectives, forensic IT investigators, administrative support personnel,

management. They all need transport, often staying overnight in hotels, and they need to be briefed and debriefed etc.
And of course, the material logistics involving vehicles, means of communication, stamps to mark documents, transport boxes, laptop computers, printers, hard discs for copying digital data, etc.

Gathering of information
The preparation of a dawn raid requires complete and recent information about the company or companies and persons that you plan on visiting. Also, knowledge about the IT infrastructure is important to preparing a digital investigation. We always gather information from the Chamber of Commerce (Trade Register), internet and other open sources. Annual reports and/or publications by or about the companies or persons can provide valuable information.
Furthermore, we always visit the location of the company prior to the dawn raid, to make sure that it is still there, and to gather information about the location, security, housing (more companies in one building, number of floors etc). Last but not least, we inform the local police in case we need their assistance.

Souce: MNA, Netherlands

V.2. Right to non-self-incrimination

According to the case law of the Community courts, the Commission may not compel an undertaking involved in a proceeding finding an infringement of Article 81 and/or Article 82 EC to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove[14].

However, the Community courts also admitted that in carrying out the tasks conferred on it by the Treaty as regards competition law enforcement, the Commission is entitled to question the undertaking under investigation about the conduct of all the other undertakings concerned. Furthermore, the regulations implementing Articles 81 and 82 EC place the undertakings under an obligation to cooperate actively and the Commission may reduce the amount of any fine imposed on a given undertaking to reflect its cooperation in the investigation[15]. To acknowledge, for example, the existence of a right to silence which would have the effect of protecting the members of an association of undertakings by preventing the association from giving evidence against its members, would go beyond what is necessary in order to preserve the rights of defence of undertakings, and would constitute an unjustified hindrance to the

[14] See Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 35; Case T-34/93 *Société Générale* v *Commission* [1995] ECR II-545, paragraph 74; Joined Cases C-204, 205, 211, 213, 217 and 217/00, *Alborg Portland A/S and others v Commission*, [2004] ECR, paragraph 209; see, by analogy, the judgment of the European Court of Human Rights *Funke* v *France*, Series A, No 256-A, p. 22.
[15] See Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 393; Joined Cases C-204, 205, 211, 213, 217 and 217/00, *Alborg Portland A/S and others v Commission*, [2004] ECR, paragraph 207.

Commission's performance of its duty to ensure that the rules on competition within the common market are observed[16].

The right to non-self-incrimination is recognised in most Member States but under different procedural and constitutional rules. This circumstance might lead to disparities within the EC as regards the application of competition law and create problems as regards investigations carried out in several Member States under Regulation 1/2003. Disparities result from the fact that it is up to the Member States to regulate the scope and exercise of the right to non-self-incrimination in national proceedings.

The application of Articles 81 and 82 EC at national level by either national competition authorities or courts in this respect, under national procedural rules, might therefore lead to divergences in the application of EC competition law. In the light of the likely increase of cases to be dealt by national competition authorities under EC law, one might wonder whether rules on the right to non-self-incrimination should be harmonised across the Community such as to avoid differences in treatment of companies under investigation between the Member States and the European Commission.

Issue 13. An old president of a long-standing NCA used to say that most of the secret agreements (e.g. cartels) are kept under the installations of company lawyers. Do we need to convince the Courts that this is an important problem?

Issue 14. How do we solve the problem of conflict of interests of lawyers that defend some companies and may be asked to assist the NCA. Do all the NCAs feel that they have enough resources and expertise to defend their cases in court?

VI. Integrating economic analysis and economists

Competition cases rest on market analysis, so economic analysis is recognized more and more to be central in the work of NCAs. This means that economists should be from the beginning involved in the teams that deal with NCA cases, either in merger control or in restrictive practice cases. The economists required for case handling need to be specialized in Industrial Organization and should also have a through knowledge of competition law. This is today a scarce resource, and experience shows that a good research economist is not necessarily a good case handler.

Economists should be entrenched in the case load. In the case of the Portuguese NCA, an economist and a lawyer are nominated to handle each merger and restrictive case. Both are jointly case handlers. Due to the difficulty in finding good economists that are case handlers, some NCAs have setup a group of economists that support the analysis of the operational departments. This solution has the inconvenient of not folding in the economic analysis from the beginning and may distort the all process.

Another important role of economic analysis is quality enhancement of case instruction and appeals . This is the role of the Chief Economist and the Economic Research

[16] Joined Cases C-204, 205, 211, 213, 217 and 217/00, *Alborg Portland A/S and others v Commission*, [2004] ECR, paragraph 208.

Division in the EU Commission and other NCAs (UK, Sweden, Norway, and Portugal among others). The Chief Economist should also provide the link with the academia, think tanks, and competition networks, such as the ECN Chief Economists working group.

Some NCAs are entrusted with promoting the development of knowledge in economics and competition law. Since resources are limited, the best way to discharge this role is to anchor a network of research economists and jurists dedicated to this field. Developing research projects in connection with the issues under scrutiny in the case load is perhaps the best way to promote this applied research. However, the problem remains of how to assure continuity in this work and how to attract and secure the best talent to this type of applied research.

Issue 15. Do all NCAs involve economists in their cases from the beginning? What is the role of the Chief Economist and Chief Legal Adviser in quality control? What other solutions may ensure close cooperation between lawyers and economists within the competition enforcement?

Issue 16. What is the role of NCAs in starting and supporting applied research in competition issues? Should they provide financial support for research in universities or research institutes applied to competition issues? Should NCAs give scholarships or fellowships to support teaching in I-O or law connected with competition issues?

VII. The media as an instrument for advocacy

Media is one of the most powerful and effective ways to outreach consumers. But there are no *free lunches* with the press. While engaging the press, there will be a permanent, non reversible and truly demanding trade-off. The media offers exposure and cost-effective marketing, but sooner than later the demand will be there for free access to privileged information, and preferential treatment. Furthermore, media remains the conduit between the NCA and the public at large. In a nutshell, media engagement for advocacy purposes comes of their subsequent evaluation. But this process can be managed.

A key strategic concern is whether and when the NCA President addresses the media, or the press office is used instead. Moreover, media is particularly keen at exploiting multiple voices and sources within the same organization, when powerful interest groups are in conflict with the NCA. It is highly recommended that the NCA communication strategy be clearly defined. A communication division should be set up, and a spokesperson empowered. This position is often better discharged by a seasoned press officer. But his/her activity would be worthless, unless he/she is in direct contact with the NCA President. In the end of the day, what probably is at a premium is to keep the initiative in what ends-up being turbulent seas, and maintaining a sense of equilibrium is crucial for this role.

The President of the Portuguese NCA has been 3 to 5 times a year on national television, when major decisions are taken or periodically on major interviews. He has also given 2 to 4 interviews to major newspapers, and has given 10 to 15 seminars and speeches at major conferences. The Czech Republic made an interesting video for

presentation in seminars about competition policy and the role of the NCA. A video is expensive but can be very effective.

Let us look at the communication strategy in terms of mergers. Some of the lessons we have learned: (i) a schedule of all merger phases should be published for Phase II mergers, in order to increase transparency, (ii) mergers should be announced no later than 5 days after notification has been accepted for knowledge of all parties, (iii) merger decisions should be announced immediately after the decision has been taken, and full texts (confidentialities extracted) published as soon as possible with supporting studies.

When should the NCA issue a communiqué? It certainly should not react every time a competition matter is raised. When it is attacked directly and when its reputation is on the line.

VII.1. Training of journalists

To ensure journalists really understand our mission, a key ingredient is to teach them. This is the long lasting way to seek their involvement, by aligning their values with the broader economic objectives pursued by NCAs. The challenge is to let them understand why NCA mission is so important to companies, consumers, and… to themselves. Dealing with well trained journalists also involves being prepared to answer the "difficult" questions, since they will be able to discuss matters as a specialist does while trying to underline the interlocutor's weakness. But in the end-of-day it pays off to run workshops for interested journalists.

Portugal carries out an annual seminar for training journalists. This seminar has been extremely important to teach journalists the basics of competition law and make them understand our cases.

VII.2. Interest groups as media sources

Media can be used as an instrument by both powerful interest groups and NCAs. Consumers are often neglected in this interplay of forces. As a result we witness a highly asymmetric game, in which interest groups set the agenda. The challenge for NCAs is to play the game up to the point in which consumer interest may motivate media interest. This may involve a hands-on approach to the media through which NCAs have to position themselves as the source and not as a source. But on the other hand, an arms-length approach has to be maintained with journalists, otherwise NCA capture by the media risks becoming a major issue.

Issue 17. Contacts with the media should be centralized by the office of the NCA President, and the President should be the only spokesperson Other Board Members can speak in seminars and write articles, after informing the Board and should refrain from presenting personal views on NCA policy and cases? What latitude should be given to staff to present matters in seminars or to write articles about NCA issues and cases in which they have worked?

Issue 18. In merger cases the undertaking or interested parties that have access to documents can use them to their advantage in the media, sometimes to influence NCA decisions. This is often the case during negotiation of remedies or when a decision

contrary to the interest of the undertaking is about to be taken. Should the NCA remain silent until the final decision is taken? Or should the NCA react, through a communiqué?

Issue 19. In restrictive practice cases both the NCA and the parties are required to respect confidentiality. What should the NCA refer to the case and when, if at any time before closing the case? What is the best way to protect confidential information in an investigation? When should its decision be published? Since most of the cases take years to reach a final closing, due to successive judicial appeals, should NCAs be prevented from making the full text of the decision public? The Portuguese NCA has adopted the policy of publishing a 2 to 5 pages summary of the decision immediately after Board approval.