POLICY ROUNDTABLES

# Evaluation of the Actions and Resources of the Competition Authorities

## 2005

## Introduction

The OECD Competition Committee debated this topic in June 2005. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. William Kovacic for the OECD and written submissions: Belgium, Canada, Denmark, the European Commission, Finland, Ireland, Japan, Korea, New Zealand, Portugal, Sweden, Turkey, the United States, as well as an aide-memoire of the discussion.

## Overview

In an increasing number of jurisdictions, public bodies are initiating projects to evaluate the effects of competition policy programs or to analyse the efficiency of competition agency organisation and procedures. Evaluation should be a routine ingredient of the competition agency's annual agenda and should be incorporated into the formulation of budgets and operational plans.

Over the past decade competition agencies have responded to their own awareness of the importance of ex post evaluation and external demands for performance measurement by devoting increasing attention to analysing the effectiveness of existing institutional arrangements and initiatives. Useful insights can be derived from a variety of evaluation methods, using resources within and external to the competition authority. One of the most fruitful areas of evaluation to date has been the field of merger control. Evaluations of existing institutional arrangements, including organisation, management methods and operational procedures, have proven useful in identifying areas for improvement and motivating adjustments.

The organisation assessment and development framework shows promise as a means for competition authorities to improve the quality of their institutional arrangements. Considerable work remains to be done to refine the methodologies used to evaluate the effectiveness of completed competition policy.

## Related Topics

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

16-Dec-2005

English/French

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP(2005)30
Unclassified

# EVALUATION OF THE ACTIONS AND RESOURCES OF COMPETITION AUTHORITIES

JT00196091



English/French

## FOREWORD

This document comprises proceedings in the original languages of a Roundtable on the Evaluation of the Actions and Resources of Competition Authorities which was held by the Competition Committee in June 2005.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur l'évaluation des actions et des ressources des autorités de concurrence, qui s'est tenue en juin 2005 dans le cadre du Comité de la Concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "les tables rondes sur la politique de la concurrence".

## OTHER TITLES

## SERIES ROUNDTABLES ON COMPETITION POLICY

| | | |
|---|---|---|
| 1. | Competition Policy and Environment | OCDE/GD(96)22 |
| 2. | Failing Firm Defence | OCDE/GD(96)23 |
| 3. | Competition Policy and Film Distribution | OCDE/GD(96)60 |
| 4. | Competition Policy and Efficiency Claims in Horizontal Agreements | OCDE/GD(96)65 |
| 5. | The Essential Facilities Concept | OCDE/GD(96)113 |
| 6. | Competition in Telecommunications | OCDE/GD(96)114 |
| 7. | The Reform of International Satellite Organisations | OCDE/GD(96)123 |
| 8. | Abuse of Dominance and Monopolisation | OCDE/GD(96)131 |
| 9. | Application of Competition Policy to High Tech Markets | OCDE/GD(97)44 |
| 10. | General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises | OCDE/GD(97)53 |
| 11. | Competition Issues related to Sports | OCDE/GD(97)128 |
| 12. | Application of Competition Policy to the Electricity Sector | OCDE/GD(97)132 |
| 13. | Judicial Enforcement of Competition Law | OCDE/GD(97)200 |
| 14. | Resale Price Maintenance | OCDE/GD(97)229 |
| 15. | Railways: Structure, Regulation and Competition Policy | DAFFE/CLP(98)1 |
| 16. | Competition Policy and International Airport Services | DAFFE/CLP(98)3 |
| 17. | Enhancing the Role of Competition in the Regulation of Banks | DAFFE/CLP(98)16 |
| 18. | Competition Policy and Intellectual Property Rights | DAFFE/CLP(98)18 |
| 19. | Competition and Related Regulation Issues in the Insurance Industry | DAFFE/CLP(98)20 |
| 20. | Competition Policy and Procurement Markets | DAFFE/CLP(99)3 |
| 21. | Regulation and Competition Issues in Broadcasting in the light of Convergence | DAFFE/CLP(99)1 |

| | | |
|---|---|---|
| 22. | Relationship between Regulators and Competition Authorities | DAFFE/CLP(99)8 |
| 23. | Buying Power of Multiproduct Retailers | DAFFE/CLP(99)21 |
| 24. | Promoting Competition in Postal Services | DAFFE/CLP(99)22 |
| 25. | Oligopoly | DAFFE/CLP(99)25 |
| 26. | Airline Mergers and Alliances | DAFFE/CLP(2000)1 |
| 27. | Competition in Professional Services | DAFFE/CLP(2000)2 |
| 28. | Competition in Local Services | DAFFE/CLP(2000)13 |
| 29. | Mergers in Financial Services | DAFFE/CLP(2000)17 |
| 30. | Promoting Competition in the Natural Gas Industry | DAFFE/CLP(2000)18 |
| 31. | Competition Issues in Electronic Commerce | DAFFE/CLP(2000)32 |
| 32. | Competition and Regulation Issues in the Pharmaceutical Industry | DAFFE/CLP(2000)29 |
| 33. | Competition Issues in Joint Ventures | DAFFE/CLP(2000)33 |
| 34. | Competition Issues in Road Transport | DAFFE/CLP(2001)10 |
| 35. | Price Transparency | DAFFE/CLP(2001)22 |
| 36. | Competition Policy in Subsidies and State Aid | DAFFE/CLP(2001)24 |
| 37. | Portfolio Effects in Conglomerate Mergers | DAFFE/COMP(2002)5 |
| 38. | Competition and Regulation Issues in Telecommunications | DAFFE/COMP(2002)6 |
| 39. | Merger Review in Emerging High Innovation Markets | DAFFE/COMP(2002)20 |
| 40. | Loyalty and Fidelity Discounts and Rebates | DAFFE/COMP(2002)21 |
| 41. | Communication by Competition Authorities | DAFFE/COMP(2003)4 |
| 42. | Substantive Criteria used for the Assessment of Mergers | DAFFE/COMP(2003)5 |
| 43. | Competition Issues in the Electricity Sector | DAFFE/COMP(2003)14 |
| 44. | Media Mergers | DAFFE/COMP(2003)16 |
| 45. | Non Commercial Services Obligations and Liberalisation | DAFFE/COMP(2004)19 |
| 46. | Competition and Regulation in the Water Sector | DAFFE/COMP(2004)20 |
| 47. | Regulating Market Activities by Public Sector | DAFFE/COMP(2004)36 |

| | | |
|---|---|---|
| 48. | Merger Remedies | DAF/COMP(2004)21 |
| 49. | Cartels: Sanctions against Individuals | DAF/COMP(2004)39 |
| 50. | Intellectual Property Rights | DAF/COMP(2004)24 |
| 51. | Predatory Foreclosure | DAF/COMP(2005)14 |
| 52. | Competition and Regulation in Agriculture : Monopsony Buying and Joint Selling | DAF/COMP(2005)44 |
| 53. | Enhancing Beneficial Competition in the Health Professions | DAF/COMP(2005)45 |

## TABLE OF CONTENTS

## EXECUTIVE SUMMARY

***by the Secretariat***

Considering the discussion at the roundtable, the submissions of the delegates, and the background paper, several key points emerge:

1. *There is a general consensus that competition agencies should regard evaluation programs as necessary, integral elements of good public administration.*

   There was broad agreement among the delegates that programs to evaluate the operations and performance of competition authorities are vital to the continued improvement of competition policy. Rather than treat the assessment of effects as merely optional (or, perhaps, potentially harmful for their capacity to illuminate weaknesses), evaluation programs should be embraced as valuable tools for delivering better results for consumers. On a regular basis, competition authorities should allocate resources (a) to examine the effectiveness of existing management practices, organisational structure, operational procedures, and (b) to study the impact of specific interventions, such as the prosecution of cases, the filing of reports, and the pursuit of advocacy initiatives. By accepting a norm of routine evaluation, a competition agency does more than promote improvements in the quality of its work. Evaluation is a valuable means to increase the awareness of and legitimacy of competition policy within a society. Among other effects, evaluation can engage a variety of institutions – other public institutions, private sector groups, consumer societies, and academic organisations -- in discussion about the rationales for and contributions of competition policy.

2. *There are growing demands from outside competition agencies to develop and apply measures to test the effectiveness of competition policy. In an increasing number of jurisdictions, legislatures and other public bodies are initiating projects to evaluate the effects of competition policy programs or to analyse the efficiency of competition agency organisation and procedures.*

   A sound conception of their responsibilities should lead competition authorities to engage in regular self-assessment. It is also apparent, however, that we are witnessing an increase in external demands for the measurement of competition policy systems and the quality of operations of individual competition agencies. Many jurisdictions have established government-wide mandates that require all public agencies to adopt and apply performance measurement techniques. In Finland, for example, the evaluation efforts of the competition authority are linked to government-wide processes by which public institutions establish performance goals and periodically report on progress achieved toward fulfilling those objectives. Some jurisdictions have supplemented these general approaches with specific initiatives to examine the work of competition authorities. For competition agencies (and for other public bodies), it is becoming increasingly evident that legislatures will not be satisfied with general, undocumented assurances that the enactment and implementation of competition laws deliver good results for society. Korea's intervention during the Roundtable provides one example of how an agency can use ex post evaluation of effects (in Korea's case, the effects of enforcement against cartels) to show how the implementation of a competition law can improve the well-being of consumers.

3. *Evaluation should be a routine ingredient of the competition agency's annual agenda and should be incorporated into the formulation of budgets and operational plans.*

There is a well-documented tendency of public and nonpublic institutions to undertake evaluations chiefly or solely in response to grave operational failures. This tendency is perhaps rooted in acceptance of the principle that things which are not obviously broken do not need to be fixed. A sensible conception of evaluation is not oriented simply to curing the causes of widely-acknowledged failures. Evaluation can serve a variety of other aims, such as promoting a better understanding of what accounts for successful programs and enabling the competition authority to replicate past successes. Evaluation also can serve as a check against complacency by identifying latent flaws in existing programs before such flaws result in serious operational breakdowns. This broader view of the role of evaluation dictates that competition agencies make evaluation a component of planning budgets and establishing operational plans. The aim is to make evaluation a routine element of agency governance rather than an extraordinary exercise conducted in response to crises.

4. *Over the past decade competition agencies have responded to their own awareness of the importance of ex post evaluation and external demands for performance measurement by devoting increasing attention to analysing the effectiveness of existing institutional arrangements and specific initiatives, such as cases and advocacy measures. Useful insights can be derived from a variety of evaluation methods, using resources within and external to the competition authority.*

The contributions of the delegates and their interventions at the Roundtable indicate that a significant and growing number of jurisdictions are carrying out projects to evaluate the substantive programs, management, and organisation of competition agencies. Current evaluation initiatives can be grouped into four general categories. First, competition agencies have been conducting assessments using their own personnel of completed cases and advocacy interventions. Japan, for example, has adopted the practice of studying some of its completed cases every year, and Australia has embarked upon efforts to measure the effectiveness of its cases and assess how its enforcement program has influenced rates of compliance with the competition law. Second, competition agencies have been analysing the effectiveness of internal management and procedures, such as New Zealand's evaluation of how to structure the responsibilities of the competition authority's legal services department and to define its relationship with other units within the authority. The third consists of enlisting the assistance of external academic experts to assist in reviewing specific interventions and procedures. The modern experience of Sweden, for example, illustrates the benefits of drawing upon outside experts in the evaluation process. A number of delegates reported that their agencies use a mix of internal analysis and recourse to outside experts. Fourth, some jurisdictions have directed government bodies outside the competition authority to assess the performance of the competition law system. In the United Kingdom, for example, the National Audit Office is close to completing a major inquiry into the effectiveness of the nation's competition regime. Collectively, these activities can be viewed as extensions of the evaluation concepts on which the OECD has established its peer review exercises and case seminars. As Turkey's intervention during the Roundtable discussion indicated, a jurisdiction can draw upon a combination of evaluation tools (for example, an external OECD peer review report and internal self-assessment exercises involving managers and case handlers in the competition agency) to identify areas for improvement.

5. *One of the most fruitful areas of evaluation to date has been the field of merger control. Studies of the results achieved with merger remedies have yielded important insights about improvements in the design and implementation of merger enforcement policy.*

Perhaps the single most extensive and valuable subject of evaluation research to date has been experience with merger enforcement, particularly the selection of merger remedies undertaken to resolve competition agency concerns about anticompetitive effects of proposed transactions. Jurisdictions that have undertaken evaluations of merger remedies have included Canada, Denmark, the European Union, and the United States. A number of these projects have undertaken the relatively more modest goal of determining whether the purchaser of divested assets actually deployed the assets to compete in the relevant market. Other, more ambitious inquiries (most notably, the EU's recent, far-reaching analysis of remedial undertakings in matters resolved from 1996 through 2000) make preliminary efforts to determine the actual market impact of specific remedies. Despite difficulties associated with the collection of data and the design of analytical models, the results of the merger remedy retrospectives have provided a substantial body of useful information to competition authorities and have motivated important changes in approaches for designing future remedies.

6. *Evaluations of existing institutional arrangements, including organisation, management methods and operational procedures, have proven useful in identifying areas for improvement and motivating adjustments.*

There is a growing recognition that choices involving the design and operations of competition policy agencies deeply influence the quality of substantive interventions. For this reason, an effective evaluation program should include periodic review of a competition's institutional arrangements as well as the evaluation of its specific substantive interventions. The European Union's merger process reforms since 2001 illustrate how organisational reforms -- such as the creation of the office of the chief economist and the use of internal "devil's advocate" panels to test proposed cases – can strengthen a competition agency's internal quality control mechanisms.

7. *The organisation assessment and development framework shows genuine promise as a means for competition authorities to improve the quality of their institutional arrangements.*

Organisation development methodology is widely used both to build new organisations and improve existing ones. The steps in this methodology are relatively straightforward: articulate the core principles of the type of organisation that is desired; convert these principles into behavioral or substantive indicators; create an assessment device using these indicators; apply the assessment, essentially with the management group of the organisation or in some circumstances with external experts; turn the results of the assessment into the framework for a building or improvement plan of action; and re-apply the assessment device on a regular basis to ensure continued application of the principles for the organisation and its processes. In a pilot project with Portugal, the Competition Division identified nine areas for assessment: strategic direction; leadership; organisation; operating and management processes; performance standards; human resource utilisation; relations with government institutions; relations with relevant publics; and performance review. Ratings for these dimensions were established based on interviews with senior officials in the authority and outside experts, followed by a seminar with senior management and development of an improvement plan.

8. *Portugal's pilot project shows that the organisation assessment and development methodology can be applied successfully to competition authorities.*

The organisation assessment and development project undertaken by Portugal suggests that competition agencies could derive major advantages from participating in periodic comprehensive reviews of their management and operations. Portugal's experience with this exercise indicates that a comprehensive organisation assessment is a useful way to engage agency insiders and outsiders in defining standards for measuring the quality of the agency's operations, for senior management to develop an improvement plan and for establishing a baseline against which that improvement can be measured over time. The assessment exercise in Portugal not only generated practical insights about areas for improvement but also is likely to advance the competition authority's reputation and credibility in the larger community.

9. *Considerable work remains to be done to refine the methodologies used to evaluate the effectiveness of completed competition policy interventions.*

As underscored in Canada's interventions during the Roundtable discussion, experience with the evaluation of individual interventions has identified a number of challenges in the design and execution of evaluations. Perhaps the greatest difficulty posed to date is to devise analytical models that permit the evaluation team to draw confident conclusions about how the competition agency's intervention, as opposed to other factors, affected economic performance. Even when the evaluation team has devised a sound analytical model, the process of collecting and analysing data can be time consuming and involve nontrivial costs. Despite methodological difficulties, competition agencies have made informative efforts to link specific interventions to changes in the economic environment. The Roundtable interventions of Ireland and the United States, for example, showed how it was possible to trace adjustments in industry practice and performance to advocacy initiatives undertaken by the competition authority. As suggested below, international bodies such as the OECD can play a valuable role by providing a forum in which competition agencies can discuss methodological issues and can share experience concerning the strengths and weaknesses of specific techniques.

10. *Sectoral studies can provide informative perspectives on how competition policy affects economic performance.*

Sectoral studies provide opportunities for a competition agency to evaluate how the application of its various policy instruments (notably, the prosecution of cases and the pursuit of advocacy measures) has affected the performance of the sectors. Compared to the examination of specific interventions, a sectoral study permits the evaluation team to examine broader trends within the sector and attempt to relate the competition authority's interventions over time to developments in the sector.

11. *Systematic efforts to collect information on evaluation methodologies and the substantive reserves of individual evaluation exercises would facilitate useful comparative analyses of competition policy and improve the pursuit of evaluation efforts within individual jurisdictions. Authorities would benefit from continued to develop a repository of information on evaluation issues.*

The Roundtable identified a number of ways in which the Competition Committee could encourage the use of evaluations to improve competition agency performance. There presently is no single repository of information that assembles all previous and pending evaluation initiatives concerning competition policy. OECD might assist in creating a data base that collects such

initiatives and helps guide competition agencies to other literature involving evaluation methodology and ex post assessments of competition agency interventions. During the Roundtable discussion, many delegates indicated that evaluation topics would be worthy of treatment in future Roundtable sessions. It is possible to imagine that the collection and presentation of the results of evaluations might become a regular element of the Competition Committee's roster of meetings, seminars, and conferences, as well as a component of its publications.

# SYNTHÈSE

***par le Secrétariat***

Plusieurs points essentiels se détachent des débats de la table ronde, des éléments soumis par les délégués et de la note de référence :

1. *De l'avis général, les autorités de la concurrence devraient considérer les programmes d'évaluation comme des éléments nécessaires et inhérents à une bonne gestion publique.*

   De l'avis général des délégués, les programmes d'évaluation des activités et des performances des autorités de la concurrence sont essentiels pour l'amélioration continue de la politique de la concurrence. Au lieu d'être considérés comme facultatifs (voire peut-être nocifs, eu égard à leur capacité de mise en lumière des points faibles), les programmes d'évaluation devraient être tenus pour des outils précieux permettant de mieux servir le consommateur. Les autorités de la concurrence devraient régulièrement affecter des ressources pour, tout d'abord, examiner l'efficacité des pratiques de gestion, de la structure organisationnelle et des procédures opérationnelles en vigueur et, ensuite, étudier l'impact d'interventions particulières telles que l'ouverture de poursuites, le dépôt de rapports d'enquête et la mise en œuvre d'actions de sensibilisation. Lorsqu'elle accepte comme la norme le fait d'être évaluée régulièrement, une autorité de la concurrence fait mieux que mettre en avant ses progrès qualitatifs. En effet, l'évaluation est un bon moyen de mieux faire connaître et de légitimer la politique de la concurrence au sein de la société. Entre autres effets, elle peut impliquer différentes institutions – d'autres organismes publics, des groupes du secteur privé, des associations de consommateurs, des établissements universitaires – dans les débats portant sur les motivations et les contributions de la politique de la concurrence.

2. *À l'extérieur des autorités de la concurrence, on observe une multiplication des demandes visant à élaborer et mettre en œuvre des mesures permettant de tester l'efficacité de la politique de la concurrence. Dans un nombre croissant de pays, le pouvoir législatif et d'autres organes de l'État lancent des projets qui visent à évaluer les effets des mesures de la politique de la concurrence ou à analyser l'efficience de l'organisation et des procédures de l'autorité de la concurrence.*

   Si elles envisagent leurs responsabilités de manière saine, les autorités de la concurrence doivent naturellement être portées à l'autoévaluation périodique. On assiste par ailleurs à une multiplication des demandes externes visant à jauger les mécanismes de la politique de la concurrence et la qualité des activités des autorités de la concurrence. De nombreux pays ont prescrit l'adoption et l'application par l'ensemble des organismes publics de techniques de mesure des performances. En Finlande, par exemple, les efforts d'évaluation de l'autorité de la concurrence sont liés aux processus – applicables à l'ensemble du gouvernement - qui permettent aux institutions de l'État de fixer des objectifs de performance et de rendre régulièrement compte du chemin parcouru. Certains pays ont ajouté à cette démarche générique des initiatives particulières destinées à examiner le travail des autorités de la concurrence. Pour ces dernières (comme pour d'autres organismes publics), il devient de plus en plus évident que le pouvoir

législatif ne se satisfera plus d'assertions générales indiquant de façon non étayée que la mise en œuvre des lois régissant la concurrence est positive pour la société. L'intervention de la Corée durant la table ronde fournit un exemple de la manière dont une autorité peut se servir de l'évaluation *ex post* (dans le cas coréen, il s'agissait de l'évaluation des effets des mesures anticartels) pour montrer en quoi l'application d'une loi sur la concurrence peut améliorer le bien-être des consommateurs.

3. *L'évaluation devrait constituer un élément normal du calendrier annuel des activités de l'autorité de la concurrence, et être intégrée à la budgétisation et la planification opérationnelle.*

Les institutions publiques et privées ont une tendance bien connue à se lancer dans une évaluation essentiellement ou uniquement en réaction à de graves défaillances opérationnelles. Cette tendance s'enracine peut-être dans l'acceptation du principe selon lequel il est inutile de réparer ce qui n'est pas manifestement cassé. Pourtant, une vision judicieuse de l'évaluation ne se contentera pas d'actions curatives visant des défaillances largement reconnues. L'évaluation peut servir bien d'autres objectifs, et par exemple à mieux faire comprendre ce qui explique qu'un programme réussisse, ou mettre l'autorité de la concurrence en position de reproduire les succès passés. L'évaluation peut aussi servir d'assurance contre les excès de confiance en mettant au jour les failles latentes des programmes en cours avant même qu'elles ne provoquent des dérèglements opérationnels majeurs. Cette vision élargie du rôle de l'évaluation impose aux autorités de la concurrence d'en faire un élément de leur budgétisation et de leur planification opérationnelle. L'objectif est donc que l'évaluation devienne un élément routinier de la gouvernance de l'autorité plutôt qu'un exercice exceptionnel déployé face à une crise.

4. *Au cours de la décennie écoulée, les autorités de la concurrence ont tenu compte de leur propre sensibilité à l'importance de l'évaluation* ex post *et des demandes externes de mesure des performances : elles ont de plus en plus veillé à analyser l'efficacité des mécanismes institutionnels en vigueur et des initiatives particulières telles que l'ouverture de poursuites et les actions de sensibilisation. Différentes méthodes d'évaluation faisant appel à des ressources intérieures et extérieures à l'autorité de la concurrence peuvent apporter des éléments de réflexion utiles.*

Les contributions des délégués et leurs interventions lors de la table ronde indiquent que maints pays - au demeurant de plus en plus nombreux - mènent des projets visant à évaluer les programmes de substance, la gestion et l'organisation des autorités de la concurrence. Les initiatives d'évaluation en cours peuvent être regroupées dans quatre grandes catégories. Premièrement, des autorités de la concurrence ont fait appel à leur propre personnel pour évaluer leurs actions judiciaires et de sensibilisation. Le Japon, par exemple, a décidé d'analyser chaque année quelques-uns des dossiers clos récemment, et l'Australie s'emploie à mesurer l'efficacité de ses poursuites et à estimer l'influence de sa politique de mise en application de la législation de la concurrence sur le respect de cette dernière. Deuxièmement, les autorités de la concurrence analysent l'efficacité de leur administration et de leurs procédures internes ; la Nouvelle-Zélande, par exemple, évalue la manière de structurer les responsabilités du service juridique de son autorité et de définir ses relations avec les autres services. En troisième lieu, certains recourent à l'assistance d'universitaires experts pour passer en revue telle ou telle intervention ou procédure. L'expérience moderne de la Suède, par exemple, illustre les avantages qu'il y a à intégrer des experts extérieurs au processus d'évaluation. Plusieurs délégués ont indiqué que leur autorité de la concurrence panachait analyses internes et appel à des experts extérieurs. Enfin, certaines juridictions ont demandé à des organismes d'État extérieurs à l'autorité de la concurrence d'évaluer la performance du dispositif législatif applicable à la concurrence. Au Royaume-Uni, par exemple, le *National Audit Office* a presque terminé une grande enquête sur l'efficacité du

dispositif national. Prises ensembles, ces différentes activités peuvent être considérées comme prolongeant les concepts applicables à l'évaluation sur lesquels l'OCDE a fondé ses examens par les pairs et ses séminaires d'étude de cas. Comme l'a souligné la Turquie dans son intervention à la table ronde, un pays peut utiliser toute une palette d'outils d'évaluation (par exemple un rapport externe d'examen par les pairs de l'OCDE et un exercice interne d'autoévaluation impliquant des dirigeants et des conseillers de l'autorité) pour recenser les domaines dans lesquels des améliorations sont possibles.

5. *À ce jour, l'un des domaines d'évaluation les plus fructueux est celui du contrôle des fusions. Les études portant sur les résultats obtenus grâce aux mesures correctrices appliquées aux fusions ont livré d'importants enseignements quant aux améliorations à apporter à la conception et à la mise en œuvre des politiques concernées.*

À ce jour, le thème le plus approfondi et le plus intéressant des recherches qui ont été menées dans le domaine de l'évaluation concerne la surveillance des fusions, et notamment les choix de mesures correctrices censées apaiser les inquiétudes des autorités de la concurrence quant aux distorsions de la concurrence induites par les opérations de fusion envisagées. Parmi les pays ou entités ayant entrepris d'évaluer de telles mesures correctrices figurent le Canada, le Danemark, les États-Unis et l'Union européenne. Un certain nombre de ces projets ont eu pour objet, de manière relativement plus modeste, de savoir si l'acquéreur des actifs cédés allait effectivement déployer ces actifs pour tenir sa place sur le marché concerné. D'autres enquêtes plus ambitieuses (dont surtout la récente analyse de grande envergure de l'UE portant sur les mesures correctrices appliquées aux dossiers réglés de 1996 à 2000) ont tenté de manière liminaire de déterminer l'effet réel d'actions correctrices précises sur le marché. Malgré les difficultés que posent la collecte de données et la mise au point de modèles analytiques, les résultats des études rétrospectives sur les actions correctrices applicables aux fusions ont produit un substantiel corpus d'informations utiles aux autorités de la concurrence, et suscité de gros changements dans les approches conceptuelles des actions correctrices futures.

6. *Les évaluations des dispositifs institutionnels existants, portant entre autres sur l'organisation, les méthodes de gestion et les procédures opérationnelles, se sont avérées utiles pour détecter les domaines d'amélioration et motiver des ajustements.*

On admet de plus en plus que les choix opérés en matière de conception et de fonctionnement des organismes chargés d'appliquer la politique de la concurrence ont une forte influence sur la qualité des interventions opérationnelles. C'est pourquoi les programmes d'évaluation, pour être efficaces, devraient comporter un examen périodique du dispositif institutionnel de la concurrence, ainsi qu'une évaluation de ses interventions opérationnelles spécifiques. Les réformes appliquées au processus de fusion de l'Union européenne depuis 2001 illustrent en quoi une réforme organisationnelle – comme, par exemple, la création d'un bureau de l'économiste en chef ou le recours à un groupe interne spécial chargé de se faire l'« avocat du diable » et de tester ainsi les dossiers instruits – est susceptible de renforcer les mécanismes internes de contrôle de la qualité d'une autorité de la concurrence.

7. *Le cadre d'évaluation et de développement organisationnels est porteur pour les autorités de la concurrence d'authentiques promesses d'amélioration de la qualité du dispositif institutionnel.*

La méthodologie du développement organisationnel est largement utilisée tant pour bâtir de nouvelles organisations que pour améliorer les organisations existantes. Les étapes de cette méthodologie sont relativement simples : expliciter les grands principes du type d'organisation souhaité ; convertir ces principes en indicateurs du comportement ou du fonctionnement ; créer

un véhicule d'évaluation utilisant ces indicateurs ; procéder à l'évaluation – essentiellement avec la direction de l'organisation ou, ponctuellement, des experts extérieurs ; intégrer les résultats de l'évaluation au cadre d'élaboration ou d'amélioration d'un plan d'action ; et réutiliser périodiquement le véhicule d'évaluation pour garantir la permanence de l'application des principes à l'organisation et à ses processus. Dans un projet pilote mené avec le Portugal, la Division de la concurrence a recensé neuf domaines d'évaluation : l'orientation stratégique ; la conduite ; l'organisation ; les processus opérationnels et managériaux ; les normes de performances ; l'utilisation des ressources humaines ; les relations avec les institutions de l'État ; les relations avec les publics concernés ; et l'examen des performances. Les notes attribuées à ces diverses dimensions ont découlé d'entretiens avec de hauts responsables de l'autorité et des experts extérieurs, suivis d'un séminaire avec la direction de l'organisme et de la mise au point d'un plan d'amélioration.

8. *Le projet pilote du Portugal montre que la méthodologie d'évaluation et de développement des organisations peut être appliquée avec succès aux autorités de la concurrence.*

Le projet d'évaluation et de développement entrepris par le Portugal donne à penser que les autorités de la concurrence pourraient tirer un avantage considérable d'une participation à des examens périodiques étendus de leur gestion et de leurs activités. L'expérience du Portugal montre que l'évaluation approfondie d'une organisation est un moyen qui permet de s'assurer de la participation de collaborateurs internes et externes de l'autorité à la définition de normes de mesure de la qualité de son fonctionnement, d'inciter sa direction à élaborer un plan d'amélioration et de figer une base de référence pour mesurer les améliorations futures. L'exercice d'évaluation portugais n'a pas seulement abouti à des éléments concrets quant aux domaines d'amélioration ; il est aussi susceptible de rehausser la renommée et la crédibilité de l'autorité de la concurrence parmi les observateurs.

9. *Il reste beaucoup de travail à faire pour affiner les méthodologies utilisées pour évaluer l'efficacité des interventions effectuées dans le cadre de la politique de la concurrence.*

Comme l'a souligné le Canada lors de ses interventions au cours de la table ronde, l'évaluation d'interventions isolées a permis d'inventorier un certain nombre de défis auxquels se heurtent la préparation et l'exécution d'exercices d'évaluation. Peut-être la plus grande difficulté recensée à ce jour concerne-t-elle la mise au point de modèles analytiques permettant à l'équipe d'évaluateurs de parvenir à des conclusion sereines quant aux répercussions de l'intervention de l'autorité, par opposition à d'autres facteurs, sur la performance économique. Et même lorsque cette équipe a conçu un modèle analytique équilibré, le processus de collecte et d'analyse des données peut s'avérer chronophage et relativement onéreux. En dépit de difficultés d'ordre méthodologique, les autorités de la concurrence se sont efforcées de faire connaître les liens qui existent entre telle ou telle intervention et les changements de l'environnement économique. Les interventions de l'Irlande et des États-Unis à la table ronde, par exemple, ont montré comment on pouvait attribuer des modifications de pratiques et de performances sectorielles à des actions de sensibilisation lancées par l'autorité de la concurrence. Comme nous le suggérons ci-après, des organisations internationales telles que l'OCDE peuvent jouer un rôle précieux en devenant des forums où les autorités de la concurrence peuvent débattre de questions méthodologiques et confronter leurs expériences sur les avantages et les inconvénients de telle ou telle technique.

*10. Les études sectorielles peuvent donner des éléments d'information quant aux répercussions de la politique de la concurrence sur la performance économique.*

Pour une autorité de la concurrence, les études sectorielles sont un moyen d'évaluer en quoi la mise en œuvre de ses différents instruments d'action (et notamment l'ouverture de poursuites et la mise en œuvre d'actions de sensibilisation) a pesé sur la performance sectorielle. Par rapport à l'examen d'interventions individuelles, l'étude sectorielle permet à l'équipe d'évaluateurs d'examiner des tendances plus larges au sein du secteur, et de tenter de mettre en relation les interventions successives de l'autorité de la concurrence et les évolutions sectorielles.

*11. Une systématisation des efforts de collecte d'informations sur les méthodologies d'évaluation et la substance des exercices individuels d'évaluation faciliterait une utile comparaison des politiques de la concurrence, et conforterait les efforts nationaux d'évaluation. Les autorités tireraient avantage de la constitution d'un corpus d'informations sur les questions touchant à l'évaluation.*

La table ronde a dégagé plusieurs façons dont le Comité de la concurrence pourrait encourager le recours à des évaluations pour améliorer les performances des autorités de la concurrence. Il n'existe pas aujourd'hui de lieu unique dans lequel seraient réunies toutes les initiatives antérieures et en cours des politiques de la concurrence. L'OCDE pourrait aider à la création d'une base de données de ce type, qui aiderait les organismes concernés à accéder à d'autres documents sur la méthodologie des évaluations, ainsi qu'à des évaluations *ex post* d'interventions d'autorités de la concurrence. Au cours des débats, de nombreux délégués ont indiqué que le thème de l'évaluation mériterait d'être abordé lors de sessions futures de la table ronde. Il est possible d'imaginer que la collecte et la présentation des résultats d'évaluations deviennent des éléments réguliers des réunions, séminaires, conférences et publications du Comité de la concurrence.

**BAKCGROUND NOTE**

# USING EVALUATION TO IMPROVE THE PERFORMANCE OF COMPETITION POLICY AUTHORITIES

***by William E. Kovacic****

## 1. Introduction

Competition policy is a work in progress. From the adoption of the first national antitrust statute in Canada in 1889, the history of competition law has featured a continuing search for optimal statutory commands, institutional designs, and operational techniques (Gavil et. al. 2002; Chs. 1, 9). Recent decades have witnessed extraordinary change as older and newer competition systems seek better practices for defining substantive commands, setting priorities, choosing cases, and selecting remedies.

This paper suggests that charting the future course of competition policy can benefit heavily from looking back and asking two simple, fundamental questions. Did the agency's interventions produce good results? Did the agency's managerial processes help ensure that the agency selected initiatives that would yield good outcomes? By assessing the quality of its substantive interventions and internal procedures, a public agency can gain valuable insights about how to improve its performance. Even the effort to define performance measures can impose valuable discipline on an agency's allocation of resources and help identify possibilities for improvement.

Not only is a norm that encourages government bodies to conduct performance evaluations good public policy, it is likely to be a key ingredient of future attempts by competition authorities to demonstrate the value of competition law to broader audiences. In older and newer competition systems, and in jurisdictions considering the adoption of a competition law, a number of observers decline to assume as a matter of theory, or accept as an article of faith, that the enforcement of a competition law yields socially useful results.[1] An *a priori* presumption of efficacy is a weak substitute for a systematic assessment of outcomes.[2]

This background paper discusses how government competition authorities might use ex post evaluations of law enforcement decisions, operational mechanisms, and organisational design to improve the quality of their work. The paper examines the value of ex post analyses of previous public enforcement actions as follows. Section 2 describes two basic forms of performance measurement that competition agencies might undertake to improve the quality of their work. Section 3 identifies the rationales for establishing and applying performance measures to evaluate the effectiveness of the substantive interventions and operational procedures of competition policy agencies. Section 4 discusses the past experience of competition agencies in conducting ex post analyses of substantive outputs and operational procedures. While not providing a comprehensive account of agency experience, Section 4 uses

* E.K. Gubin Professor of Government Contracts Law, George Washington University Law School. The author thanks Joe Phillips and Patricia Heriard-Dubreuil for many helpful comments and suggestions about the preparation of this paper. The views expressed here are the author's alone.

noteworthy examples to provide a context for the proposals in Section 5 that present methodologies for performing evaluations.

## 2. The Evaluation of Competition Agencies: Two Forms of Performance Measurement

This paper addresses two basic ways that competition agencies might go about measuring the quality of their performance. The first is to evaluate the contribution of the agency's outputs – such as the prosecution of cases or the commitment of resources to competition advocacy – to the attainment of the goals embodied in the jurisdiction's competition laws. Suppose, for example, that the jurisdiction's competition law seeks to improve economic performance by proscribing anticompetitive mergers, improper exclusion by dominant firms, or naked agreements among rivals to set prices or other terms of trade. An outcomes-oriented program of evaluation would seek to determine how much the agency's pursuit of specific initiatives helped achieve these ends.

A second approach to evaluation is process-based. In lieu of or in addition to evaluating outcomes, an evaluation program might seek to assess the quality of the competition agency's internal operations – the mix of managerial methods and organisational choices that determine how the agency allocates and applies its resources. This approach treats management and organisation as critical inputs into the implementation of competition policy and seeks to identify improvements in how the competition agency operates. The logic is that progress toward superior managerial and organisational techniques will increase the likelihood that the agency's substantive outputs generally promote the realisation of the competition law's objectives.

In striving to cope with the crisis of the moment or the press of new business, public (and private) institutions might be tempted to regard performance evaluation as a purely optional, discretionary undertaking. The need for a competition agency to address current exigencies – for example, to cope with an unusually large number of merger filings – can encourage acceptance of the view that the expenditure of effort to evaluate substantive outputs or managerial inputs is an unaffordable luxury or a costly "diversion" of resources away from the treatment of immediate operational needs. In this frame of mind, an agency's managers may reason that they can *either* support current operations *or* conduct ex post assessments, but not both.

To perceive that performance measurement comes at the expense of fulfilling current operational obligations misconceives the role of evaluation. As a large and growing literature has demonstrated, performance measurement is a necessary ingredient of good practice for public institutions.[3] From this perspective, strong mechanisms for evaluating outcomes and decision making processes are not detached from, but instead are integral to, the creation of sound policy outputs (*see, e.g.*, Majoras 2005). Outlays for performance measurement by a public institution are no more "discretionary" than the effort that physicians exerts after performing surgery to meet with their patients and determine whether the surgery improved their patients' health.[4]

Properly understood, performance measurement is not an institutional burden but instead is a valuable asset – a means for an agency to tap its base of experience (and to borrow from the experience of peer institutions) to improve the quality of its work. A routine of retrospective assessments can help agency managers engage in what two scholars of public administration, Richard Neustadt and Ernest May, have called "thinking in time streams" – applying "the kind of mental ability that readily connects discrete phenomena over time and repeatedly checks connections."[5] Robust performance measurement tools can help answer the three fundamental questions that Neustadt and May (1986; 270) have identified as the core concerns of public agency decision making: "'Will it work?' 'Will it stick?' 'Will it help more than it hurts?'"

As noted above, two important focal points for ex post evaluation are the substantive outputs of the competition agency (e.g., cases and advocacy interventions) and the operational processes (e.g., strategic planning and case handling) that generate such outputs. The literature on performance evaluation has noted the tendency of public and private institutions to conduct detailed ex post assessments solely or largely as a desperate, necessary response to an operational calamity. Such evaluations unmistakably can play a valuable role in improving agency performance in the short- and longer-term. For example, a detailed reconstruction and analysis of a serious operational failure can identify weaknesses in specific substantive projects or in an institution's decision making processes and can foster adjustments in the institution's projects or the establishment of formal rules and cultural norms that reduce the possibility of future disasters.[6]

A custom of conducting ex post assessments only in response to grave operational failures is a seriously incomplete form of performance measurement. A superior approach is to examine programs on an ongoing basis and not simply in response to dramatic failures. A well-conceived evaluation mechanism would study programs that appear at any single moment to be working well. Such initiatives can serve to identify possible improvements that will make the acceptable or commendable program truly excellent. From a more defensive perspective, a routine of unflinching assessment can spot flaws that, if uncorrected, could lead to a major policy breakdown. When success is achieved by narrow margins or gained by sheer luck, an organisation may overestimate its skill and shave the margin of error to a dangerous thinness that eventually begets failure. To make no effort to assess outcomes and the causes of outcomes is a form of flying blind.[7]

It is also well known that few institutions, public or private, have a strong taste for subjecting themselves to rigorous assessments of their work. Good performance measures can be hard to design, and institutions may be daunted by the cost and indeterminacy of trying to formulate truly informative measures. When pressed to devise performance measures, some institutions have embraced badly flawed criteria simply because the activities they have chosen to observe were measurable – an approach no less delusional than disdaining all measurement until the roof caves in. Ask the wrong questions, and you can get spurious answers.

Students of public administration readily acknowledge the problems of selecting good performance measures and agree that the worth of an evaluation exercise depends heavily on the validity of the chosen criteria. At the same time, public administration scholars are sceptical of claims that a given activity is so resistant to measurement that one must rely entirely upon the actor's untested (and, says the actor, untestable) representations about the quality of the actor's work. Even if measurement problems are significant and turn out to be overwhelming, the very process of seeking to define what constitutes good performance can add rigor to an institution's decisions about what it should do. Among other results, the effort to define good performance can press an institution to improve its classification and tracking of programmatic inputs and outputs.

The apprehension about performance measurement goes beyond problems associated with choosing the correct yardstick. Even if supplied a perfect methodology, some institutions might shrink from applying it. On a good day, an evaluation can show that an institution's actions or processes had good consequences. On a bad day, the evaluation can reveal harmful consequences, or no consequences at all. An institution might perceive that two of these three outcomes (no effects or bad effects) will be unflattering, and it may lack confidence that an ex post assessment will uncover good results. These anxieties may be perfectly understandable, but few objective observers would regard such fears as reasonable grounds to forego performance measurement. If the institution's discomfort with conducting evaluations is a strong sense that rigorous measurement will reveal serious error, that by itself is reason for an institution to perform such assessments.

## 3. The Rationale for Ex Post Evaluation in Making Competition Policy

A number of rationales support the commitment of resources by competition agencies to develop and apply performance measures to evaluate substantive interventions and operational procedures. These rationales go beyond the general considerations of sound public administration described above in Section 2. The need for performance measurement in competition policy stems from both the distinctive qualities of competition policy as a form of government regulation and in modern institutional developments within and across jurisdictions with competition laws.

### *3.1 Uncertainty: Competition Policy as Experimentation*

The process of formulating competition policy frequently requires public antitrust authorities to make difficult judgments amid uncertainty about the competitive significance of various forms of business conduct (Heyer 2005). Will a merger of two significant rivals retard or increase competition? Are the restrictions that limit the freedom of participants in a joint venture reasonably necessary to ensure the development of a new product? Are the business justifications offered to support a refusal to deal or an exclusive contract genuine or contrived? Decisions of these types can be difficult even in "routine" matters, and they can be especially challenging when rapid technological change, deregulation, or other dynamic forces complicate the analysis of competitive effects.[8]

The formulation of policy amid uncertainty gives a substantial experimental element to government enforcement. Individual enforcement decisions can be viewed as experiments in which public authorities test the efficacy of different hypotheses about the competitive significance of business behavior.[9] Over time, the public antitrust agencies arrive at a given policy equilibrium by periodically expanding and contracting the zone of enforcement. Testing the validity of different hypotheses involves making enforcement decisions that take chances with either intervening too aggressively or not intervening enough. Without experiments that sometimes intervene too much or sometimes intervene too little, it would be impossible for enforcement authorities to determine the correct mix of policies[10]

Two illustrations underscore the role of experimentation in competition policy. The first is the development over the past half-century of policy against cartels. The story of modern anti-cartel policy in the United States and in other jurisdictions can be told as a series of interrelated experiments with measures that primarily sought to increase the rate of detection for collusive schemes and to boost the punishments for violators (Baker 2001; Kovacic 2003, at 416-25). The enhancement by the Department of Justice of its leniency program in 1993 and 1994 is perhaps the best known and most widely emulated of these experiments.[11] The successes in the past decade of high-powered leniency programs in eliciting the revelation of illegal cartels has obscured the scepticism within and outside DOJ that accompanied the reforms of the early 1990s. The only way to know whether stronger assurances about immunity from criminal prosecution would attract more disclosures was to try it out. That the program would make a genuine difference was not self-evident at the time.

The second example involves the U.S. Federal Trade Commission's decision in 1984 to permit General Motors and Toyota to engage in a production joint venture is illustrative.[12] The FTC's approval of the transaction reflected an understanding that attaining important efficiency gains and productivity advances promised by the transaction would require the Commission to loosen, at least on an experimental basis, existing antitrust restrictions on collaboration involving major competitors. When the transaction was approved with conditions, some observers contended that the FTC had made a catastrophic policy choice.[13] Subsequent analysis of the GM-Toyota joint venture has suggested that the collaboration gave General Motors valuable experience in implementing lean production and labour management systems that helped inspire the company's design of its Saturn division.[14]

The importance of uncertainty and the experimental quality of competition policy is apparent in several dimensions of government decision making. Competition authorities sometimes are called upon to diagnose the competitive significance of dominant firm conduct. Claims of unlawful exclusion often require the competition agency to choose between competing explanations that posit efficiency and naked exclusion as rationales for the challenged behaviour. A decision to prosecute or not to prosecute may depend upon debatable interpretations of observed behavior.[15]

Another uncertainty-laden task for competition agencies is to predict the competitive effects of proposed mergers.[16] This inherently predictive exercise can be especially difficult in sectors undergoing upheaval by reason of technological dynamism, deregulation, or globalisation.[17] In many instances, enforcement officials may be able to do no better than make intelligent guesses about the impact of individual mergers, particularly for consolidations that will yield high degrees of concentration but also might generate significant efficiencies.

The analytical exercise that vividly underscores the uncertainty-related difficulties of diagnosing past behaviour or predicting the impact of proposed transactions is the formulation of remedies.[18] In negotiating settlements or preparing a request for relief in a case, competition agency officials often must make problematic judgments about which remedies will resolve competitive problems. The choice of cures in any specific case – for example, imposing limits on conduct to remedy an abuse of dominance – to some degree inevitably involves experimentation.[19] As much as any element of competition policy, the selection of remedies calls for efforts to examine and learn from past experience ("How has this worked before?") as a guide to future decisions.

In the sciences, an indispensable element of the process of experimentation is the systematic evaluation of the experiment's results. So it should be with experimentation in competition policy. Without ex post testing, it rarely will be possible to determine whether the assumptions and hypotheses that motivated a competition agency's the decision to prosecute were sound. Ex post assessments also can reduce the uncertainty associated with future decisions by illuminating how well various theories diagnose business conduct or predict competitive effects and by informing judgments about the impact of various remedies.

### *3.2 Limited Transparency: The Impact of Policymaking by Settlement*

A widely accepted principle of public administration is that government authorities should make the rationale for public policies and the processes for establishing such policies transparent. Transparency promotes clarity in forming public competition policy, increases the understanding of legal commands by affected parties, and disciplines the exercise of discretion by public officials by subjecting their actions to external review and criticism.[20] Transparent policymaking methods inform external observers (especially business operators) about the content of and rationale for specific decisions help ensure the regularity and honesty of public administration.[21] Common transparency-enhancing measures include publishing decisions in law enforcement matters, issuing guidelines, and using speeches to articulate the basis for specific initiatives.

The enforcement of competition laws in a number of jurisdictions, such as the European Union (EU) and the United States, today relies significantly upon settlements.[22] One important source of this development is the establishment of mandatory notification mechanisms and waiting periods for merger control.[23] Premerger notification systems have expanded recourse to settlements involving divestitures or conduct-related undertakings to resolve competitive concerns with individual transactions.[24]

The increased use of consent agreements has created problems that result from imperfections in the transparency surrounding the acceptance of a settlement. In the typical settlement, it may be difficult for

those other than the parties to the negotiations to accurately assess the basis for or significance of the settlement.[25] In announcing settlements, the official statements of competition agencies tend to portray the enforcement agency's decision to prosecute and its resolution of the matter favourably. In their formal public pronouncements, competition agencies ordinarily do not express doubts about whether the solution contained in the settlement will cure apparent competition problems with the transaction. In the hospital of public competition law enforcement, all surgeries are portrayed as successes.

The respondent firms ordinarily have the best-informed perspective on the government's claims about the value and significance of consent decrees. In theory, firms subject to consent decrees could issue statements that dispute either the government's rationale for intervention or the competitive significance of the relief obtained. Although they have the information to point out enforcement agency miscalculations (including the acceptance of inadequate relief), the merging parties have little incentive to do so – at least in a public, visible manner. The repeat-game nature of the regulatory process, in which companies and external advisors such as law firms and economic consulting firms appear regularly before the competition agencies, discourages private entities from candid, public discussion of the deficiencies of settlements they have accepted.

Over time, the fuller context surrounding a settlement becomes somewhat clearer as enforcement officials give speeches, as news organisations conduct inquiries, and enforcement officials, respondents, competitors, or external advisors reveal what took place during deliberations between the enforcement agency and the firm. Even with a fuller, gradual revelation of information, the disclosure of relevant data can be decidedly incomplete. Unlike a trial, which usually generates a rich, publicly available record, the settlement agreement supplies little basis for outsiders to evaluate the competition agency's strategy and tactics.[26] Outsiders often must parse the competition agency's public announcements that it has gained effective relief and test them against the respondents' subdued and private suggestions that, while it accepted the remedy, the transaction emerged essentially unscathed.

There are several ways to address transparency problems associated with using settlements to resolve government competition cases. One approach is for competition agencies to reveal more information about the theory of competitive harm and rationale for remedies in the competitive impact statements that accompany settlements.[27] Among other effects, such disclosures facilitate efforts by outsiders to assess the agency's performance. Enforcement officials also could use speeches or formal statements to explain more fully why they decided not to intervene to challenge or modify specific transactions. Practice in some jurisdictions (such as the EU) has dictated routine explanation of decisions not to prosecute, and jurisdictions that traditionally have said little or nothing about forbearance (such as the United States) have begun to emulate the custom of fuller disclosure.

A second approach, emphasized in this paper, is to adopt policies that commit the competition agency to undertake periodic, *ex post* assessments to evaluate the soundness of the decision making process and to consider the effects of substantive interventions such as settlements. The performance of *ex post* evaluations, either by the competition agency itself or by outsiders with the competition agency's cooperation, and the publication of results would help determine the value of specific remedies.[28]

### *3.3 The Evolutionary Quality of Antitrust Jurisprudence and Enforcement Policy*

The development of competition policy is inherently evolutionary (*see* Johnson 2004, at 7; Kovacic 2003). In some jurisdictions, the evolutionary character stems partly from the institutional design of the competition policy system. In adopting the principal U.S. antitrust laws, for example, the Congress created general statutory commands and gave the federal courts responsibility for interpreting their operative terms and adjusting the content of doctrine over time.[29] The U.S. courts have recognised that fulfilling their

assigned role in this consciously evolutionary scheme requires an awareness of how past interpretations of the antitrust laws have affected commerce.[30]

A more universal source of competition policy's evolutionary nature is its interdisciplinary foundation. To a degree unmatched in other fields of economic regulation, the competition law draws upon the contributions of economics. In antitrust practice, economic analysis plays a central role in resolving such key antitrust issues as delineating the relevant market and assessing the efficiency consequences of various forms of business behavior.[31]

Economics is a dynamic discipline. The history of industrial organisation economics has featured considerable change and refinement in the understanding of commercial phenomena.[32] As economic learning has changed, so too have changed many antitrust legal doctrines that are informed by economic insights. Empirical research, including the analysis of past antitrust cases, has supplied a major impetus for the development of new industrial organisation ideas and an important stimulus for alterations in antitrust doctrine and enforcement policy.[33]

### *3.4 Institutional Multiplicity: Concurrent Oversight*

The modern competition policy environment features numerous public and private actors with authority to enforce antitrust commands. Multiplicity has a significant international dimension and, in some jurisdictions, an important domestic element. Globally, the development of new competition policy systems and the enhancement of older regimes have meant that individual mergers or other forms of commercial activity are likely to attract attention from a variety of national or regional competition bodies.[34] Inside some jurisdictions, such as Brazil, France, and the United States, responsibility for formulating and executing competition policy is shared by two or more public competition authorities.[35] In many jurisdictions, the public competition authorities also share authority with public sectoral regulators to scrutinise mergers or other forms of conduct.[36] The slow but continuing development of private rights of action in jurisdictions that previously had relied solely upon public enforcement provides a still further source of decentralisation of prosecutorial authority.

The fragmentation of policymaking authority requires business managers to account for a wide array of substantive competition policy commands and differing interpretations of the same commands by different public enforcement bodies. In recent years a number of observers have drawn attention to complications that arise when individual episodes of business behaviour are subject to numerous parallel enforcement efforts within and across jurisdictions. Most attention has focused on the possibility that multiple reviews of mergers by national competition authorities can unduly raise the cost of executing such transactions.[37] An emerging area of concern is the extent to which diverse remedial schemes interact in the prosecution of specific instances of misconduct. Ex post studies of specific enforcement episodes would assist in clarifying the impact of having numerous public antitrust authorities examine the same business conduct and informing debate about possible adjustments.

### *3.5 Institutional Multiplicity: Benchmarking Operational Processes*

For all of complexity it introduces into business planning and inter-agency coordination, the development of new competition systems and the reform of existing systems has created numerous opportunities for competition authorities in one jurisdiction to benchmark their operational procedures with their counterparts. There is considerable variation in the manner in which individual authorities organise their institutions into operational units, devise strategies, and allocate resources. The diversification in approaches provides numerous comparative yardsticks by which an agency can evaluate the soundness of its own organisational choices and procedures.

Among other possibilities, comparative study supplies a basis for a competition agency to decide how to establish internal quality control – for example, by establishing an independent unit of economists with authority to report directly to the agency leadership or by creating "devil's advocate" panels to test the assumptions and evidence of agency case handlers. As suggested below, diversification also has supplied models for agencies to consider in building their own measures of performance and conducting ex post performance reviews.

### *3.6 The Value of Competition Agency Participation in Performance Management*

Competition agencies are not the only possible source of performance assessments of competition policy. Researchers have created a substantial literature that analyses specific cases, enforcement programs, or procedures without participation by or cooperation from the government agencies responsible for the matters in question.[38] In a number of instances, such assessments have influenced antitrust policy by changing the views of enforcement officials and courts about the validity of certain doctrines or enforcement practices.[39] Government bodies outside the competition agency, such as entities entrusted with audit responsibilities, also have conducted performance assessments.[40] In recent years, government bodies such as Canada's International Development Research Centre have funded projects to encourage local researchers in transition economies to evaluate the actual effects of competition law enforcement and to identify barriers to competition.[41]

As these examples suggest, a competition policy system might rely solely on the initiative of researchers or institutions other than the competition authority to obtain ex post assessments of individual cases or enforcement programs without the participation of the competition agency. Several considerations indicate the importance of formal participation by the competition agencies. The competition agency is likely to be the main repository of information about the decision to prosecute and about internal deliberations concerning the management of individual cases. The competition authority also may have unique capability to collect information relating to the effects of enforcement programs.[42]

The most important factor favouring performance measurement within the competition agency is the likelihood that a routine of evaluation will have a greater effect in promoting regular, timely adjustments in the agency's practice. One ideally would prefer to have the competition agency actively seek improvements in its operations and to incorporate learning from past experience immediately and directly into future operational decisions. George Stigler said as much 35 years ago in discussing whether it was wise for an institution to rely entirely on periodic reviews by outsiders to evaluate programs and identify areas for adjustment (Blue Ribbon Defence Panel, 1970; 198)::

> "No organisation can achieve or maintain efficiency in structure or operation by having a critical review made by expert outsiders once each five or ten years – even if . . . the recommendations of the review panel are unfailingly adopted. A good organisation must have built into its very structure the incentives to its personnel to do the right things."

## 4. Experience with Performance Evaluation of Competition Agencies

Beginning in the late 1970s and continuing to the present, three strands of commentary have focused attention on the adequacy of competition agency efforts to evaluate their performance. The first strand has taken the form of recommendations by government bodies and individual commentators that competition agencies expand the amount of resources allocated to evaluating the effects of past enforcement decisions.[43] One formative event that identified an emerging consensus on this point was the U.S. FTC hearings in 1995 on innovation and globalisation.[44] The desirability of devoting greater resources to *ex*

*post* evaluation of completed matters was a major theme of competition policy experts who testified at the FTC proceedings.[45]

A second, distinct strand of noteworthy commentary has come from observers who have questioned the value of past competition policy initiatives and suggested that many competition policy programs had failed to achieve their aim of improving economic performance.[46] Some analysts focused on the lack of evidence suggesting that antitrust intervention had yielded measurable benefits. Others argued that some or many interventions had diminished consumer welfare. The mildest policy implication of these critiques is that selected forms of antitrust enforcement – such as efforts to control abusive behaviour by dominant firms – had been generally counterproductive and warranted dramatic retrenchment or abandonment. The bolder proposition to emerge from this line of commentary is that, because antitrust laws more often than not retard economic progress, nations are better off without them.

The third line of commentary has developed in the context of discussions about the appropriate foundations for economic growth in countries undertaking the transition from central planning toward greater reliance on market processes. In discussions about economic law reform, commentators sometimes have questioned the value of placing competition policy on the reform agenda or have argued that transition economies would do best by foregoing the enactment of antitrust laws.[47] Both variants of this perspective – those who doubt the benefits of competition policy for transition economies and those who emphatically oppose the adoption of antitrust laws in transition environments – suggest that the proponents of competition policy bear the burden, as yet unmet, of showing that the enactment and implementation of competition laws yield positive results. In effect, the sceptics and the outright opponents have underscored the value of assembling evidence that shows the value of competition policy in emerging markets.

The discussion below addresses three types of evaluation-related activities concerning competition agencies: general assessments of competition agency performance and evaluation efforts, evaluations of the effects of individual interventions such as cases or advocacy initiatives, and evaluations of agency processes or programs. The paper describes each type of evaluation activity and provides detailed treatments of more notable initiatives that illustrate important methodological strengths and weaknesses of specific approaches.

### *4.1 General External Studies of Competition Agency Performance and Evaluation Efforts*

On many occasions, competition agencies have been the subject of studies by external observers who seek to appraise the quality of competition agency performance. In a number of instances, the authors of these studies have assessed or commented upon the effectiveness of competition agency efforts to make performance evaluations a component of routine operations. The general, wide-ranging studies of agency performance and performance measurement initiatives fall into four categories, described below.

#### *4.1.1 Studies by Individual Researchers or Small Teams of Researchers*

One category of inquiry consists of studies that examine the full scope of a competition agency's operations or major elements of an agency's work. Some of these studies have been performed by individual scholars,[48] while others have been assembled by teams of researchers.[49] The authors of this type of study ordinarily, but not invariably, enjoy some degree or formal or informal cooperation from insiders at the competition agency in performing research on the institution.[50] The studies tend to focus most intensely on the quality of the agency's internal decision making processes, but some authors have presented detailed evaluations of specific interventions.[51]

### *4.1.2 Studies by Other Government Institutions*

A second category of broad-ranging study consists of works prepared by government agencies outside the competition authority. The most noteworthy of these works have been prepared by national authorities with responsibility for auditing government agencies. Due to their status as government institutions and by reason of their information gathering powers, these auditing authorities typically have extensive access to the internal records and personnel of the competition agency in performing their research.

In the United States, the Congress from time to time instructs the Government Accountability Office (formerly known as the Government Accounting Office) to study various features of the operations of the U.S. antitrust agencies. One noteworthy example of this type of inquiry took place in 1980, when the GAO conducted a detailed assessment of the management systems of the U.S. FTC and the Antitrust Division of the U.S. Department of Justice. Among other findings, the GAO study (U.S. GAO 1980) urged the U.S. federal antitrust agencies to devote more resources to conducting ex post assessments of individual competition matters and to improve internal management systems for monitoring the progress of investigations and other case-related activities within the agencies. The National Audit Office of the United Kingdom presently is engaged in conducting an assessment of OFT that involves, among other focal points, the discussion of performance measures for evaluating OFT's competition policy activities.

### *4.1.3 Studies by Blue Ribbon Panels*

Competition agencies occasionally have been the subject of assessments prepared by special committees or blue ribbon panels. In many instances, blue ribbon panels have been assembled under the auspices of non-government organisations, either at the request of government officials or on the independent initiative of the non-government organisation.[52] Other blue ribbon panels have been established on an ad hoc basis without any attachment to an existing government or non-government organisation.[53]

For the most part, blue ribbon panels have devoted most of their attention to the management of competition agencies and have focused less upon the wisdom of specific interventions such as cases or advocacy measures. In performing these process-oriented assessments, the blue ribbon inquiries generally have enjoyed substantial cooperation from the competition agencies, particularly if the blue ribbon panel originated with a request from the chief of state or the national legislature. The impact of these inquiries has varied considerably, but one can identify a number of instances in which the recommendations of the blue ribbon panel has spurred significant reforms in the management of the competition agency.[54]

### *4.1.4 Agency wide or System wide Evaluations by Multinational Organisations*

A fourth category of general assessment has taken the form of studies of national competition systems or individual competition agencies performed by multinational organisations. The OECD in particular has engaged in two types of broad-based inquiries. The OECD's Competition Division has conducted studies of the enforcement activities of individual jurisdictions and published reports of its findings. Although such reports have not attempted to provide a comprehensive profile of activity, they have provided useful perspectives on the enforcement programs and operations of the competition authorities in question.[55]

The second form of agency wide or system wide assessment has consisted of "peer reviews" – a format pioneered by the OECD's Competition Committee. To build a foundation for the peer review exercises, Competition Division consultants or professional staff prepare reports based on detailed study of the competition agency's enforcement patterns, interviews and written questionnaires, and conversations with competition policy experts and business officials inside the country.[56] In conducting the investigation, the OECD researchers typically have enjoyed substantial cooperation from the competition agency under

examination. The reports supply the chief basis for peer review sessions at the regularly scheduled meetings of the OECD Competition Committee and the OECD's Global Competition Forum. The results of these audits often are made available to the public. OECD's peer review efforts have been supplemented by contributions from other multinational bodies such as the World Trade Organisation (WTO), which has used conferences and seminars to promote the benefits of peer review as a means for newer competition authorities to improve operations and benefit from the transfer of know-how from more experienced institutions.

*4.1.5 General Assessments of Competition Agencies by Outsiders: Strengths and Weaknesses*

External observers have made important contributions to our understanding of the operation of competition agencies and, in important cases, have served to improve agency management and operations. The agency's awareness that it will periodically undergo review by outside researchers and institutions provides an incentive to engage in internal initiatives to improve operations and to measure performance. Where the external examiner or examining body is expert in the operations of the competition agency and enjoys extensive access to the agency's internal records and personnel, it is possible to offer an informative diagnosis of the agency's work and to suggest useful avenues for improvement.

Reliance on external observers to perform general assessments of competition agency performance can suffer from four basic problems. One weakness in the general assessments generated by outsiders, particularly evident in the work of blue ribbon panels, is the lack of consistent, commonly accepted criteria for measuring agency performance. The external researcher or research body may fail to carefully specify its evaluative standards and, in reviewing the findings of previous evaluation research, may fail to identify differences in the standards applied by earlier studies.[57] The rush to prepare the instant report often denies the blue ribbon panel time to do the more discriminating, historically accurate assessment that is vital to making sound assessments about the quality of past performance and to make sensible recommendations about future improvements.

A second problem concerns the knowledge base of the external analysts. In some cases, the external observers lack adequate access to agency records and personnel to develop a confident understanding of the agency's current operations. This is less a problem for researchers (such as national audit bodies or panels operating with the endorsement of the chief executive or national legislature) with strong tools to compel cooperation than it is for individual researchers seeking, without official government sponsorship, to conduct broad-ranging studies of agency operations. Another form of knowledge deficiency is the researcher's limited background in the agency or in the competition policy field generally. Without a well informed lens for studying the agency, it is unlikely that the researcher will make accurate or wise interpretations of what is observed.

A third problem concerns the incentives of the external observer to provide a fully candid assessment of the agency's operations. A researcher, or member of a research team, who wishes to have a future relationship or cooperation with the competition agency may be reluctant to give a truly unvarnished assessment of the agency's flaws. When an agency cooperates with an external reviewer by choice and not by compulsion, the agency may decline to participate in exercises in which the reviewer refuses, implicitly or explicitly, to moderate harsh conclusions, at least for public consumption. This is, perhaps, an inherent limitation of the voluntary peer review exercises conducted by OECD and other multinational bodies. If the peer review report is absolutely unflinching in its criticism of a competition agency, and if discussants at OECD meetings pull no punches in their interrogatories to agency officials, few agencies may be willing to subject themselves to such assessments.[58]

A fourth problem concerns the passivity that may permeate an agency that relies chiefly on outsiders to conduct occasional reviews of the agency's performance. Reviews by outsiders can complement, but

cannot substitute completely for, the agency's own efforts to engage in a continuous, routine assessment of its interventions and operations. As noted in Section 2.6 above, the aim should be to encourage each competition agency to devise its own mechanisms to evaluate and improve the quality of its work.

### *4.2 Case-Specific Evaluations of Competition Agency Intervention*

The antonym of the macroscopic, highly generalised assessment of agency performance described above is the narrowly focused, microscopic evaluation of the effects of specific interventions. This segment of the paper discusses the evaluation of individual initiatives. This form of inquiry has been the province of individual researchers, competition agencies, and multinational bodies, as blue ribbon panels generally have not made detailed assessments of individual matters. The discussion below reviews experience with case studies and examines the most ambitious effort to date by a competition agency to evaluate case outcomes.

#### *4.2.1 Studies Performed by Outside Researchers Without Competition Agency Involvement*

Most of the case-specific evaluations of the substantive outcomes of competition agency interventions have been performed by academics working alone or in small teams. With some notable exceptions, discussed below, academics have performed their evaluations of individual cases solely on the basis of publicly available and without access to the competition agency's internal records. These studies are "independent" of the competition agency in the sense that they neither depend on the competition agency as a source of information nor do they require the researchers to make explicit or implicit concessions to the agency as a condition for performing the research. The main limitation of such studies is that the researchers ordinarily lack access to internal agency records that reveal the thinking that led to the decision to prosecute.

#### *4.2.2 Studies by Other Government Bodies: GAO Study of U.S. Petroleum Mergers*

Government agencies with audit responsibilities occasionally have conducted detailed studies of individual competition agency enforcement decisions. In 2004, the U.S. General Accountability Office published the most ambitious effort to date by a government audit authority to evaluate the effects of a competition agency's interventions (U.S. GAO 2004). The GAO sought to measure the competitive effects of eight petroleum industry mergers completed between 1997 and 2000. The FTC had reviewed and approved all seven mergers to proceed, although it had required the merging parties to make significant divestitures in some of the transactions. The mergers analysed by the GAO included Exxon's acquisition of Mobil, which the FTC approved following the largest divestiture of retail assets in the history of U.S. merger control.

To perform its study, the GAO developed econometric models to identify how the mergers and supplier concentration affected prices of gasoline. GAO relied mainly on its own staff of economists to develop the models and consulted external advisors, including several economists expert in petroleum industry competition issues, in formulating its model and research plan. For data, GAO purchased information on wholesale prices from a private firm, the Oil Price Information Service, that monitors petroleum industry activities. GAO shared an initial draft of its report with the FTC, which offered extensive critical comments on the study's methodology. GAO largely declined to accept the FTC's methodological suggestions and published the report in May 2004. The GAO study concluded that six of the eight mergers it reviewed resulted in price increases, while two caused gasoline prices to fall.

Publication of the petroleum merger study triggered an extended, intense public debate between the GAO and the FTC about the soundness of the GAO's work. The FTC contended that the GAO report contained serious methodological errors that denied its results reliability (FTC 2004b). The Commission

argued that three fundamental flaws undermined the GAO study. First, in performing econometric analyses of specific mergers, GAO was said to have failed to account properly for many factors that affect gasoline prices. Second, the FTC contended that GAO's assessment of how concentration affects prices did not use the properly defined relevant markets that sound industrial organisation analysis requires. Third, the FTC said that GAO failed to consider critical facts about individual transactions, such as Exxon's merger with Mobil, that were vital to assessing their impact on prices.

In January 2005, the FTC and GAO jointly convened a conference to discuss work that the two agencies had done to evaluate the effects of petroleum industry mergers.[59] Academic economists, including several experts in econometrics, critiqued the work of the two agencies. One major limitation of this exercise was the GAO's refusal to fully specify its econometric methodology and to make available all data it used to run its models. A number of commentators pointed out that, without the full revelation of the model and all data used to run the model it would be impossible to conduct a meaningful test of the GAO results.

#### *4.2.3 Case-Specific Reviews Performed by Multinational Bodies*

A number of multinational organisations have conducted seminars or workshops whose focus is the analysis of specific enforcement measures undertaken by new competition authorities. OECD has carried out several forms of evaluation exercises since the early 1990s.[60] OECD conducts regular case study seminars that examine selected enforcement initiatives of transition economy competition agencies.[61] In the case seminar format, small teams of foreign experts meet for several days with case handlers and other officials from the competition authorities to review specific cases. The outside advisors hear presentations by the competition agency officials, who recount their decision to prosecute and the responses of the defendant firms. The foreign advisors then lead a critical discussion of that work. Variants of the case seminars have taken place in regional conferences organised by UNCTAD individually or in cooperation with other donor bodies.

#### *4.2.4 Case-Specific Reviews Undertaken or Sponsored by Competition Agencies*

Over the past 25 years competition agencies on some occasions have conducted studies of individual cases. As described below in Part 4.2.6, the FTC in the late 1970s and early 1980s sponsored evaluations by outside academics of Commission decisions involving vertical restraints[62] and dominant firm behavior.[63] Among other assessments completed in the past decade, the FTC and its professional staff published studies of the agency's interventions to control of mergers in the soft drink industry (Saltzman et al. 1999), the implementation of divestiture decrees in merger cases (FTC 1999), the effect of mergers in the hospital sector (Vita & Sacher 2001), and the effect of mergers in the petroleum industry (FTC 2004a; Taylor & Hoskin 2004). The FTC also has sought to improve the aggregate measures of performance mandated by the U.S. Congress under the Government Performance and Results Act.

In the late 1980s, the Department of Justice (DOJ), acting pursuant to the terms of a consent decree, funded research concerning the effects of the restructuring of American Telephone & Telegraph.[64] DOJ researchers also reviewed the consequences to selected mergers of airlines in the 1980s (Werden et al. 1991) and examined the effects of mergers of accounting firms in the 1990s (Sullivan 2002). DOJ economists currently are performing research on the consequences of mergers in other industries.

Of agency-sponsored evaluations that have been completed, one of the most interesting was conducted in the 1990s by the Peruvian competition agency, the National Institute for Defence of Competition and Protection of Intellectual Property (Indecopi).[65] During her tenure as Indecopi's chair, Beatriz Boza invited academics and practitioners to serve as researchers in residence in Indecopi and to

study various aspects of Indecopi's substantive programs and administrative procedures. As such, the researchers had extensive access to internal Indecopi records and to the agency's officials.

The results of the researchers' work, which Boza called an "academic audit," were published following internal discussion and comment within Indecopi.[66] The publication of the studies fulfilled Indecopi's commitment to the researchers at the outset of the project to publish the completed papers (redacted to omit non-public information) without regard to whether the researchers praised or criticised the agency. Boza and her colleagues regarded the preparation and publication of the studies as important vehicles for improving the quality of Indecopi's decision making and to increase public awareness of the institution.

In addition to these completed evaluation projects, a number of competition agencies in recent years have initiated projects to evaluate the impact of individual cases. Among other developments, various bodies with competition policy duties in the United Kingdom have been conducting research to document the consequences of individual cases.[67]

*4.2.5 The FTC Vertical Restraints and Abuse of Dominance Impact Evaluations*

As mentioned above, in the late 1970s and early 1980s the FTC carried out a program to evaluate the consequences of vertical restraints cases and one abuse of dominance case commenced in the 1970s.[68] The impetus for the studies was a letter transmitted in 1978 by a committee of the U.S. Congress to the FTC Chairman (Michael Pertschuk) asking that the FTC perform case studies of vertical restraints cases. The committee, the Senate Subcommittee on Antitrust and Monopoly, suggested that the FTC examine its experience with vertical restraints enforcement to explore the possibility indicated the previous year in *Continental T.V., Inc. v. GTE Sylvania Inc.*[69] that there might be an empirical basis for adopting a per se rule of illegality for various non-price vertical restraints. Thus, the original impetus for conducting the studies was external (a Congressional request) rather than internal to the FTC.

The Congressional letter led the FTC to devise a project to assess the effects of various vertical restraints cases initiated in the 1970s. The FTC chose to focus the vertical restraints evaluations on its past enforcement activities in five industries (shoes, blue jeans, audio components, industrial gases, and hearing aids). The cases in question addressed price and non-price distribution practices, with the majority of cases challenging minimum resale price maintenance arrangements. In addition to reviewing vertical restraints matters, the agency decided to use the project as an occasion to evaluate the consequences of other areas of enforcement. The tentative initial plan was to include at least one case involving abuse of dominance – a major area of enforcement priority for the FTC in the 1970s – and at least one case involving horizontal mergers. Responsibility for carrying out the project was assigned to the Assistant Director for Planning in the FTC's Bureau of Competition, John Kirkwood, who assembled a team of two FTC attorneys and two FTC economists to manage the project.

The agency's decision to proceed with an evaluation of past competition cases was not well received by the professional staff of the Bureau of Competition, the FTC's antitrust enforcement unit. A central concern was that any study that questioned the wisdom or efficacy of the FTC's past interventions would be used to attack the Commission's position in the litigation of pending competition cases or, more generally, would be used to discredit the agency's competition policy work. A further concern was that any findings that found the FTC had achieved beneficial results in the cases studied would be dismissed by outsiders as the product of efforts by the Commission to manipulate the design and execution of the study to generate positive assessments. In short, outcomes favourable to the FTC's interests would be disregarded, whereas outcomes critical of the FTC's work would be embraced as evidence of institutional failure. Whatever the result, argued the Bureau of Competition staff, the agency could not "win."

To inform the design of the study, the FTC impact evaluation team retained two prominent industrial organisation scholars (Richard Caves and Ben Klein) to prepare research protocols. The protocols suggested approaches that researchers might use to evaluate the outcomes of FTC vertical restraints cases and sketched the sequence of investigative steps that the FTC might follow to conduct the studies.[70] Based on the Caves and Klein protocols and discussions with the FTC's Bureau of Competition and Bureau of Economics, the impact evaluation team decided that the case studies would have essentially four elements: (1) a review of publicly available material relevant to the case, including academic literature and trade press accounts that provided information about the effects of the FTC's intervention; (2) an examination of the FTC decision in the case, the FTC's internal files concerning the case, and the record of any administrative proceedings; (3) the preparation of a report evaluating the impact based on items (1) and (2); and (4) recommendations for collection of further data to test more fully the conclusions presented in the researcher's written report.

The impact evaluation team then confronted the question of which researchers would conduct the studies. One possibility was to perform the work in-house by assigning the studies to economists in the FTC's Bureau of Economics. The agency rejected this alternative on the ground that reliance on FTC insiders would raise questions about the credibility and reliability of the results. This concern led the FTC to seek outside researchers to perform the studies. The strategy chosen to enlist outside researchers was suggested in the Caves and Klein research protocols: hire well-regarded, relatively junior academicians to perform the studies. Because the Commission was able to pay no more than $10,000 per study, it was highly unlikely that more senior and better known economists could be persuaded to do the work.

With the assistance of Caves, Klein, and other outside academics, the impact evaluation team sought to identify economists who, though junior in their academic careers, had shown promise in the field of industrial organisation economics. The choice of researchers from this set of candidates posed its own difficulties. It is common for a researcher to approach a topic of inquiry – for example, the analysis of vertical restraints – with a point of view that is shaped by training, personal philosophical perspectives, and past research. With a close reading of the researcher's previous written work and some inquiry into the individual's policy preferences, it would be possible to determine whether the researcher would be inclined or not to take a favourable view of the FTC's theory of the case and its decision to prosecute.

Had it chosen to do so, the FTC could have skewed the results of the studies by giving research contracts to academics with a generally positive view of vertical restraints enforcement or the prosecution of other cases (such as abuse of dominance matters) that the agency meant to study. Aware that such an approach easily could discredit the entire enterprise, the agency consciously sought to assemble a collection of researchers with a balance of philosophical perspectives.[71] Though the researchers disagreed about the value of vertical restraints cases, they shared the characteristic of having highly regarded technical skills and training. One measure of the skill in the selection process is the number of researchers – among them, Victor Goldberg, Howard Marvel, and Sharon Oster – who have achieved considerable distinction in their subsequent professional careers. To perform the abuse of dominance study of the Xerox consent decree, the impact evaluation team selected Timothy Bresnahan, who was well on his way to becoming a leading figure in the field of industrial organisation economics.

As the researchers assembled publicly available information to prepare their studies, the FTC's impact evaluation team assembled the Commission's records on the cases and supplied the relevant records to each researcher. Among the most important confidential agency records provided to the outside economists were the internal pre-complaint memoranda prepared by the Bureau of Competition and the Bureau of Economics concerning the decision to prosecute. These documents laid out and analysed the results of the pre-complaint investigation and the proposed theory of the case.

To gain access to these and other non-public records, the researchers signed nondisclosure agreements that forbade the publication of non-public information. The FTC's contracts with the outside experts permitted the researchers to publish their work and committed the agency to use its best efforts to publish the studies. The terms of the contract required the researchers to provide, before submission for publication in journals or in other works, the FTC with drafts of their papers to enable FTC attorneys to ensure that non-public material had been excised. Subject to this restriction, the researchers were free to publish their work, and several published versions of their studies in professional journals.[72]

Beyond the process of screening out non-public information, the researchers were required to submit an initial draft for substantive review and comments by the FTC staff. To a considerable extent, the FTC's review of the drafts focused on technical issues – such as the accuracy of the researcher's characterisation of the FTC's internal deliberations and the agency's theory of the case, the completeness of the researcher's literature review, and the thoroughness of exposition. At the same time, the preliminary conclusions included in some of initial drafts rekindled the anxiety of some FTC attorneys who had opposed the initiation of the evaluation project. Some assessments of the FTC's cases were favourable, but some were decidedly not. The receipt of the initial drafts raised again the question of whether the agency should carry the project to its intended conclusion.

The impact evaluation team and other internal FTC reviewers pressed the researchers, those sympathetic to the FTC's cases and those who were hostile, to defend their methodology and conclusions. Some discussions with the academics who authored unflattering assessments of the Commission's work were contentious. Despite intense disagreements between the FTC and some researchers and some internal FTC discomfort with the unfavourable evaluations, the Commission fulfilled its commitment to publish the results and permitted the researchers to seek publication of their papers.

From a number of perspectives, the impact evaluation project was a success. Most external audiences who read the published studies have concluded that the researchers presented highly informative critiques of the Commission's economic theories in each case, offered a useful preliminary assessment of the likely effect of FTC intervention, and proposed a sensible methodology for conducting further empirical study. Most observers also have found that the studies yielded valuable insights about the cases examined and made strong contributions to our understanding of price and non-price vertical restraints and the compulsory patent licensing remedy imposed to resolve the abuse of dominance prosecution against Xerox.

An intended element of the original impact evaluation program – the pursuit of follow-on work to conduct further empirical testing – never took place, as the FTC chose not to allocate additional resources for these undertakings. Thus, an inherent limitation of the studies is their relatively thin empirical foundation. The outside researchers were able to assess the coherence of the FTC's theory of the cases and to evaluate the wisdom of the decision to prosecute in light of evidence available to the agency at the time the complaints were issued. Beyond collecting publicly available information about industry developments, the researchers were unable to conduct empirical tests of their hypotheses about the likely economic consequences of each case.

From an institutional perspective, it appears that the FTC's willingness to perform the studies and its actual execution of the project enhanced the agency's reputation in the eyes of outsiders by demonstrating its commitment to subject enforcement choices to rigorous analysis by outsiders. At the same time, one must acknowledge that the performance of ex post assessments does come with internal costs for the agency that go beyond the allocation of resources to perform and manage the studies. The pursuit of the project did arouse internal opposition. In one instance, the concerns of the FTC's competition case handlers came to pass, as a respondent in a pending vertical restraints case introduced the critical assessment of any FTC case by one outside researcher to bolster its case for exculpation. The Commission

ultimately decided to dismiss its complaint in the matter,[73] though it is difficult to tell what impact the researcher's study had upon the agency's ruling.

### *4. 3 Process-Oriented Evaluations of Competition Agency Operations and Organisation*

The second category of modern evaluation experience takes the form of efforts to analyse key elements of the process and operations of competition agencies. Unlike the case-specific studies described above, the process-oriented reviews do not seek to analyse the competitive consequences of individual agency interventions. The focus of process-oriented studies has been to evaluate the quality of agency decision making and to test the soundness of procedures used to carry out the agency's responsibilities.

#### *4.3.1 Process-Based Evaluations by Competition Agencies*

The past quarter-century has featured extraordinary innovation and change in the design of competition systems and the management of competition agencies. The growth in the number of new systems, a phenomenon often depicted as a source of troublesome complexity, has spurred a remarkable process of experimentation with institutional design and unprecedented attention to the role that the choice of institutional arrangements plays in shaping substantive policy results. This period has witnessed dramatic upgrades in jurisdictions, such as Australia and Canada, that were among the first nations to adopt competition laws, as well as in jurisdictions such as South Africa and South Korea, that are more recent arrivals to the community of nations with competition laws, It is the rare jurisdiction that has not taken steps in recent years to retool important aspects of the structure, responsibilities, or remedies of its competition agency.

In recent years, the Competition Directorate of the European Commission (DG Comp) has conducted a number of formative studies of its own procedures and, more generally, of the operation of the European Union's system of competition law. In many instances, these assessments of process and policymaking have inspired far-reaching reforms.[74] In the period since 2000 alone, the results flowing from DG Comp's process-oriented evaluations have included the creation of the position of chief economist within the top management tier of the institution; the establishment of "devil's advocate" panels to test the strength of theories and evidence on which cases might be based; an internal reorganisation that, among other effects, redistributed authority for the review of mergers; and a modernisation program that decentralises key decision making functions to the national competition authorities of the EU member states and vests the national courts with expanded adjudication responsibilities.

The EU also has actively engaged in broad programmatic reviews of important areas of DG Comp policymaking. One focal point of attention has been the retooling of enforcement protocols, including the issuance of new guidelines concerning the licensing of intellectual property (Lowe & Peeperkorn 2005). Still more recently, DG Comp has undertaken a substantial inquiry into the implementation of its remedies in competition cases (de Souza 2005). The full results of this evaluation are likely to appear by the close of 2005.

Another noteworthy example of process-oriented reform is the Office of Fair Trading (OFT) in the United Kingdom. A basic reassessment of the adequacy of remedies for serious antitrust offences led OFT to develop and gain acceptance for proposals to treat the creation of cartels as crimes. Reflecting on its experience in dealing with competition issues arising in formerly or currently regulated sectors, OFT has played a leading role in devising innovative approaches to improving liaison with sectoral regulators and coordinating operations. OFT leadership also has been engaged in internal assessments about how best to organise the investigation and litigation of cases.

A final representative illustration comes from the FTC's experience in the 1990s of evaluating the effectiveness of its process for designing remedies for mergers (FTC 1999).[75] The study constituted the Commission's first effort to evaluate the quality of its merger remedies since the adoption in 1976 of the Hart-Scott-Rodino Antitrust Improvements Act, which established the modern U.S. framework for advance notification of certain mergers.[76] Among other consequences, the creation of compulsory notification requirements and mandatory waiting periods facilitated more extensive recourse to settlements that used divestitures and various conduct-related undertakings to resolve discrete competitive concerns.

The FTC study was an internally-generated initiative that emerged from research being conducted by the Compliance Division of the FTC's Bureau of Competition and the agency's Bureau of Economics. In their experience with mergers, the professional staff of these operation units had identified a number of potential weaknesses in FTC practice concerning remedies. Existing practice dictated that the FTC tracked compliance with divestiture obligations only to the point that the agency approved a specific divestiture proposal and the merging parties actually divested the assets in question. The FTC's process took no account, in any systematic way, of whether the purchaser of the divested assets eventually used the assets to make sales in the relevant market or whether the purchaser's participation in the market with the divested assets had any competitive effect. In addition to its own experience, the Commission staff was aware of a large academic literature that doubted the effectiveness of many merger remedies, including remedies achieved after the implementation of the Hart-Scott-Rodino reforms in the late 1970s.[77]

Reflecting on these experiences, the FTC's professional staff in 1995 recommended that the Commission carry out a systematic assessment of the agency's divestiture process. Compared to earlier FTC research on merger remedies, the novelty of the proposed study was its emphasis on questioning the buyers of divested assets upon the ultimate disposition and use of those assets. The Commission carried out the study in two parts. It first undertook a pilot study to test its methodology, which consisted mainly on open-ended telephone interviews of purchasers of assets divested pursuant to settlements in merger cases. After accounting for the results of the pilot inquiry, the Commission carried out a fuller assessment and examined 35 orders entered from October 1989 through September 1994 in which the FTC had required the divestiture of assets. The chosen five-year period permitted the agency to examine divestitures whose effects would have had an impact in the market and which took place recently enough that the buyers would have relatively clear memories of the divestiture experience. The 35 cases also involved a broad range of industries, purchasers, and divested assets.

The FTC relied mainly on a team of its own attorneys and economists to conduct the study, although it obtained comments on drafts from a business school professor (David Ravenscraft) who had extensive experience with data collection and in analysing mergers and acquisitions. The FTC staff identified 50 buyers who had purchased assets divested in the 35 cases and interviewed 37 of the buyers. The staff also interviewed eight of the merging party respondents and two third parties. The Commission published the results of its inquiry in 1999 and highlighted four findings: (1) three-quarters of the divestitures examined in the study "succeeded to some degree" (FTC 1999; 8); (2) settlements that compelled the divestiture of ongoing businesses succeeded more frequently than divestitures of discrete assets; (3) the possibility of continuing entanglements and relationships between purchaser and seller required close attention by the competition agency, as such links sometimes posed unexpected problems for the purchasers and sometimes may have been critical for the purchaser's success in using the divested assets; and (4) smaller firms succeeded at the same rate as larger firms in using the divested assets.

The 1999 Divestiture Study was extraordinarily informative for the FTC and for other competition agencies. The study's results inspired significant adjustments in the agency's evaluation of settlement proposals involving divestitures and altered the types of demands that the FTC subsequently made in settlement negotiations. The study led a number of competition agencies in other jurisdictions to re-

evaluate their own approach to remedies in merger cases and, in some instances, to undertake their own variant of the FTC's inquiry.

In some respects, the study's aim was relatively modest. It did not attempt to measure the actual competitive effects of FTC merger remedies – only "to draw conclusions about whether the buyer of the divested assets was able to enter the market and maintain operations" (FTC 1999; 9). Yet even so limited an inquiry is valuable. If a basic assumption of an agency's merger remedy policy is that divested assets will remain in the relevant market and assist a firm other than the merging parties to compete for sales, it is worth knowing whether the purchaser succeeded in using the assets to accomplish any sales. If the answer to this question is "no" in more than a trivial number of circumstances, the agency needs to rethink its assumptions about the efficacy of its merger control policy. If the answer is typically "yes," it is still helpful to know what makes for a successful divestiture and to use that knowledge to improve merger solutions in the future.

Perhaps the greatest limitation of the FTC study is its cursory description of the criterion used to measure the success of the purchaser in deploying the divested assets. The FTC reported that of the 37 divestitures it studied, "28 appear to have resulted in viable operations in the relevant market" (FTC 1999; 10). The FTC added that in each of the 28 successful cases, "the approved buyer acquired the assets, began operations, and was operating in the relevant market within a reasonable time" (FTC 1999; 10). The FTC study did not specify what practical test it used in deciding whether a firm had engaged in "viable operations" – a term that might encompass a single sale in the relevant market or thousands of sales.

The experience of DG Comp, OFT, FTC, and other agencies underscores several important elements of effective process-oriented review. Two characteristics stand out. The first is the importance for the competition agency of stepping back and undertaking a deliberate, comprehensive assessment of the efficacy of specific programs or procedures. A meaningful review of an agency's practices cannot be done in a half-hearted manner. In all instances, the competition agency in question was willing to devote some of its best human resources to examine selected areas of operation and to suggest improvements. A second, closely-related characteristic is the role that comparative study has played in suggesting paths for reform. Benchmarking across jurisdictions served to illuminate operational or programmatic alternatives and supplied an experience base with which to assess the qualities of such alternatives.

### *4.3.2 Process-Oriented Evaluations by Multinational Bodies*

The peer review exercises described in Section 4.1.4 above have provided an important means for process-oriented evaluation. The positive reaction to peer review projects that international organisations have received from their members and affiliates suggests that competition agencies would welcome greater efforts by the larger, global multinational bodies (e.g., the International Competition Network, OECD, UNCTAD) to focus more attention on issues of agency management and operations. Among many competition agencies, there appears to be a keen desire to meet with peer institutions to discuss, analyse, and benchmark each other with respect to basic operational matters. Important focal points for such engagements might include the process for developing an agency-wide strategic plan, the optimal approach for organising the agency's staff (along functional lines? by sector? with an independent unit for economists?), the design of internal quality control measures, the relationship of the legal services department to case-handling units, and the best way to coordinate activities with other government bodies, such as sectoral regulators, with substantive portfolios that overlap the portfolio of the competition agency.

In multinational gatherings, the extensive attention given to the question of *what* competition agencies should do (give top priority to prosecuting cartels? apply a dominance test or a substantial lessening of competition standard in merger control?) has tended to overshadow the equally important question of *how* they should do it. In the formal meeting rooms, delegates often discuss whether one analytical concept is

superior to another. In the conversations during breaks, meals, or social gatherings, the delegates frequently ask each other how their home agencies decide what to do and press for practical details about how common administrative tasks are carried out. There is considerable room for multinational bodies to serve their members interests by putting questions of management and internal procedure on the agenda more frequently and prominently.

### *4.3.3 The OECD Performance Management Initiative*

One particularly noteworthy initiative by a multinational body to improve performance measurement is the OECD Competition Committee's recently established Institutional Assessment and Development Project. The OECD project seeks to use lessons from performance measurement experience in private and public institutions in recent decades to prepare an instrument for assessing the quality of internal management and procedures of competition authorities and for indicating areas for improvement. As tested in various public and private settings, the key steps of the performance management methodology are (1) the articulation of the "core principles" of the organisation to be studied, (2) selecting types of behaviour that indicate whether the organisation is adhering to the core principles, (3) creating an internal assessment procedure that uses the behavioural criteria to measure the organisation's operations, (4) conducting an assessment of the organisation, focusing mainly on the organisation's managers but also involving consultation in some instances with external experts, (5) using the results of the assessment to improve the structure or decision making processes of the organisation, and (6) repeating the assessment on a regular basis for evaluate the implementation of reforms and to identify further areas for improvement.

To adapt this framework to the assessment of competition agencies, OECD consulted various individuals ("key informants") with expertise in the operations of competition agencies to identify the operational characteristics of successful competition agencies and prepared an assessment instrument (principally, a questionnaire) to apply to individual competition agencies. The aim of the project is to develop a methodology that competition agencies can apply systematically to evaluate existing procedures on a continuing basis over time and to incorporate the results of each inquiry into the formulation and execution of reforms. The project seeks to develop an empirically based foundation for competition agencies to raise the quality of their management and operational routines.

Two potential contributions of the project deserve emphasis. First, the very effort to identify the "core principles" and key behavioural characteristics could provide valuable insights into what separates a "good" or "superior" competition agency from a merely adequate institution.[78] Views about the quality of competition agencies often are based on idiosyncratic impressions about the volume and type of an agency's outputs – mainly the prosecution of cases. The initiation and litigation of cases provide readily observable events for analysis by academics, practitioners, and journalists. To a large degree, enforcement actions – especially "big" cases involving easily recognised respondents – commonly are assumed to be the proper measure of what a government agency has done (Kovacic 2003).

In critical respects, the case-centric vision of competition policy is unduly narrow. Taken on its own terms, the case-centric perspective gives excessive weight to spectacular matters involving easily recognised respondents and routinely undervalues the "small" case that can make "big" law (Muris 2003a). By lauding the enforcement official who files the enforcement action, the case-centric view of competition policy tends to overlook to what the cases actually accomplished. This is the equivalent of measuring an airline's quality by the number and size of departing flights without devoting equal attention to how, when, and where the airplanes descend to earth.

Equally serious weaknesses of case-centrism are its disregard for non-litigation policy instruments and its indifference to investments in institutional capability that is vital to successful policymaking. Case-

centrism treats advocacy – for example, the filing of comments on proposed legislation or administrative regulations – as a feeble substitute for prosecuting cases. Nor does case-centrism respect an agency's commitment to build that intellectual capital that informs the choice and execution of litigation and non-litigation interventions, alike.

The antidote to case-centrism is a better awareness of the determinants of effective competition policy. Recent developments in the academic literature and public policy display a growing recognition of the role that institutional design and capability play in shaping the quality of government competition programs (Kovacic 2001; Muris 2003b). A virtue of the OECD assessment project is its recognition that the "outputs" of competition agencies do not generate spontaneously. Instead, outputs come into being only through a combination of managerial choices and operational procedures. Projects that encourage agencies to strengthen the quality of inputs have true promise to raise the quality of outputs. Over time, good technique tends to beget good results.

The project second potential contribution of the project is to create and assemble a substantial base of knowledge about how competition agencies might best answer basic, recurring questions about how to structure, manage, and operate an institution. The creation and refinement of a commonly accepted standard for process-oriented evaluation would facilitate the analysis of individual jurisdictions and permit extensive comparisons across jurisdictions. If the project ultimately engages a large number of competition agencies, each participant will have a common frame of reference with which to discuss key operational and organisation issues with its peers and a large base of experience with which to inform its own decisions.

In January 2005, the competition agency of Portugal agreed with OECD that Portugal would serve as the jurisdiction for prototyping the project. From January through April, representatives of the OECD collaborated with the Portuguese Competition Authority in applying the assessment tool. An initial summary of the results of the project will be presented by Paul Maylon, an OECD consultant and a principal architect of the project, and officials from the Portuguese Competition Authority at the June 2005 Evaluation Roundtable of the OECD and at later meetings in the coming twelve months of the Latin American Competition Forum and the Global Forum on Competition .

## 5. Constructing A Methodology for Conducting Performance Evaluations

This section proposes methodologies that competition agencies might consider in using ex post assessments to derive insights about the substance and process of policymaking.[79] It is worth acknowledging at the outset the reasons why competition agencies might be disinclined to spend resources in evaluating the effects of completed interventions or operational procedures. An evaluation might not find that the agency has achieved favourable results. For example, the evaluation might reveal that specific enforcement initiatives either had no effect or yielded perverse results. A competition agency understandably might hesitate to undertake research that casts doubt upon the wisdom of its past actions and, perhaps, raises questions about current enforcement programs.

As suggested above, concern that the application of performance measurement techniques might unmask, and possibly make transparent to external observers, an agency's miscalculations about the value of specific interventions is not a sound basis for dispensing with evaluation. There may be instances in which a government agency properly might withhold information about frailties or vulnerabilities in its operations out of concern that disclosure might assist outsiders in frustrating the attainment of important national goals.[80] Competition policy, by contrast, is more likely a field in which fuller disclosure and analysis of outcomes will stimulate public discussion that serves over time to improve the quality of competition policy. The social benefit of performance measurement in correcting enforcement or process

weaknesses or channelling resources toward activities with the strongest contributions toward improving consumer welfare outweigh the immediate costs of reputational discomfort to the competition agency.

A second possible impediment to developing and applying performance measurement techniques is expense. To fund evaluations, a competition agency must spend resources that otherwise might be made available for the development of new cases and for the fulfilment of mandates, such as the review of proposed mergers, imposed by law. As discussed in Section 2 above, expenditures for evaluation help insure that outlays for substantive programs are well spent. Evaluation helps inform the competition agency's decision about what to do next – just as navigation informs a captain's judgment about how to handle a ship. Without some dedication of resources to ex post evaluation, it is doubtful that a competition agency can have confidence that its enforcement programs are achieving appropriate ends, especially where the initiative in question (such as the proper approach to merger analysis in technologically dynamic sectors) can rely heavily on untested intuitions about the effects of intervention. Even where there is broad consensus about the social value of applying the substantive command (e.g., a prohibition against supplier cartels), ex post evaluation can identify ways in which a competition agency can improve its enforcement of the command. For these reasons, a routine allotment of funds for evaluation activities should be part of the competition agency's annual budget.

A third and more serious obstacle involves the design of the performance measurement process. Evaluating the effects of individual prosecutorial decisions can present difficult measurement and data collection issues. To decide that an agency ought to assess the quality of its organisation and operational procedures does not indicate exactly how the assessment should be performed.

One response to this concern is that even simple analytical models supported by limited data promise to provide a more confident basis for policymaking than many competition authorities currently possess. The exercises undertaken by the European Union and the United States to evaluate the implementation of merger remedies in one sense have involved relatively simply analytical techniques. The agencies have not sought in these exercises to measure the actual competitive impact of divestitures. Instead, DG Comp and the FTC have employed simple but informative methods to test their assumptions about the likelihood that a purchaser of divested assets would deploy those assets to compete in the relevant market. The effort to determine whether divested assets remained in the market and were used to compete against the merging parties gave the competition agencies considerable valuable information about the design of future merger remedies.

The balance of this Section provides a second response to concerns about methodology by proposing approaches that competition agencies might take to design new performance measurement systems or to enhance existing programs for ex post evaluation. The section analyses methodology issues that affect the design of case-specific evaluations and process-oriented evaluations, alike, and highlights concerns that relate specifically to each form of performance measurement.

### *5.1 Constructing an Evaluation Methodology*

A competition agency considering the establishment or enhancement of a performance measurement system faces at least three basic methodological issues. First, how should it go about framing methodological options and identifying superior evaluation techniques? Second, should the agency use its own employees to conduct the evaluation exercise, or should it enlist the participation of outsiders? Third, should the agency disclose the results of its evaluation exercises only to its own personnel, or should the outcome of the assessments be made available in some form to audiences outside the agency? Each issue is considered below.

### *5.1.1 Choosing A Process for Designing a Performance Measurement Methodology*

The process for designing a case-specific or process-oriented performance methodology should involve contributions from competition policy insiders and outsiders. Agencies should envision the planning process as having four elements, described below.

*Preliminary Discussions within the Competition Agency*. The first step should be internal discussions involving the competition agency's management team to establish a consensus, in principle, for carrying out a performance measurement exercise and to identify a bureau within the agency that will be responsible for measurement projects. Many agencies have found that an appropriate location for this responsibility is an office dedicated largely to policy analysis functions. The initial intramural discussions should be informed by the agency's own initial reading of the literature on performance measurement for competition agencies. A policy office within the competition agency is a natural candidate to perform the literature survey.

*Consultations with Expert Outsiders*. The second key step in designing a methodology is the consultation of expert outsiders. This can be done in a variety of ways. One approach tested in a number of jurisdictions is for the agency to consult a relatively small group of expert outsiders, who are chosen for their familiarity with the issues posed by the form of evaluation the agency has in mind. In planning a case-specific evaluation project, the agency would want to consult industrial organisation economists with experience in doing empirical work. This was the methodology that the FTC followed when it gave contracts to Richard Caves and Ben Klein in the late 1970s to draft protocols to guide its assessment of vertical restraints and abuse of dominance cases. In preparing a process-oriented review, the agency would seek advice from experts who are intimately familiar with the management and operation of a competition agency, as well as experts with extensive experience in conducting performance management reviews for public or private institutions.

A second repository of external expertise that ought to be tapped in this initial exploratory phase of planning is other competition authorities. As suggested in this background paper, competition agencies have accumulated valuable experience with performance measurement. Discussions with competition agency officials who have conducting such evaluations are a valuable, necessary element of initial preparation. The materials contained in this background paper and the country contributions to be presented at the OECD session provide a starting place to identify the relevant competition agency personnel.

A third source of expertise external to the competition agency consists of other government institutions with experience in performance measurement. Increased concern in recent decades with improving the performance of public agencies has generated a number of innovations for assessing the quality of agency management systems and specific substantive outputs (Kusek & Rist 2004; 1-38). Within any single jurisdiction, a variety of government agencies other than bodies traditionally associated with auditing functions may have valuable experience in designing evaluation programs. This foregoing approach to planning a performance measure exercise, which emphasises consultations with a comparatively small number of advisors, can be carried out in a relatively quiet and non-public manner. A competition agency might prefer to begin with this low-key approach as a means of identifying possibilities best suited to its own circumstances and resources. This initial consultation phase by itself may provide the agency with a confident basis for launching the evaluation exercise without further steps to identify and vet options for performance measurement.[81]

A competition agency could decide to engage in a more elaborate planning process that supplements the low-key, non-public consultation between competition agency staff and small numbers of expert outsiders. The more elaborate process could include issuing a preliminary project description or work plan

or simply posing methodology issues for public comment. A still more robust form of public involvement would be to host a public conference, seminar, or workshop to gather the views of academics, practitioners, business officials, consumer groups, and other government officials about the appropriate design and substantive focus of an evaluation exercise. Where the competition agency is uncertain about the resolution of technical issues, the public workshops also can be an occasion for eliciting commentary about the results of previous efforts by competition agencies to conduct performance assessments.

*Budgeting*. The initial planning phase is an appropriate occasion to begin formulating a budget for the evaluation exercise. For the better funded competition agencies, good practice would dictate that some funds be earmarked annually for performance measurement. For the reasons described earlier in this paper, the agency should progress toward a norm that encourages the inclusion of some outlays for performance measurement in each budget cycle.

For poorly funded agencies that are struggling unsuccessfully to satisfy even the most urgent immediate operational needs, two possibilities come to mind. One is to rely on regional cooperation and regional associations to serve as focal points for the planning and, possibly, the execution of performance measurement exercises. This is one of a number of areas in which regional bodies can facilitate the pursuit of institution-building projects that might exceed the capabilities of any single competition agency. A second approach is to approach donor agencies to seek subsidies for evaluation exercises. In recent years, national and multinational donors have given increased attention to performance measurement, and there is reason to believe that requests by competition agencies would not simply be brushed aside.

*Identifying Restrictions on the Use and Dissemination of Confidential Records*. The initial planning process should address restrictions on the use of confidential data – proprietary business records in the possession of the competition agency and the confidential work product (e.g., memoranda prepared by professional staff and sensitive internal decision making records) of the competition agency itself – in the performance management exercise. Most, if not all, competition agencies will need to consider whether and with what conditions confidential records can be provided to agency outsiders who will participate in the evaluation exercises, and what restrictions must be observed in any public release of the results of an evaluation exercise. A further issue for some jurisdictions is whether the work product of the evaluation exercise itself must be revealed pursuant to the disclosure requirements of various public records statutes. For these and related questions, the initial process of planning an evaluation program ordinarily draws upon the advice of the legal services department of the competition agency.

Experience in individual jurisdictions is likely to vary, but some general observations about the treatment of confidential records are possible. Most jurisdictions have mechanisms for permitting outside experts to gain access to confidential records upon signing nondisclosure agreements. The typical nondisclosure agreement forbids the outsider to reveal confidential information to specified categories of individuals, unless the competition agency expressly authorises the disclosure. The nondisclosure agreement also permits academics and other commentators to write about the project, but requires that the author give the competition agency drafts of manuscripts to ensure that confidential information has not been disclosed. Competition agencies that have published their own reports or papers on evaluation exercises also have found effective mechanisms to supply informative accounts of their results without disclosing business or other information that must be kept secret.

Issues concerning the preservation of confidential data are another area in which competition agencies have assembled considerable experience. An agency planning its first evaluation exercise can consult its peer organisations for advice about how to manage the flow of information used in and generated by an evaluation program. It is quite likely that agencies experienced in performing evaluation exercises can provide templates of nondisclosure agreements or supply descriptions of safeguards used to ensure that confidentiality obligations are observed.

### *5.1.2 Conducting Ex Post Assessments: Using Insiders, Outsiders, or Both*

One evaluation methodology would rely solely on the competition agency's own personnel to conduct evaluations. The agency would establish a process for its own personnel to select completed enforcement initiatives (both litigated cases and consent agreements) or operational procedures and analyse their quality. For example, a case-specific evaluation would consist of having agency personnel review specific enforcement episodes in detail, studying the deliberative processes that led to the agency's intervention, interviewing those involved in the decision to prosecute, and collecting data on effects, such as by consulting customers or competitors of the respondents. Internal self-evaluation could be performed as a collaborative effort involving case handlers, economic units, and policy bodies.

As suggested above, there are considerable advantages in engaging the talents of expert outsiders in performing assessments and not simply in the design of the measurement process. When they conduct or contribute to the actual assessment, an outsider can provide an expert perspective that the agency itself does not possess and can make the assessment more objective by bringing a presumably neutral point of view to the exercise. The outsiders could be non-government employees working under contract to the antitrust agencies, or could be employees of government institutions, such as national audit offices that occasionally examine competition agencies.

The level of participation by outsiders could range from more expansive forms of involvement, such as performing case studies, to more limited contributions such as offering comments on studies prepared by agency insiders. Compared to relying solely on insiders, participation by outsiders also is likely to increase the credibility of the evaluation exercise in the eyes of external groups. Even if an audit is not made public in any form, the agency probably will obtain a more meaningful perspective on its work if it engages outsiders on a confidential basis to participate in preparing the audit or commenting on reports that present the results.

One recent example that warrants attention by competition agencies is the IRDC project mentioned in Section 3.6 above. In this project, the Government of Canada is funding research by scholars in seven developing countries[82] to identify and analyse factors that impede competition in the private sector of their economies. One important dimension of the IRDC study is the examination of how interventions by competition policy agencies in these countries have affected economic performance. To perform the country studies, the IRDC project director (Simon Evenett) has recruited a team of scholars in each developing country. Drafts of some country studies have been completed,[83] and the project's aim is to make the studies and data sets assembled to perform the studies available to other scholars and analysts.

One could imagine a collaboration in which a competition agency canvassed existing case-specific evaluation research within its own borders and sought to form a partnership with the organisation conducting the research. For existing or proposed projects of this type, the competition agency might offer its cooperation to the outside researchers, including access to agency personnel and discussions about publicly available information of which the outside researchers might not be aware. A still less drastic form of productive involvement would have the competition agency host or participate in conferences in which the results of such research are presented.

### *5.1.3 Disclosure of Results*

One disclosure technique would have the results of ex post assessments revealed solely to enforcement agency personnel. For some competition policy agency insiders, this approach is likely to seem to be the least threatening form of evaluation. If the findings are negative, only the agency will be aware of them.[84] An evaluation program which the competition agency performs assessments but limits disclosure of the results to its own personnel is considerably better than no evaluation system at all. Even

if an agency is unwilling to reveal evaluation results to outsiders, its chances of identifying and correcting flaws in case selection and procedure are likely to improve if it engages in a purely intramural exercise of candid self-assessment. As the agency uses and applies its internal evaluation methodology, it may become more comfortable over time in revealing at least some information about its assessments to outsiders.

The alternative to purely in-house distribution is to make evaluation results public in some form. The competition authority could issue public versions of the evaluations that delete references to sensitive information, such as confidential business data or material that discloses enforcement intentions regarding pending matters. A general presumption favouring public disclosure is warranted as a means of improving the substance and perceived legitimacy of a competition policy program, as well as the rigor of internal decision making. Even limited forms of public disclosure can elicit useful suggestions from outsiders about improvements in the choice of interventions and procedure.

By its willingness to subject its operations and decisions to public discussion, the competition agency can increase public confidence in the competition policy system. The knowledge that the agency will engage in future public discussion about assessments of its work could supply additional motivation to agency managers and professional staff to carry out their responsibilities conscientiously.

Here it is useful to consider, again, the experience of the FTC with its study of merger remedies in the 1990s. The FTC divestiture study underscores the benefits of public disclosure (U.S. FTC 1999). As noted above in Section 4.3.1, the merger remedies study was conducted by FTC attorneys and economists, who consulted an outside academic about the design and execution of the inquiry. After deleting references to confidential, non-public information, the agency released the study to the public. The FTC remedies study was both informative and influential. Had the FTC chosen to conduct the study internally and make no public disclosure of its results, the exercise unmistakably would have been valuable for what it told the FTC about needed improvements in the design of remedies. It is also clear that publication of the results stimulated a useful public debate about merger remedies and served to inform other competition agencies about how to improve merger control.

As a technique for disseminating the results of case studies and evaluations, competition policy agencies might commit themselves to engage in the detailed public analysis of specific cases or internal procedures that have been the subject of analysis by agency insiders or outsiders. Discussions of individual cases and of internal procedures that engage enforcement officials, private practitioners, business operators, and academics would increase understanding of the motivations for and consequences of individual enforcement decisions and agency procedures. Whether conducted in seminars, workshops, or conferences, the public give-and-take provides useful feedback to the competition agency and stimulates thinking about evaluation among external constituencies. From experience with discussion and debate between competition agencies and external groups concerning issues of doctrine and enforcement policy, there is good reason to expect that a dialogue on matters relating to performance management would yields improvements in agency case selection and management.[85]

### *5.2 Special Considerations for Process-Oriented Performance Measurement*

The central task for applying a process-oriented evaluation methodology is to define what constitutes good internal agency procedures. Presented below is the suggested beginning of a list of good practice characteristics by which the quality of a competition agency's management techniques and procedures might be tested.[86]

*Mechanism for Strategic Planning*. To be effective, a competition agency, be it old or new, must have a conscious process for setting goals and planning steps to accomplish them. To do otherwise is to be the

passive captive of external demands, whether in the form of complaints from consumers or business operators, or requests for action by public bodies such as legislatures or government ministries. Even the most humbly funded competition agency must develop a strategic plan that defines what it will seek to achieve in the coming year or series of years.

*Maintenance and Disclosure of Data Bases*. Each competition agency should prepare and provide a full statistical profile of its enforcement activity. Good data bases are indispensable to the tracking and analysis of an agency's activities over time. Despite their importance to performance measurement, the maintenance and public disclosure of comprehensive, informative data bases on enforcement are relatively uncommon for competition policy agencies. Every authority should take the seemingly pedestrian but often neglected step of developing and making publicly available a data base that (a) reports each case initiated, (b) provides the subsequent procedural and decisional history of the case, and (c) assembles aggregate statistics each year by type of case. Each agency should develop and apply a classification scheme that permits its own staff and external observers to see how many matters of a given type the agency has initiated and to know the identity of specific matters included in category of enforcement activity.

Among other ends, a current and historically complete enforcement data base would promote better understanding and analysis, inside and outside the agency, of trends in enforcement activity.[87] For example, access to such data bases would give competition agencies greater ability to benchmark their operations with their peers. For poorly funded institutions, this is another area in which regional or global organisations can make immediate, major contributions.

*Explanation of Actions Taken and Not Taken*. Competition agencies should take measures to progress toward a norm that favours explanations for all important decisions to prosecute or not to prosecute. One might define as "important" any matter in which a competition authority conducts an elaborate inquiry. The norm suggested here would dictate that the agency seek as often as possible to explain why it decided not to intervene following an extensive investigation.

*Assessment of Human Capital*. Continuous institutional improvement requires a competition agency to regularly evaluate its human capital. The capacity of an agency's staff deeply influences what it can accomplish. An agency routinely must examine the fit between its activities and the expertise of its professionals. Has the agency developed a systematic training regimen for upgrading the skills of agency professionals? If the agency is active in areas such as intellectual property that require special expertise, has it acquired the requisite specialised skills – for example, by hiring some patent attorneys? Do government statutes and regulations that control public sector employment permit the agency to recruit needed expertise in a timely manner?

*Investments in Competition Policy R & D*. An essential element of continuous institutional improvement is the enhancement of the competition agency's knowledge base. In many activities, particularly in conducting advocacy, the effectiveness of competition agencies depends on establishing intellectual leadership. To generate good ideas and demonstrate the empirical soundness of specific policy recommendations, competition authorities must invest resources in "competition policy research and development."[88] Regular outlays for research and analysis serve to address the recurring criticism that competition policy lags unacceptably in understanding the commercial phenomena it seeks to address.

*Recognition of Policymaking Interdependencies*. Efforts to formulate effective competition policy increasingly will require competition agencies to study more closely how other government institutions affect the competitive process. Many jurisdictions resemble a policymaking archipelago in which various government bodies other than the competition agency deeply influence the state of competition. Too often

each policy island in the archipelago acts in relative isolation, with a terribly incomplete awareness of how its behaviour affects the entire archipelago.

It is ever more apparent that competition agencies must use non-litigation policy instruments to build the intellectual and policy infrastructure that connects the islands and engenders a government-wide ethic that promotes competition. To build this infrastructure requires competition authorities to make efforts to identify and understand the relevant interdependencies and to build relationships with other public instrumentalities. In a number of instances, the study of collateral government policies will reveal how existing and proposed forms of public intervention impede competition. The capacity to study and document the effects of such impediments and to undertake advocacy initiatives to correct them will be important elements of an agency's program. On the report card by which we measure competition agencies, the suppression of harmful public intervention should count just as heavily as the prosecution of a case that forestalls a private restraint

*Benefits of Comparative Study*. As suggested above, comparative study can play an informative tool for individual competition agencies to improve performance.[89] No competition agency should consider adjustments in its own organisation, procedures, or management techniques without examining experience abroad. Whatever the issue may be (for example, analytical methodology, investigative techniques, personnel policy, or advocacy), foreign practice frequently has much to teach any competition authority.[90]

The degree of attentiveness to and analysis of relevant foreign experience should be one criterion by which a competition agency's internal procedures are evaluated. The ready availability in electronic form of foreign materials concerning many elements of competition agency enforcement and operations facilitates the comparative analysis contemplated here. Multinational organisations can spur this process by creating databases that describe and collect the results of evaluation projects carried out within individual jurisdictions.

### *5.3 Special Considerations in Case-Specific Evaluations*

Past experience with the evaluation of specific competition agency interventions suggests considerations that agencies should take into account in carrying out the evaluation of cases or other actions.

*Reviewing a Collection of Matters Rather than Analysing Single Cases*. An agency may learn more about its selection of cases or other inventions if it studies several related matters rather than focusing on a single intervention. For example, the FTC's study of vertical restraints cases in the late 1970s and early 1980s examined a range of matters within individual industries to develop a more general sense of the impact of its resale price maintenance and nonprice vertical restraints enforcement program. It may not always be possible to study several matters of a specific type, and, as the FTC-sponsored study of the Xerox abuse of dominance settlement shows, the study of an individual case can be highly useful. Nonetheless, the design of a case-specific evaluation project should consider the possibility of studying two or more matters of a specific type.

*Understanding Enforcement Choices in Context*. Good case studies demand the skills of the historian and political scientist no less than the skills of an economist.[91] Researchers conducting case studies should be pressed to account for the context that motivated the decision to prosecute. In addition to evaluating consequences ex post, a good case study should seek to recreate as much as possible the ex ante assumptions that guided the agency's decision to intervene. This is particularly true for interventions that turn out to be ineffective or in some sense counterproductive. Agencies seldom engage in unsuccessful endeavours because they enjoy failure or take pleasure in retarding social progress.

Commentators sometimes are fond of attributing the failure of an agency's substantive interventions to the irrationality, primitiveness, or general perversity of its incumbent decision makers. This explanation often is a mistaken, intellectually lazy answer to the question of why agencies fail. It ducks the harder, perplexing question of why intelligent individuals made choices that prove to be seriously ill-conceived. As one scholar has made the point, "[i]ndividual regulatory experiments and episodes must be judged against a standard true to the particular historical moment" (McCraw 1984; 308).

A case study may reveal that an agency made a faulty decision because it relied upon the wrong analytical model despite the availability of better models. One part of the researcher's task is to explain why the agency persisted in embracing the flawed model and neglected superior alternatives. The researcher should be pressed to suggest what types of institutional adjustments might serve in the future to avoid being trapped on the wrong path. This type of analysis is possible only if the researcher declines to build and demolish a strawman and instead takes the ideas and institutional influences that guided the competition agency at the time of the decision to prosecute on their own terms.

*Sensitivity to Institutional Capabilities and Long-Term Consequences*. One factor for the assessment of a decision to intervene is the care with which a competition agency avoided serious mismatches between its institutional capability and the analytical demands posed by the case. In some sense, a public institution always will be forced to run at a level above its capacity. There is a difference between trying to operate at 105 percent of capacity and at 200 percent of capacity. The first condition is manageable. The second is a formula for failure. Sensitivity to the longer term institutional demands associated with initiating a new matter and effort to achieve a rough match between commitments and capability ensure that incumbent managers do not impose significant negative externalities on successors and on their agencies as a whole.

### *5.3.1 Case-Specific Evaluations: Building Mandates into Settlement Decrees*

Courts sometimes have played an important role in promoting efforts to assess the results of relief obtained in settlements. Since 1974, the federal district courts have been required to approve antitrust settlements in cases prosecuted by the Justice Department.[92] One provision of the settlement approved by Judge Harold Greene to resolve the government's monopolisation claims in *United States v. AT&T Co.*[93] required periodic evaluations of the efficacy of the relief negotiated between AT&T and DOJ.[94] This requirement generated informative assessments of the effects of the AT&T divestiture and analyses of the need for continuing restrictions on the business operations of the successors to the Bell Telephone system (*see, e.g.*, Huber 1987).

The evaluation mandated by Judge Greene in *AT&T* in some ways resembled a command that Judge Charles Wyzanski incorporated in the decree issued at the close of the Justice Department's monopolisation case in *United States v. United Shoe Machinery Corp*.[95] After finding that United Shoe had engaged in illegal monopolisation, Judge Wyzanski imposed a collection of controls on the defendant's future conduct. Paragraph 18 of the decree provided that ten years after the decree's effective date "both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition."[96] In the mid-1960s, Judge Wyzanski conducted the review contemplated in the 1953 decree.[97]

The settlement in *AT&T* and the decree in *United Shoe* provide models that enforcement agencies and courts might adopt for other antitrust settlements. To ensure that the consequences of settlements (especially provisions of uncertain effect) receive subsequence scrutiny, an enforcement agency or a court could mandate periodic review of their effects. Where settlements are not subject to judicial approval, the competition agency might use its administrative discretion to incorporate mandatory assessment provisions in at least a sample of its orders. The certainty of occasional ex post review would add discipline to the

negotiation of settlement terms and increase the empirical foundation for designing antitrust remedies in the future.

## 6. Conclusion

In 1940, two prominent commentators, Walton Hamilton and Irene Till, authored a gloomy assessment of the first 50 years of experience with antitrust enforcement in the United States. The two scholars observed that "[t]he Sherman Act has been called a 'charter of freedom' for American industry. Why has it not been a success?" (Hamilton & Till, 1940; 4). Among other findings, they concluded that future improvements would require the correction of various institutional flaws of the U.S. competition agencies. In particular, Hamilton and Till criticised what they believed to be the competition agencies' preoccupation with bringing the next case without the benefit of an internal management system that selected matters on the basis of continuing industry analysis, used such analysis to frame effective remedies, and monitored results (id., at 30-35).

Competition agencies have evolved considerably, and have accomplished a great deal, since Hamilton and Till reviewed U.S. experience 65 years ago. Despite the passage of time, their emphasis on the importance of sound institutional design and operations as keys to the substantive success of competition agencies rings true today. In discussions of competition policy, there is a natural tendency to focus on current issues of doctrine and enforcement policy. These issues, after all, often have an immediate and powerful intellectual appeal. Amid discussions about the pressing substantive issues of the moment, it is easy to lose sight of the practical questions that beset efforts to formulate and execute competition policy programs. How should an agency set priorities? What is the best way to organise the investigation and litigation of cases? Which internal quality control mechanisms work best?

The exercises of preparing performance measures and conducting evaluations provide valuable tools for answering these critical questions about the administration of competition policy. The assessment of outcomes of substantive interventions can generate useful information about such basic matters as the choice of cases and the design of remedies. The routine evaluation of internal procedures supplies regular opportunities to determine whether the agency's organisational infrastructure and management techniques put the competition authority in the best possible position to select promising substantive initiatives and bring them to a successful close. A competition policy system is only as good as the institutions entrusted with implementation.[98] By emphasising internal review and improvement, a competition agency puts proper emphasis on the expansion of its knowledge base and institution-building as indispensable predicates to success.

Evaluations may indicate needed adjustments in the competition agency's statutory authority. In recent decades, many competition authorities have sought and obtained important enhancements in the framework of laws, and there is every reason to believe that a key to effectiveness over time will be the installation of periodic upgrades to account for past experience and new conditions.[99] A program of performance measurement and evaluation can supply a better empirical foundation for designing and justifying needed changes.

Evaluation promises to play a larger role that extends well beyond a competition authority's intramural decisions about case selection and management. The legitimacy of government efforts to enforce competition policy commands depends substantially on the ability of competition policy authorities to demonstrate to a variety of external observers – for example, legislators, business managers, and the public at large – that chosen forms of intervention to curb restraints on business rivalry improve economic performance. Neither the intuitions of public enforcement officials nor the hypotheses of academic theorists are likely to provide a confident basis for outsiders to conclude that the government agency has selected the correct mix of policies or chosen the ideal procedures to execute programs.

Competition policy institutions face a continuing need to justify their value, and one cannot expect critical observers to be satisfied solely with the unsubstantiated assurances of efficacy.[100]

Larger multinational bodies such as ICN, OECD, and UNCTAD and smaller regional associations have taken promising steps to promote the formulation and application of performance measures. Case seminars and peer review exercises have provided important sources of evaluation, and the regular meetings of these bodies have supplied useful venues for individual agencies to share know-how (for example, on the design of merger remedies) about the results of their own evaluation efforts. Considerable work remains to be done to encourage acceptance by competition agencies of a norm that treats evaluation as a vital tool for ensuring that government competition programs achieve desired ends. In the past, the evaluation initiatives of the major international competition policy institutions have focused on performing evaluations for their members. The focus for the future has to shift more toward projects that assist and prod competition agencies to devise and apply their own performance measurement methodology.

Ex post evaluation of results is important for all institutions, but it is especially critical for competition agencies. Competition policy relies heavily on experimentation and evolutionary adjustment to ensure that doctrine and enforcement policy make defensible distinctions between benign and dangerous commercial practices. Even for the most experienced and self-assured competition agency, competition policy is a work in progress, and performance measurement provides a vital element of the process by which agencies test new techniques and adapt proven methods to new circumstances. The aphorism often applied to the growth of individuals rings true in this field of public policy: It is what you learn after you know it all that really counts.

## NOTES

1. When confronted with arguments advanced solely on the basis of theory or assumptions lacking empirical support, one of my former colleagues (David Hyman) at the Federal Trade Commission would observe: "In God we trust. All others provide data."

2. *See* Report from Officialdom (2000: 593, 594-95) (comments of Robert Pitofsky; stating that "unexamined enforcement policy is not an appropriate way to proceed" and observing that antitrust agencies "virtually have an obligation, not just to enforce the law, but to take a look at the consequences of our enforcement").

3. *See* Kusek & Rist (2004) (discussing importance of results-oriented evaluation to effective public administration); Wilson (1989; 373-75) (describing policy benefits of having government bodies evaluate results of their programs).

4. *Compare* U.S. General Accounting Office (1980; 12) ("Neither the [U.S.] FTC nor the Antitrust Division has in the past placed a high priority on evaluating enforcement activities to assure that resources are effectively employed."); Lipsky (1995; 7) ("Retrospective research on the accuracy of the economic predictions underlying previous antitrust decisions is also extremely rare. When the Commission or a court strikes down a merger, for example, it seldom attempts to quantify either the efficiencies or the price increases that might result from a decision for or against the transaction.").

5. Neustadt & May (1986; 252-53). Professors Neustadt and May observe that this type of thinking "is a special style of approaching choices, more the planner's or the long-term program manager's than the lawyer's or judge's or consultant's or trouble-shooter's . . . ." Id.

6. One widely-taught example is the effort by De Havilland to determine the cause of crashes in the early 1950s of the world's first commercial jet airliner, the Comet. De Havilland conducted extensive research on a Comet in its inventory, identified a latent design flaw that caused the crashes, and made the results of its research available to the world's aviation community. *See* Williams (2000; 15-16). De Havilland's work in identifying the cause of the disasters and in publicizing the results of its evaluation facilitated significant improvements in the design of commercial jet transports.

7. In his recent treatment of one area of the business of sport, Lewis (2004; 241) quotes one observer as capturing the problems of an organization that cannot, or will not, develop good measures of performance: "[The sport franchise executives] aren't equipped to evaluate their own systems. They don't have the mechanism to let in the good and get rid of the bad. They either keep everything or get rid of everything, and they rarely do the latter.").

8. *See* Kovacic (2001; 805, 825-39) (reviewing how the U.S. FTC and the competition directorate of the European Commission analyzed the likely competitive effects of Boeing's acquisition of McDonnell Douglas amid conditions of technological dynamism and regulatory complexity).

9. The discussion of the experimental features of competition policy is based in part on Kovacic (2001b).

10. *See* Kovacic (2003; 472-76) (emphasizing cumulative nature of competition policy making and importance of experimentation as a source of learning for competition authorities).

11. The experimentation did not come to rest with the leniency reforms of the 1990s. It continues at a robust pace in many jurisdictions today. *See, e.g.*, Pate (2005; 18) (discussing rationale for U.S. reforms in 2004 that increased maximum criminal fines for Sherman Act violations and provided partial dispensation from treble damages for certain leniency applicants).

12. *See* General Motors Corp., 103 F.T.C. 374 (1984) (consent decree permitting General Motors and Toyota to participate in production joint venture, subject to various restrictions).

13. *See General Motors*, 104 F.T.C. at 391, 397 (dissenting statement of Commissioner Patricia Bailey):

> [I]f this joint venture between the world's first and third largest automobile companies does not violate the antitrust laws, what does the Commission think will? This is surely the question that potential joint venture partners will be asking themselves. In this decision, the Commission has swept another set of generally recognized antitrust principles into the dustbin, using again the incorporeal economic rhetoric that now dominates Commission decision-making. In this case, the decision results in the blessing of a business proposal that is both breathtaking in its audacity and mind-numbing in its implications for future joint ventures between leading U.S. firms and major foreign competitors that seek to lend a helping hand.

14. S*ee* Roos (1995) (describing how GM-Toyota joint venture led GM to adopt production and management innovations).

15. *Compare* Muris (2000) (criticizing FTC prosecution of Intel for abuse of dominance) *with* Balto & Nagata (2000) (defending FTC challenge to Intel). *See also* Vickers (2004) (discussing difficulties in devising general analytical tests for evaluating claims of improper exclusion).

16. The predictive element of merger control is evident in the laws or implementing regulations of many jurisdictions. For example, Section 7 of the U.S. Clayton Act bars mergers whose effect "may be substantially to lessen competition or to tend to create a monopoly." 15 U.S.C. § 18 (1998).

17. See FTC (1996; Ch. 1) (discussing analytical complexity arising from rapid industrial change induced by technological dynamism, globalization, and deregulation).

18. *See* Kovacic (2000; 1314) (describing how technological dynamism complicates design of antitrust remedies).

19. In his discussion of the remedy accepted by FTC in 1975 to resolve its monopolization case against Xerox; Willard Tom uses the language of experimentation. After recounting the origin of the remedy, Tom asks: "What are we to make of this naked, but apparently highly successful, experiment in social engineering?" Tom (2001; 979).

20. S*ee* Khemani & Dutz (1995; 28) (emphasizing importance of transparent decision making processes in formulating competition policy).

21. Weak transparency regimes can undermine the quality of public administration. *See* Stiglitz (1999; 40) ("Governments in many countries have a strong proclivity for secrecy. ... Secrecy provides more scope for the work of special interest groups, greater cover for corruption, and greater opportunities for hiding mistakes.").

22. *See* Waller (1998; 1408-17) (discussing how U.S. enforcement agencies often use settlements to resolve antitrust concerns); Symposium (1995; 4-27) (same).

23. *See* Blumenthal (1996; 15) (describing U.S. system for notification and review of proposed mergers); Venit & Kolasky (2000) (discussing U.S. and European Union merger review systems).

24. *See* Symposium (1997) (analyzing the importance of the premerger notification mechanism in identifying and resolving competitive concerns involving mergers and acquisitions).

25. *See* Leary (1995; 231-33, 236-40, 246-49) (recommending that U.S. FTC provide business community with more information about its merger enforcement decisions and the rationale for consent agreements); *compare* Bloom & Stack (1995; 2) (finding "need for greater transparency in the [U.S. FTC's] enforcement decisions relating to transactions involving pharmaceutical products that are under development"); Skitol (1995; 2) ("[T]here is a certain `black-magic' quality and lack of transparency about [U.S. FTC] decision-making, particularly about the conclusions reached on high-visibility, controversial transactions.").

26. *Compare* Sohn 1995; 12-13) (noting that previous U.S. federal antitrust enforcement concerning innovation markets has occurred "where the R&D overlap is a small part of a much larger transaction"; in such a context, "the parties have strong incentives to `fix' the problem quickly and go forward, irrespective of their assessment of the merits of the [U.S. FTC's] base. We may well continue to have enforcement by consent order without the important safeguard provided by the litigation alternative or even a vigorous defence at the enforcement agency level. In this context, it is particularly important that the Commission clearly set forth and consistently apply its enforcement principles.").

27. *See* Skitol (1995; 3) (proposing that the FTC, when publishing a proposed complaint and consent order, issue a fuller "analysis to aid public comment" that reveals the bases for the Commission's decision to intervene).

28. A third approach is to rely more upon the full litigation of cases to clarify and establish legal principles. On the benefits of litigation as a way to clarify antitrust doctrine, see Calkins (1998).

29. *See* Kovacic (1992) (describing congressional delegation of interpretational authority to the courts in the U.S. antitrust laws).

30. *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (describing U.S. Supreme Court's distinctive role under the antitrust laws "in recognizing and adapting to changed circumstances and the lessons of accumulated experience").

31. *See* Baker (2003) (discussing how economic learning is absorbed into antitrust jurisprudence and enforcement policy); Kovacic & Shapiro (2000) (describing influence of economic analysis on development of legal antitrust doctrines since 1890 in the United States).

32. *See* Carlton (2001; 680) ("[A]s the literature in economics shows, economists often take decades to understand certain business practices.").

33. *See State Oil*, 522 U.S. at 15-18 (reviewing how "a considerable body of scholarship discussing the effects of vertical restraints" influenced judicial reassessment of the per se ban on maximum resale price maintenance); *see also* Muris (2001; 903-07) (describing impact of developments in industrial organization economics on merger enforcement policy).

34. *See* Symposium (2001; 6-65) (reviewing developments in merger control in various national jurisdictions); Kovacic (1998) (examining opportunities for multiple review of mergers resulting from growth in number of competition policy systems in transition economies).

35. The decentralization of prosecutorial authority across public and private entities in the United States is unmatched. *See* Kovacic (2004).

36. *See* Kolasky (2001) (describing parallel review by U.S. Department of Justice and Federal Communications Commission of mergers in telecommunications sector). In a number of jurisdictions, government regulatory bodies not ordinarily considered to have a competition policy portfolio take decisions that significantly influence the competitive process and affect, at least indirectly, the programs of public competition

authorities. *See* U.S. Federal Trade Commission (2003) (discussing how process of granting patent rights in United States can affect competition); Kovacic & Reindl (2005 Forthcoming) (discussing how decisions of institutions that grant intellectual property rights can have major impact on competition).

37. S*ee* International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (2000; 3-18) (summarizing possible costs associated with multiple reviews of individual transactions conducted by national competition authorities and by different competition bodies within a single country).

38. For a representative collection of papers examining the outcomes of specific cases, see Symposium (2000); Symposium (2001b). For a detailed examination of the merger review process in one jurisdiction, see Sims & Herman (1997). For a detailed examination of enforcement programs in several nations in Central Europe, see Fingleton et al. (1995).

39. For example, efforts in the United States to establish mandatory notification requirements and waiting periods for proposed mergers drew heavily upon the research of Elzinga (1969).

40. For example, the United Kingdom's National Audit Office presently is engaged in a study of the effectiveness of the operations of the Office of Fair Trading.

41. The IRDC project is described by the program manager in Evenett (2004). The initial results of this project, presented in a workshop in Buenos Aires in March 2005, are very promising.

42. The FTC, for example, has information-gathering powers that could be used to collect data on the effects of specific enforcement measures. *See* 15 U.S.C. § 46 (1998) (provision granting FTC power to gather company data to perform economic studies).

43. *See* Fingleton et al. (1995; 171) (discussing competition policy enforcement in Visegrad countries; urging "greater evaluation and refinement of the criteria used in making decisions"); Guasch (1998) ("It is imperative that competition agencies ... periodically evaluate the impact (efficiency and distribution) of their decisions and widely disseminate their findings."); U.S. General Accounting Office (1980; 15) (recommending that the U.S. Attorney General ensure that the Antitrust Division of the Department of Justice "provides for a continuing assessment and evaluation of the effectiveness of enforcement efforts in promoting and restoring competition"); Katzmann (1980; 204) (studies by U.S. FTC "could help resolve current public-policy debates about the role of antitrust in economic policy"; finding that "[m]ore work needs to be done about the effects of market concentration; there is a paucity of information about the impact of antitrust action on various economic indicies"); Kovacic (1989; 187) (advocating ex post evaluations to inform the selection of cases and litigation techniques); Kovacic (1989b; 1147) (ex post evaluations could improve design of government monopolization cases); Rodriguez & Williams (1998; 178) ( multinational bodies and individual donors should increase monitoring and analysis of enforcement decisions of transition economy competition agencies).

44. The results of these proceedings are reported in U.S. FTC (1996).

45. *See, e.g.*, Augustine (1995; 6-7) ("[A] study should be conducted to review, say, two years after the fact, whether the intended outcomes of previous antitrust reviews [of defence industry mergers] were actually achieved, and if not, what lessons are to be learned."); Gilbert (1995; 2-3) (urging FTC "to use its investigatory powers to learn more about the competitive effects of hospital mergers. . . . The Commission could do a great service by undertaking a critical review of the effects of antitrust enforcement in this industry."); Lipsky (1995; 10) ("The Commission should consider whether retrospective study of the assumptions and results of previous antitrust enforcement efforts would help to discover whether fundamental but unstated misconceptions about supply response may underlie some enforcement judgments."); Sims (1995; 17) (proposing that FTC study actual effects of hospital mergers); Skitol (1995; 6-7) (proposing that FTC's Bureau of Economics review experience of selected consortia that filed notifications under the National Cooperative Research Act or the National Cooperative Research and

Production Act); *see also* Brodley (1995) (advocating *ex post* verification that efficiencies claimed for mergers and joint ventures have materialized); Nelson (1995; 7) ("[I]t appears that the FTC could perform a valuable service by researching and documenting more fully the economic circumstances under which shipments pattern data can be misleading").

46. Recent contributions expressing these concerns include Crandall (2001) and Crandall & Elzinga (2004).

47. This literature is surveyed and discussed in Kovacic (2001c; 286-90).

48. Notable examples of this type include the study by Katzmann (1980) of the U.S. FTC and the study by Weaver (1980) of the Antitrust Division of the U.S. Department of Justice.

49. Important contributions of this type include the Fingleton et al. (1995) assessment of the implementation of competition policy in the Visegrad countries, the Clarkson and Muris (1980) study of the U.S. FTC, and the Cox et al. (1969) evaluation of the consumer protection activities of the U.S. FTC.

50. In some jurisdictions, researchers can take advantage of laws that compel public agencies to disclose certain types of records.

51. For example, the Clarkson & Muris (1980) volume on the U.S. FTC, for example, includes detailed assessments of selected competition cases.

52. In 1969, at the request of President Richard Nixon, the American Bar Association (ABA) assembled a blue ribbon panel (ABA 1969) to evaluate the U.S. FTC. In the late 1980s, at its own initiative, the ABA convened blue ribbon panels to examine the DOJ Antitrust Division and the FTC, respectively.

53. A recent example is the Antitrust Modernization Commission (AMC), which the U.S. Congress established to evaluate various aspects of U.S. competition policy. The AMC received an appropriation of funds from Congress to hire a professional staff and conduct its operations.

54. *See* Kovacic (1982) (describing how recommendations of an 1969 ABA blue ribbon panel elicited major reforms of the U.S. FTC).

55. For a representative example of such reports, see Clark (1999). The author thanks John Clark for many useful conversations concerning his research on behalf of OECD.

56. From a small, representative sample of published OECD peer review studies, see Wise (1999, 2000, 2001); see also OECD (1999) (peer review of competition policy and regulatory reform in Hungary). The author thanks Jay Schaffer and Michael Wise for their informative comments in many conversations about the OECD peer review exercises.

57. Blue ribbon panels have a habit of reciting the conclusions of earlier, related blue ribbon studies without accounting for differences in the evaluative standards applied by previous panels. *See* Kovacic (1982;. 599-602) (discussing work of blue ribbon panels concerning performance of U.S. FTC).

58. A compromise of sorts that may address this problem is for the peer review researcher to provide highly sensitive criticisms privately to the agency under review and to moderate or omit such criticisms in reports or presentations made for a larger audience.

59. See papers and proceedings of the conference, titled "Estimating the Price Effects of Mergers and Concentration in the Petroleum Industry: An Evaluation of Recent Learning," are available at <http://www.ftc.gov/ftc/workshops/oilmergers/index.htm>.

60. S*ee* Kovacic (2000b; 394-95) (discussing OECD programs to evaluate antitrust enforcement).

61. The author thanks Sally Van Siclen for many useful conversations about the OECD case seminars.

62 *See* U.S. Federal Trade Commission (1984) (presenting results of assessments of FTC vertical restraints cases).

63. *See* Bresnahan (1985) (presenting evaluation of relief obtained in 1975 in settlement by FTC of abuse of dominance complaint against Xerox).

64. *See* Huber (1987) (evaluating effects of AT&T divestiture).

65. Indecopi's creation and early operations are examined in Boza (1998).

66. See Boza (2000) (presenting results of academic audit of Indecopi's competition policy programs).

67. *See* Geroski (2004) (reporting on research performed by the UK Department of Trade and Industry and the UK Competition Commission).

68. By way of disclosure, the author of this paper was a member of the FTC team that oversaw the design and implementation of the impact evaluation project described here. The author was the principal FTC representative for the evaluation of the Xerox abuse of dominance consent decree. As recounted here, details of the project are based on the account provided in US FTC (1984).

69. 433 U.S. 36 (1977).

70. The Caves and Klein research protocols are reproduced in FTC (1984).

71. FTC (1984; 7-8). The FTC impact evaluation team selected the vertical restraints researchers "on the basis of both their academic expertise, particularly in vertical restraints, and the diversity of perspectives they would bring to the project." *Id.* at 9.

72. Two prominent, much-cited examples are Bresnahan (1987) and Marvel (1982).

73. In re Beltone Electronics Corp., 100 F.T.C. 204 (1982).

74. The dramatic modern reforms of the European competition policy system since 2000 are detailed and analyzed in Wils (2005; 1-59).

75. The FTC's 1999 merger remedies study is one element of a larger collection of merger control process reviews that the U.S. agencies have undertaken since the early 1990s and have continued to pursue to the present.

76. The Congressional proponents of the merger reforms adopted in the 1976 legislation relied extensively on the work of academic researchers who found that divestitures imposed as remedies for consummated mergers seldom achieved their intended remedial goals. *See* Elzinga (1969).

77. The relevant literature is collected and reviewed in Kouliavtsev (2005).

78. The 2003-2004 Annual Report of the Australian Competition and Consumer Commission superbly illustrates how a competition authority can identify the "core principles" that motivate its efforts and can specify the behavioural characteristics by which it measures fulfilment of its core principles (and by which it invites outsiders to measure its progress. ACCC (2004; 19-103).

79. For a comprehensive discussion of how public institutions can design and implement evaluation methodologies, see Kusek & Rist (2004).

80. In the context of discussing information security issues, Peter Swire (2004) provides a highly informative model for analyzing when the disclosure of information about a system is likely to set in motion developments that increase or decrease the security of the system. The author thanks Professor Swire for useful conversations concerning the issue of when a government agency should disclose more information about its operations.

81. For example, the World Bank has established a "Measuring Results" project that uses ex post assessments to evaluate the implementation of law reform initiatives and other development-related measures that have received assistance from the Bank. A description of the Bank's Measuring Results project is available at <http://www.worldbank.org/wbsite/external/projects>.

82. The nations are Argentina, Brazil, China, Egypt, India, Mexico, and South Africa.

83. Examples of IRDC-sponsored studies that present an informative mix of case-specific and process-oriented assessments of national competition regimes include Garcia-Verdu & Solano (2005); Malherbe et al. (2005); Petrecolla (2005).

84. Some jurisdictions may have public disclosure statutes that could require a competition agency to make such assessments, or redacted versions of them, available if requested to do so. The design of a purely internal study would have to account for the types of information that might have to be revealed.

85. *See* Melamed (1998; 444) ("It is important to keep in mind ... that antitrust in [the United States] is based, not on a political or legislative code, but rather on a broad general statute that has been sustained through what is really a common law process – by which I mean, not only a process of federal court litigation, but more broadly a dialog among academic and business communities, the enforcement agencies and the courts.").

86. The discussion in Section 5.3 is derived in part from Kovacic (2005).

87. For a formative treatment of the value of good statistical records for the analysis of competition policy, see Posner (1970).

88. The concept of "competition policy research and development" and its role in determining institutional capability are analyzed in Muris (2002). *See also* Uesugi (2005; 76) (describing creation by Japanese Fair Trade Commission in 2003 of Competition Policy Research Center to bolster JFTC's research capabilities).

89. For an excellent review of the use of international benchmarking as a way to improve the competition systems of individual jurisdictions, and for a less sanguine view than this paper holds of the potential net benefits of comparative benchmarking, see Kerber & Budzinski (2004; 36-40).

90. See (Kovacic 2000b) (describing what older competition authorities can learn from institutional innovations undertaken by newer competition authorities); Scott (2005; 41-48) (discussing value of comparative analysis and international benchmarking in informing Canada's consideration of reforms to its competition statutes).

91. On the importance of history and political science as sources of insight about the development of competition systems and as tools for understanding specific enforcement measures, see Gerber (1998).

92. 15 U.S.C. § 16 (1998).

93. 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983).

94. United States v. Western Electric Co., 552 F. Supp. 131, 194-95 (D.D.C. 1982).

95. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

96. 110 F. Supp. at 354.

97. Emphasizing that United Shoe's market share fell from 85% in 1953 to 62% in 1964, Judge Wyzanski rejected the government's request that the company be split into at least two successor firms. The Supreme Court later reversed judge Wyzanski's ruling that he lacked discretion to impose a divestiture in this instance. *United States v. United Shoe Machinery*, 391 U.S. 244 (1968).

98. *See* Laffont (1999) (describing how quality of implementing institutions determines success of competition policy system); Muris (2005) (discussing institutional characteristics, including investments in "competition policy research and development," that improve an competition agency's prospects for success).

99. *See, e.g.*, Clarke & Corones (1999; 8-16) (describing modern reform of Australia's competition system); Collins & Brown (1997) (reviewing enhancement of Canada's competition laws in the 1980s and subsequent implementation); Dekeyser & Gauer (2005) (describing new EU framework for enforcement of Articles 81 and 82 of the EC Treaty).

100. *See* Katzmann (1979; 205) ("[W]ithout studies indicating whether antitrust policy is technologically capable of achieving various economic goals, government is vulnerable to the charge that antitrust is a charade or a lightning rod that absorbs the frustrations of those who might otherwise push for greater state intervention in the economy.").

**NOTE DE RÉFÉRENCE**

# UTILISATION DE L'ÉVALUATION POUR AMÉLIORER LES PERFORMANCES DES AUTORITÉS CHARGÉES DE LA POLITIQUE DE LA CONCURRENCE

***de William E. Kovacic*** [*]

## 1. Introduction

La politique de la concurrence est en constante évolution. Depuis l'adoption des premières dispositions nationales antitrust au Canada en 1889, l'histoire du droit de la concurrence s'est caractérisée par une recherche continuelle des meilleures prescriptions réglementaires, conceptions institutionnelles et techniques opérationnelles (Gavil et. al. 2002 ; chapitres 1, 9). Ces dernières décennies, des bouleversements extraordinaires se sont produits, les systèmes de concurrence anciens et nouveaux cherchant à appliquer de meilleures pratiques pour définir des prescriptions sur le fond, fixer les priorités, choisir des affaires et opter pour des solutions.

Selon ce rapport, il peut être extrêmement utile dans le cadre d'une définition de la future orientation de la politique de la concurrence, de procéder à un examen rétrospectif de la situation et de se poser deux questions élémentaires et fondamentales. Les interventions de l'autorité compétente ont-elles permis d'obtenir de bons résultats ? Les procédures de gestion de l'autorité ont-elles contribué à ce que les initiatives choisies par l'autorité se soldent par un succès ? L'évaluation par un organisme public de la qualité de ses interventions majeures et de ses procédures internes peut lui permettre de mieux comprendre comment améliorer ses performances. Même l'effort de définir des indicateurs de performance peut imposer une discipline utile concernant l'allocation des ressources de l'autorité et aider à repérer les possibilités d'amélioration.

Non seulement il est sain, dans le cadre de la politique des pouvoirs publics, de définir une norme encourageant les instances publiques à effectuer des évaluations des performances, mais il s'agit probablement aussi d'un élément indispensable aux autorités de la concurrence pour démontrer ensuite l'utilité du droit de la concurrence à un public plus large. Dans les systèmes anciens et récents, ainsi que dans les juridictions envisageant l'adoption d'une législation de la concurrence, un certain nombre d'observateurs refusent d'accepter d'un point de vue théorique, ou comme une évidence, que la mise en œuvre d'un droit de la concurrence a des conséquences utiles socialement[1]. Une présomption d'efficacité *a priori* ne remplace guère une évaluation systématique des résultats[2].

Cette note de réflexion traite de la possibilité pour les autorités de la concurrence d'utiliser des évaluations *ex post* de décisions d'application du droit, de mécanismes opérationnels et de conception organisationnelle pour améliorer la qualité de leur travail. Le rapport examine la valeur des analyses *ex post* des initiatives d'application du droit menées par les pouvoirs publics de la façon suivante. La section 2 décrit deux formes élémentaires d'évaluation des performances que les autorités de la concurrence pourraient adopter pour améliorer la qualité de leur travail. La section 3 identifie la logique présidant à la

[*] E.K. Gubin, professeur de droit des contrats publics, faculté de droit de l'Université George Washington. L'auteur remercie Joe Phillips et Patricia Heriard-Dubreuil pour leurs nombreux commentaires et suggestions utiles sur la préparation de ce rapport. Les points de vue qui y sont exprimés n'engagent que leur auteur.

mise en place et l'application d'indicateurs de performances pour évaluer l'efficacité des interventions de fond et des procédures opérationnelles des organismes chargés de mettre en œuvre la politique de la concurrence. La section 3 traite de l'expérience passée des autorités de la concurrence dans le cadre de leurs analyses ex post de résultats sur le fond et des procédures opérationnelles. Bien qu'elle ne rende pas compte de façon exhaustive de l'expérience des autorités, la section 4 utilise des exemples dignes d'intérêt afin de fournir un contexte pour les propositions dans la section 5, qui présente les méthodes d'évaluation des performances.

## 2. Évaluation des autorités de la concurrence : deux formes d'évaluation des performances

Ce rapport s'intéresse à deux méthodes élémentaires que peuvent utiliser les autorités de la concurrence pour évaluer la qualité de leurs performances. La première consiste à évaluer la contribution des résultats de l'autorité – comme les poursuites engagées ou l'affectation de ressources au plaidoyer en faveur de la concurrence – pour atteindre les objectifs inscrits dans le droit de la concurrence de la juridiction. Supposons, par exemple, que le droit de la concurrence de la juridiction cherche à améliorer les performances économiques en interdisant les fusions anticoncurrentielles, l'exclusion non justifiée par les entreprises dominantes ou les ententes pures et simples entre concurrents pour fixer les prix ou d'autres conditions d'échanges commerciaux. Un programme d'évaluation axé sur les résultats viserait à déterminer dans quelle mesure la recherche par l'autorité d'initiatives spécifiques a permis de parvenir à ces résultats.

Une deuxième approche de l'évaluation se fonde sur les procédures. Au lieu ou en plus d'évaluer les résultats, un programme d'évaluation peut chercher à évaluer la qualité des opérations internes de l'autorité de la concurrence – l'ensemble des méthodes de gestion et des choix organisationnels qui déterminent l'allocation et l'utilisation par l'autorité de ses ressources. Cette approche traite la gestion et l'organisation comme des éléments essentiels à la mise en œuvre de la politique de la concurrence et cherche à identifier les améliorations du mode de fonctionnement de l'autorité de la concurrence. L'idée est qu'en améliorant ses techniques de gestion et d'organisation, l'autorité aura plus de chances de favoriser de manière générale, à travers ses résultats sur le fond, la réalisation des objectifs du droit de la concurrence.

En luttant pour faire face à la crise du moment ou à la pression d'une nouvelle activité, les institutions publiques (et privées) peuvent être tentées de considérer l'évaluation des performances comme une entreprise purement optionnelle laissée à leur discrétion. La nécessité pour une autorité de la concurrence de traiter les affaires en cours – par exemple, un nombre d'une ampleur inhabituelle de dossiers de fusion – peut inciter à penser que des efforts consacrés à l'évaluation des résultats sur le fond ou des contributions en termes de gestion est un luxe inabordable ou un « détournement » coûteux des ressources au détriment du traitement de besoins opérationnels immédiats. Dans cet état d'esprit, les responsables des organismes peuvent se dire qu'ils sont contraints de choisir entre traiter les affaires courantes ou mener des évaluations *ex post*, mais ne peuvent effectuer les deux.

L'impression que l'évaluation des performances se fait au détriment des obligations opérationnelles courantes part d'une conception erronée de son rôle. Comme l'a démontré une documentation importante qui ne cesse de s'étoffer, l'évaluation des performances est un élément indispensable aux institutions publiques pour bien exercer leurs activités[3]. Vu sous cet angle, l'existence de mécanismes solides d'évaluation des résultats et des processus de décision n'est pas indépendante de la production de bons résultats en termes de politique, mais ces mécanismes en font partie intégrante (*voir, par ex.* Majoras 2005). Les dépenses consacrées à l'évaluation des performances par une institution publique qui ne sont pas plus « discrétionnaires » que la volonté d'un chirurgien de rencontrer son patient après une opération pour s'assurer si l'opération a été bénéfique pour sa santé[4].

Bien comprise, l'évaluation des performances ne représente pas une corvée institutionnelle, mais un actif précieux – un moyen pour une autorité de puiser à la source de son expérience (et de s'inspirer de

l'expérience de ses homologues) pour améliorer la qualité de son travail. Un programme d'évaluations rétrospectives peut aider les responsables de ces autorités à commencer ce que deux spécialistes de l'administration publique, Richard Neustadt et Ernest May, ont appelé « penser en flux temporels » – en appliquant « le genre de capacité mentale qui établit facilement des liens entre les phénomènes se produisant au fil du temps et vérifie régulièrement ces liens. »[5] De solides instruments d'évaluation des performances peuvent aider à répondre aux trois questions fondamentales que Neustadt et May (1986; 270) ont définies comme les préoccupations essentielles dans le cadre de la prise de décision d'un organisme public : « Est-ce que cela va marcher ? « Est-ce que cela va durer ? » « Est-ce que cela va faire plus de bien que de mal ? »

Comme on l'a mentionné plus haut, pour une évaluation *ex post*, les deux facteurs importants sont les résultats de fond de l'autorité de la concurrence (par ex., les affaires et les interventions en défense de la concurrence) et les procédures opérationnelles (par ex., la planification stratégique et le traitement des affaires) qui peuvent être à l'origine de ces résultats. La documentation sur l'évaluation des performances a souligné la tendance des institutions publiques et privées à mener des évaluations *ex post* détaillées uniquement ou en grande partie en réaction nécessaire et désespérée à une calamité opérationnelle. Ces évaluations jouent indéniablement un rôle précieux dans l'amélioration des performances de l'organisme à court et à long terme. Par exemple, une reconstitution et une analyse détaillées d'un échec opérationnel grave peuvent mettre en évidence les faiblesses de projets de fond spécifiques ou de processus de décision d'une institution ou l'instauration de règles formelles et de normes culturelles qui limitent la possibilité de futurs désastres[6].

L'habitude de procéder à des évaluations *ex post* seulement en réaction à de graves incidents opérationnels est une forme gravement incomplète d'évaluation des performances. Une meilleure approche est d'examiner les programmes de façon permanente et pas seulement en réactions à des incidents spectaculaires. Un mécanisme d'évaluation bien conçu étudierait des programmes qui semblent à tout moment bien fonctionner. De telles initiatives peuvent aussi servir à repérer les améliorations possibles qui feront d'un programme acceptable ou louable un programme vraiment excellent. D'un point de vue plus défensif, une évaluation systématique régulière peut repérer des failles qui, si elles ne sont pas corrigées, risquent d'entraîner un blocage majeur de la politique. Quand elle remporte un succès à peu de choses près ou par pure chance, une organisation peut surestimer ses compétences et réduire la marge d'erreur à tel point que l'incident finit par être inévitable. Ne pas s'efforcer d'évaluer les résultats et les raisons à l'origine de ces résultats revient à fonctionner à l'aveuglette[7].

On sait aussi de manière générale que peu d'institutions, qu'elles soient publiques ou privées, aiment se soumettre à des évaluations rigoureuses de leur travail. Il peut être difficile de concevoir de bons indicateurs des performances et les institutions redoutent peut-être le coût et l'indétermination liés à une tentative de formulation d'indicateurs porteurs de véritables informations. Lorsqu'on insiste pour qu'elles conçoivent des indicateurs de performances, certaines institutions adoptent des critères extrêmement défectueux simplement parce que les activités qu'elles avaient choisies d'examiner étaient mesurables – approche non moins illusoire que de refuser toute évaluation jusqu'à ce que le toit s'effondre. En posant les mauvaises questions, on risque d'obtenir les mauvaises réponses.

Des étudiants en administration publique ont volontiers reconnu la difficulté de choisir de bons indicateurs de performances et admettent que l'utilité d'une évaluation dépend considérablement de la validité des critères choisis. Parallèlement, des spécialistes de l'administration publique se montrent sceptiques face aux affirmations selon lesquelles une activité donnée peut être si résistante à l'évaluation qu'il faut se fonder entièrement sur les interprétations non testées par l'intervenant (et, selon l'intervenant, impossibles à tester) sur la qualité de son travail. Même si les problèmes soulevés par une évaluation sont importants et se révèlent envahissants, la simple démarche de vouloir définir ce qui constitue de bonnes performances peut ajouter de la rigueur aux décisions d'une institution sur ce qu'elle doit faire. Entre

autres résultats, les tentatives de définir de bonnes performances peuvent inciter une institution à améliorer sa classification et à repérer les apports et les résultats programmatiques.

La crainte d'une évaluation des performances dépasse les problèmes associés au choix de la référence correcte. Même si elles se voient doter d'une méthodologie parfaite, certaines institutions risquent d'hésiter à l'appliquer. Les bons jours, une évaluation peut montrer que les actions ou les processus d'une institution ont eu des conséquences positives. Les mauvais jours, l'évaluation peut faire ressortir des conséquences négatives ou aucune conséquence. Une institution risque d'avoir l'impression que deux de ces trois résultats (aucun impact ou un mauvais impact) ne jouent pas en sa faveur et elle peut manquer de confiance et penser qu'une évaluation *ex post* ne mettra pas en évidence de bons résultats. Ces craintes sont sans doute parfaitement compréhensibles, mais peu d'observateurs objectifs jugeraient qu'il s'agit d'arguments raisonnables pour éviter une évolution des performances. Si le malaise de l'institution face à la mise en œuvre d'une évaluation réside dans le sentiment qu'une mesure rigoureuse révélera une grave erreur, on a là une raison suffisante pour qu'une institution effectue de telles évaluations.

## 3. L'argument en faveur d'une évaluation *ex post* pour concevoir une politique de la concurrence

Un certain nombre d'arguments justifient que des autorités de la concurrence consacrent des ressources au développement et à l'application d'indicateurs de performances pour évaluer leurs interventions de fond et leurs procédures opérationnelles. Ces arguments vont au-delà des considérations générales sur une saine administration publique exposées dans la Section 2. La nécessité d'une évaluation des performances dans le cadre de la politique de la concurrence vient des qualités distinctives de la politique de la concurrence en tant que forme de réglementation des pouvoirs publics et dans les évolutions institutionnelles au sein des juridictions dotées d'un droit de la concurrence et à travers ces juridictions.

### *3.1 Incertitude : la politique de la concurrence en tant qu'expérimentation*

Le processus de formulation d'une politique de la concurrence nécessite souvent des autorités publiques compétentes qu'elles procèdent à des jugements difficiles dans un contexte incertain concernant l'importance de diverses formes de pratiques commerciales au regard de la concurrence (Heyer 2005). La fusion de deux concurrents importants va-t-elle freiner ou accentuer la concurrence ? Les restrictions qui limitent la liberté des participants à une co-entreprise sont-elles raisonnablement nécessaires pour assurer le développement d'un nouveau produit ? Les justifications commerciales sont-elles présentées pour appuyer un refus de négocier ou un contrat d'exclusivité véritable ou contraint ? Des décisions de ce type peuvent être difficiles à prendre, même dans des affaires « courantes », et elles peuvent être particulièrement ardues quand les changements technologique rapides, une déréglementation ou d'autres forces dynamiques compliquent l'analyse des effets concurrentiels[8].

La formulation de la politique dans un contexte d'incertitude constitue un facteur expérimental important pour la mise en œuvre du droit par les pouvoirs publics. Les décisions d'application du droit individuelles peuvent être considérées comme des expériences dans le cadre desquelles les autorités testent l'efficacité de différentes hypothèses sur l'importance en termes de concurrence des pratiques commerciales[9]. À terme, les autorités de la concurrence parviennent à un point d'équilibre donné de leur action en étendant et en restreignant périodiquement le champ d'application du droit. La vérification de la validité des différentes hypothèses nécessite des décisions d'application du droit qui risquent soit d'être trop agressives, soit d'être insuffisantes. Sans l'expérience que constitue une intervention parfois excessive et parfois trop timide, il serait impossible pour les autorités chargées de l'application du droit de déterminer où se situe le bon compromis dans leur action[10].

Deux illustrations mettent en évidence le rôle de l'expérimentation dans la politique de concurrence. La première est le développement au cours du siècle dernier d'une politique contre les ententes. L'histoire de la politique moderne de lutte contre les ententes aux États-Unis et dans d'autres juridictions peut être racontée sous la forme d'une série d'expériences interconnectées dans le cadre desquelles des mesures ont été prises qui cherchaient essentiellement à accélérer le rythme de détection des mécanismes d'entente et à favoriser la sanction des contrevenants (Baker 2001 ; Kovacic 2003, pp. 416-25). L'amélioration apportée par le ministère de la Justice à son programme de tolérance en 1993 et en 1994 compte sans doute parmi les expériences de ce type les plus connues et les plus largement imitées[11]. Les succès remportés au cours de la dernière décennie par les programmes de tolérance déployant de gros moyens pour obtenir la révélation d'ententes illégales ont atténué, au sein et à l'extérieur du ministère de la Justice, le scepticisme qui a accompagné les réformes du début des années 90. La seule façon de savoir si le fait de donner plus d'assurances quant à une immunité vis-à-vis de poursuites pénales pouvait susciter d'autres révélations était d'essayer. Il n'était pas évident, à l'époque, que le programme ferait une réelle différence.

Le deuxième exemple, qui porte sur la décision de la Federal Trade Commission aux États-Unis en 1984 d'autoriser General Motors et Toyota à créer une co-entreprise de production, est révélateur[12]. L'approbation de l'opération par la FTC reflétait l'interprétation selon laquelle, si l'opération générait les gains considérables d'efficience et de productivité qu'elle promettait, la Commission devrait assouplir, du moins de façon expérimentale, les restrictions antitrust sur une collaboration faisant intervenir de gros concurrents. Lorsque l'opération a été approuvée à certaines conditions, des observateurs ont affirmé que la FTC avait fait un stratégique choix catastrophique[13]. Une analyse ultérieure de la coentreprise GM-Toyota porte à croire que la collaboration a donné à General Motors une expérience précieuse dans la mise en œuvre d'une production allégée et de systèmes de gestion du travail qui a en partie inspiré la conception par la société de sa division Saturn[14].

L'importance de l'incertitude et de la qualité expérimentale de la politique de la concurrence est manifeste à plusieurs égards dans la prise de décision des pouvoirs publics. Les autorités de la concurrence sont parfois consultées pour diagnostiquer l'importance concurrentielle des pratiques d'une entreprise dominante. Les plaintes pour exclusion illégales nécessitent parfois que l'autorité de la concurrence choisisse entre des explications contradictoires qui invoquent l'efficience et l'exclusion pure et simple comme arguments pour les pratiques mises en cause. La décision d'engager ou non des poursuites peut dépendre d'interprétations contestables des pratiques observées[1.5].

Une autre mission chargée d'incertitudes pour les autorités de la concurrence consiste à prévoir l'impact sur la concurrence des fusions proposées[16]. Cet exercice intrinsèquement prévisionnel peut s'avérer particulièrement difficile dans des secteurs qui sont soumis à des perturbations en raison du dynamisme technologique, d'une déréglementation ou de la mondialisation[17]. Dans bien des cas, les responsables chargés de faire appliquer les lois peuvent ne pas être en mesure de faire mieux que de tenter de deviner intelligemment les répercussions d'une fusion donnée, en particulier dans le cas de consolidations qui aboutiront à une forte concentration mais peuvent aussi générer d'importants gains d'efficience.

La formulation de mesures correctrices est l'exercice analytique qui met en évidence de façon frappante les difficultés liées aux incertitudes d'un diagnostic du comportement passé ou d'une prévision de l'impact des opérations proposées[18]. Dans le cadre de la négociation d'un règlement judiciaire ou de la préparation d'une demande de réparation dans une affaire, les responsables de l'autorité de la concurrence doivent souvent procéder à des jugements problématiques sur les mesures correctrices les problèmes de concurrence. Le choix des mesures correctrices dans une affaire donnée – par exemple, imposer des limites aux comportement pour remédier à un abus de position dominante – fait inévitablement intervenir, dans une certaine mesure, l'experimentation[19]. Comme tout élément de la politique de la concurrence, la sélection d'un remède applicable à une entreprise requiert un examen soigneux de l'expérience passée afin

d'en tirer les leçons (« Comment cela marchait auparavant ? ») pour s'en inspirer lors des futures décisions.

En sciences, un élément indispensable du processus d'expérimentation réside dans l'évaluation systématique des résultats des expériences. Il faut qu'il en soit de même pour l'expérimentation en matière de politique de la concurrence. Sans vérifications *ex post*, il sera rarement possible de déterminer si les hypothèses qui ont incité une autorité de la concurrence à décider d'engager des poursuites sont solides. Les évaluations *ex post* peuvent aussi réduire les incertitudes liées aux futures décisions en mettant en évidence avec quelle efficacité les différentes théories permettent de faire le diagnostic du comportement commercial ou de prédire l'impact concurrentiel et en étayant les jugements sur l'impact de divers mesures correctrices.

### *3.2 Transparence limitée : l'impact de la définition de la politique au moyen de règlements négociés*

En matière d'administration publique, un principe largement accepté veut que les pouvoirs publics fassent la transparence sur la logique de leur action et les processus de définition de ces politiques. La transparence favorise la clarté dans la conception de l'action des pouvoirs publics en matière de concurrence, améliore la compréhension des prescriptions juridiques par les parties concernées et discipline l'exercice du pouvoir d'appréciation des agents publics en soumettant leurs initiatives à un examen et aux critiques de l'extérieur[20]. Des méthodes transparentes de détermination de l'action des pouvoirs publics qui informent les observateurs extérieurs (en particulier les intervenants commerciaux) du contenu et de la logique de certaines décisions contribuent à garantir la régularité et l'honnêteté de l'administration publique[21]. Parmi les mesures courantes d'amélioration de la transparence, on compte la publicité les décisions sur les questions d'application du droit, la publication d'instructions et l'utilisation de discours pour structurer certaines initiatives.

L'application du droit de la concurrence dans un certain nombre de juridictions, comme l'Union européenne (UE) et les États-Unis, repose de nos jours considérablement sur le règlement négocié[22]. Une des principales raisons de cette évolution est la mise en place de mécanismes de notification obligatoire et de délais d'attente pour le contrôle des fusions[23]. Les systèmes de notification préalable à la fusion font largement appel aux règlements négociés qui font intervenir des désinvestissements ou des mécanismes liés au comportement pour résoudre des problèmes de concurrence concernant certaines transactions[24].

Le recours de plus en plus fréquent à des conventions d'expédient a soulevé des problèmes du fait du manque de transparence concernant l'acceptation d'un règlement négocié. Dans le cas d'un règlement négocié caractéristique, il peut s'avérer difficile pour ceux qui ne sont pas parties aux négociations d'évaluer avec précision les fondements ou l'importance du règlement négocié[25]. Lorsqu'elles annoncent les règlements négociés, les déclarations officielles des autorités de la concurrence tendent à présenter la décision de l'organisme chargé de l'application du droit d'engager des poursuites et la solution qu'il apporte au problème sous un angle favorable. Dans leurs communiqués officiels au public, les autorités de la concurrence n'expriment habituellement pas de doutes sur l'efficacité de la solution contenue dans le règlement négocié pour régler les problèmes de concurrence que semble poser la transaction. Dans l'hôpital de l'application du droit de la concurrence par les pouvoirs publics, toutes les opérations chirurgicales sont présentées comme des réussites.

Les entreprises qui ont répondu sont habituellement les mieux informées sur les affirmations des pouvoirs publics concernant la valeur et l'importance des jugements d'expédient. En théorie, les entreprises soumises aux jugements d'expédients pourraient publier des déclarations qui contestent les arguments des pouvoirs publics en faveur d'une intervention ou l'importance en termes de concurrence de la réparation obtenue. Bien qu'elles disposent d'informations pour signaler les erreurs d'appréciation de

l'organisme chargé de l'application du droit (y compris l'acceptation d'une réparation inadéquate), les parties à la fusion ne sont guère encouragées à le faire – du moins de façon publique, visible. Le caractère répétitif du processus réglementaire, dans le cadre duquel les entreprises et les conseillers externes comme les cabinets juridiques et les sociétés de conseil économique se présentent régulièrement devant les autorités de la concurrence, décourage les organismes privés d'un débat public sincère sur les insuffisances qu'elles ont acceptées dans le cadre de règlements négociés.

Au fil du temps, l'ensemble des conditions entourant un règlement négocié devient un peu plus clair lorsque les responsables de l'application du droit prononcent des discours, les organes d'information mènent des enquêtes et les responsables de l'application du droit, les répondants, les concurrents ou les conseillers externes révèlent ce qui s'est passé pendant les délibérations entre l'organisme chargé de l'application du droit et l'entreprise. Cependant, même dans le cas d'une révélation progressive plus complète, la diffusion de données pertinentes peut être très incomplète. Contrairement à un jugement, qui donne généralement lieu à de copieux comptes rendus accessibles au public, la convention de règlement ne fournit guère d'éléments aux personnes extérieures pour évaluer la stratégie et la tactique de l'autorité de la concurrence[26]. Les non-initiés doivent souvent analyser les déclarations publiques des autorités de la concurrence selon lesquelles elles ont obtenu une réparation effective et les confronter aux suggestions discrètes et privées des répondants selon lesquelles, même si elles ont accepté les mesures correctrices, l'opération n'a dans l'ensemble subi aucune égratignure.

Il y a plusieurs moyens de s'attaquer aux problèmes de transparence en rapport avec le recours à des règlements négociés pour régler des affaires de concurrence portées devant les pouvoirs publics. Une des approches repose sur la diffusion par les autorités de la concurrence de plus d'informations sur la théorie du préjudice concurrentiel et sur la logique des mesures correctrices dans les déclarations concernant l'impact sur la concurrence qui accompagnent les règlements négociés[27]. Entre autres effets, ce type de communication facilite les efforts effectués par les non-initiés pour évaluer les performances de l'autorité. Les responsables de l'application du droit pourraient aussi recourir à des discours ou des déclarations officielles pour expliquer plus amplement leur décision de ne pas intervenir pour remettre en cause ou modifier certaines opérations. La pratique dans certaines juridictions (comme l'UE) a imposé une explication régulière des décisions de ne pas engager de poursuites et les juridictions qui avaient coutume de ne rien dire ou presque sur leur attitude tolérante (comme aux États-unis) ont commencé à suivre cette habitude d'une communication plus complète.

Une seconde approche, mise en évidence dans ce rapport, consiste à adopter des politiques qui engagent l'autorité de la concurrence à effectuer des évaluation *ex post* périodiques, afin de mesurer le bien fondé du processus de décision et d'envisager l'impact d'interventions importantes comme des règlements. La réalisation des évaluations *ex post*, par l'autorité de la concurrence elle-même ou par des personnes extérieures avec la coopération de l'autorité de la concurrence, ainsi que la publication des résultats contribuerait à déterminer l'intérêt de certaines mesures correctrices[28].

### *3.3 Caractère évolutif de la jurisprudence et de la politique d'application du droit de la concurrence*

La politique de la concurrence est intrinsèquement évolutive (*voir* Johnson 2004, p. 7; Kovacic 2003). Dans certaines juridictions, ce caractère évolutif vient en partie de la conception institutionnelle du système de la politique de la concurrence. En adoptant les principales lois antitrust américaines, par exemple, le Congrès a créé des prescriptions réglementaires générales et a accordé aux tribunaux fédéraux la responsabilité d'interpréter leurs conditions d'application pratique et d'ajuster le contenu de la doctrine au fil du temps[29]. Les tribunaux américains ont reconnu que l'accomplissement de la mission qui leur est assignée selon ce dispositif volontairement évolutif nécessite une connaissance de l'impact des interprétations antérieures de la législation antitrust sur le commerce[30].

Cette nature évolutive découle plus généralement des fondements interdisciplinaires de la politique de la concurrence. À un niveau inégalé dans d'autres domaines de la réglementation économique, le droit de la concurrence puise dans les contributions de la science économique. Dans la pratique antitrust, l'analyse économique joue un rôle essentiel pour résoudre des problèmes antitrust fondamentaux comme la définition du marché pertinent et l'évaluation des conséquences en termes d'efficience des différentes formes de comportement commercial[31].

L'économie est une discipline dynamique. L'histoire de l'économie des entreprises industrielles a connu des bouleversements considérables et a vu s'affiner la compréhension des phénomènes commerciaux[32]. De même que l'apprentissage de l'économie a changé, de nombreuses doctrines juridiques antitrust qui bénéficient des apports de l'économie ont aussi changé. Les recherches empiriques, notamment l'analyse d'anciennes affaires antitrust, ont fortement stimulé le développement de nouvelles idées au sein des entreprises industrielles et ont vigoureusement encouragé des modifications de la doctrine antitrust et de la politique d'application du droit[33] .

### *3.4 Multiplicité institutionnelle : surveillance simultanée*

La politique moderne de la concurrence fait intervenir de nombreux acteurs publics et privés habilités à faire appliquer des prescriptions antitrust. La multiplicité a une dimension internationale considérable et, dans certaines juridictions, un élément national important. Globalement, avec l'évolution des nouveaux dispositifs de la politique de la concurrence et l'amélioration de régimes plus anciens, les différentes fusions ou autres formes d'activité commerciale sont susceptibles d'attirer l'attention d'une diversité d'instances de la concurrence nationales ou régionales[34]. Au sein de certaines juridictions, comme le Brésil, les États-Unis et la France, la responsabilité de formuler et de mettre en œuvre la politique de la concurrence est partagée entre deux autorités publiques de la concurrence ou davantage[35]. Dans de nombreuses juridictions, les autorités publiques de la concurrence partagent aussi leurs prérogatives avec des autorités de tutelle sectorielles en matière de surveillance des fusions ou autres formes de comportement[36]. Le développement lent mais continu des droits des intervenants privés à engager des recours dans des juridictions qui s'en remettaient auparavant uniquement à une application publique du droit est un autre facteur à l'origine de la décentralisation de l'habilitation à engager des poursuites.

La fragmentation de la responsabilité de définir la politique de la concurrence impose aux chefs d'entreprise de tenir compte la responsabilité d'un large éventail de prescriptions importantes de politique de la concurrence ainsi que des interprétations divergentes des mêmes prescriptions par diverses instances publiques chargées de l'application du droit. Ces dernières années, un certain nombre d'observateurs ont attiré l'attention sur des complications qui surviennent lorsque différents cas de comportement commercial font l'objet de nombreux efforts parallèles d'application du droit au sein des juridictions et entre différentes juridictions. L'attention s'est surtout focalisée sur le fait que, si les autorités nationales de la concurrence se livrent à de multiples examens des fusions, on risque d'assister à une augmentation excessive du coût de la réalisation de telles transactions[37]. On commence notamment à se demander dans quelle mesure les différents dispositifs de mesures correctrices interagissent avec les poursuites engagées dans des cas spécifiques de manquement. Les études *ex post* de cas spécifiques d'application du droit aideraient à clarifier l'impact de l'examen par de nombreuses autorités antitrust du même comportement commercial et de renseigner le débat sur des ajustements possibles.

### *3.5 Multiplicité institutionnelle : processus opérationnels d'étalonnage*

Bien qu'elle ait compliqué la planification des activités et la coordination entre les différents organismes, la mise au point de nouveaux régimes de la concurrence et la réforme des régimes existants a créé d'innombrables occasions pour les autorités de la concurrence d'une juridiction de mesurer leurs procédures opérationnelles par rapport à celles de leurs homologues. Les différentes autorités ont chacune

leur façon d'organiser leurs institutions en unités opérationnelles, de concevoir des stratégies et d'allouer des ressources. La diversification des approches permet de disposer de nombreux critères comparatifs qui donnent la possibilité à un organisme d'évaluer la solidité de ses propres choix et procédures en matière d'organisation.

Entre autres possibilités, une étude comparative donne une base aux autorités de la concurrence pour décider comment mettre en place un contrôle interne de la qualité – par exemple en créant une unité indépendante d'économistes habilités à rendre compte directement à la direction de l'autorité ou en établissant des panels « de l'avocat du diable » pour tester les hypothèses et les preuves présentés par ceux qui traitent les affaires au sein de l'autorité. Comme on le verra plus loin, la diversification a aussi fourni des modèles que peuvent examiner les organismes lorsqu'ils établissent leurs propres évaluations des performances et mènent des examens des performances *ex post*.

### *3.6 Intérêt de la participation de l'autorité de la concurrence dans la gestion des performances*

Les autorités de la concurrence ne sont pas la seule source possible d'évaluations des performances de la politique de la concurrence. Les chercheurs ont produit une importante documentation qui analyse des cas spécifiques, des programmes d'application ou des procédures sans la participation ou la coopération d'organismes publics responsables des affaires en question.[38]. Dans un certain nombre de cas, de telles évaluations ont influencé la politique antitrust en changeant les points de vue des responsables chargés de l'application du droit et des tribunaux sur la validité de certaines doctrines ou pratiques d'application des lois[39]. Les instances publiques en dehors de l'autorité de la concurrence, comme des organismes auxquels sont confiées des responsabilités d'audit, ont aussi effectué des évaluations des performances[40]. Ces dernières années, des instances publiques comme le Centre de recherches pour le développement international (CRDI) du Canada ont financé des projets pour encourager les chercheurs locaux dans les économies en transition à évaluer les véritables effets de l'application du droit de la concurrence et à répertorier les obstacles à la concurrence[41].

Comme le montrent ces exemples, un système de politique de la concurrence peut ne reposer que sur l'initiative des chercheurs ou des institutions autres que l'autorité de la concurrence pour obtenir des évaluations *ex post* d'affaires individuelles ou de programmes d'application du droit sans la participation de l'autorité de la concurrence. Plusieurs considérations montrent l'importance d'une participation formelle des autorités de la concurrence. L'autorité de la concurrence est probablement le seul dépositaire d'informations sur la décision d'engager des poursuites et sur les délibérations internes concernant la gestion des différentes affaires. L'autorité de la concurrence peut aussi être seule à pouvoir rassembler les informations concernant l'impact des programmes d'application du droit[42].

Le facteur le plus important en faveur d'une évaluation des performances au sein de l'autorité de la concurrence est la probabilité que la régularité de cet exercice favorisera mieux des ajustements réguliers et opportuns des pratiques de l'organisme. Idéalement, il serait préférable que l'autorité de la concurrence cherche activement à améliorer son mode de fonctionnement et à prendre en compte immédiatement et directement les leçons tirées de l'expérience passée dans ses futures décisions opérationnelles. C'est ce que préconisait George Stigler il y a déjà 35 ans lorsqu'il se demandait s'il était sage pour une institution de compter entièrement sur des examens périodiques effectués par des personnes extérieures pour évaluer les programmes et repérer les domaines où un ajustement est nécessaire (Blue Ribbon Defence Panel, 1970 ; 198) :

> « Aucune organisation ne peut obtenir et maintenir une structure ou un mode de fonctionnement efficace au moyen d'un examen critique mené par des personnes extérieures tous les cinq ou dix ans – même si... les recommandations du groupe

d'examinateurs sont scrupuleusement adoptées. Une bonne organisation doit prévoir au sein même de sa structure des incitations pour que son personnel agisse correctement. »

## 4. Expérience de l'évaluation des performances par les autorités de la concurrence

Depuis la fin des années 70 et jusqu'à maintenant, trois types de commentaires ont retenu l'attention à propos de l'adéquation des efforts des autorités de la concurrence pour évaluer leurs performances. Le premier a pris la forme de recommandations par des instances publiques et des commentateurs individuels qui invitent les autorités de la concurrence à accroître le montant des ressources attribuées à l'évaluation de l'impact des décisions passé d'application du droit[43]. Un événement formateur qui a mis en évidence l'émergence d'un consensus sur ce point a été les audiences de la FTC aux États-Unis en 1995 sur l'innovation et la mondialisation[44]. L'intérêt de consacrer plus de ressources à l'évaluation *ex post* d'affaires closes a constitué un thème majeur des spécialistes de la politique de la concurrence qui ont témoigné lors des procédures de la FTC[45].

Un deuxième type de commentaires distinct et digne d'intérêt vient d'observateurs qui se sont interrogés sur la valeur des initiatives passées en matière de politique de la concurrence et ont estimé que de nombreux programmes dans ce domaine ne sont pas parvenus à atteindre leur objectif d'améliorer les performances économiques[46]. Certains analystes ont porté leur attention sur le manque de preuves d'avantages mesurables générés par une intervention antitrust. D'autres ont avancé que plusieurs ou de nombreuses interventions avaient fait reculer le bien-être du consommateur. La critique la plus clémente de la politique adoptée est que certaines formes d'application des mesures antitrust – comme les tentatives de contrôler le comportement abusif d'entreprises dominantes – ont produit dans l'ensemble l'effet inverse de celui recherché et ont favorisé un repli ou un abandon spectaculaire. Selon la proposition plus audacieuse qui ressort de ce type de commentaires, comme la législation antitrust retarde le plus souvent les progrès économiques, mieux vaut pour les pays qu'ils n'en aient pas.

Le troisième type de commentaires est apparu dans le cadre de discussions sur les bases convenables de la croissance économique dans les pays passant d'une planification centralisée à un plus grand recours aux mécanismes du marché. Dans les discussions sur la réforme du droit économique, les commentateurs se sont souvent interrogés sur l'intérêt d'intégrer la politique de la concurrence au calendrier des réformes ou ont avancé que les économies en transition feraient mieux de renoncer à adopter la législation[47]. Les deux variantes de cet point de vue – ceux qui doutent des avantages de la politique de la concurrence pour les économies en transition et ceux qui s'opposent résolument à l'adoption de lois antitrust dans ces économies – donnent à penser que les partisans de la politique de la concurrence ont la mission jamais réalisée de montrer que l'adoption et l'application du droit de la concurrence donnent des résultats positifs. En fait, les sceptiques et les opposants purs et simples ont mis en relief l'intérêt de rassembler des preuves du bien fondé de la politique de la concurrence dans les marchés émergents.

L'étude qui suit traite de trois types d'activités liées à l'évaluation concernant les autorités de la concurrence : les évaluations générales des performances des autorités de la concurrence et leurs efforts d'évaluation, les évaluations des effets des interventions individuelles comme les affaires ou les initiatives de défense de la concurrence, et les évaluations des procédures ou des programmes des organismes. Le rapport décrit chaque type d'activité d'évaluation et présente un exposé détaillé d'initiatives plus notables qui illustrent les principaux atouts et inconvénients méthodologiques de certaines approches.

### *4.1 Études externes générales des performances des autorités de la concurrence et efforts d'évaluation*

À de nombreuses occasions, les autorités de la concurrence ont fait l'objet d'études d'observateurs extérieurs qui cherchent à évaluer la qualité de leurs performances. Dans un certain nombre de cas, les auteurs de ces études ont évalué ou commenté l'efficacité des efforts des autorités de la concurrence de faire des évaluations des performances une composante de leur fonctionnement normal. Les études générales, qui couvrent toutes sortes de domaines, sur les performances des organismes et les initiatives d'évaluation des performances se classent en quatre catégories, décrites ci-après.

#### *4.1.1 Études menées par des chercheurs individuels ou de petites équipes de chercheurs*

Une catégorie d'enquête repose sur des études qui examinent toute l'étendue des opérations de l'autorité de tutelle ou les principaux aspects du travail de l'organisme. Certaines de ces études ont été menées par des spécialistes individuels[48], tandis que d'autres ont été préparées par des équipes de chercheurs[49]. Les auteurs de ce type d'études bénéficient habituellement, mais pas systématiquement, d'une certaine coopération informelle de la part de personnes travaillant pour l'autorité de la concurrence afin d'effectuer des recherches sur cette institution[50]. Les études tendent à se concentrer plus intensément sur la qualité des processus de prise de décision interne, mais certains auteurs ont présenté des évaluations détaillées d'interventions spécifiques[51].

#### *4.1.2 Études menées par des institutions publiques*

Une deuxième catégorie d'études d'une grande étendue se compose de travaux préparés par des organismes publics en dehors de l'autorité de la concurrence. Parmi ces travaux, les plus notables sont ceux d'autorités nationales ayant la responsabilité de procéder à l'audit d'organismes publics. Étant donné leur statut d'institutions publiques et en raison de leurs pouvoirs de collecte d'informations, ces autorités d'audit ont d'habitude largement accès aux dossiers internes et au personnel de l'autorité de la concurrence pour mener leurs recherches.

Aux États-Unis, le Congrès donne de temps en temps l'instruction au Government Accountability Office (le GAO, auparavant appelé le Government Accounting Office) d'examiner plusieurs aspects des opérations des autorités antitrust américaines. Un exemple de ce type d'enquête digne d'être signalé a eu lieu en 1980, quand le GAO a effectué une évaluation détaillée des systèmes de gestion de la FTC aux États-Unis et de la Division antitrust du ministère américain de la Justice. Parmi les autres conclusions, l'étude du GAO (U.S. GAO 1980) invite instamment les autorités antitrust fédérales aux États-Unis à consacrer plus de ressources à des évaluations *ex post* concernant les différentes affaires de concurrence et d'améliorer leurs systèmes internes de gestion pour contrôler les progrès des enquêtes et d'autres activités menées par les autorités sur des affaires. Le National Audit Office au Royaume-Uni effectue actuellement une évaluation de l'OFT qui prévoit, entre autres axes de travail, un examen d'indicateurs de performances pour évaluer les activités de l'OFT en matière de politique de la concurrence.

#### *4.1.3 Études menées par des panels de spécialistes*

Les autorités de la concurrence ont fait l'objet d'évaluations occasionnelles préparées par des comités *ad hoc* ou des panels de spécialistes. Dans bien des cas, les panels de spécialistes ont été constitués sous les auspices d'organisations non gouvernementales, soit à la demande de responsables des pouvoirs publics, soit à l'initiative indépendante de l'organisation non gouvernementale[52]. D'autres panels de spécialistes ont été constitués pour des besoins spécifiques et sans aucun lien avec une organisation gouvernementale ou non gouvernementale existante[53].

Dans l'ensemble, les panels de spécialistes ont surtout porté leur attention sur la gestion des autorités de la concurrence et se sont moins intéressés au bien fondé de certaines interventions dans des affaires ou des initiatives de défense de la concurrence. Dans le cadre de ces évaluations axées sur les processus, les enquêtes du panel de spécialistes ont généralement bénéficié d'une coopération substantielle de la part des autorités de la concurrence, en particulier si le panel se présentait avec une demande du chef de l'État ou du parlement national. L'impact de ces enquêtes a considérablement varié, mais on constate un certain nombre de cas dans lesquels les recommandations du panel de spécialistes ont favorisé d'importantes réformes dans la gestion de l'autorité de tutelle[54].

#### *4.1.4 Évaluations effectuées à l'échelle de tout l'organisme ou de tout le système par des organisations multinationales*

Une quatrième catégorie d'évaluation générale a pris la forme d'études des systèmes de concurrence nationaux ou de différente autorités de tutelle menées par des organisations multinationales. L'OCDE, en particulier, a lancé deux types d'enquêtes de grande portée. La Division de la concurrence de l'OCDE a mené des études sur les activités d'application du droit de différentes juridictions et a publié ses conclusions. Bien que ces rapports n'aient pas eu pour but de présenter un bilan complet de ces activités, ils ont offert des perspectives utiles sur les programmes d'application du droit et les activités des autorités de la concurrence concernées[55].

La deuxième forme d'évaluation de tout l'organisme ou de tout le système est l'« examen par les pairs » – un mécanisme inauguré par le Comité de la concurrence de l'OCDE. Pour donner une assise à cet exercice d'examen par les pairs, les consultants de la Division de la concurrence ou le personnel spécialisé ont préparé des rapports fondés sur l'étude détaillée des schémas d'application du droit par l'autorité de la concurrence, des entretiens et des questionnaires écrits, ainsi que des conversations avec des spécialistes de la politique de la concurrence et des responsables commerciaux à l'intérieur du pays[56]. En menant leur enquête, les chercheurs de l'OCDE ont généralement bénéficié d'une bonne coopération de la part de l'autorité de la concurrence concernée. Les rapports constituent la base essentielle des séances d'examen par les pairs lors de réunions programmées régulièrement par le Comité de la concurrence de l'OCDE et le Forum mondial sur la concurrence de l'OCDE. Les résultats de ces audits sont souvent accessibles au public. Les examens par les pairs de l'OCDE ont été complétés par des contributions d'autres instances multinationales comme l'Organisation mondiale du commerce (OMC), qui a assuré, par des conférences et des séminaires, la promotion des avantages de l'examen par les pairs comme moyen pour les autorités de la concurrence plus récentes d'améliorer leur fonctionnement et l'avantage d'un transfert de savoir-faire provenant d'institutions plus expérimentées.

#### *4.1.5 Évaluations générale des autorités de la concurrence par des personnes extérieures : atouts et inconvénients*

Les observateurs extérieurs ont contribué pour une bonne part à faire comprendre les activités des autorités de la concurrence et, dans des cas importants, d'améliorer la gestion et le fonctionnement de l'organisme. Consciente qu'elle sera soumise périodiquement à un examen mené par des chercheurs et des institutions extérieurs, l'autorité de la concurrence est incitée à prendre des initiatives internes pour améliorer son fonctionnement et évaluer ses performances. Lorsque l'examinateur extérieur ou l'instance examinatrice est spécialisé dans les activités de l'autorité de la concurrence et bénéficie d'un accès étendu aux dossiers internes et au personnel de l'organisme, il est possible de proposer un diagnostic informatif des travaux de l'organisme et de faire des propositions utiles d'amélioration.

La dépendance vis-à-vis d'observateurs extérieurs pour la réalisation d'évaluations générales des performances de l'autorité de la concurrence soulève quatre problèmes fondamentaux. Un des inconvénients des évaluations générales effectuées par des personnes extérieures, inconvénient qui ressort

nettement des travaux des panels de spécialistes, est le manque de critères cohérents généralement reconnus pour évaluer les performances de l'organisme. Le chercheur ou l'instance de recherche extérieurs peuvent ne pas préciser soigneusement leurs critères d'évaluation et, lorsqu'ils traitent des conclusions de recherches antérieures dans le cadre d'une évaluation, ne pas repérer les différences de critères appliqués lors d'études antérieures[57]. La précipitation pour produire instantanément un rapport ne laisse souvent pas le temps au panel de spécialistes d'effectuer l'analyse rétrospective précise, menée avec plus de discernement, qui est indispensable à des évaluations solides sur la qualité des performances passées et à des recommandations raisonnables en vue d'améliorations futures.

Un deuxième problème réside dans les connaissances des analystes extérieurs. Dans certains cas, les observateurs extérieurs ne disposent pas de l'accès nécessaire aux dossiers et au personnel des autorités de la concurrence pour parvenir à bien comprendre le fonctionnement courant de l'organisme. Ce n'est pas tant un problème pour les chercheurs (comme les instances nationales d'audit ou les panels qui exercent leurs activités avec l'aval des autorités gouvernementales ou parlementaires) disposant de puissants instruments pour imposer une coopération que pour des chercheurs individuels s'efforçant, sans soutien officiel, de mener des études de grande ampleur sur les activités de l'autorité. Une autre forme de carence en matière de connaissances est liée au manque d'informations de fond que possède le chercher sur l'autorité de la concurrence ou le domaine de la politique de la concurrence en général. Sans ces connaissances pour examiner l'autorité, le chercheur a peu de chance d'interpréter correctement ou sagement ce qu'il observe.

Un troisième problème porte sur les incitations de l'observateur extérieur à présenter une évaluation totalement franche des activités de l'autorité. Un cherche, ou le membre d'une équipe de recherche, qui souhaite entretenir par la suite une relation ou une coopération avec l'autorité de la concurrence peut être réticent à fournir une évaluation sans fard des défauts de l'organisme. Lorsqu'un organisme coopère avec un examinateur extérieur par choix et non par contrainte, il peut refuser de participer à certains exercices dans le cadre desquels l'examinateur refuse, de façon implicite ou explicite, de modérer ses conclusions sévères, du moins à l'intention du public. Il s'agit là, sans doute, d'un inconvénient inhérent à la pratique d'examens par les pairs facultatif menés par l'OCDE et d'autres organismes multinationaux. Si le compte rendu de l'examen par les pairs s'en tient résolument à ses critiques vis-à-vis d'une autorité de la concurrence et si les intervenants dans les réunions de l'OCDE ne font pas preuve d'un peu de retenue lors de leurs interrogatoires de responsables de l'organisme, sans doute peu d'autorités de tutelle seront enclines à se soumettre à de telles évaluations[58].

Un quatrième problème concerne la passivité dont fait preuve une autorité de tutelle qui repose principalement sur des personnes extérieures pour mener des examens occasionnels des performances de l'organisme. Les examens par des personnes extérieures peuvent complémenter les propres efforts de l'organisme, sans toutefois s'y substituer complètement, de mener une évaluation régulièrement de ses interventions et de son mode de fonctionnement. Comme il a été mentionné dans la section 2.6 plus haut, l'objectif doit être d'encourager chaque autorité de tutelle à concevoir ses propres mécanismes pour évaluer et améliorer la qualité de son travail.

### *4.2 Évaluations sur la base de cas spécifiques de l'intervention des autorités de la concurrence*

L'antonyme de l'évaluation macroscopique très générale des performances d'une autorité que l'on vient de décrire réside dans l'évaluation microscopique très ciblée des effets d'interventions spécifiques. Cette section examine l'évaluation de différentes initiatives. Cette forme d'enquête a été l'apanage de différents chercheurs, autorités de la concurrence et organisations multinationales, car les panels d'experts ne procèdent généralement pas à des évaluations précises de dossiers individuels. L'examen qui suit examine l'expérience à partir d'études de cas en s'attachant aux efforts les plus ambitieux à ce jour consentis par une autorité de la concurrence pour évaluer les résultats d'affaires.

### *4.2.1 Études menées par des chercheurs extérieurs sans intervention des autorités de la concurrence*

La plupart des évaluations des interventions d'autorités de la concurrence s'attachant à des affaires spécifiques ont été réalisées par des universitaires travaillant seuls ou en petites équipes. A quelques exceptions notables près, sur lesquelles on reviendra plus loin, ces universitaires ont réalisé leurs évaluations d'affaires spécifiques en s'appuyant uniquement sur des documents publiquement disponibles et sans pouvoir avoir accès aux dossiers internes de l'autorité de la concurrence. Ces études sont « indépendantes de l'autorité de la concurrence au sens où elles ne dépendent pas de cette autorité en tant que source d'information et où elles ne demandent pas aux chercheurs de faire des concessions explicites ou implicites à l'autorité pour effectuer leur recherche. La principale limite que présentent ces études réside dans le fait que les chercheurs n'ont généralement pas accès aux dossiers internes de l'autorité qui révèlent la réflexion qui a présidé à la décision d'engager des poursuites.

### *4.2.2 Études menées par des instances publiques : étude du GAO sur les fusions dans le secteur pétrolier aux États-Unis*

Des organismes publics ayant des responsabilités de contrôle ont occasionnellement réalisé des études de décisions ponctuelles d'application du droit prises par une autorité de la concurrence. C'est ainsi qu'en 2004, le General Accountability Office des États-Unis a publié le résultat des efforts les plus ambitieux jamais consentis par une autorité de contrôle de l'administration publique pour évaluer les effets des interventions d'une autorité de la concurrence (U.S. GAO 2004). Le GAO a en effet voulu mesurer les effets sur la concurrence de huit fusions réalisées dans le secteur pétrolier de 1997 à 2000. La FTC avait examiné et approuvé la poursuite de l'ensemble des sept fusions, bien qu'elle ait demandé aux entreprises concernées de procéder à des désinvestissements importants dans le cadre de certaines opérations. Parmi les fusions analysées par le GAO, on compte l'acquisition par Exxon de Mobil, que la FTC a approuvée après la plus grande opération de cessions d'actifs de distribution de l'histoire du contrôle des fusions aux États-Unis.

Pour réaliser son étude, le GAO a mis au point des modèles économétriques destinés à mettre en évidence la façon dont les fusions et la concentration des fournisseurs ont affecté les prix de l'essence. Le GAO s'est principalement appuyé sur ses propres économistes pour élaborer les modèles et a consulté des conseillers externes, notamment plusieurs économistes spécialisés dans les problèmes de concurrence dans le secteur pétrolier, pour formuler son modèle et le plan de son étude. Pour ce qui est des données, le GAO a acheté des informations sur les prix de gros auprès d'une entreprise privée, le Oil Price Information Service, qui suit les activités du secteur pétrolier. Le GAO a communiqué une première version de son rapport à la FTC, qui a répondu par des commentaires critiques considérables sur la méthodologie de l'étude. Le GAO a, dans une large mesure, rejeté les propositions méthodologiques de la FTC et a publié le rapport en mai 2004. L'étude du GAO a conclu que six des huit fusions examinées se sont traduites par des augmentations de prix alors que dans deux cas elles ont entraîné une baisse des prix de l'essence.

La publication de l'étude sur les fusions pétrolières a déclenché un vaste et intense débat public entre le GAO et la FTC quant à la validité du travail du GAO. La FTC affirmait en effet que le rapport du GAO comportait de graves erreurs méthodologiques qui remettaient en cause la fiabilité de ses résultats (FTC 2004b). La Commission précisait que trois lacunes méthodologiques portaient préjudice à l'étude du GAO. Premièrement, lors de l'analyse économétrique de certaines fusions, elle critiquait le GAO pour ne pas avoir convenablement tenu compte de nombreux facteurs qui affectent les prix de l'essence. Deuxièmement, elle affirmait que l'évaluation par le GAO de la façon dont la concentration affecte les prix n'utilisait pas les marchés pertinents convenablement définis que suppose une analyse valable de l'organisation du secteur. Troisièmement, pour la FTC, le GAO n'a pas examiné des faits essentiels concernant les différentes opérations, comme la fusion d'Exxon avec Mobil, qui ont été déterminants pour évaluer leur impact sur les prix.

En janvier 2005, la FTC et le GAO ont convoqué ensemble une conférence pour étudier les travaux que ces deux autorités avaient réalisés pour évaluer les effets des fusions dans le secteur pétrolier[59]. Des économistes universitaires, notamment plusieurs experts en économétrie, ont critiqué les travaux des deux autorités. L'une des principales limites de cet exercice a été le refus du GAO de communiquer intégralement sa méthodologie économétrique et de fournir toutes les données qu'il avait utilisée pour faire tourner ses modèles; Un certain nombre de commentateurs ont souligné, qu'en l'absence de révélation intégrale du modèle et de l'ensemble des données utilisées pour le faire tourner, il serait impossible de procéder à une vérification significative des résultats obtenus par le GAO.

*4.2.3 Examens d'affaires spécifiques réalisés par des organisations multinationales*

Un certain nombre d'organisations multinationales ont organisé des séminaires ou des ateliers portant sur l'analyse de mesures spécifiques d'application du droit prises par de nouvelles autorités de la concurrence. L'OCDE a procédé à diverses formes d'exercices d'évaluation depuis le début des années 90[60]. C'est ainsi qu'elle organise des séminaires réguliers d'étude de cas qui examinent un certain nombre d'initiatives d'application du droit prises par des autorités de la concurrence d'économies en transition[61]. Dans ce cadre, de petites équipes d'experts étrangers se réunissent pendant plusieurs jours avec les personnes ayant traité des affaires et d'autres agents des autorités de la concurrence pour examiner des dossiers spécifiques. Les conseillers extérieurs écoutent des exposés présentés par des agents d'autorité de la concurrence qui rendent compte de leur décision d'engager des poursuites ainsi que des réactions des entreprises défenderesses. Les conseillers étrangers procèdent ensuite à un examen critique de ces travaux. Des variantes de ces séminaires se sont déroulées dans le cadre de conférences régionales organisées par la CNUCED elle-même ou en coopération avec d'autres organismes donneurs.

*4.2.4 Examens d'affaires spécifiques entreprises ou parrainées par des autorités de la concurrence*

Ces 25 dernières années, les autorités de la concurrence ont réalisé des études d'affaires spécifiques dans certaines occasions. Comme on le verra plus loin dans la section 4.2.6, la FTC a parrainé à la fin des années 70 et au début des années 80 des évaluations réalisées par des universitaires indépendants concernant des décisions de la Commission à propos de restrictions verticales[62] et de comportements d'entreprises dominantes[63]. Parmi les autres évaluations réalisées ces dix dernières années, la FTC et ses experts ont publié des études consacrées aux interventions de la Commission visant à contrôler des fusions dans le secteur des boissons non alcoolisées (Saltzman et al. 1999), à la mise en œuvre d'ordonnances de désinvestissement dans des affaires de fusion (FTC 1999), aux effets des fusions dans le secteur hospitalier (Vita & Sacher 2001), ainsi qu'à ceux de fusions dans le secteur pétrolier (FTC 2004a; Taylor & Hoskin 2004). La FTC s'est en outre efforcée d'améliorer ses indicateurs agrégés de performances conformément aux demandes du Congrès des États-Unis dans le cadre de la Government Performance and Results Act [Loi sur les performances et résultats de l'administration publique].

A la fin des années 80, le département de la Justice (DOJ), agissant conformément aux termes d'un jugement d'expédient, a financé une étude concernant les effets de la restructuration de la compagnie American Telephone & Telegraph[64]. Les experts du DOJ ont aussi étudié les conséquences de certaines fusions de compagnies aériennes dans les années 80 (Werden et al. 1991) ainsi que les effets des fusions des cabinets comptables dans les années 90 (Sullivan 2002). Les économistes du DOJ réalisent actuellement des études sur les conséquences des fusions dans d'autres secteurs.

Parmi les évaluations existantes parrainées par des autorités de la concurrence, l'une des plus intéressantes a été réalisée dans les années 90 par l'autorité péruvienne de la concurrence, l'Institut national de défense de la concurrence et de la protection de la propriété intellectuelle (Indecopi)[65]. Au cours de son mandat à la tête de l'Indecopi, Beatriz Boza a invité des universitaires et des praticiens à venir à l'Indecopi en tant que chercheurs invités et à étudier divers aspects des programmes de fond et des

procédures administratives de l'Indecopi. A ce titre, les chercheurs ont bénéficié d'un large accès aux dossiers internes de l'Indecopi et aux agents de l'autorité.

Les résultats du travail des chercheurs que Mme Boza a qualifié « d'audit universitaire » ont été publiés à la suite de discussions et de commentaires au sein de l'Indecopi[66]. La publication de ces études a répondu à l'engagement pris par l'Indecopi vis-à-vis des chercheurs dès l'origine du projet de publier les contributions réalisées (rédigées de façon à ne pas faire figurer d'informations non publiques) sans se préoccuper de savoir si les chercheurs félicitaient ou critiquaient l'autorité. Mme Boza et ses collègues ont vu dans la préparation et la publication des études d'importants vecteurs d'amélioration de la qualité des décisions de l'Indecopi et de sensibilisation de l'institution.

Outre ces projets d'évaluation déjà réalisés, un certain nombre d'autorités de la concurrence ont lancé ces dernières années des projets d'évaluation de l'impact d'affaires spécifiques. Entre autres évolutions, divers organismes exerçant des missions en matière de politique de la concurrence au Royaume-Uni ont mené des recherches visant à mieux connaître les conséquences de ces affaires[67].

#### *4.2.5 Les évaluations par la FTC de l'impact d'affaires de restrictions verticales et d'abus de position dominante*

Comme on l'a vu, à la fin des années 70 et au début des années 80, la FTC a mis en œuvre un plan d'évaluation des conséquences d'affaires de restrictions verticales ainsi que d'une affaire d'abus de position dominante qui avaient commencé dans les années 70[68]. Le facteur ayant déclenché ces études aura été une lettre transmise en 1978 par une commission du Congrès des États-Unis au président de la FTC (Michael Pertschuk) demandant à la FTC de procéder à une étude d'affaires de restrictions verticales. La commission en question, la sous-commission de l'antitrust et des monopoles du Sénat, a proposé que la FTC se penche sur son expérience de la répression des restrictions verticales afin d'étudier la possibilité, évoquée l'année précédente dans l'affaire *Continental T.V., Inc. c. GTE Sylvania Inc.*[69], qu'il existe des éléments empiriques plaidant pour l'adoption d'une règle d'illégalité *per se* des restrictions verticales hors prix. L'élan initialement donné à ces études a donc été externe (une demande du Congrès) plutôt qu'interne à la FTC.

La lettre du Congrès a amené la FTC à concevoir un projet visant à évaluer les effets de diverses affaires de restrictions verticales entamées dans les années 70. La FTC avait choisi de se concentrer sur les évaluations de restrictions verticales visées par ses activités d'application du droit dans cinq secteurs (chaussures, blue jeans, composants audio, gaz industriels et appareils auditifs). Les affaires en question portaient sur des pratiques de distribution liées ou non aux prix, la majorité des affaires visant à contester des mécanismes de prix imposés. Outre l'examen de dossiers de restrictions verticales, l'autorité a décidé de profiter de ce prjet pour évaluer les conséquences d'affaires dans d'autres domaines d'application du droit. Le projet initialement envisagé devait inclure au moins une affaire d'abus de position dominante — l'une des grandes priorités de l'action de la FTC dans les années 70 — et au moins une affaire de fusion horizontale. C'est le Directeur adjoint de la planification du Bureau de la concurrence de la FTC, John Kirkwood, qui a été chargé du projet et a constitué une équipe composée de deux avocats et deux économistes de la FTC devant gérer le projet.

La décision de l'autorité de procéder à une évaluation d'affaires de concurrence passées n'a pas bien été accueillie par les experts du Bureau de la concurrence, qui est le service d'application du droit de la concurrence de la FTC. En effet, ils craignaient surtout qu'une éventuelle étude remettant en cause la sagesse ou l'efficacité des interventions passées de la FTC ne serve à attaquer la position de la Commission dans les procédures concernant des affaires de concurrence en cours d'examen, ou plus généralement qu'elle ne serve à discréditer le travail de l'autorité dans le domaine de la politique de la concurrence. Ils craignaient en outre que d'éventuelles conclusions selon lesquelles la FTC avait obtenu des résultats utiles

dans les affaires étudiées ne soient dénigrées par des éléments extérieurs comme le produit d'efforts de la Commission pour manipuler la conception et la réalisation de l'étude afin d'obtenir des évaluations positives. Bref, les résultats favorables aux intérêts de la FTC seraient méprisés, tandis que des résultats critiques sur les travaux de la FTC seraient retenues comme des preuves de l'échec de l'institution. Quel que soit le résultat, affirmaient les agents du Bureau de la concurrence, la FTC ne pouvait pas « gagner ».

Pour étayer la conception de l'étude, l'équipe d'évaluation de l'impact de la FTC a recruté deux spécialistes universitaires de premier plan en matière d'organisation industrielle (Richard Caves et Ben Klein) pour préparer les protocoles de recherche. Les protocoles proposaient des démarches que les chercheurs pouvaient suivre pour évaluer les résultats obtenus par la FTC dans des affaires de restrictions verticales et esquissaient la séquence des étapes que la FTC pourrait suivre pour réaliser les études[70]. S'appuyant sur les protocoles de Caves et Klein et des discussions avec le Bureau de la concurrence et le Bureau des études économiques de la FTC, l'équipe d'évaluation de l'impact a décidé que les études de cas comporteraient pour l'essentiel quatre éléments : (1) un examen de la documentation disponible publiquement sur l'affaire concernée, y compris les publications universitaires et les comptes rendus de la presse professionnelle qui donnaient des informations sur les effets de l'intervention de la FTC ; (2) un examen de la décision rendue par la FTC dans l'affaire, les dossiers internes de la FTC concernant l'affaire ainsi que les pièces des éventuelles procédures administratives ; (3) la p^réparation d'un rapport évaluant l'impact de l'action de la FTC sur la base des éléments (1) et (2) ; et (4) les recommandations en vue de la collecte de données en vue de vérifier plus complètement les conclusions présentées dans le rapport écrit du chercheur.

L'équipe de l'évaluation de l'impact s'est ensuite intéressée à la question de savoir lesquels des chercheurs mèneraient les études. Une possibilité était d'effectuer cette tâche en interne en chargeant des économistes du Bureau of Economics de la FTC d'effectuer ces études. L'organisme a rejeté cette solution en arguant que la dépendance vis-à-vis de personnes internes à la FTC pourrait faire douter de la crédibilité et de la fiabilité des résultats. Cette préoccupation a incité la FTC à faire appel à des chercheurs extérieurs pour effectuer les études. La stratégie adoptée pour recruter des chercheurs extérieurs a été suggérée dans les protocoles de recherche de Caves et Klein : il faut avoir recours à des universitaires bénéficiant d'un peu d'expérience et d'une bonne réputation, pour faire ces études. Comme la Commission n'était pas en mesure de payer plus de 10 000 USD par étude, il était fort peu probable que des économistes plus expérimentés et connus puissent être convaincus de se charger de ce travail.

Avec l'aide de Caves, Klein et d'autres chercheurs extérieurs, l'équipe d'évaluation de l'impact a tenté d'identifier des économistes qui, même avec relativement peu d'expérience dans leur carrière universitaire, avaient donné des signes prometteurs dans le domaine de l'économie des entités industrielles. Le choix des chercheurs à partir de cet ensemble de candidats a posé en soi des difficultés. Il est fréquent qu'un chercheur aborde un thème d'enquête – par exemple, l'analyse des restrictions verticales – avec un point de vue influencé par sa formation, ses idées philosophiques personnelles et ses recherches antérieures. En lisant attentivement les précédents travaux rédigés par le chercheur et en se renseignant sur ses préférences personnelles en matière de politique, il doit être possible de déterminer la propension du chercheur à adopter ou non un point de vue favorable vis-à-vis de la théorie de la FTC sur l'affaire et sa décision d'engager des poursuites.

Si elle avait décidé de recourir à ce procédé, la FTC aurait pu biaiser les résultats des études en attribuant les contrats de recherche à des chercheurs ayant une idée dans l'ensemble positive de l'application du droit en matière de restrictions verticales ou de l'engagement de poursuites concernant d'autres affaires (comme les questions d'abus de position dominante) que l'autorité envisageait d'examiner. Consciente qu'une telle approchait pourrait facilement discréditer toute l'initiative, l'organisme a volontairement choisi à constituer un groupe de chercheurs représentant différentes approches philisophiques[71]. Même si les chercheurs n'étaient pas d'accord sur l'intérêt des affaires de

restrictions verticales, ils avaient en commun des compétences techniques et une formation reconnues. Un indicateur de compétence lors du processus de sélection est le nombre de chercheurs – parmi eux figurent Victor Goldberg, Howard Marvel et Sharon Oster – qui ont acquis une immense réputation dans leur carrière professionnelle ultérieure. Pour mener l'étude sur l'abus de position dominante dans le cadre du jugement d'expédient concernant Xerox, l'équipe d'évaluation de l'impact a choisi Timothy Bresnahan, qui était déjà sur le point de devenir un des éminents spécialistes du domaine de l'économie des entités industrielles.

De même que les chercheurs rassemblaient des informations accessibles au public pour préparer leurs études, l'équipe d'évaluation de l'impact de la FTC rassemblait des dossiers de la Commission sur les différentes affaires et transmettait les dossiers pertinents à chaque chercheur. Parmi les dossiers confidentiels les plus importants de l'organisme fournis aux économistes extérieurs se trouvaient des mémorandums internes préalables aux plaintes préparés par le Bureau of Competition et le Bureau of Economics concernant la décision d'engager des poursuites. Ces documents exposaient et analysaient les résultats de l'enquête préalable à la plainte et la théorie proposée relative à l'affaire.

Pour avoir accès à ces dossiers et d'autres non accessibles au public, les chercheurs ont signé une convention de confidentialité qui interdisait la diffusion des informations non publiques. Les contrats de la FTC avec les spécialistes extérieurs permettaient aux chercheurs de publier leurs travaux et engageait l'organisme à consacrer tous ses efforts pour que les études soient publiées. Les conditions du contrat exigeaient des chercheurs qu'ils présentent à la FTC, avant soumission pour publication dans des revues ou autres ouvrages, les projets de leurs rapports pour permettre aux avocats de la FTC de veiller à ce que les informations non publiques aient été exclues. Sous réserve de cette restriction, les chercheurs étaient libres de publier leurs travaux et plusieurs versions publiées de leurs études dans des revues professionnelles[72].

Au delà du processus d'écrémage des informations non publiques, les chercheurs étaient tenus de soumettre un projet initial pour examen approfondi et commentaires par le personnel de la FTC. Dans une très large mesure, l'examen des projets par la FTC s'intéressait aux aspects techniques – comme la justesse de la présentation par le chercheur des délibérations internes de la FTC et de la théorie de l'affaire de l'organisme, l'exhaustivité de l'examen des publications par le chercheur et la rigueur de la présentation. Parallèlement, les conclusions préliminaires que comportaient certains projets attisaient les craintes de certains avocats de la FTC, qui s'étaient opposés au lancement du projet d'évaluation. Certaines évaluations des affaires de la FTC étaient favorables, mais d'autres ne l'étaient vraiment pas. La réception des projets initiaux soulevait une fois de plus la question de savoir si l'autorité de la concurrence devait amener le projet jusqu'à la conclusion voulue.

L'équipe d'évaluation de l'impact et d'autres examinateurs internes de la FTC ont incité les chercheurs, ceux qui étaient favorables aux affaires de la FTC tout comme ceux qui y étaient opposés, à défendre leur méthodologie et leurs conclusions. Certaines discussions avec les spécialistes qui ont rédigé des évaluations critiques des travaux de la Commission étaient controversées. Malgré de profonds désaccords entre la FTC et certains chercheurs et un certain malaise interne au sein de la FTC vis-à-vis des évaluations défavorables, la Commission a respecté son engagement à publier les résultats et a permis aux chercheurs de tenter de faire publier leurs rapports.

Sous un certain nombre de points de vue, le projet d'évaluation de l'impact s'est révélé un succès. La grande majorité des lecteurs extérieurs des publications en ont conclu que les chercheurs présentaient dans chaque cas des critiques extrêmement instructives des théories économiques de la Commission, proposaient une évaluation préliminaire utile des conséquences probables de l'intervention de la FTC et proposaient une méthodologie raisonnable pour mener une étude empirique plus approfondie. La plupart des observateurs ont aussi conclu que les études permettaient de bien comprendre certains aspects des affaires examinées et contribuaient fortement à une meilleure appréhension des restrictions verticales en

matière de prix ou non et des mesures correctrices obligatoires concernant l'octroi d'un brevet imposées pour résoudre les poursuites pour abus de position dominante à l'encontre de Xerox.

Un élément intentionnel du programme initial d'évaluation de l'impact – la réalisation des travaux de suivi pour effectuer d'autres tests empiriques – ne s'est jamais produit, car la FTC a choisi de ne pas accorder de ressources supplémentaires pour ces initiatives. Par conséquent, une des limites inhérentes aux études est leur fondement empirique relativement mince. Les chercheurs extérieurs ont pu évaluer la cohérence de la théorie des affaires de la FTC, ainsi que le bien-fondé de la décision d'engager des poursuites au vu des preuves dont disposait l'organisme au moment où les plaintes ont été déposées. En dehors de la collecte d'informations accessibles au public sur l'évolution du secteur, les chercheurs n'ont pas pu effectuer de tests empiriques concernant leurs hypothèses sur les conséquences économiques probables de chaque affaire.

D'un point de vue institutionnel, il semble que la volonté de la FTC de procéder à des études et la réalisation effective du projet ont amélioré la réputation de l'organisme aux yeux de monde extérieur en démontrant qu'il était prêt à se soumettre à une analyse rigoureuse de la part de personnes extérieures. Parallèlement, il faut reconnaître que la réalisation d'évaluations *ex post* s'accompagne de coûts internes pour l'organisme qui vont au-delà de l'allocation de ressources pour mener et gérer les études. La réalisation du projet a soulevé une opposition interne. Dans un cas, les inquiétudes des examinateurs d'une affaire de concurrence de la FTC se sont dissipées une fois qu'un répondant dans une affaire en cours de restrictions verticales s'est servi de l'évaluation critique d'une affaire quelconque de la FCT par un chercheur extérieur pour appuyer son argument en faveur d'une disculpation. La Commission a fini par décider de rejeter sa plainte dans cette affaire[73], mais il est difficile de dire quel impact l'étude du chercheur a eu sur la décision de l'organisme.

### *4. 3 Évaluations, axées sur les processus, des activités et de l'organisation des autorités de la concurrence*

La deuxième catégorie d'expérience d'évaluation moderne se manifeste par les efforts pour analyser les éléments essentiels des processus et des activités et de l'organisation des autorités de la concurrence. Contrairement aux études portant sur des affaires spécifiques dont il a été question plus haut, les examens axés sur les processus ne cherchent pas à analyser les conséquences en matière de concurrence des différentes interventions de l'organisme. L'objectif des études axées sur les processus est d'évaluer la qualité de la prise de décision de l'organisme et de tester la fiabilité des procédures utilisées par l'organisme pour accomplir sa mission.

#### *4.3.1 Évaluations fondées sur les processus par les autorités de tutelle*

Les 25 dernières années ont été marquées par une innovation extraordinaire ainsi que par des changements dans la conception de systèmes de la concurrence et dans la gestion des autorités de la concurrence. La multiplication de nouveaux systèmes, phénomène souvent décrit comme source de complexité gênante, a favorisé un processus remarquable d'expérimentation dans la conception institutionnelle et suscité un intérêt sans précédent dans l'influence du choix de mécanismes institutionnels dans l'obtention de résultats fondamentaux en matière de politique de la concurrence. Durant cette période, des améliorations considérables ont eu lieu dans certaines juridictions, comme l'Australie et le Canada, qui ont été parmi les premiers pays à adopter des lois relatives à la concurrence, ainsi que dans des juridictions comme l'Afrique du Sud et la Corée eu Sud, qui ont rejoint plus récemment la communauté des pays dotés d'un droit de la concurrence. Rares sont les juridictions qui n'ont pas pris de mesures, ces dernières années, pour repenser des aspects importants de la structure, des responsabilités ou des mesures correctrices de leur autorité de la concurrence.

Ces dernières années, la Direction générale de la concurrence de la Commission européenne (DG concurrence) a mené un certain nombre d'études sur ses propres procédures et, plus généralement sur le fonctionnement du système de droit de la concurrence de l'Union européenne. Dans bien des cas, ces évaluations des procédures et de la définition des politiques ont inspiré des réformes de grande portée[74]. Durant la période depuis 2000 à elle seule, les résultats émanant des évaluations axées sur les processus de la DG Concurrence ont abouti notamment à la création de la position d'économiste en chef dans les sphères supérieures de la direction de l'institution ; la mise en place de panels d'« avocats du diable » pour tester la solidité des théories et les preuves sur la base desquelles peuvent se fonder des affaires ; une réorganisation interne qui, entre autres effets, a redistribué l'habilitation à examiner des fusions ; et un programme de modernisation qui décentralise les fonctions essentielles de décision en les confiant aux autorités de la concurrence nationales des États membres de l'UE et confie aux tribunaux nationaux des responsabilités de décision étendues.

L'UE s'est aussi lancée activement dans de vastes examens programmatiques de domaines importants de la définition de politiques par la DG Concurrence. Un des centres d'attention a porté sur la réorganisation des protocoles d'application du droit de la concurrence, y compris la publication de nouvelles lignes directrices concernant la concession de licences de propriété intellectuelle (Lowe & Peeperkorn 2005). Plus récemment encore, la DG concurrence a entrepris une enquête de fond sur la mise en œuvre de ses mesures correctrices dans le cadre d'affaires relatives à la concurrence (de Souza 2005). L'ensemble des résultats de cette évaluation devrait paraître d'ici la fin 2005.

Un autre exemple digne d'être signalé de la réforme axée sur les processus est l'Office of Fair Trading (OFT) au Royaume-Uni. Une réévaluation élémentaire du bien fondé des mesures correctrices concernant des infractions graves au droit de la concurrence a amené l'OFT à concevoir et obtenir le feu vert pour des propositions visant à traiter la constitution d'ententes comme des infractions. En réfléchissant à son expérience du traitement des problèmes de concurrence se manifestant dans des secteurs auparavant ou actuellement réglementés, l'OFT a joué un rôle majeur dans la conception d'approches innovantes de l'amélioration des relations avec les autorités de tutelle sectorielles et dans la coordination des opérations. La direction de OFT s'est aussi livrée à des évaluations internes sur le meilleur moyen d'organiser les enquêtes et les poursuites concernant les affaires.

Une dernière illustration représentative réside dans l'expérience acquise par la FTC durant les années 1990s lors de l'évaluation de l'efficacité de sa procédure de conception de mesures correctrices dans le cadre de fusions (FTC 1999)[75]. L'étude a constitue la première tentative de la part de la Commission d'évaluer la qualité de ses mesures correctrices appliquées aux fusions depuis l'adoption en 1976 du Hart-Scott-Rodino Antitrust Improvements Act, qui a mis en place aux États-Unis le dispositif moderne de notification préalable de certaines fusions[76]. Parmi d'autres conséquences, la création des obligations de notification et les périodes d'attente obligatoires ont facilité la généralisation du recours aux règlements qui utilisaient les cessions d'actifs et différentes initiatives liées au comportement pour régler de légers problèmes de droit de la concurrence.

L'étude de la FTC est une initiative d'origine interne et constitue l'aboutissement de recherches menées par la Compliance Division du Bureau of Competition de la FTC et du Bureau of Economics de l'organisme. Dans le cadre de leur expérience des fusions, le personnel spécialisé de ces services opérationnels a repéré un certain nombre de faiblesses potentielles dans la pratique de la FTC concernant les mesures correctrices. La pratique existante exigeait que la FTC ne surveille la conformité avec les obligations de désinvestissement que dans la mesure où l'organisme approuvait une proposition donnée de désinvestissement et où les parties concernées par la fusion cédaient effectivement les actifs en question. La procédure de la FTC ne tenait aucun compte, de façon systématique, de l'utilisation éventuelle de ces actifs par l'acheteur des actifs cédés pour les vendre sur le marché correspondant ou d'un quelconque effet sur la concurrence de la présence sur le marché de l'acheteur détenant les actifs cédés. En dehors de sa

propre expérience, le personnel de la Commission savait que de nombreux rapports de spécialistes remettaient en cause l'efficacité de nombreuses mesures correctrices dans le cadre de fusions, y compris des mesures prises après la mise en œuvre des réformes à la fin des années 70[77].

Se penchant sur ces expériences, les experts de la FTC ont recommandé en 1995 que la Commission effectue une évaluation systématique de la procédure de désinvestissement appliquée par l'organisme. Par rapport à des recherches antérieures de la FTC sur les mesures correctrices dans le cadre de fusions, la nouveauté de l'étude proposée était la priorité qu'elle accordait à interroger les acheteurs des actifs cédés sur la cession et l'utilisation en dernier ressort de ces actifs. La Commission a effectué une étude en deux parties. Elle a d'abord entrepris une étude pilote pour tester sa méthodologie, qui se composait essentiellement d'entretiens téléphoniques ouverts avec les acheteurs d'actifs cédés à la suite du règlement d'affaires de fusions. Après avoir rendu compte des résultats de l'enquête pilote, la Commission a effectué une évaluation plus complète et examiné 35 décisions rendues d'octobre 1989 à septembre 1994 dans le cadre desquelles la FTC avait exigé des cessions d'actifs. La période de cinq ans choisie a permis à l'organisme d'examiner les désinvestissements dont les répercussions auraient un impact sur le marché et qui s'étaient déroulées suffisamment récemment pour que les acheteurs se souviennent assez clairement de l'expérience du désinvestissement. Les 35 affaires concernaient en outre un large éventail de secteurs, d'acheteurs et d'actifs cédés.

La FTC s'est essentiellement appuyée sur une équipe constituées de ses propres avocats et économistes pour mener l'étude, même si elle a obtenu des commentaires sur des projets de la part d'un professeur d'une école de commerce (David Ravenscraft) qui avait une grande expérience de la collecte de données et de l'analyse des fusions et des acquisitions. Le personnel de la FTC a identifié 50 acheteurs qui avaient fait l'acquisition d'actifs cédés dans le cadre des 35 affaires et il en interviewé 37. Le personnel a également interrogé huit des répondants qui étaient partie à la fusion et deux parties tierces. La Commission a publié les résultats de son enquête en 1999 et elle a souligné quatre conclusions : (1) les trois quarts des désinvestissements examinés dans l'étude ont « été réussis dans une certaine mesure » (FTC 1999 ; 8) ; (2) les règlements qui ont ordonné le désinvestissement d'activités en cours ont mieux réussi que les désinvestissements d'actifs isolés ; (3) la possibilité d'imbrications et de relations persistantes entre acheteur et vendeur a exigé la surveillance attentive de l'autorité de la concurrence, car ce type de liens pose parfois des problèmes inattendus pour les acheteurs et peut parfois constituer un facteur déterminant pour que l'acheteur parvienne à utiliser les actifs cédés; et (4) les entreprises de moindre taille ont réussi, dans les mêmes proportions que les grandes sociétés, à utiliser les actifs cédés.

L'étude de 1999 sur les désinvestissements a été extraordinairement instructive pour la FTC et les autres autorités de la concurrence. Les résultats de l'étude ont été à l'origine d'ajustements importants de l'évaluation par l'organisme des propositions de règlement faisant intervenir des désinvestissements et ont changé le type des exigences émises ultérieurement par la FTC dans le cadre de règlements négociés. L'étude a amené un certain nombre d'autorités de la concurrence d'autres juridictions à réévaluer leur propre approche vis-à-vis des mesures correctrices dans les affaires de fusions et, dans certains cas, à lancer leur propre version de l'enquête de la FTC.

À certains égards, l'objectif de l'étude était relativement modeste. Elle ne cherchait pas à évaluer l'impact véritable en matière de concurrence des mesures correctrices de la FTC en cas de fusions – mais seulement « à tirer des conclusions sur la capacité ou non de l'acheteur des actifs cédés à pénétrer sur le marché et à maintenir les activités » (FTC 1999 ; 9). Pourtant, même une enquête aussi restreinte présente un grand intérêt. Si une politique sur les mesures correctrices d'une autorité de la concurrence en cas de fusion pose comme hypothèse de base que les actifs cédés resteront dans le marché concerné et aideront une entreprise autre que les parties concernées par la fusion à accroître ses ventes vis-à-vis de la concurrence , il est utile de savoir si l'acheteur a réussi à se servir des actifs pour réaliser de quelconques ventes. Si la réponse à cette question est « non » dans plus d'un nombre dérisoire de circonstances,

l'autorité de la concurrence doit revenir sur ses hypothèses concernant l'efficacité de sa politique de contrôle des fusions. Si la réponse est habituellement « oui », il est utile de connaître les facteurs favorables à un désinvestissement réussi et d'utiliser cette connaissance pour améliorer les solutions de fusions à l'avenir.

Peut-être la principale carence de l'étude de la FTC est sa description succincte du critère qui sert à évaluer la réussite de l'acheteur à déployer les actifs cédés. La FTC a signalé que, sur les 37 désinvestissements étudiés, « 28 semblent avoir abouti à des opérations viables sur le marché concerné » (FTC 1999 ; 10). La FTC a ajouté que, dans chacune des 28 affaires, « l'acheteur approuvé a fait l'acquisition des actifs, il a commencé ses activités et il a été actif sur le marché en question dans des délais raisonnables » (FTC 1999 ; 10). L'étude de la FTC ne précise pas les tests qu'elle a utilisés en pratique pour décider si une entreprise avait lancé « des activités viables » –terme qui peut recouvrir une seule vente sur le marché correspondant ou des milliers de ventes.

L'expérience de la DG concurrence, de l'OFT, de la FTC et d'autres organismes met en évidence plusieurs éléments importants d'un examen efficace axé sur les processus. Deux caractéristiques se dégagent. La première est qu'il est important pour l'autorité de la concurrence de prendre du recul et d'entreprendre une évaluation intégrale et volontaire de l'efficacité de programmes ou de procédures spécifiques. Un examen significatif des pratiques de l'organisme ne peut se faire à contrecœur. Dans tous les cas, l'autorité de la concurrence en question était prête à confier à une partie de ses meilleures ressources humaines l'examen de certains domaines de son activité et à proposer des améliorations. Une deuxième caractéristique étroitement liée est le rôle qu'a joué l'étude comparative dans la proposition d'orientations de réforme. Une comparaison entre les juridictions a permis de mettre en évidence d'autres solutions opérationnelles ou programmatiques et a fourni une base d'expérience permettant d'évaluer les avantages de ces solutions.

### *4.3.2 Évaluations axées sur les processus par des instances multinationales*

Les exercices d'examen par les pairs décrits dans la section 4.1.4 plus haut ont donné des moyens importants d'évaluation axée sur les processus. La réaction positive aux projets d'examen par les pairs que les organisations internationales ont obtenue de la part de leurs membres et des affiliés donne à penser que les autorités de la concurrence accueilleraient favorablement de plus gros efforts de la part d'instances multinationales plus importantes (par exemple, le Réseau international de la concurrence, l'OCDE, la CNUCED) pour attirer davantage l'attention sur les problèmes de gestion et d'activités des autorités de la concurrence. Ces autorités de la concurrence sont nombreuses à se montrer enthousiastes à l'idée de rencontrer des institutions homologues pour discuter, analyser et comparer entre elles des aspects opérationnels élémentaires. Cette volonté pourrait être notamment canalisée dans la mise au point d'un plan stratégique à l'échelle de l'autorité de tutelle, l'approche optimale pour organiser le personnel de l'organisme (selon des branches fonctionnelles ? par secteur ? avec une unité indépendante d'économistes ?), la conception d'indicateurs de contrôle de la qualité interne, la relation du service juridique avec les unités chargées de traiter les affaires et le meilleur moyen de coordonner les activités avec d'autres organismes publics, comme les autorités de tutelle sectorielles, avec des portefeuilles importants qui recoupent une partie du portefeuille de l'autorité de la concurrence.

Dans les réunions internationales, l'attention s'est surtout portée sur la question de savoir *ce que* les autorités de la concurrence devraient faire (accorder la toute première priorité aux poursuites contre les ententes ? appliquer un critère de domination du marché ou une atténuation substantielle de la norme de concurrence dans le contrôle des fusions ?) et a eu tendance à éclipser la question toute aussi importante de savoir *comment* elles devraient s'y prendre. Dans les salles de réunion officielles, les délégués cherchent souvent à déterminer si un concept analytique est supérieur à un autre. Dans les conversations durant les pauses, les repas ou les rencontre informelles, les délégués se demandent souvent mutuellement de quelle

manière leurs autorités de tutelle nationales décident de la démarche à suivre et tentent d'obtenir des précisions sur le déroulement pratique des tâches administratives courantes. Les instances multinationales pourraient rendre un immense service à leurs membres en plaçant plus fréquemment les questions de gestion et de procédure interne à l'ordre du jour et en les classant dans les priorités.

### *4.3.3 L'initiative de gestion des performances de l'OCDE*

Parmi les initiatives en vue d'améliorer l'évaluation des performances émanant d'un organisme multinational, il convient de mentionner le Projet de développement et d'évaluation institutionnels qu'a récemment mis sur pied le Comité de la concurrence de l'OCDE. Le projet de l'OCDE cherche à tirer parti des leçons découlant de l'expérience de l'évaluation des performances dans les institutions publiques et privées ces dernières décennies pour préparer un outil permettant d'évaluer la qualité de la gestion et des procédures internes des autorités de la concurrence et de signaler des aspects à améliorer. Comme cela a été testé dans différents organismes publics et privés, les principales étapes de la méthodologie de la gestion des performances sont (1) l'articulation des « principes essentiels » de l'organisation à étudier, (2) la sélection de types de comportements qui montrent que l'organisation adhère aux principes essentiels, (3) la création d'une procédure d'évaluation interne qui se sert de ces critères comportementaux pour évaluer les activités de l'organisation, (4) la réalisation d'une évaluation de l'organisation, en s'intéressant principalement aux dirigeants de l'organisation, mais en consultant aussi certaines instances dotées de spécialistes externes, (5) l'utilisation des résultats de l'évaluation pour améliorer la structure ou les processus de prise de décision de l'organisation et (6) la répétition régulière de l'évaluation pour évaluer la mise en œuvre des réformes et pour identifier d'autres domaines à améliorer.

Pour adapter ce dispositif à l'évaluation des autorités de la concurrence, l'OCDE a consulté différentes personnes (« des informateurs essentiels ») disposant d'un savoir-faire en rapport avec les activités des autorités de la concurrence pour identifier les caractéristiques opérationnelles d'autorités de la concurrence efficaces et elle a préparé un outil d'évaluation (principalement un questionnaire) à appliquer à chaque autorité de la concurrence. L'objectif du projet est de mettre au point une méthodologie que les autorités de la concurrence peuvent appliquer systématiquement pour évaluer les procédures existantes de façon continuelle au fil du temps, et pour tenir compte des résultats de chaque enquête dans la formulation et l'application des réformes. Le projet cherche à développer des bases empiriques pour les autorités de la concurrence, de façon à améliorer la qualité de leurs procédures de gestion et de fonctionnement.

Il convient à cet égard de souligner deux contributions potentielles. Tout d'abord, le travail même qui consiste à identifier les « principes essentiels » et les principales caractéristiques pourrait permettre de mieux comprendre ce qui distingue une « bonne » ou une « excellente » autorité de tutelle d'une institution simplement satisfaisante[78]. Les points de vue sur la qualité des autorités de la concurrence se fondent souvent sur des impressions idiosyncrasiques concerne le volume et le type de production d'un organisme – surtout les poursuites relatives à des affaires. L'ouverture d'une affaire ou un procès sont des événements aisément observables pour une analyse par des spécialistes, des praticiens et des journalistes. Dans une large mesure, les mesures répressives – en particulier dans des « grosses » affaires concernant des répondants facilement reconnus – passent généralement pour une indication valable du travail d'une autorité publique (Kovacic 2003).

Dans des domaines critiques, quand on se cantonne aux affaires pour étudier la politique de la concurrence, on limite à tort son champ d'observation. Si l'on s'en tient à cet angle, une étude centrée sur les affaires accorde trop d'importance à des questions spectaculaires qui concernent des répondants facilement identifiables et sous-estime habituellement la « petite » affaire qui peut donner lieu à l'adoption d'une « grande » loi (Muris 2003a). En faisant les louanges de l'agent chargé de l'application du droit qui engage l'action répressive, l'étude de la politique de la concurrence centrée sur les affaires tend à ne pas tenir compte de ce qui a été accompli par le biais de ces affaires. Cela équivaut à évaluer la qualité d'une

compagnie aérienne en fonction du nombre et de l'importance des vols en partance sans accorder la même attention à la façon dont les avions atterrissent, ni à quel moment ou à quel l'endroit.

D'autres points faibles tout aussi graves de cette focalisation sur les affaires est qu'elle ne tient pas compte des instruments de la politique de la concurrence en dehors des poursuites, ou encore des investissements dans des capacités institutionnelles qui sont indispensables au choix d'une politique efficace. Dans le cadre d'une approche qui se focalise sur les affaires, la défense de la concurrence – par exemple, la collecte de commentaires sur la législation ou les réglementations administratives proposées – passe pour un mauvais substitut des poursuites. De même, cette approche ne rend pas dûment compte de la volonté d'une autorité de constituer un capital intellectuel qui justifie le choix et la pratique d'interventions faisant intervenir ou non des poursuites.

L'antidote à la focalisation sur les affaires réside dans une meilleure sensibilisation aux éléments déterminants d'une politique de la concurrence efficace. De récentes évolutions des publications universitaires et la politique publique témoignent d'une reconnaissance de plus en plus marquée du rôle que jouent la conception et les capacités institutionnelles dans la définition de la qualité des programmes des pouvoirs publics en matière de concurrence (Kovacic 2001 ; Muris 2003b). Le projet d'évaluation de l'OCDE a pour avantage de reconnaître que la « production » des autorités de la concurrence ne se génère pas spontanément. Elle ne naît, au contraire, que grâce à un ensemble de plusieurs choix des dirigeants et procédures opérationnelles. Les projets qui encouragent les organismes à améliorer la qualité des facteurs de production ont de fortes chances d'améliorer la qualité de la production. À terme, une bonne technique tend à aboutir à de bons résultats.

La deuxième contribution potentielle du projet réside dans la constitution de bases importantes de connaissances sur la meilleure façon pour les autorités de la concurrence de réagir à des problèmes fondamentaux et récurrents et de faire fonctionner une institution. La définition et le perfectionnement d'une norme communément acceptée pour une évaluation axée sur les processus faciliteraient l'analyse de chaque juridiction et permettraient des comparaisons approfondies entre les différentes juridictions. Si le projet concerne, à terme, un grand nombre d'autorités de la concurrence, chaque participant disposera d'un cadre commun de référence sur la base duquel pourront être débattues avec des pairs des questions opérationnelles et d'organisation essentielles, ainsi qu'un vaste socle d'expérience permettant de justifier ses propres décisions.

En janvier 2005, l'autorité de la concurrence du Portugal a convenu avec l'OCDE que le Portugal serait la juridiction qui servirait à créer un prototype du projet. De janvier à avril, des représentants de l'OCDE ont collaboré avec l'Autorité portugaise de la concurrence pour appliquer l'outil d'évaluation. Un résumé initial des résultats du projet sera présenté par Paul Maylon, consultant de l'OCDE et principal architecte du projet, ainsi que des agents de l'Autorité portugaise de la concurrence lors de la Table ronde sur l'évaluation de l'OCDE qui se tiendra en juin 2005 et à l'occasion de réunions ultérieures dans les douze prochains mois du Forum latino-américain de la concurrence et du Forum mondial de la concurrence.

## 5. Mise au point d'une méthodologie d'évaluation des performances

Cette section propose des méthodologies que les autorités de tutelle pourraient envisager d'utiliser dans le cadre de leurs évaluations *ex post* pour mieux comprendre la nature même de la définition d'une politique de la concurrence et du processus correspondant[79]. Il est utile de reconnaître d'emblée les raisons expliquant les réticences des autorités de la concurrence à consacrer des ressources pour évaluer les effets d'interventions ou de procédures opérationnelles achevées. Une évaluation peut conclure que l'organisme n'a pas obtenu de bons résultats. Par exemple, l'évaluation peut révéler que des initiatives spécifiques d'application du droit n'ont eu aucun effet ou bien ont produit des résultats contraires au but recherché. On

peut comprendre qu'une autorité de la concurrence hésite à entreprendre des recherches qui font douter du bien-fondé d'actions antérieures et remettent éventuellement en cause les programmes actuels d'application du droit.

Comme nous l'avons suggéré plus haut, on ne peut invoquer comme raison valable pour se dispenser d'une évaluation la crainte que l'application de techniques d'évaluation des performances ne dévoile, et peut-être ne rende transparentes pour les observateurs extérieurs, les erreurs d'appréciation de l'organisme quant à l'intérêt d'interventions spécifiques. Il peut arriver qu'un organisme public évite purement et simplement de révéler les aspects vulnérables et fragiles de ses activités par crainte que cette révélation ne permette à des personnes extérieures d'empêcher de parvenir à des objectifs nationaux importants[80]. Il semblerait que la politique de la concurrence soit, au contraire, un domaine où une communication et une analyse plus complète de la production stimuleront le débat public qui contribue au fil du temps à améliorer la qualité de cette politique. L'avantage social d'une évaluation des performances pour rectifier les faiblesses dans l'application du droit et les processus ou pour canaliser les ressources vers des activités qui contribuent le plus à améliorer le bien-être des consommateurs compense le coût immédiat que représente une gêne en termes de réputation pour l'autorité de la concurrence.

Un deuxième obstacle possible au développement et à l'application de techniques d'évaluation des performances réside dans leur coût. Pour financer les évaluations, une autorité de la concurrence doit dépenser des ressources qui pourraient être autrement consacrées au développement de nouvelles affaires et à l'accomplissement de mandats, comme l'examen de propositions de fusions, imposé par la loi. Comme il a été précisé plus haut dans la section 2, les frais liés à l'évaluation permettent de s'assurer que les dépenses pour des programmes importants seront utiles. L'évaluation aide à justifier la décision de l'autorité de la concurrence sur la prochaine démarche à suivre – de même que la navigation aide le capitaine à décider des opérations à mener sur son bateau. Sans une certaine allocation des ressources à l'évaluation *ex post*, il est peu probable qu'une autorité de la concurrence puisse être certaine que ses programmes d'application du droit atteignent les objectifs voulus, surtout lorsque l'initiative en question (comme l'approche convenable à adopter pour l'analyse d'une fusion dans les secteurs dynamiques sur le plan technologique) peut dépendre fortement d'institutions qui n'ont pas été soumises à un examen concernant l'impact de leurs interventions. Même si un large consensus existait sur l'intérêt social d'appliquer une prescription de fond (par exemple, une interdiction des ententes entre fournisseurs), une évaluation *ex post* peut répertorier des moyens pour une autorité de la concurrence d'améliorer sa mise en œuvre de la prescription. Pour ces raisons, une allocation régulière de fonds aux activités d'évaluation devrait être prévue dans le budget annuel d'une autorité de la concurrence.

Un troisième obstacle plus grave concerne la conception du processus d'évaluation des performances. L'évaluation de l'impact de chaque décision en matière de poursuites peut poser des problèmes ardus d'évaluation et de collecte de données. Lorsque l'on décide qu'un organisme devrait évaluer la qualité de ses procédures organisationnelles et opérationnelles, on ne précise pas exactement comment l'évaluation doit avoir lieu.

Face à cette préoccupation, on peut répondre que même des modèles analytiques simples étayés par des données limitées promettent de fournir, en vue de la définition d'une politique, une base plus fiable que celle que possèdent de nombreuses autorités de la concurrence. Dans un certain sens, les exercices entrepris par l'Union européenne et les États-Unis pour évaluer la mise en œuvre de mesures correctrices en cas de fusion ont fait intervenir des techniques analytiques relativement simples. Les organismes n'ont pas cherché dans le cadre de ces exercices à évaluer le véritable impact de ces désinvestissements en termes de concurrence. La DG Concurrence et la FTC ont plutôt employé des méthodes simples pour vérifier la validité de leurs hypothèses sur la probabilité qu'un acheteur d'actifs cédés déploie ces actifs pour livrer concurrence sur le marché en question. Les efforts pour déterminer si les actifs cédés sont restés sur le marché et ont été utilisés pour concurrencer les parties engagées dans la fusion ont apporté aux

autorités de la concurrence de précieuses informations sur la conception de futures mesures correctrices en cas de fusion.

Pour maintenir un équilibre au sein de cette section, une deuxième réaction est proposée face aux inquiétudes concernant la méthodologie. On y propose des approches que pourraient prendre les autorités de la concurrence en vue de concevoir de nouveaux systèmes d'évaluation des performances ou d'améliorer les programmes existants pour une évaluation *ex post*. La section analyse les problèmes de méthodologie qui se posent lors de la conception d'évaluations d'affaires spécifiques ou d'évaluations axées sur les processus et elle met en évidence les craintes concernant spécialement chaque forme d'évaluation des performances.

### *5.1 Mise au point d'une méthodologie d'évaluation*

Une autorité de la concurrence envisageant la création ou l'amélioration d'un système d'évaluation des performances est confrontée à au moins trois problèmes méthodologiques élémentaires. Tout d'abord, comment doit-elle définir des options méthodologiques et repérer d'excellentes techniques d'évaluations ? Deuxièmement, l'autorité doit-elle demander à ses propres employés de mener l'évaluation ou doit-elle faire appel à des personnes extérieures ? Troisièmement, l'autorité doit-elle révéler les résultats des évaluations uniquement à son propre personnel ou les conclusions des évaluations doivent-elles être accessibles sous une forme quelconque à des publics extérieurs à l'organisme ? Chaque question est traitée ci-après.

#### *5.1.1 Choix d'un processus pour concevoir une méthodologie d'évaluation des performances*

Le processus de conception d'une méthodologie d'évaluation des performances en fonction d'affaires spécifiques ou axée sur les processus doit faire appel à des contributions de spécialistes internes et externes de la politique de la concurrence. Les organismes doivent considérer que le processus de planification se compose de quatre éléments, décrits ci-après.

*Discussions préliminaires au sein de l'autorité de la concurrence.* Durant la première étape doivent avoir lieu des discussions internes qui font intervenir la direction de l'autorité de la concurrence afin d'établir un consensus, de principe, en faveur d'une évaluation des performances et de confier les projets d'évaluation à un service au sein de l'organisme. De nombreuses autorités de la concurrence ont estimé que le service auquel il faut confier cette responsabilité doit avoir pour principales fonctions l'analyse de la politique. Les discussions internes initiales doivent s'inspirer des lectures préalables par l'organisme de la documentation sur l'évaluation des performances concernant les autorités de la concurrence. Un service chargé de la politique de la concurrence au sein de l'organisme est tout désigné pour mener l'enquête sur la documentation qui existe.

*Consultations d'experts extérieurs*. La deuxième étape essentielle de la conception d'une méthodologie est la consultation d'experts extérieurs. Cela peut se faire de plusieurs manières. Une approche a été testée dans différentes juridictions : l'autorité de la concurrence consulte un nombre relativement restreint d'experts extérieurs, choisis pour leur bonne connaissance des problèmes qui se posent selon le type d'évaluation que l'organisme envisage. Lorsqu'elle prépare un projet d'évaluation en fonction d'affaires spécifiques, l'autorité de la concurrence doit consulter des économistes spécialisés dans les entreprises industrielles et dotés d'une expérience des travaux empiriques. C'est la méthodologie qu'a adoptée la FTC quand elle a chargé Richard Caves et Ben Klein, à la fin des années 1970, d'élaborer des protocoles pour guider son évaluation des affaires de restrictions verticales et d'abus de position dominante. Pour la préparation d'un examen axé sur les processus, l'organisme devait demander conseil à des spécialistes connaissant mieux la gestion et le fonctionnement d'une autorité de la concurrence, ainsi

qu'à des experts ayant une bonne expérience des examens d'évaluation des performances pour des institutions publiques ou privées.

Les autorités de la concurrence constituent une deuxième source détenant un savoir-faire externe qu'il faut exploiter lors de cette phase exploratoire initiale de planification. Comme le suggère ce document de référence, les autorités de la concurrence ont acquis une précieuse expérience de l'évaluation des performances. Les discussions avec les responsables des autorités de la concurrence qui ont mené de telles évaluations sont des éléments utiles et nécessaires à la préparation initiale. Les informations contenues dans ce document de référence et les contributions des pays qui doivent être présentées lors de la réunion de l'OCDE sont un point de départ pour identifier le personnel correspondant de l'autorité de la concurrence.

Une troisième source de savoir-faire extérieure à l'autorité de la concurrence se compose d'autres institutions publiques possédant une expérience de l'évaluation des performances. Ces dernières décennies, le souci croissant d'améliorer les performances des organismes publics a donné lieu à un certain nombre d'innovations pour évaluer la qualité des systèmes de gestion des organismes et de leurs productions importantes spécifiques (Kusek & Rist 2004 ; 1-38). Dans une juridiction donnée, différents organismes publics en dehors des instances traditionnellement associés aux fonctions d'audit peuvent avoir une précieuse expérience de la conception de programmes d'évaluation. L'approche évoquée précédemment de la planification d'un exercice d'évaluation des performances, qui accorde une importance particulière aux consultations d'un nombre comparativement restreint de conseillers, peut être appliquée de façon relativement discrète et sans que le public en soit informé. Une autorité de la concurrence peut préférer commencer par cette approche modeste pour repérer les possibilités les mieux adaptées à sa situation et ses ressources. En soi, cette phase de consultation initiale peut donner à l'organisme la confiance nécessaire pour effectuer une évaluation sans passer par d'autres étapes pour déterminer et contrôler les options d'évaluation des performances[81].

Une autorité de la concurrence peut décider de se lancer dans un processus de planification plus élaboré qui complète la consultation modeste et non publique menée par l'organisme auprès d'un nombre restreint de spécialistes externes. Ce processus plus élaboré peut comprendre la publication d'une description ou d'un plan de travail préliminaire concernant le projet ou la simple définition des problèmes de méthodologie en vue de commentaires publics. Pour inviter le public à participer davantage, une conférence, un séminaire ou un atelier public peut être organisé pour rassembler les points de vue des chercheurs, des praticiens, des dirigeants d'entreprise, des associations de consommateurs et d'autres agents publics sur la conception appropriée et les principaux axes d'un exercice d'évaluation. Lorsque l'autorité de la concurrence n'est pas certaine des solutions à apporter à des problèmes techniques, les ateliers publics peuvent aussi être l'occasion d'éclaircir les commentaires sur les résultats d'efforts menés antérieurement par les autorités de la concurrence pour effectuer des évaluations des performances.

*Budget prévisionnel*. La phase de planification initiale est l'occasion de commencer à préparer un budget pour l'exercice d'évaluation. Pour les autorités de la concurrence les mieux financées, l'attribution chaque année de certains fonds à l'évaluation des performances constituerait une bonne pratique. Pour les raisons décrites précédemment dans ce rapport, l'organisme devrait aller dans le sens d'une norme qui encourage l'inscription dans chaque cycle budgétaire de certaines dépenses au titre de l'évaluation des performances.

Pour des organismes insuffisamment financés qui cherchent en vain à satisfaire même les exigences opérationnelles immédiates les plus urgentes, deux possibilités viennent à l'esprit. L'une est de s'en remettre à la coopération régionale et à des associations régionales afin de devenir le centre d'attention pour la planification et, éventuellement, la réalisation d'évaluations des performances. Il s'agit là d'un des quelques domaines où les instances régionales peuvent faciliter le déroulement de projets destinés à mettre

en place des institutions qui peuvent dépasser les capacités d'une seule autorité de la concurrence. Une deuxième approche consiste à entrer en contact avec des organismes donneurs afin de tenter d'obtenir des subventions pour les évaluations. Ces dernières années, les donneurs nationaux et multinationaux ont accordé une attention croissance à l'évaluation des performances et des signes donnent à penser que les demandes des autorités de la concurrence ne seraient pas écartées d'un revers de main.

*Détection des restrictions à l'utilisation et à la diffusion de dossiers confidentiels*. Le processus de planification initial doit se pencher sur les restrictions à l'utilisation de données confidentielles – dossiers commerciaux exclusifs en possession de l'autorité de la concurrence et travaux confidentiels (par exemple des notes préparée par le personnel spécialisé et les dossiers internes sensibles sur la prise de décision) de l'autorité de la concurrence elle-même – dans le cadre d'un exercice de gestion des performances. La plupart des autorités de la concurrence, sinon toutes, devront se demander s'il faut confier des dossiers confidentiels, et à quelles conditions, à des personnes extérieures à l'organisme qui participeront aux exercices d'évaluation, et quelles restrictions doivent être respectées pour la diffusion publique des résultats d'une évaluation. Un autre problème pour certaines juridictions est de savoir si les travaux d'évaluation doivent être révélés selon les conditions de diffusion prévues par différents règlements publics. Concernant ces questions et d'autres considérations connexes, le processus initial de planification d'un programme d'évaluation s'inspire habituellement des conseils des services juridiques de l'autorité de la concurrence.

Même si les juridictions ont sans doute chacune une expérience différente, on peut formuler certaines observations générales sur le traitement des dossiers confidentiels. La plupart des juridictions ont des mécanismes qui permettent aux experts extérieurs d'avoir accès à des dossiers confidentiels sous réserve de signer des conventions de non diffusion. Généralement, une convention de ce type interdit à la personne extérieure de révéler les informations confidentielles à certaines catégories de personnes, sauf si l'autorité de la concurrence en a expressément autorisé la divulgation. La convention de non diffusion permet aussi aux chercheurs et autres commentateurs d'écrire à propos du projet, mais elle exige que l'auteur remette à l'autorité de la concurrence les brouillons de ses écrits pour qu'elle puisse s'assurer que des informations confidentielles n'ont pas été divulguées. Les autorités de la concurrence qui ont publié leurs propres rapports ou documents sur les exercices d'évaluation ont aussi trouvé des mécanismes efficaces pour transmettre des comptes rendus informatifs de leurs résultats sans divulguer d'informations commerciales ou autres qui doivent être gardées secrètes.

Les problèmes de protection de données confidentielles constituent un autre domaine où les autorités de la concurrence ont acquis une expérience considérable. Une autorité préparant son premier exercice d'évaluation peut demander conseil auprès d'organismes homologues sur la gestion des flux d'informations utilisés ou générés par un programme d'évaluation. Il est assez probable que les organismes ayant une expérience pratique des évaluations peuvent fournir des modèles de conventions de non diffusion ou des descriptions des mesures de protection utilisées pour veiller au respect des obligations de confidentialité.

### *5.1.2 Réalisation d'évaluations* ex post *: recours à des personnes internes, externes ou aux deux*

Une méthodologie d'évaluation peut s'appuyer uniquement sur le propre personnel de l'autorité de la concurrence pour effectuer les évaluations. L'organisme établit alors un processus pour que son propre personnel choisisse des initiatives de mises en œuvre achevées (des affaires ayant fait l'objet de poursuites et des conventions d'expédient) ou des procédures opérationnelles et en analyse la qualité. Par exemple, une évaluation en fonction d'affaires spécifiques consisterait à faire examiner dans le détail, par le personnel de l'organisme, de périodes d'application du droit spécifiques, à étudier les processus délibératoires qui ont amené l'organisme à intervenir, à interviewer des personnes qui ont participé à la décision d'engager des poursuites, et à collecter de données sur l'impact, en consultant par exemple des

clients ou des concurrents des répondants. Une autoévaluation interne pourrait être menée dans le cadre de travaux de collaboration auxquels participeraient des personnes qui traitent les affaires, des unités économiques et des instances chargées de la politique de la concurrence.

Comme il a été suggéré plus haut, il y a d'immenses avantages à faire appel aux talents de spécialistes extérieurs pour effectuer des évaluations et pas seulement pour la conception du processus d'évaluation. Lorsqu'elle pratique ou contribue à une évaluation, une personne extérieure peut apporter le point de vue d'un spécialiste que l'organisme lui-même ne possède pas et peut effectuer l'évaluation de façon plus objective en proposant une attitude supposée neutre dans l'exercice de sa mission. Ces personnes extérieures pourraient être des salariés n'appartenant pas à la fonction publique qui travaillent de façon contractuelle pour les autorités de la concurrence ou bien des salariés d'institutions publiques, comme les instances nationales de contrôle des comptes qui, de temps en temps, examinent les autorités de la concurrence.

Les personnes extérieures peuvent être invitées à fournir une participation importante, la réalisation d'études de cas par exemple, ou plus limitée, comme des commentaires sur des études préparées en interne. Par rapport à une approche reposant uniquement sur des collaborateurs internes, la participation de collaborateurs extérieurs peut augmenter la crédibilité de l'exercice d'évaluation aux yeux de groupes extérieurs. Même si un audit n'est pas rendu accessible au public sous une forme quelconque, l'organisme pourra sans doute se faire une idée plus significative de son travail s'il demande à des collaborateurs extérieurs de participer, sous réserve de confidentialité, à la préparation de l'audit ou aux commentaires sur les rapports qui en présentent les résultats.

Un récent exemple qui mérite d'être étudié par les autorités de la concurrence est le projet du CRDI mentionné précédemment dans la section 3.6. Dans ce projet, les pouvoirs publics canadiens financent des recherches menées par des spécialistes dans sept pays en développement[82] pour répertorier et analyser des facteurs qui constituent des obstacles à la concurrence dans le secteur privé de leurs économies. Une dimension importante de l'étude du CRDI est l'examen de l'impact sur les performances économiques des interventions des autorités chargées de la politique de la concurrence dans ces pays. Pour réaliser les études par pays, le directeur du projet du CRDI (Simon Evenett) a recruté une équipe de chercheurs dans chacun des pays en développement. Des versions provisoires de certaines études par pays ont été achevées[83], et l'objectif du projet est de mettre à la disposition d'autres chercheurs et analystes l'ensemble des études et données réunies à cet effet.

On peut concevoir une collaboration dans le cadre de laquelle une autorité de la concurrence répertorie les recherches réalisées dans ses propres frontières sur l'évaluation en fonction d'affaires spécifiques et s'efforce de constituer un partenariat avec l'organisation qui effectue les recherches. Pour les projets existants ou proposés de ce type, l'autorité de la concurrence peut offrir sa coopération aux chercheurs externes, notamment en leur donnant accès au personnel de l'organisme et en ayant des discussions sur des informations à caractère public dont les chercheurs externes peuvent ignorer l'existence. Selon une forme encore moins affirmée d'engagement productif, l'autorité de tutelle pourrait accueillir ou participer à des conférences où les résultats de ces recherches sont présentés.

### *5.1.3 Diffusion des résultats*

Une technique de diffusion consiste à révéler les résultats d'évaluations *ex post* uniquement au personnel de l'organisme d'application du droit. Selon certaines personnes qui travaillent dans les organismes chargés de la politique de la concurrence, cette approche paraîtra sans doute comme la forme d'évaluation la moins menaçante. Si les conclusions sont négatives, seul l'organisme en sera conscient[84]. Un programme dans le cadre duquel l'autorité de la concurrence effectue des évaluations, mais limite la diffusion des résultats à son propre personnel est nettement préférable à l'absence totale de système

d'évaluation. Même si un organisme n'est pas prêt à révéler les résultats d'une évaluation à des personnes extérieures, il a sans doute plus de chance de repérer et de corriger les défauts de la sélection des affaires et de la procédure d'évaluation s'il se livre à un exercice purement interne d'autoévaluation franche. À mesure que l'organisme utilise et applique sa méthodologie d'évaluation interne, il peut se sentir plus confiant au fil du temps à l'idée de révéler au moins certaines informations sur ses évaluations à des personnes extérieures.

L'alternative à une diffusion purement interne consiste à rendre les résultats de l'évaluation publics sous une certaine forme. L'autorité de la concurrence peut publier des versions publiques des évaluations qui supprime les références à des informations sensibles, comme des données commerciales confidentielles ou des éléments sur les intentions d'application du droit concernant des affaires en cours. Une présomption générale en faveur d'une diffusion publique se justifie dans la mesure où cette diffusion peut améliorer la nature et la légitimité perçue d'un programme de politique de la concurrence, ainsi que la rigueur de la prise de décision interne. Même des formes restreintes de diffusion publique peuvent susciter des suggestions utiles de personnes extérieures sur les améliorations à apporter dans le choix des interventions et de la procédure.

En se montrant prête à soumettre ses activités et ses décisions au débat public, l'autorité de la concurrence peut renforcer la confiance du public dans le système de politique de la concurrence. Le fait de savoir que l'organisme va soumettre à un futur débat public les évaluations de son travail peut inciter davantage les dirigeants et le personnel spécialisé des organismes à mener leur mission consciencieusement.

Il est utile à cet égard, là aussi, d'examiner l'expérience de la FTC concernant son étude des mesures correctrices en cas de fusion durant les années 1990. L'étude de la FTC sur les désinvestissements met en évidence les avantages d'une diffusion publique (U.S. FTC 1999). Comme il a été souligné plus haut dans la section 4.3.1, l'étude sur les mesures correctrices en cas de fusion a été menée par des avocats et des économistes de la FTC, qui ont consulté un chercheur extérieur sur la conception et la réalisation de l'enquête. Après avoir supprimé les références à des informations confidentielles non publiques, l'organisme a diffusé l'étude dans le public. L'étude de la FTC sur les mesures correctrices s'est révélée à la fois instructive et influente. Si la FTC avait choisi d'effectuer l'étude en interne et de ne pas révéler publiquement ses résultats, l'exercice aurait certainement été utile en raison des enseignements que pouvait en tirer la FTC sur les améliorations nécessaires de la conception de mesures correctrices. Il est cependant évident que la publication des résultats a stimulé le débat public sur les mesures correctrices en cas de fusion et a servi à informer les autres autorités de la concurrence des moyens d'améliorer le contrôle des fusions.

Les autorités chargées de la politique de la concurrence peuvent choisir comme technique de diffusion des résultats des études de cas et des évaluations de s'engager à mener une analyse publique détaillée d'affaires spécifiques ou de procédures internes qui ont fait l'objet d'une analyse en interne ou par des collaborateurs extérieurs. Des discussions portants sur des affaires individuelles et des procédures internes auxquelles participeraient des responsables de l'application du droit, des praticiens privées, des dirigeants d'entreprise et des chercheurs permettraient de mieux comprendre les motivations des différentes décisions d'application du droit et procédures de l'autorité, ainsi que leurs conséquences. Qu'il soit appliqué dans le cadre de séminaires, d'ateliers ou de conférences, le principe d'échange avec le public apporte des réactions utiles à l'autorité de la concurrence et stimule la réflexion sur l'évaluation à travers les entités externes. Sur la base de l'expérience relative à la discussion et au débat entre les autorités de la concurrence et des groupes extérieurs à propos des problèmes de doctrine et de politique d'application du droit, tout porte à croire qu'un dialogue sur des questions concernant la gestion des performances entraînerait des améliorations dans la sélection et la gestion des affaires par l'organisme[85].

### *5.2 Considérations spéciales sur l'évaluation des performances axée sur les processus*

La mission essentielle dans le cadre de l'application d'une méthodologie d'évaluation axée sur les processus consiste à définir ce que sont de bonnes procédures internes pour l'organisme. Un début de liste des critères de bonnes pratiques est proposé ci-après, qui permettrait de tester les techniques et les procédures de gestion de l'autorité de tutelle[86].

*Mécanisme de planification stratégique*. Pour être efficace, une autorité de la concurrence, qu'elle soit ancienne ou récente, doit prévoir un processus conscient qui consiste à définir des objectifs et à planifier des étapes pour les réaliser. Si l'on procède autrement, on est prisonnier des demandes extérieures, que ce soit sous forme de plaintes des consommateurs ou des dirigeants d'entreprise, ou de demandes d'intervention d'instances publiques comme le parlement ou les ministères. Même l'autorité de tutelle bénéficiant du budget le plus modeste doit mettre au point un plan stratégique qui définit ce qu'elle souhaite réaliser l'année suivante ou sur un certain nombre d'années.

*Entretien et diffusion de bases de données*. Chaque autorité de la concurrence devrait préparer et fournir un profil statistique complet de ses activités d'application du droit. De bonnes bases de données sont indispensables pour assurer le suivi des activités de l'organisme et les analyser au fil du temps. Malgré leur importance pour l'évaluation des performances, l'entretien et la diffusion publique de bases de données informatives complètes sur l'application du droit sont assez rares de la part des autorités chargées de la politique de la concurrence. Chaque autorité devrait prendre des mesures en apparence prosaïque mais souvent négligées pour développer et rendre accessible au public une base de données qui (a) rende compte de chaque affaire engagée, (b) retrace l'historique des procédures et des décisions concernant l'affaire et (c) regroupe des statistiques agrégées chaque année en fonction du type d'affaire. Chaque autorité de la concurrence devrait concevoir et appliquer un mécanisme de classification qui permette à son propre personnel et aux observateurs extérieurs de voir combien de dossiers d'un certain type un organisme a ouvert et de connaître la nature des cas spécifiques inclus dans une catégorie d'activité d'application du droit.

Entre autres objectifs, une base de données, actuelles et complètes d'un point de vue rétrospectif sur l'application du droit permettrait de mieux comprendre et analyser, à l'intérieur et à l'extérieur de l'organisme, les tendances de l'activité d'application du droit[87]. Par exemple, grâce à l'accès à de telles données, les autorités de la concurrence pourraient mieux étalonner leurs opérations par rapport à leurs homologues. Pour des institutions insuffisamment financées, il s'agit là d'un autre domaine dans lequel les organisations régionales ou mondiales peuvent apporter des contributions importantes et immédiates.

*Explication des actions juridiques engagées ou non*. Les autorités de la concurrence devraient prendre des mesures pour instaurer une norme qui favorise des explications de toutes les décisions importantes d'engager ou non des poursuites. On peut définir comme « importante » toute affaire dans le cadre de laquelle une autorité de la concurrence mène une enquête élaborée. La norme proposée ici imposerait que l'organisme cherche le plus souvent possible à expliquer pour quelle raison il a décidé de ne pas intervenir à la suite d'une enquête approfondie.

*Évaluation du capital humain*. Une amélioration institutionnelle continuelle requiert d'une autorité de la concurrence une évaluation régulière de son capital humain. Les capacités du personnel d'un organisme influencent fortement ce qu'il est en mesure d'accomplir. Une autorité de la concurrence doit examiner régulièrement l'adéquation entre ses activités et les compétences de ses spécialistes. L'organisme a-t-il mis au point des programmes de formation systématiques pour optimiser les compétences de ses experts ? Si l'organisme exerce des activités dans des domaines comme la propriété intellectuelle qui requiert des compétences spéciales, s'est-il doté des compétences spécialisées requises – par exemple, en recrutant des avocats spécialisés dans les brevets ? Les règlements publics et la réglementation qui contrôle l'emploi

dans le secteur public autorisent-ils l'organisme à recruter les compétences nécessaires au moment opportun ?

*Investissement dans la recherche-développement sur la politique de la concurrence*. Un élément essentiel d'amélioration institutionnelle permanente est l'optimisation des connaissances de l'autorité de la concurrence. Dans bien des activités, en particulier dans le cadre de la défense de la concurrence, l'efficacité des autorités de la concurrence dépend de l'instauration d'une prééminence intellectuelle. Pour générer de bonnes idées et prouver la solidité empirique de recommandations spécifiques en matière de politique de la concurrence, les autorités de la concurrence doivent investir des ressources dans « la recherche-développement sur la politique de la concurrence »[88]. Les dépenses régulières au titre de la recherche et l'analyse servent à contrer la critique récurrente selon laquelle la politique de la concurrence a un retard inacceptable dans la compréhension des phénomènes commerciaux qu'elle cherche à traiter.

*Reconnaissance d'interdépendances dans la définition de la politique*. Les tentatives visant à formuler une politique efficace de la concurrence amèneront de plus en plus les autorités de la concurrence à examiner plus attentivement l'impact des institutions publiques sur le processus concurrentiel. De nombreuses juridictions ressemblent à un archipel en matière de définition de la politique, dans lequel diverses instances publiques en dehors de l'autorité de la concurrence exercent une forte influence sur la situation en matière de concurrence. Trop souvent, chaque îlot politique de l'archipel agit dans un isolement relatif, malheureusement très vaguement conscient de l'impact de son comportement sur l'ensemble de l'archipel.

Il apparaît de plus en plus clairement que les autorités de la concurrence doivent recourir à des instruments d'action autres que les poursuites pour échafauder une infrastructure intellectuelle et politique qui relie les îles entre elles et donne naissance à une éthique à l'échelle de toute l'administration publique en faveur de la concurrence. Pour construire cette infrastructure, les autorités de la concurrence doivent faire des efforts pour répertorier et comprendre les interdépendances correspondantes et pour nouer des relations avec d'autres instruments de l'action publique. Dans un certain nombre de cas, l'étude des politiques publiques parallèles révèlera comment des formes existantes et proposées d'intervention publique présentent un obstacle à la concurrence. La capacité d'étudier et de mieux connaître l'impact de ces obstacles et de prendre des initiatives en matière de défense pour y remédier constituera un élément important du programme de l'organisme. Dans le compte rendu qui nous sert à évaluer les autorités de la concurrence, la suppression d'une intervention publique préjudiciable devrait avoir autant de poids que l'engagement de poursuites dans le cas d'une affaire qui empêche une restriction privée.

*Avantages d'une étude comparative*. Comme il a été suggéré précédemment, une étude comparative peut servir d'instrument informatif pour permettre à des autorités de la concurrence d'améliorer leurs performances[89]. Aucune autorité de la concurrence ne devrait envisager de modifier son organisation, ses procédures ou ses techniques de gestion sans examiner l'expérience étrangère. Quelle que soit la question étudiée (par exemple, la méthodologie analytique, les techniques d'investigation, la politique en matière de personnel ou la défense de la concurrence), la pratique étrangère est souvent porteuse de riches enseignements pour toute autorité de la concurrence[90].

L'intérêt qu'une autorité de la concurrence porte à l'expérience étrangère correspondante et l'analyse qu'elle en fait devrait être un critère permettant d'évaluer ses procédures internes. L'accès immédiat, sous forme électronique, à des informations étrangères concernant de nombreux aspects de l'application du droit et des opérations d'une autorité de la concurrence facilite l'analyse comparative envisagée ici. Les organisations multinationales peuvent stimuler ce processus en créant des bases de données qui décrivent et rassemblent les résultats des projets d'évaluation menés au sein de chaque juridiction.

### *5.3 Considérations spéciales concernant les évaluations en fonction d'affaires spécifiques*

L'expérience passée de l'évaluation d'interventions spécifiques de l'autorité de la concurrence indique un certain nombre de considérations dont les organismes devraient tenir compte lorsqu'ils effectuent une évaluation des affaires ou d'autres actions.

*L'examen d'un ensemble de problèmes plutôt que l'analyse d'affaires isolées*. Un organisme a plus à apprendre de sa sélection d'affaires ou d'autres interventions s'il étudie plusieurs dossiers connexes au lieu de se concentrer sur une intervention isolée. Par exemple, l'étude des affaires de restrictions verticales de la FTC à la fin des années 70 et au début des années 80 a porté sur un éventail d'affaires au sein de différents secteurs de façon à obtenir une idée plus générale de l'impact de son programme d'application du droit en cas de prix imposé et de restrictions verticales hors prix. On ne peut pas toujours examiner plusieurs affaires d'un type spécifique et, comme le montre l'étude parrainée par la FTC sur le règlement dans l'affaire d'abus de position dominante concernant Xerox, l'étude d'un cas isolé peut être extrêmement utile. Néanmoins, la conception d'un projet d'évaluation en fonction d'affaires spécifiques devrait envisager la possibilité d'étudier deux affaires d'un certain type ou davantage.

*Compréhension des choix d'application du droit en contexte*. Les bonnes études de cas exigent tout autant les compétences d'un historien et d'un spécialiste des sciences politiques que celles d'un économiste[91]. Les chercheurs menant des études de cas doivent être fortement incités à rendre compte du contexte qui a motivé la décision d'engager des poursuites. En dehors de l'évaluation des conséquences *ex post*, une bonne étude de cas devrait chercher à reconstituer autant que possible les hypothèses *ex ante* qui ont influencé la décision de l'organisme à intervenir. C'est d'autant plus vrai pour les interventions qui s'avèrent inefficaces ou, dans un certain sens, produisent les effets contraires à ceux recherchés. Les organismes s'engagent rarement dans des entreprises vaines parce qu'elles apprécient l'échec ou prennent plaisir à retarder le progrès social.

Les commentateurs aiment parfois attribuer l'échec d'une intervention sur le fond de la part d'un organisme à l'irrationalité, au caractère primitif ou à la perversité générale de ses dirigeants du moment. Cette explication, qui témoigne d'une certaine paresse intellectuelle, est une mauvaise réponse à la question de savoir pourquoi ces organismes ont échoué. Elle esquive la question plus ardue, plus troublante, de savoir pourquoi des personnes intelligentes ont fait un choix qui se révèle très mal inspiré. Comme l'a fait remarquer un spécialiste, « les expériences et les épisodes personnels en matière de réglementation doivent être jugés à l'aune d'une norme valable pour ce moment précis de l'histoire » (McCraw 1984 ; 308).

Une étude de cas peut révéler qu'un organisme a pris une mauvaise décision parce qu'il se fondait sur un modèle analytique erroné en dépit de l'existence de meilleurs modèles. Une partie de la mission du chercheur est d'expliquer pourquoi l'organisme a persisté à vouloir adopter un modèle défectueux et a négligé des alternatives plus satisfaisantes. Le chercheur doit être fortement incité à suggérer quels types d'ajustements institutionnels pourraient être utiles à l'avenir pour éviter de rester embourbé dans la mauvaise voie. Ce type d'analyse n'est possible que si le chercheur refuse de construire et de démolir un épouvantail, mais prend au contraire en considération les idées et les influences institutionnelles qui ont guidé l'autorité de la concurrence au moment de la décision d'engager des poursuites de son propre chef ;

*Sensibilisation aux capacités institutionnelles et aux conséquences à long terme*. Un facteur permettant d'évaluer une décision d'intervenir est la prudence dont fait preuve l'autorité de la concurrence pour éviter une grave inadéquation entre ses capacités institutionnelles et les exigences analytiques imposées par l'affaire. En un certain sens, une institution publique sera toujours contrainte de fonctionner au-delà de ses capacités. Il y a cependant une différence entre essayer de fonctionner à 105 % de ses capacités et à 200 % de ses capacités. La première situation est gérable. La deuxième est une formule

vouée à l'échec. Une sensibilisation aux exigences institutionnelles à long terme associées à l'initiation d'une nouvelle affaire et les tentatives d'atteindre à peu près un équilibre entre les engagements et les capacités permettent d'éviter que les dirigeants en place fassent peser d'importantes externalités négatives sur leurs successeurs et sur les organismes dans leur ensemble.

### *5.3.1 Évaluations en fonction d'affaires spécifiques : prévoir des obligations dans les jugements d'expédient*

Les tribunaux ont parfois largement contribué à encourager les tentatives d'évaluer les résultats des réparations obtenues lors de règlements négociés. Depuis 1974, les tribunaux fédéraux sont tenus d'approuver les règlements antitrust concernant les affaires pour lesquelles le ministère de la Justice a engagé des poursuites[92]. Une des dispositions du règlement approuvé par le juge Harold Greene à la suite des plaintes du gouvernement pour monopole dans l'affaire *États-Unis c.. AT&T Co*[93] exigeait des évaluations périodiques de l'efficacité de la réparation négociée entre AT&T et le ministère américain de la Justice[94]. Cette condition a donné lieu à des évaluations instructives sur l'impact du démantèlement d'AT&T et à des analyses sur la nécessité de poursuivre les restrictions sur les activités commerciales des successeurs de Bell Telephone System (*voir, par exemple*, Huber 1987).

L'évaluation demandée par le juge Greene dans l'affaire *AT&T* ressemble d'une certaine manière à un ordre que le juge Charles Wyzanski a incorporé dans le jugement publié à l'issue du cas de monopole traitée par le ministère de la justice dans l'affaire *États-Unis c. United Shoe Machinery Corp*[95]. Après avoir conclu que United Shoe avait instauré un monopole illégal, le juge Wyzanski a imposé un ensemble de mesures de contrôle de la conduite future de la partie mise en cause. Le paragraphe 18 du jugement prévoit que, dix ans après la date effective de l'ordonnance, « both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition » [les deux parties devront rendre compte devant ce tribunal de l'impact de ce jugement et pourront alors déposer une requête en vue de sa modification, de sorte que son impact permette une concurrence praticable][96]. Vers 1965, le juge Wyzanski a procédé à l'examen envisagé dans le jugement de 1953[97].

Le règlement dans l'affaire *AT&T* et le jugement dans l'affaire *United Shoe* ont servi de modèles susceptibles d'être adoptés par les instances et les tribunaux chargés de l'application du droit pour d'autres règlements en matière de concurrence. Pour s'assurer d'un contrôle ultérieur des conséquences de ces règlements (en particulier les dispositions pouvant entraîner un impact incertain), un organisme ou un tribunal chargé de l'application du droit pouvait ordonner un examen périodique de cet impact. Lorsque les règlements ne sont pas soumis à une approbation judiciaire, l'autorité de la concurrence peut faire appel à ses pouvoirs administratifs pour inclure des dispositions obligatoires en matière d'évaluation dans au moins un échantillon de ses décisions. La certitude d'un examen *ex post* occasionnel ajouterait une certaine discipline dans la négociation des conditions de règlement judiciaire et consoliderait les bases empiriques permettant de concevoir pour l'avenir des mesures correctrices en matière de concurrence.

## 6. Conclusion

En 1940, deux éminents commentateurs, Walton Hamilton et Irene Till, ont rédigé une triste évaluation des 50 premières années d'expérience en matière d'application du droit antitrust aux États-Unis. Les deux spécialistes faisaient remarquer que « on avait qualifié la Loi Sherman de 'charte de la liberté' pour l'industrie américaine. Pourquoi n'a-t-elle pas été un succès ? » (Hamilton & Till, 1940 ; 4). Entre autres résultats, ils avaient estimé que de futures améliorations nécessiteraient de remédier à plusieurs carences institutionnelles que présentaient les autorités américaines de la concurrence. En particulier, Hamilton et Till critiquaient ce qu'ils pensaient être une préoccupation des autorités de la concurrence, autrement dit ouvrir la prochaine affaire sans tirer parti d'un système de gestion interne qui choisisse les

affaires en fonction d'une analyse permanente du secteur, ils ont utilisé cette analyse pour concevoir des mesures correctrices efficaces et ils ont suivi les résultats (id., pp. 30-35).

Les autorités de la concurrence ont considérablement évolué depuis et elles ont réalisé des prouesses depuis que Hamilton et Till ont étudié l'expérience des États-Unis il y a 65 ans. Malgré le temps écoulé, leur insistance sur l'importance d'une conception et d'activités institutionnelles saines en tant que facteurs essentiels pour que les autorités de la concurrence enregistrent un réel succès sonne encore juste aujourd'hui. Dans les débats sur la politique de la concurrence, il existe une tendance naturelle à se focaliser sur des problèmes immédiats de doctrine et de politique d'application du droit. Ces problèmes présentent, après tout, un intérêt immédiat et puissant sur le plan intellectuel. Lors de discussions sur les problèmes de fond pressants du moment, on peut facilement perdre de vue les questions pratiques qui font obstacle aux tentatives de formuler et d'appliquer des programmes de politique de la concurrence. Comment un organisme doit-il définir ses priorités ? Quel est le meilleur moyen d'organiser l'enquête et les poursuites relatives aux affaires ? Quels mécanismes internes de contrôle de la qualité fonctionnent-ils le mieux ?

Les exercices de préparation et de réalisation d'une évaluation des performances donnent des outils précieux permettant de répondre à ces questions essentielles sur l'administration de la politique de la concurrence. L'évaluation des résultats des interventions sur le fond peut fournir des informations utiles sur des problèmes élémentaires comme le choix des affaires et la conception de mesures correctrices. L'évaluation régulière de procédures internes donne régulièrement l'occasion de déterminer si l'infrastructure organisationnelle et les techniques de gestion de l'organisme place l'autorité de la concurrence dans la meilleure position possible pour choisir des initiatives prometteuses sur le fond et les mener avec succès à leur terme. Un système de politique de la concurrence ne vaut que ce que valent les institutions qui ont la charge de mettre en œuvre cette politique[98]. En insistant sur l'examen et l'amélioration internes, une autorité de la concurrence insiste à juste titre sur le développement de ses connaissances et de l'institution, des conditions préalables indispensables à son succès.

Des évaluations peuvent mettre en évidence des ajustements nécessaires dans les pouvoirs réglementaires dont dispose l'autorité de la concurrence. Ces dernières décennies, bien des autorités de la concurrence ont cherche à améliorer considérablement la législation, et elles y sont parvenu, et tout porte à croire qu'un élément indispensable à l'efficacité à terme sera l'instauration d'améliorations périodiques pour tenir compte de l'expérience passée et des nouvelles conditions[99]. Un programme d'évaluation des performances peut fournir de meilleures bases empiriques pour la conception et la justification de changements nécessaires.

L'évaluation promet de jouer un rôle plus important qui va bien au-delà des décisions internes d'une autorité de la concurrence sur la sélection et la gestion des affaires. La légitimité des efforts des pouvoirs publics pour mettre en œuvre les prescriptions en matière de politique de la concurrence dépend fortement de la capacité des organismes chargés de la politique de la concurrence à démontrer à différents observateurs extérieurs – par exemple, les législateurs, les dirigeants d'entreprise et le public en général – que des formes choisies d'intervention pour infléchir les restrictions vis-à-vis des concurrents commerciaux améliorent les performances économiques. Ni les intuitions des responsables d'instances publiques chargées de l'application du droit, ni les hypothèses des théories avancées par les chercheurs ne sont susceptibles d'inciter des personnes extérieures à conclure avec confiance que l'organisme public a opté pour la bonne combinaison de politique ou a choisi les procédures idéales pour mettre en œuvre les programmes. Les institutions de la politique de la concurrence sont confrontées au besoin continuel de justifier leur valeur et on ne peut attendre d'observateurs critiques qu'ils se satisfassent uniquement d'assurances d'efficacité non fondées[100].

Les instances multinationales plus grandes comme l'ICN, l'OCDE et la CNUCED ainsi que des associations régionales plus petites ont pris des mesures prometteuses pour promouvoir la formulation et l'application d'indicateurs de performances. Des séminaires portant sur certaines affaires et la pratique d'examens par les pairs ont fourni des sources importantes d'évaluation et les réunions régulières de ces instances ont constitué des manifestations utiles permettant à différents organismes de partager un savoir-faire (par exemple, sur la conception de mesures correctrices en cas de fusion) concernant les résultats de leurs propres efforts d'évaluation. Un travail considérable reste à faire pour inciter les autorités de la concurrence à accepter une norme qui considère l'évaluation comme un outil indispensable pour s'assurer que les programmes publics en matière de concurrence atteignent les objectifs souhaités. Par le passé, les initiatives des grandes institutions internationales compétentes en matière de politique de la concurrence ont prioritairement porté sur l'évaluation de leurs membres. Pour l'avenir, il faut mettre plus l'accent sur des projets qui aident et poussent les autorités de la concurrence à mettre au point et appliquer leur propre méthodologie d'évaluation de leurs performances.

L'évaluation *ex post* des résultats est importante pour toutes les institutions, mais elle est encore plus essentielle pour les autorités de la concurrence. La politique de la concurrence s'appuie fortement sur l'expérimentation et sur des ajustements évolutifs de façon que la doctrine et la politique d'application du droit procèdent à des distinctions défendables entre pratiques commerciales acceptables et dangereuses. Même pour l'autorité de la concurrence la plus expérimentée et la plus sûre d'elle-même, la politique de la concurrence est un effort permanent et mesurer ses performances est vital pour tester de nouvelles techniques et adapter des méthodes éprouvées à des circonstances nouvelles. L'aphorisme souvent appliqué à la croissance des individus sonne juste dans ce domaine de l'action des pouvoirs publics : ce qui compte vraiment, c'est uniquement que vous apprenez une fois que vous connaissez tout.

## NOTES

1. Lorsqu'il était confronté à des arguments ne reposant que sur la théorie ou des hypothèses non étayées par des données empiriques, un de mes anciens collègues (David Hyman) de la Federal Trade Commission disait : « Nous croyons en Dieu. Tous les autres doivent fournir des données. »

2. *Voir* Report from Officialdom (2000: 593, 594-95) (commentaires de Robert Pitofsky ; selon lequel « une politique de mise en œuvre non examinée n'est pas un bon moyen de procéder » et notait que les autorités de la concurrence « ont quasiment l'obligation, non seulement de faire appliquer la loi, mais aussi de réfléchir aux conséquences de leur application du droit »).

3. *Voir* Kusek & Rist (2004) (où il est question de l'importance d'une évaluation axée sur les résultats pour une administration publique efficace) ; Wilson (1989; 373-75) (qui décrit les avantages en termes de politique d'une évaluation par des instances gouvernementales des résultats de leurs programmes).

4. *Comparer avec* U.S. General Accounting Office (1980 ; 12) (« Ni la FTC [des États-Unis], ni l'Antitrust Division n'ont accordé par le passé une grande place à l'évaluation des activités de mise en œuvre pour s'assurer que les ressources sont employées efficacement ») ; Lipsky (1995 ; 7) (« Des recherches rétrospectives sur la véracité des prédictions économiques qui sous-tendent les décisions antitrust antérieures sont aussi extrêmement rares. Lorsque la Commission ou un tribunal sanctionne une fusion, par exemple, elle ou il s'efforce rarement de quantifier soit l'amélioration de l'efficacité, soit les hausses de prix, qui pourraient résulter d'une décision en faveur ou au détriment de l'opération »).

5. Neustadt & May (1986 ; 252-53). Les professeurs Neustadt et May constatent que ce type de pensée « constitue une démarche particulière d'approche des choix, qui correspond plutôt au planificateur ou au gestionnaire de programme à long terme qu'à l'avocat, au juge, au consultant ou à l'expert appelé en cas de crise... » Id.

6. Un exemple couramment enseigné est la tentative de De Havilland de déterminer la cause des accidents au début des années 1950 du premier avion commercial du monde, le Comet. De Havilland a mené une enquête approfondie sur un Comet faisant partie de son stock, a repéré un défaut de conception latent à l'origine des accidents et a mis les résultats de ses recherches à la disposition de la communauté aéronautique mondiale. *Voir* Williams (2000 ; 15-16). Les travaux de De Havilland pour déceler la cause des désastres et publier les résultats de son évaluation ont favorisé d'importantes améliorations de la conception des transports aériens commerciaux.

7. Dans son analyse récente d'un domaine du sport, Lewis (2004; 241) évoque un observateur qui résume les problèmes d'une organisation qui ne peut pas, ou ne veut pas, envisager de bonnes évaluations des performances : « Les personnes chargées d'accorder les licences sportives ne sont pas équipées pour évaluer leurs propres systèmes. Elles ne disposent pas du mécanisme susceptible d'intégrer les aspects positifs et d'éliminer les aspects négatifs. Soit elles gardent tout, soit elles se débarrassent de tout, et elles prennent rarement cette dernière initiative. »).

8. *Voir* Kovacic (2001 ; 805, 825-39) (un examen de l'analyse par la FTC des États-Unis et la direction de la concurrence de la Commission européenne des effets sur la concurrence de l'acquisition par Boeing de McDonnell Douglas dans des conditions d'effervescence technologique et de complexité réglementaire).

9. L'examen des caractéristiques expérimentales de la politique de concurrence se fonde, en partie, sur Kovacic (2001b).

10. *Voir* Kovacic (2003 ; 472-76) (mise en évidence du caractère cumulatif de la conception politique de la concurrence et de l'importance de l'expérimentation comme source d'apprentissage pour les autorités de la concurrence).

11. L'expérimentation ne s'est pas arrêtée avec les réformes des programmes de clémence des années 90. Elle se poursuit à un bon rythme dans de nombreuses juridictions aujourd'hui. *Voir, par ex.*, Pate (2005 ; 18) (étude de la logique des réformes aux États-Unis en 2004 qui ont augmenté les amendes maximales en droit pénal en cas d'infractions à la loi Sherman et qui ont permis de déroger en partie aux dommages au triple pour certains candidats au bénéfice des programmes de clémence).

12. *Voir* General Motors Corp., 103 F.T.C. 374 (1984) (jugement d'expédient autorisant General Motors et Toyota à participer à la création d'une coentreprise, sous réserve de diverses restrictions).

13. *Voir General Motors*, 104 F.T.C. sous 391, 397 (déclaration de désaccord de la Commissaire Patricia Bailey) :

> « Si cette coentreprise entre le premier et le troisième constructeur automobile mondial n'enfreint pas les lois antitrust, selon la Commission, qu'est-ce qui peut bien le faire ? C'est certainement la question que des associés potentiels dans cette coentreprise vont eux-mêmes se poser. Dans cette décision, la commission a jeté aux orties un autre lot de principes antitrust généralement admis, en adoptant une fois de plus ce discours économique incorporel qui domine à présent les prises de décision au sein de la Commission. En l'occurrence, la décision aboutit à donner le feu vert à une proposition commerciale qui est aussi stupéfiante par son audace qu'impressionnante quant à ses conséquences pour les futures coentreprises entre des sociétés américaines de premier plan et de gros concurrents étrangers qui cherchent à leur prêter main forte. »

14. Voir Roos (1995) (qui décrit comment la coentreprise GM-Toyota dirigée par GM a adopté les innovations en matière de production et de gestion).

15. *Comparer avec* Muris (2000) (qui critique les poursuites engagées par la FTC contre Intel pour abus de sa situation dominante) *ainsi que* Balto & Nagata (2000) (qui défend le recours de la FTC contre Intel). *Voir aussi* Vickers (2004) (qui examine les difficultés de conception de tests analytiques généraux pour l'évaluation de plaintes d'exclusion répréhensible).

16. L'élément prévisible du contrôle des fusions ressort clairement de la législation ou des règles d'application de nombreuses juridictions. Par exemple, l'article 7 de la Loi Clayton aux États-Unis interdit les fusions qui « risquent de réduire substantiellement la concurrence et tendent à créer un monopole. » 15 U.S.C. § 18 (1998).

17. Voir FTC (1996 ; Ch. 1) (qui traite de la complexité analytique provenant des bouleversements industriels rapides provoqués par le dynamisme technologique, la mondialisation et la déréglementation).

18. *Voir* Kovacic (2000 ; 1314) (qui décrit la complication qu'entraîne le dynamisme technologique pour la conception de mesures correctrices antitrust).

19. Dans son examen des mesures correctrices acceptées par la FTC en 1975 à titre de règlement de l'affaire de monopole engagée à l'encontre de Xerox ; Willard Tom utilise le langage de l'expérimentation. Après avoir fait le point sur l'origine des mesures correctrices, Tom demande : « Que faut-il conclure de cette expérience isolée, mais apparemment très réussie, d'ingénierie sociale ? » Tom (2001 ; 979).

20. Voir Khemani & Dutz (1995 ; 28) (qui souligne l'importance de processus de décision transparents dans la formulation d'une politique de la concurrence).

21. Les régimes peu transparents peuvent nuire à la qualité de l'administration publique. *Voir* Stiglitz (1999 ; 40) (« Les pouvoirs publics de nombreux pays ont une forte propension au secret. ...Ce secret donne plus de marge de manœuvre à des groupes d'intérêt spéciaux, plus de moyens de dissimuler la corruption et plus de possibilités de camoufler des erreurs. »).

22. *Voir* Waller (1998 ; 1408-17) (qui examine le recours fréquent par les organismes américains chargés de l'application du droit à des règlements négociés pour répondre à des préoccupations en matière de concurrence) ; Symposium (1995; 4-27) (idem).

23. *Voir* Blumenthal (1996; 15) (qui décrit le système américain de notification et d'examen des propositions de fusion); Venit & Kolasky (2000) (qui traite des systèmes d'examen des concentrations aux États-Unis et dans l'Union européenne).

24. *Voir* Symposium (1997) (qui analyse l'importance d'un mécanisme de notification préalable à la fusion pour répertorier et résoudre les préoccupations en matière de concurrence concernant les fusions et les acquisitions).

25. *Voir* Leary (1995; 231-33, 236-40, 246-49) (qui recommande à la FTC aux États-Unis de fournir aux intervenants commerciaux plus d'informations sur ses décisions d'application du droit en matière de fusion et sur la logique qui a présidé aux conventions d'expédient) ; *comparer avec* Bloom & Stack (1995 ; 2) (qui estime qu'il faut « une plus grande transparence dans les décisions d'application du droit [de la FTC aux États-Unis] en ce qui concerne les opérations relatives aux produits pharmaceutiques en cours de développement ») ; Skitol (1995 ; 2) (« Les prises de décisions [de la FTC aux États-Unis] relèvent un peu de la 'magie noire' et manquent de transparence, en particulier en ce qui concerne les conclusions sur les opérations controversées très médiatisées. »).

26. *Comparer avec* Sohn (1995 ; 12-13) (qui note que la précédente mesure d'application du droit antitrust qu'a prise l'administration fédérale des États-Unis concernant les marchés de l'innovation est survenue « quand la R&D se recoupait avec une petite partie d'une opération bien plus importante » ; dans un tel contexte, « les parties sont fortement incitées à 'régler' le problème rapidement et par avance, indépendamment de leur évaluation des mérites des arguments [de la FTC aux États-Unis]. Il est tout à fait possible que nous continuions à assister à une application du droit au moyen de jugements d'expédient sans la protection importante assurée par la possibilité de poursuites ou même par une vigoureuse défense au niveau de l'autorité chargée de l'application du droit. Dans ce contexte, il est particulièrement important que la Commission expose clairement et applique de façon cohérente ses principes de mise en œuvre du droit. »).

27. *Voir* Skitol (1995; 3) (qui propose que la FTC, lorsqu'elle publie une proposition de plainte et un jugement d'expédient, publie une « « analyse pour faciliter les commentaires publics » plus complète qui révèle les fondements de la décision d'intervenir prise par la Commission).

28. Une troisième approche consiste à s'appuyer davantage sur le jugement d'affaires devant les tribunaux pour clarifier et établir les principes juridiques. Sur les avantages des jugements pour clarifier une doctrine antitrust, voir Calkins (1998).

29. *Voir* Kovacic (1992) (qui décrit la délégation par le Congrès du pouvoir d'interprétation aux tribunaux aux termes de la législation antitrust américaine).

30. *Voir* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (qui décrit le rôle distinct de la Cour suprême aux États-Unis aux termes de la législation antitrust « pour reconnaître le changement de circonstances et les leçons à tirer de l'expérience accumulée, et s'y adapter »).

31. *Voir* Baker (2003) (qui traite de la prise en compte des leçons économiques dans la jurisprudence antitrust et la politique d'application du droit) ; Kovacic & Shapiro (2000) (qui décrit l'influence de l'analyse économique sur les doctrines juridiques antitrust depuis 1890 aux États-Unis).

32. *Voir* Carlton (2001 ; 680) (« Comme le montre la documentation économique, il faut souvent des dizaines d'années pour que les économistes comprennent certaines pratiques commerciales ».).

33. *Voir State Oil*, 522 U.S. pp. 15-18 (qui examine comment « un ensemble considérable de spécialistes débattant de l'impact des restrictions verticales » a influencé la réévaluation juridique de l'interdiction *per se* des prix imposés) ; *voir aussi* Muris (2001 ; 903-07) (qui décrit l'impact de l'évolution de l'économie de l'organisation industrielle sur la politique d'application du droit en matière de fusion).

34. *Voir* Symposium (2001 ; 6-65) (qui examine l'évolution du contrôle des fusions dans différentes juridictions nationales) ; Kovacic (1998) (qui traite des possibilités d'examen dans le cadre d'études multiples de fusions résultant de l'augmentation du nombre de systèmes de politique de la concurrence dans les économies en transition).

35. La décentralisation de l'autorité chargée des poursuites à travers les entités publiques et privées aux États-Unis est sans équivalent. *Voir* Kovacic (2004).

36. *Voir* Kolasky (2001) (qui décrit l'étude parallèle menée par le ministère américain de la Justice et la Federal Communications Commission concernant les fusions dans le secteur des télécommunications). Dans un certaine nombre de juridictions, les organes publics de réglementation qui passent habituellement pour ne pas avoir de responsabilité en matière de politique de la concurrence prennent des décisions qui influencent considérablement le processus concurrentiel et ont des répercussions, au moins indirectes, sur les programmes des autorités publiques de la concurrence. *Voir* U.S. Federal Trade Commission (2003) (qui traite la façon dont la délivrance de brevets aux États-Unis peut affecter la concurrence) ; Kovacic & Reindl (2005 à paraître) (examinant l'impact considérable sur la concurrence que peuvent avoir les décisions des institutions qui accordent des droits de propriété intellectuelle).

37. *Voir* International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (2000 ; 3-18) (qui résume les coûts éventuels associés à de multiples examens d'opérations individuelles, menés par les autorités nationales de la concurrence et par différentes instances de la concurrence au sein d'un seul pays).

38. Pour un ensemble représentatifs de documents examinant l'issue de cas spécifiques, voir Symposium (2000) ; Symposium (2001b). Pour une étude détaillée du processus d'examen d'une fusion dans une juridiction, voir Sims & Herman (1997). Pour une étude détaillée des programmes d'application du droit dans plusieurs pays d'Europe centrale, voir Fingleton et al. (1995).

39. Par exemple, les efforts aux États-Unis pour instaurer des conditions de notification obligatoire et des délais d'attente pour les propositions de fusion se sont fortement inspirés des recherches d'Elzinga (1969).

40. Par exemple, le National Audit Office du uk du Royaume-Uni procède actuellement à une étude de l'efficacité des activités de l'Office of Fair Trading.

41. Le projet du CRDI est présenté par le responsable du programme à Evenett (2004). Les résultats initiaux de ce projet, exposés lors d'un atelier à Buenos Aires en mars 2005, sont très prometteurs.

42. La FTC, par exemple, est dotée de pouvoirs de collecte des informations qui pourraient servir à rassembler des données sur l'impact de certaines mesures d'application du droit. *Voir* 15 U.S.C. § 46 (1998) (disposition accordant à la FTC le pouvoir de collecter des informations sur les sociétés afin d'effectuer des études économiques).

43. *Voir* Fingleton et al. (1995; 171) (qui examine la mise en œuvre de la politique de la concurrence dans les pays de l'accord de Visegrad ; demandant « une évaluation plus approfondie et un affinement des critères utilisés dans la prise de décisions ») ; Guasch (1998) (« Il est impératif que les autorités de la concurrence... évaluent périodiquement l'impact (efficacité et distribution) de leurs décisions et diffusent largement leurs conclusions. ») ; U.S. General Accounting Office (1980 ; 15) (qui recommande que l'Attorney General des

États-Unis veille à ce que la Division antitrust du ministère de la Justice « propose une évaluation permanente et une mesure de l'efficacité des efforts de mise en œuvre dans le cadre de la promotion et du rétablissement de la concurrence ») ; Katzmann (1980; 204) (des études menées par la FTC aux États-Unis « pourraient aider à résoudre les débats actuels sur la politique publique concernant le rôle de la politique antitrust dans la politique économique » ; estime que « il faut plus de travaux sur l'impact de la concentration des marchés ; les informations manquent sur les répercussions des mesures antitrust sur divers indices économiques ») ; Kovacic (1989 ; 187) (qui plaide en faveur d'évaluations *ex post* pour étayer la sélection des cas et les techniques en matière de litiges) ; Kovacic (1989b ; 1147) (les évaluations *ex post* pourraient améliorer le montage des dossiers des autorités dans les affaires de monopole) ; Rodriguez & Williams (1998 ; 178) (les instances multinationales et les donneurs individuels devraient renforcer le contrôle et l'analyse des décisions d'application du droit prises par les autorités de la concurrence des économies en transition).

44. Les résultats de ces procédures sont précisés dans U.S. FTC (1996).

45. *Voir*, par exemple, Augustine (1995 ; 6-7) (« Une étude devrait être menée pour examiner, disons, deux ans après les faits, si les résultats prévus d'examens antitrust antérieurs [de fusions dans le secteur de la défense] ont été vraiment obtenus et, dans le cas contraire, quelles sont les leçons à en tirer. ».) ; Gilbert (1995 ; 2-3) (qui demande instamment à la FTC « d'utiliser ses pouvoirs d'enquête pour en apprendre davantage sur l'impact en matière de concurrence des fusions entre hôpitaux... La Commission se rendrait très utile en effectuant un examen critique des répercussions de la mise en œuvre de mesures antitrust dans ce secteur ») ; Lipsky (1995 ; 10) (« La Commission devrait se demander si une étude rétrospective des hypothèses et résultats des précédents efforts d'application de mesures antitrust aiderait à découvrir si des méprises fondamentales, mais tacites, peuvent sous-tendre certains jugements d'application du droit ») ; Sims (1995 ; 17) (qui propose que la FTC étudie l'impact réel des fusions des hôpitaux) ; Skitol (1995 ; 6-7) (qui propose que le Bureau économique de la FTC examine l'expérience concernant certains consortiums qui ont déposé des notifications aux termes du National Cooperative Research Act [Loi sur la recherche coopérative nationale] ou du National Cooperative Research and Production Act [Loi sur la recherche et la production coopératives nationales]) ; *voir aussi* Brodley (1995) (qui plaide en faveur d'une vérification *ex post* de la concrétisation des efficiences que l'on affirme pouvoir réaliser en cas de fusions et constitution de co-entreprises) ; Nelson (1995 ; 7) (« Il semble que la FTC pourrait rendre un précieux service en effectuant des recherches et en produisant des rapports plus complets sur les circonstances économiques dans lesquelles les données sur le schéma de livraison peuvent induire en erreur »).

46. Parmi les contributions récentes exprimant ces inquiétudes figurent Crandall (2001) et Crandall & Elzinga (2004).

47. Cette documentation est examinée et traitée dans Kovacic (2001c ; 286-90).

48. Parmi les exemples notables de ce type, on trouve l'étude de Katzmann (1980) de la FTC aux États-Unis et l'étude de Weaver (1980) de la Division antitrust du ministère américain de la Justice.

49. Parmi les contributions importantes de ce type figurent l'évaluation de Fingleton et al. (1995) de la mise en œuvre de la politique de la concurrence dans les pays de l'accord de Visegrad, l'étude de Clarkson et Muris (1980) de la FTC aux États-Unis et l'évaluation de Cox et al. (1969) sur les activités de protection du consommateur de la FTC aux États-Unis.

50. Dans certaines juridictions, les chercheurs peuvent tirer parti de lois contraignant les organismes publics à donner accès à certains types de dossiers.

51. Par exemple, le volume de Clarkson & Muris (1980) sur la FTC aux États-Unis comporte des évaluations détaillées de certaines affaires de concurrence.

52. En 1969, à la demande du Président Richard Nixon, l'American Bar Association (ABA) a mis en place un panel de spécialistes (ABA 1969) pour évaluer la FTC aux États-Unis. À la fin des années 1980, de sa

propre initiative, l'ABA a convoqué des panels de spécialistes pour examiner la Division antitrust du ministère de la Justice et la FTC, respectivement.

53. Un récent exemple est donné par l'Antitrust Modernization Commission (AMC), que le Congrès américain a créée pour évaluer différents aspects de la politique américaine de la concurrence. L'AMC s'est vu attribuer des fonds par le Congrès pour recruter un personnel spécialisé et exercer ses activités.

54. *Voir* Kovacic (1982) (qui décrit comment les recommandations d'un panel de spécialistes constitué par l'ABA en 1969 ont abouti à d'importantes réformes de la FTC aux États-Unis).

55. Pour un exemple représentatif de ce type de rapports, voir Clark (1999). L'auteur remercie John Clark pour de nombreuses conversations utiles concernant ses recherches pour le compte de l'OCDE.

56. Pour un petit échantillon représentatif des examens par les pairs de l'OCDE publiés, voir Wise (1999, 2000, 2001) ; voir aussi OCDE (1999) (examen de la politique de la concurrence et de la réforme de la réglementation en Hongrie). L'auteur remercie Jay Schaffer et Michael Wise pour leurs commentaires instructifs lors de nombreuses conversations sur la pratique des examens par les pairs de l'OCDE.

57. Les panels de spécialistes ont coutume de reprendre les conclusions d'études antérieures correspondantes effectuées par des panels de spécialistes sans tenir compte des différences dans les normes d'évaluation appliquées par ces panels antérieurs. *Voir* Kovacic (1982 ; pp. 599-602) (qui traite des travaux des panels de spécialistes concernant les performances de la FTC aux États-Unis).

58. Un certain compromis qui peut régler ce problème est que le chercheur effectuant l'examen par les pairs communique en privé les critiques extrêmement sensibles à l'organisme et modère ou omet ces critiques dans les rapports ou les présentations à l'intention d'un plus grand public.

59. Voir les documents et les comptes rendus de la conférences, intitulée « Estimating the Price Effects of Mergers and Concentration in the Petroleum Industry: An Evaluation of Recent Learning » [Estimation de l'impact sur les prix des fusions et de la concentration dans le secteur pétrolier : évaluation des leçons récentes] qui sont disponibles à l'adresse http://www.ftc.gov/ftc/workshops/oilmergers/index.htm.

60. Voir Kovacic (2000b; 394-95) (qui traite des programmes de l'OCDE destinés à évaluer la mise en œuvre de mesures antitrust).

61. L'auteur remercie Sally Van Siclen pour de nombreuses conversations utiles sur les séminaires de l'OCDE portant sur des affaires spécifiques.

62 *Voir* U.S. Federal Trade Commission (1984) (qui présente les résultats des évaluations des affaires de restrictions verticales traitées par la FTC).

63. *Voir* Bresnahan (1985) (qui présente une évaluation de la réparation obtenue en 1975 dans le cadre d'un règlement par la FTC d'une plainte pour abus de position dominante contre Xerox).

64. *Voir* Huber (1987) (qui évalue les effets du démantèlement d'AT&T).

65. La création et les premières activités d'Indecopi sont traitées dans Boza (1998).

66. *Voir* Boza (2000) (qui présente les résultats d'un audit mené par des spécialistes universitaires sur les programmes de politique de la concurrence d'Indecopi).

67. *Voir* Geroski (2004) (qui rend compte des recherches menées par le ministère britannique du Commerce et de l'Industrie et la Commission de la concurrence britannique).

68. A cet égard, l'auteur du présent rapport a été membre de l'équipe de la FTC qui a supervisé la conception et l'application du projet d'évaluation de l'impact décrit ici. L'auteur a été le principal représentant de la FTC pour l'évaluation du jugement d'expédient concernant l'abus de position dominante dans le cadre de l'affaire Xerox. Comme le mentionne le présent document, les précisions concernant le projet se fondent sur le compte rendu fourni par la FTC aux États-Unis (1984).

69. 433 U.S. 36 (1977).

70. Les protocoles de recherche de Caves et Klein sont reproduits dans FTC (1984).

71. FTC (1984 ; 7-8). L'équipe d'évaluation de l'impact de la FTC a choisi des chercheurs pour les restrictions verticales « [sur la base de leur spécialité de recherche, en particulier dans le domaine des restrictions verticales, et de la diversité des perspectives qu'ils pourraient apporter au projet ». *Id.* p. 9.

72. Deux exemples éminents, souvent cités, sont Bresnahan (1987) et Marvel (1982).

73. En l'occurrence Beltone Electronics Corp., 100 F.T.C. 204 (1982).

74. Les réformes modernes spectaculaires du système européen de la politique de la concurrence depuis 2000 sont présentées et analysées en détails dans Wils (2005 ; 1-59).

75. L'étude de 1999 de la FTC sur les mesures correctrices dans le cadre de fusions constitue un des éléments d'un ensemble plus vaste d'examens de processus de contrôle des fusions que les autorités de la concurrence aux États-Unis ont entrepris depuis le début des années 1990 et qu'elles ont continué de mener jusqu'à présent.

76. Les propositions que le Congrès a formulées en vue de réformes concernant les fusions, adoptées dans la législation de 1976, reposaient essentiellement sur les travaux de chercheurs universitaires qui ont conclu que les cessions d'actifs imposées comme mesures correctrices pour les fusions réalisées atteignaient rarement les objectifs correcteurs prévus. *Voir* Elzinga (1969).

77. Les documents correspondants font l'objet d'un inventaire et d'un examen dans Kouliavtsev (2005).

78. Le Rapport annuel de 2003-2004 de la Competition and Consumer Commission australienne illustre parfaitement comment une autorité de la concurrence peut répertorier les « principes essentiels » qui motivent ses efforts et peut préciser les caractéristiques comportementales sur lesquelles se fonde l'évaluation du respect de ses principes essentiels (et sur la base desquelles elle invite les personnes extérieures à mesurer ses progrès). ACCC (2004 ; 19-103).

79. Pour un examen approfondi de la façon dont les institutions publiques peuvent concevoir et mettre en œuvre des méthodologies d'évaluation, voir Kusek & Rist (2004).

80. Dans le contexte d'un examen des problèmes de sécurité de l'information, Peter Swire (2004) propose un modèle extrêmement instructif pour analyser à quel moment la communication d'informations sur un système est susceptible de déclencher des événements qui renforcent ou diminuent la sécurité du système. L'auteur remercie le professeur Swire pour ses conversations utiles à propos du moment opportun pour qu'un organisme public révèle des informations supplémentaires sur ses activités.

81. Par exemple, la Banque mondiale a mis sur pied un projet intitulé « Mesurer les résultats » qui se sert d'évaluations *ex post* pour évaluer la mise en œuvre des initiatives de réformes juridiques et d'autres indicateurs d'évolution qui ont bénéficié de l'aide de la Banque. On trouvera une description du projet de la Banque, « Mesurer les résultats », à l'adresse http://www.worldbank.org/wbsite/external/projects.

82. Ces pays sont l'Afrique du Sud, l'Argentine, le Brésil, la Chine, l'Égypte, l'Inde et le Mexique.

83. Parmi les exemples d'études sponsorisées par le CRDI qui présentent une combinaison intéressante d'évaluations fondées sur des affaires spécifiques et d'évaluations axées sur les processus de régimes de concurrence nationaux, on trouve Garcia-Verdu & Solano (2005) ; Malherbe et al. (2005) ; Petrecolla (2005).

84. Certaines juridictions peuvent avoir des règles de communication publique qui exigent d'une autorité de la concurrence qu'elle mène de telles évaluations, ou bien des versions éditées de ces règles, que l'on peut se procurer sur simple demande. Dans le cas de la préparation d'une étude réalisée purement en interne, il faudrait prendre en compte les catégories d'informations que l'on pourrait être tenu de révéler.

85. *Voir* Melamed (1998 ; 444) (« Il importe de garder à l'esprit... que le dispositif antitrust aux [États-Unis] se fonde, non pas sur un code politique ou législatif, mais plutôt sur des règles générales étendues qui se sont maintenues grâce à ce qui correspond en vérité à un processus de *common law* – et j'entends par là pas seulement un processus de poursuites engagées devant des tribunaux fédéraux, mais plus généralement un dialogue entre les chercheurs et les milieux d'affaires, les organismes chargés de l'application du droit et les tribunaux. »).

86. L'analyse dans la section 5.3 s'inspire en partie de Kovacic (2005).

87. Pour un exposé instructif sur l'intérêt de bonnes données statistiques en vue d'analyser la politique de la concurrence, voir Posner (1970).

88. Le concept de « recherche et développement sur la politique de la concurrence » et son rôle dans la définition des capacités institutionnelles est analysé dans Muris (2002). *Voir aussi* Uesugi (2005 ; 76) (qui décrit la création en 2003 par la Commission japonaise du commerce équitable du Centre de recherche en politique de la concurrence pour renforcer les capacités de recherche de cette Commission).

89. Pour une excellente analyse du recours à un étalonnage international pour améliorer les systèmes de la concurrence des différentes juridictions et pour une opinion moins optimiste que dans le présent rapport sur les avantages nets potentiels d'un référencement comparatif, voir Kerber & Budzinski (2004 ; 36-40).

90. Voir (Kovacic 2000b) (qui décrit ce que des autorités de la concurrence plus anciennes peuvent apprendre des innovations institutionnelles lancées par des autorités plus jeunes) ; Scott (2005 ; 41-48) (qui traite de l'intérêt d'une analyse comparative et d'un étalonnage international qui permet de clarifier les projets de réformes du Canada concernant son droit de la concurrence).

91. Sur l'importance de l'histoire et des sciences politiques en tant que sources d'informations éclairantes sur l'évolution des systèmes de la concurrence et en tant qu'outils pour comprendre des mesures spécifiques d'application du droit, voir Gerber (1998).

92. 15 U.S.C. § 16 (1998).

93. 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, Maryland c. États-Unis, 460 U.S. 1001 (1983).

94. *États-Unis c. Western Electric Co*., 552 F. Supp. 131, 194-95 (D.D.C. 1982).

95. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

96. 110 F. Supp. at 354.

97. Soulignant que la part de marché de United Shoe avait reculé de 85 % en 1953 à 62 % en 1964, le juge Wyzanski a rejeté la demande du gouvernement qui souhaitait que l'entreprise soit divisée en au moins deux entreprises lui succédant. La Cour suprême a ensuite annulé la décision du juge Wyzanski, invoquant qu'il

n'était pas habilité à imposer un démantèlement en l'occurrence. *États-Unis c. United Shoe Machinery*, 391 U.S. 244 (1968).

98. *Voir* Laffont (1999) (qui décrit l'importance de la qualité des institutions d'application du droit pour le succès du système de la politique de la concurrence) ; Muris (2005) (qui traite des caractéristiques institutionnelles, y compris les investissements dans « la recherche et le développement sur la politique de la concurrence » qui améliorent les perspectives de réussite d'une autorité de la concurrence).

99. *Voir, entre autres.*, Clarke & Corones (1999 ; 8-16) (qui décrit la réforme moderne du système de concurrence australien) ; Collins & Brown (1997) (qui examine l'amélioration du droit de la concurrence canadien durant les années 1980 et la mise en œuvre qui a suivi) ; Dekeyser & Gauer (2005) (qui présente le nouveau cadre de l'UE pour la mise en œuvre des articles 81 et 82 du Traité de la CE).

100. *Voir* Katzmann (1979 ; 205) (« S'ils ne disposent pas d'études précisant si la politique de la concurrence est capable, d'un point de vue technologique, d'atteindre divers objectifs économiques, les pouvoirs publiques sont vulnérable face à l'accusation que le dispositif de la concurrence est une mascarade ou un paratonnerre qui absorbe les frustrations de ceux qui auraient autrement incité à une plus grande intervention publique dans l'économie. »).

## BIBLIOGRAPHIE

American Bar Association. 1969. Report of the American Bar Association Commission to Study the Federal Trade Commission.

Augustine, Norman R. Nov. 2, 1995. Prepared Statement for Federal Trade Commission Hearings on Global and Innovation-Driven Competition.

Australian Competition and Consumer Commission. 2004. ACCC Annual Report 2003-2004.

Baker, Donald I. 2001. *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*. 69 George Washington Law Review 693.

Baker, Jonathan B. 2003. *Preface to Post-Chicago Economics*, in Post-Chicago Developments in Antitrust Law 20 (Antonio Cucinotta et al. eds.).

Balto, David A. & Ernest A. Nagata. 2000. *Proof of Competitive Effects in Monopolization Cases: A Response to Professor Muris*, 68 Antitrust Law Journal 309.

Blue Ribbon Defence Panel. 1970. Report to the President and the Secretary of Defence on the Department of Defence.

Bloom, Allen & Stephen A. Stack, Jr. Oct. 23, 1995. Prepared Statement Before the Federal Trade Commission Hearings on the Changing Nature of Competition in a Global and Innovation-Driven Age.

Blumenthal, William B. 1996. *Overenforcement in the Hart-Scott-Rodino Second Request Process*, in The Economics of the Antitrust Process 15 (Malcolm B. Coate & Andrew N. Kleit eds.).

Boza, Beatriz (Editor). 2000. The Role of the State in Competition and Intellectual Property Policy in Latin America: Towards an Academic Audit of Indecopi.

Boza, Beatriz (Editor). 1998. Peru's Experience in Market Regulatory Reform 1993-1998.

Bresnahan, Timothy. May 1985. *Post-Entry Competition in the Plain Paper Copier Market*. 75 American Economic Review 15.

Brodley, Joseph F. Nov. 1, 1995. Proof of Efficiencies in Mergers and Joint Ventures: Testing Ex Ante Claims Against Ex Post Evidence – Prepared Statement for Federal Trade Commission Hearings on Global and Innovation-Driven Competition.

Calkins, Stephen. 1998. *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*. 72 St. John's Law Review 1.

Carlton, Dennis W. 2001. *A General Analysis of Exclusionary Conduct and Refusal to Deal – Why Aspen and Kodak are Misguided*. 68 Antitrust Law Journal 659.

Clark, John. 1999. *Droit et politique de la concurrence dans les pays baltes*. 1 Revue de l'OCDE sur le droit et la politique de la concurrence 149.

Clarke, Philip, & Stephen Corones. 1999. Competition Law and Policy: Cases and Materials.

Clarkson, Kenneth, & Timothy J. Muris, eds.. 1981. The Federal Trade Commission Since 1970.

Collins, Paul, & D. Jeffrey Brown. 1997. *National Antitrust Laws in a Continental Economy: A Comparison of Canadian and American Antitrust Laws*. 65 Antitrust Law Journal 495.

Cox, Edward, Richard Fellmeth & James Schulz. 1969. "The Nader Report" on the Federal Trade Commission.

Crandall, Robert W. 2001. *The Failure of Structural Remedies in Sherman Act Monopolization Cases*. 80 Oregon Law Review 109.

Crandall, Robert W., & Kenneth G. Elzinga. 2004. *Injunctive Relief in Sherman Act Monopolization Cases*. 21 Research in Law & Economics 277 (John B. Kirkwood. ed.).

DeKeyser, Kris, & Celine Gauer. 2005. *The New Enforcement System for Articles 81 and 82 and the Rights of Defence*. 2004 Fordham Corporate Law Institute 537 (Barry Hawk, ed.).

De Souza, Nadia. April 27-28, 2005. "EC Merger Remedies." Powerpoint presentation atht the IBC 12th Annual London Conference on Advanced EC Competition Law.

Elzinga, Kenneth G. 1969. *The Antimerger Law: Pyrrhic Victories?* 12 Journal of Law & Economics 43.`

Evenett, Simon J. Mar. 2004. "Promoting Competitive Markets in Developing Countries" (Mimeo).

Federal Trade Commission. 2004a. The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement.

Federal Trade Commission. 2004b. "Market Forces, Anticompetitive Activity, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets." Testimony before the Subcommittee on Energy and Air Quality of the Committee on Energy and Commerce, U.S. House of Representatives, Hearing on the Status of the U.S. Refining Industry (July 15, 2004).

Federal Trade Commission. Oct. 2003. To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy.

Federal Trade Commission. 1999. Bureau of Competition, A Study of the Commission's Divestiture Process (1999), *available at* http://www.ftc.gov/os/1999/9908/index.htm#6.

Federal Trade Commission. May 1996). Staff Report, Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace.

Federal Trade Commission. 1984. Impact Evaluations of Federal Trade Commission Vertical Restraints Cases (Ronald N. Lafferty, Robert H. Lande & John B. Kirkwood, eds.).

Fingleton, John, Eleanor Fox, Damien Neven & Paul Seabright. 1995. Competition Policy and the Transformation of Central Europe.

Gerber, David J. 1998. Law and Competition in Twentieth Century Europe: Protecting Prometheus.

Garcia-Verdu, Rodrigo, & Oliver Solano. 2005. "Promoting Competitive Markets in Mexico."

Gavil, Andrew I., William E. Kovacic & Jonathan Baker. 2002. Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy.

Geroski, Paul A. Sept. 2004. "Is Competition Policy Worth It?" (Mimeo).

Gilbert, Richard. Nov. 14, 1995. Responding to Structural Change: A Call for a Review of the Competitive Consequences of Hospital Mergers – Prepared Statement for Federal Trade Commission Hearings on Global and Innovation-Driven Competition.

Guasch, J. Luis. Dec. 1998. Competition Policy Advocacy and Regulatory Reform: Presentation Prepared for the World Bank's First International Training Program on Competition Policy (Dec. 13-18, 1998).

Heyer, Ken. 2005. *A World of Uncertainty: Economics and the Globalization of Antitrust*. 72 Antitrust Law Journal 375.

Huber, Peter W. 1987. The Geodesic Network: 1987 Report on Competition in the Telephone Industry..

International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust. 2000. Final Report.

Johnson, Melanie. 2004. *Keynote Speech*, in II Current Competition Law 3 (Mads Andenas et al., eds.).

Katzmann, Robert A. 1980. Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy.

Kerber, Wolfgang, & Oliver Budzinski. 2004. *Competition of Competition Laws: Mission Impossible?*, in Competition Laws in Conflict 31 (Richard A. Epstein & Michael S. Greve eds.).

Khemani, R. Shyam & Mark A. Dutz. 1995. *Instruments of Competition Policy and Their Relevance for Economic Development*, in Regulatory Policies and Reform: A Comparative Perspective 16 (Claudio R. Frischtak ed.).

Kolasky, William J. 2001. *The FCC's Review of the Bell Atlantic/NYNEX and SBC/Ameritech Mergers: Regulatory Overreach in the Name of Promoting Competition*. 68 Antitrust Law Journal 771.

Kouliavtsev, Mikhail S. 2005. *Some Empirical Evidence on the Effectiveness of Antimerger Relief in the United States*. 43 Economic Inquiry 370.

Kovacic, William E. 2005. *Achieving Better Practices in the Design of Competition Policy Institutions*, in On the Merits – Current Issues in Competition Law and Policy 195 (Paul Lugard & Leigh Hancher eds.).

Kovacic, William E. 2004. *Toward a Domestic Competition Network*, in Competition Laws in Conflict 316 (Richard A. Epstein & Michael S. Greve, eds.).

Kovacic, William E. 2003. *The Modern Evolution of U.S. Competition Policy Enforcement Norms*. 71 Antitrust Law Journal 377.

Kovacic, William E. 2001. *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 Antitrust Law Journal 805.

Kovacic, William E. 2001b. *Evaluating Antitrust Experiments*. 9 George Mason Law Review 843.

Kovacic, William E. 2001c. *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*. 77 Chicago-Kent Law Review 265.

Kovacic, William E. 2000. *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 University of Connecticut Law Review 1285.

Kovacic, William E. 2000b. *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*. 74 St. John's Law Review 361.

Kovacic, William E. 1998. *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*. 66 University of Cincinnati Law Review 1075.

Kovacic, William E. 1992. *The Influence of Economics on Antitrust Law*. 30 Economic Inquiry 294.

Kovacic, William E. 1989. *Federal Antitrust Enforcement in the Reagan Administration: Two Cheers for the Disappearance of the Large Firm Defendant in Nonmerger Cases*. 12 Research in Law & Economics 173.

Kovacic, William E. 1989b. *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*. 74 Iowa Law Review 1105.

Kovacic, William E. 1982. *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*. 17 Tulsa Law Journal 587.

Kovacic, William E. & Andreas Reindl. 2005 (Forthcoming). *An Interdisciplinary Approach to Improving Competition Policy and Intellectual Property Policy*. Fordham International Law Journal.

Kovacic, William E. & Carl Shapiro. 2000. *Antitrust Policy: A Century of Economic and Legal Thinking*. 14 Journal of Economic Perspectives 43.

Kusek, Jody Zall, and Ray C. Rist. 2004. Ten Steps to a Results-Based Monitoring and Evaluation System (World Bank).

Laffont, Jean-Jacques. 1999. *Competition, Information, and Development*, in Annual World Bank Conference on Development Economics 1998, at 237 (Boris Pleskovic & Joseph E. Stiglitz, eds.).

Leary, Thomas B. Oct. 17, 1995. Transcript, U.S. Federal Trade Commission Hearings on Global and Innovation-Based Competition.

Lewis, Michael. 2004. Moneyball.

Lipsky, Jr., Abbott B. Oct. 18, 1995. Geographic Competition and Market Definition: The Proper Use of Economic Theory in Antitrust Decisions: Prepared Statement for the Federal Trade Commission Hearings on Global and Innovation-Driven Competition.

Lowe, Philip, & Luc Peeperkorn. 2005. *Singing in Tune with Competition and Innovation: The New EU Competition Policy Towards Licensing*. 2004 Fordham Corporate Law Institute 265 (Barry E. Hawk ed. 2005).

Majoras, Deborah Platt. Feb. 8, 2005. "A Dose of Our Own Medicine: Applying a Cost/Benefit Analysis to the FTC's Advocacy Program." Remarks before the Charles River Associates, *disponible à l'adresse* http://www.ftc.gov/speeches/majoras/050208currebttopics.pdf.

Malherbe, Stephan, Andrew Myburgh, Jacob Kosoff & Paul Anderson. February 2005. "Promoting Competitive Markets in Sough Africa."

McCraw, Thomas K. 1984. Prophets of Regulation.

Marvel, Howard P. 1982. *Exclusive Dealing*. 25 Journal of Law & Economics 1.

Melamed, A. Douglas. 1998. *International Antitrust in an Age of International Deregulation*, 6 George Mason Law Review 437.

Muris, Timothy J. 2005. *Principles for a Successful Competition Agency*. 72 University of Chicago Law Review 165.

Muris, Timothy J. Nov. 2003a. "How History Can Inform Practice" (Remarks before the Fall Forum of the American Bar Association Section of Antitrust Law, Washington, D.C.), *disponible à l'adresse* http://www.ftc.gov.

Muris, Timothy J. 2003b. *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*. 2003 Columbia Business Law Review 359.

Muris, Timothy J. Dec. 10, 2002. "Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy" (remarques pour le Milton Handler Annual Antitrust Review), *disponible à l'adresse* http://www.ftc.gov.speeches/muris/handler.

Muris, Timothy J. 2001. *GTE Sylvania and the Empirical Foundations of Antitrust*. 68 Antitrust Law Journal 899.

Muris, Timothy J. 2000. *The FTC and the Law of Monopolization*, 67 Antitrust Law Journal 693.

Nelson, Philip B. Oct. 19, 1995. Prepared Statement for Federal Trade Commission Hearings on the Changing Nature of Competition in a Global and Innovation-Driven Age.

Neustadt, Richard, & Ernest May. 1986. Thinking in Time: the Uses of History for Decisionmakers.

Organisation de coopération et développement économique. Sept. 1999. Regulatory Reform – The Hungary Country Review.

Pate, R. Hewitt. 2005. *Current Issues in International Antitrust Enforcement*. 2004 Fordham Corporate Law Institute 17 (Barry E. Hawk ed. 2005).

Petrecolla, Diego. Feb. 2005. "Promoting Competitive Markets in Developing Countries – Argentina."

Posner, Richard A. 1970. *A Statistical Study of Antitrust Enforcement*. 13 Journal of Law & Economics 365.

Report from Officialdom. 2000. *Roundtable Conference with Enforcement Officials*, 68 Antitrust Law Journal 581.

Rodriguez, Armando E. & Mark D.Williams. Spring 1998. *Recent Decisions by the Venezuelan and Peruvian Agencies: Lessons for the Export of Antitrust*. 43 Antitrust Bulletin 147.

Roos, David. September 1995). Automobile Competitiveness: A Report of the MIT International Motor Vehicle Program (Déclaration préparée pour le Capital Hill Forum on Industrial Competitiveness de septembre 1995 et soumise dans le cadre de l'exposé du Professeur Roos lors des auditions de la Federal Trade Commission des États-Unis sur la concurrence mondiale et tirée par l'innovation, 18 octobre 1995).

Saltzman, Harold, Roy Levy & John C. Hilke. Nov. 1999. Transformation and Continuity: The U.S. Carbonated Soft Drink Bottling Industry and Antitrust Policy Since 1980 (U.S. FTC Staff Report).

Scott, Sheridan. 2005. *Cartel Enforcement: International and Canadian Developments*. 2004 Fordham Corporate Law Institute 33 (Barry E. Hawk ed. 2005).

Sims, Joe. Nov. 14, 1995. Antitrust Treatment of Mergers in Distressed Industries: Hospitals as a Case Study – Déclaration préparée pour les auditions de la Federal Trade Commission des États-Unis sur la concurrence mondiale et tirée par l'innovation.

Sims, Joe, & Deborah P. Herman. 1997. *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*. 65 Antitrust Law Journal 865.

Sohn, Michael N. Oct. 25, 1995. Competitive Effects and Entry Analysis in R&D and Future Generation Markets: Plan d'une déposition pour les auditions de la Federal Trade Commission des États-Unis sur la concurrence mondiale et tirée par l'innovation.

Skitol, Robert A. Oct. 26, 1995. Déclaration préparée pour les auditions de la Federal Trade Commission des États-Unis sur la concurrence mondiale et tirée par l'innovation.

Stiglitz, Joseph E. 1999. *Knowledge for Development: Economic Science, Economic Policy, and Economy Advice,* in Annual World Bank Conference on Development Economics 9,(Boris Pleskovic & Joseph E. Stiglitz eds.).

Sullivan, Mary W. 2002. *The Effect of the Big Eight Accounting Firm Mergers on the Market for Audit Services*. 45 Journal of Law & Economics 375.

Swire, Peter P. 2004. *A Model for When Disclosure Helps Security: What is Different About Computer and Network Security?* 2 Journal on Telecommunications and High Technology Law.

Symposium. Spring 2001. *International Merger Control*. Antitrust Magazine 6.

Symposium. 2001b. *Antitrust at the Millennium (Part II)*. 68 Antitrust Law Journal.

Symposium. 2000. *Antitrust at the Millennium (Part I)*. 68 Antitrust Law Journal.,

Symposium. 1997. *Twenty Years of Hart-Scott-Rodino Merger Enforcement*. 65 Antitrust Law Journal 13

Symposium. Fall 1995. *Consent Decrees: Antitrust Enforcers as Regulators*. Antitrust Magazine 4.

Taylor, Christopher T., & Daniel S. Hosken. 2004. "The Economic Effects of the Marathon-Ashland Joint Venture: The Importance of Industry Supply Shocks and Vertical Market Structure." (FTC Bureau of Economics Working Paper).

Tom, Willard K. 2001. *The 1975 Xerox Consent Decree: Ancient Artifacts and Current Tensions*. 68 Antitrust Law Journal 967.

Uesugi, Akinori. 2005. *Where Japanese Competition Policy Is Going – Prospect and Reality of Japan*. 2004 Fordham Corporate Law Institute 57 (Barry E. Hawk ed. 2005).

U.S. General Accounting Office. May 2004. "Energy Markets: Effects of Mergers and Market Concentration in the U.S. Petroleum Industry."

U.S. General Accounting Office. Feb. 29, 1980. Closer Controls and Better Data Could Improve Antitrust Enforcement.

Venit, James S. & William J. Kolasky. 2000. *Substantive Convergence and Procedural Dissonance in Merger Review*, in Antitrust Goes Global 79 (Simon J. Evernett et al. eds.

Vickers, John. Sept. 3, 2004. "Abuse of Market Power." Contribution pour la Conférence de la European Association for Research in Industrial Economics, Berlin.

Vita, Michael G., & Seth Sacher. 2001. *The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study*. 49 Journal of Industrial Economics 63.

Waller, Spencer Weber. 1998. *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*. 77 Oregon Law Review 1383.

Weaver, Suzanne. 1980. Decision to Prosecute.

Werden, Gregory J. et al. 1991. *The Effects of Mergers on Price and Output: Two Studies from the Airline Industry*. 12 Managerial and Decision Economics 341.

Williams, Ray. 2000. Images of Aviation: Comet and Nimrod.

Wils, Wouter P.J. 2005. Principles of European Antitrust Enforcement.

Wilson, James Q. 1989. Bureaucracy.

Wise, Michael. 2001. *Examen du droit de la concurrence en Italie*. 3 Revue de l'OCDE sur le droit et la politique de la concurrence 65.

Wise, Michael. 2000. *Examen du droit de la concurrence en Corée*. 2 OECD Revue de l'OCDE sur le droit et la politique de la concurrence 127.

Wise, Michael. 1999. *Examen du droit de la concurrence aux États-Unis*. 1 Revue de l'OCDE sur le droit et la politique de la concurrence 9.

# BELGIQUE

Les délégués sont invités à examiner les demandes spécifiques suivantes comme points principaux de la discussion. Il est demandé aux délégués de procéder comme d'usage avec les précédentes tables rondes en fournissant des exemples spécifiques lorsqu'ils font part de leurs expériences.

## 1. Quelles mesures a prise l'autorité de la concurrence pour conduire ou participer à l'évaluation des :

### *1.1 Effets d'une ou de plusieurs initiatives passées de mise en œuvre de la loi, de cas, de projet de plaidoyer, de rapports ou autres actions de son ressort ?*

En Belgique, la première loi complète sur la protection de la concurrence économique date du 5 août 1991. Cette première loi n'ayant pas donné tous les effets escomptés quant à une application effective du droit de la concurrence, une nouvelle loi a été prise en 1999. Pour renforcer l'application du droit de la concurrence, les principales modifications ont été de renforcer l'effectif des membres du Conseil de la concurrence et d'y nommer 4 membres à temps plein. Un budget particulier a été attribué au Conseil de la concurrence alors qu'auparavant le budget était confondu avec celui du ministère de l'Économie. Il a également été créé un Corps des rapporteurs (au nombre de 6) pour diriger les instructions tant pour les ententes , les abus de position dominante que pour les concentrations.

Afin d'alléger le travail du Service de la concurrence et du Conseil de la concurrence, qui étaient surtout occupés par le traitement des concentrations, les seuils de notification de ces dernières furent augmentés et la notion de part de marché fut supprimée pour favoriser une plus grande sécurité juridique des entreprises.

Néanmoins, il s'avère aujourd'hui que ces mesures n'ont pas été suffisantes pour pouvoir appliquer de façon effective le droit de la concurrence en Belgique. C'est pourquoi un nouveau projet de loi est actuellement en discussion. Ce nouveau projet prévoit notamment un renforcement plus important des effectifs des Autorités belges de la concurrence. D'autre part, ayant constaté que le temps de travail de ces autorités était toujours trop pris par le contrôle des concentrations, les seuils de notification vont être substantiellement augmentés afin de pouvoir libérer du temps pour la lutte contre les pratiques restrictives de concurrence.

### *1.2 L'efficacité des formes existantes d'organisation interne et de procédure, telles que les mécanismes pour établir des priorités dans l'allocation des ressources ?*

En ce qui concerne les priorités quant à l'instruction des dossiers, la loi attribue cette compétence au seul Corps des rapporteurs.

Pour les prises de décisions, c'est le Conseil de la concurrence qui fixe les priorités de traitement des dossiers.

L'allocation des ressources suit donc ces fixations de priorités.

**2. Comment l'autorité de la concurrence a conduit ou participé à l'évaluation ?**

***2.1 En utilisant ses propres ressources et son personnel ?***

1. Oui.

***2.2 En recrutant des experts à l'extérieur pour conduire l'évaluation ?***

2. Non.

***2.3 En coopérant avec des organisations externes (par exemple, une université ou "think tank") ou avec des experts 'extérieurs qui procèdent à une évaluation avec leur propres moyens ?***

3. ***Non.***

**3. Quelle était la méthodologie de l'exercice d'évaluation ?**

***3.1 Est-ce que l'exercice dépendait de données empiriques, de données qualitatives ou des deux ? Comment les données ont-elles été collectées ?***

L'évaluation s'est effectuée de façon empirique. Les données ont été prises dans la banque de données interne reprenant tous les dossiers ouverts et traités au cours des différentes années.

***3.2 Est-ce que l'autorité de la concurrence s'est réunie ou a participé à des conférences ou à des ateliers pour solliciter les opinions d' observateurs extérieurs sur les effets de ses activités ?***

Non.

***3.3 A quelles difficultés méthodologiques l'autorité de la concurrence a-t-elle eu à faire face en procédant à l'évaluation et comment a-t-elle essayé de les résoudre ?***

Il n'y a pas eu de difficultés.

**4. Quelles ont été les résultats de l'évaluation ?**

Les résultats de l'évaluation ont été que le Service de la concurrence, le Corps des rapporteurs et le Conseil de la concurrence devaient consacrer beaucoup trop de temps à des concentrations qui n'avaient pas d'effets importants sur le marché belge.

**5. Comment les résultats de l'exercice de l'évaluation ont-ils été diffusés ?**

***5.1 Seulement aux agents de l'autorité de la concurrence ?***

Non.

***5.2 Seulement aux agents à l'intérieur et à l'extérieur de l'autorité de la concurrence ?***

Oui.

***5.3 Au cours de débats publics après une correction appropriée pour éviter la révélation d'informations non publiques ?***

Non.

**6. Quel impact l'évaluation a-t-elle eu sur les futures activités de l'autorité de la concurrence ?**

***6.1 Est-ce que les résultats de l'évaluation ont motivé des ajustements dans l'allocation des ressources de l'autorité, l'organisation ou les procédures ?***

Oui. Un nouveau projet de loi est actuellement en cours de discussion. Le Ministre de l'économie a mis une priorité sur le renforcement de l'application du droit de la concurrence.

**7. Quel impact l'évaluation a-t-elle sur les diverses composantes de l'opinion en dehors de l'autorité de la concurrence ?**

***7.1 Est-ce que les résultats ont motivé le parlement à adopter une nouvelle législation ou à allouer des fonds supplémentaires pour corriger les faiblesses de l'autorité de l'agence ou des opérations ?***

Oui, un projet de loi est en cours.

***7.2 Est-ce que l'évaluation permet de sensibiliser l'opinion à la valeur de formes spécifiques d'intervention ?***

# CANADA

On May 12, 2004, the Commissioner of Competition appeared in front of the Standing Senate Committee on Banking, Trade and Commerce that was examining Bill C-249, a proposed amendment to the *Competition Act*. A member of the Committee asked Commissioner Scott whether the Competition Bureau ("Bureau") had examined the respective post-merger marketplace after the Superior Propane decision[1]. Commissioner Scott responded:

> *"That is an excellent question. It is something I have been following. Some of the other competition authorities like to go back to see the implications of their decision later on. For example, if they allowed a merger, did the prices rise afterwards or vice versa? It would have been an interesting thing to do in the case of Superior Propane.*
>
> *That would not be an easy proposition. You would not just look at prices; you would have to look at a number of other inputs to see what exactly was happening in the marketplace. Prices could go up because of weather conditions, which is something we would take into account if we were doing a proper analysis of the situation.*
>
> *There is no publicly available information that would allow us to do the type of analysis that we would need to do to determine whether there has been a significant increase in prices, for example, as a result of the merger, that one might expect.*
>
> *Under the current legislation we do not have a tool that would allow us to pursue that information, nor do we have the power to require companies to provide us with the sort of confidential information that we would need. It would be an interesting proposition if we were able to do that."*

Even with these challenges, following the Commissioner's appearance, the Bureau decided last year it would be worthwhile to conduct post-merger reviews to assess the impact of its decisions and those taken by the Competition Tribunal ("Tribunal") using publicly available data. The Bureau is currently in the process of conducting an initial test-case ex-post evaluation.

## 1. What steps has the competition authority taken to conduct or participate in evaluation of:

As this ex-post evaluation is not yet completed and therefore has not yet been made public, this submission will refer to the respective transaction as simply the "transaction" or the "merger". Similarly, because of the evaluation's current non-public status, specific details of the transaction cannot be directly discussed, except in general form, where appropriate.

The goal of the ex-post evaluation was to gauge, based on publicly available information, whether or not it was possible to assess whether prices ultimately increased as a result of the transaction.

## 2. How has the competition authority conducted or participated in the evaluation?

In order to conduct this ex-post evaluation, the Bureau has relied primarily on outside experts to carry out the work. The Bureau has provided comments on the drafts.

## 3. What was the methodology of the evaluation exercise?

***General Methodology***

As stated above, a central purpose of the ex-post evaluation was to measure whether prices changed as a result of the merger and by how much. In order to analyse price changes resulting from the merger, a reduced-form regression analysis is being utilised. To this end, the regression model has both a time component (months) and a cross-sectional component (cities). Finally, the regression model is linear in logarithms, meaning that a linear regression equation is estimated using the natural logarithm of the dependant and each respective explanatory variable. Use of this specification allows for each estimated coefficient to be depicted as an elasticity. Due to the data limitations, the study examined pricing data at the city level rather than at the actual geographic market level and was limited to retail prices rather than the wholesale prices evaluated in the merger assessment.

Various sensitivity controls have to be incorporated into the regression analysis. For example, as the goal of the analysis is to measure price changes resulting from the transaction, those prices occurring after the transaction date have to be compared to those prices occurring before. In addition to the identified cost and demand factors, a time trend and monthly dummy variables (i.e. to capture any seasonality effects) have been incorporated into the regression. As well, a lagged-price variable as an additional explanatory variable has been incorporated in order to see whether there was a short-term impact that was different from the long-term impact of the transaction. Finally, as part of the general sensitivity analysis, numerous alternative regressions are being conducted using a variety of alternative parameter specifications.

*Data/Informational Considerations:*

While an ideal data set would have been one that used transaction-level data (i.e. both price and cost data) from the merging companies themselves, such data were not available. Under the current statute, the Bureau does not have a clear mandate to use formal powers to access such data from companies once an inquiry has been closed.[2] Accordingly, only data from public sources and third-party vendors can be used. There are a variety of issues stemming from this lack of necessary empirical data, such as:

- the analysis is restricted to using public data, and hence there are only data available on one of many product categories that the merged firm produced;
- a sufficiently long time series for many of the smaller cities is lacking; and
- many demand and supply variables are not available or readily available at the city level, but instead were available at the province level.

Further complicating the review is the fact that at about the time of the merger, not only did wholesale prices increase, but volatility did also. In addition, attempting to control for changes in market conditions in the various retail markets is proving to be important.

In light of these issues related to data described above, obtaining data (including cost as well as price data) directly from the merged companies as well as competitors themselves would be the best solution, provided that it is over a reasonably long time frame and was provided at a sufficiently disaggregated level. Obtaining similar data from companies in a nearby but distinct geographic market would also be useful. Given the short time series, this type of study would likely work best if data from geographic markets unaffected by the merger were also included with one sample from before and one from after the merger (or more samples, if possible, especially after the merger if the timing of when the merger might affect

prices is unknown). Such geographic markets can be used to control for changes in cost and demand conditions. Without these controls, a sufficiently long time series would be required, even when using company data, to measure accurately and, thereby hold constant, the possible effects of cost and demand changes on prices.

**4. What were the results of the evaluation?**

Considering the difficulties explained above, the evaluation results are only of limited inferential use. The most important insight derived from these results is not so much that there appears to be price effects post-merger, but that the data are not available to critically evaluate the pricing impact of this transaction.

**5. How were the results of the evaluation exercise distributed?**

As the ex-post evaluation exercise is not completed, it has not been made public at this time.

**6. What impact did the evaluation have on the future activities of the competition authority?**

The results will be duly considered in light of the ability to achieve the above stated goals, and an assessment will be made of how useful the process has been and how useful it can be. This may include speaking with market participants, not only relying on pricing evidence, and considering the use of alternative techniques.

**7. What impact did the evaluation have upon constituencies outside the competition authority?**

Since the exercise is not yet completed, there has not been any external impact thus far. The Bureau intends to conduct further ex-post evaluations. When these evaluations are completed, they will provide further insight into any limitations we have to collect data to perform such evaluations. They will also provide a higher level of transparency regarding the effectiveness of decisions taken by the Bureau and/or the Tribunal.

## NOTES

1. http://www.parl.gc.ca/37/3/parlbus/commbus/senate/Com-e/bank-e/06ev-e.htm?Language=E&Parl=37&Ses=3&comm_id=3

2. Footnote 16 of the Organisation for Economic Cooperation and Development 2004 review of Canada's Competition Law and Institution, released on January 18, 2005 states, "The Bureau is also unable to employ formal investigative powers in conducting *ex-post* reviews of previous law enforcement actions."

# DENMARK

The Danish Competition Authority appreciates the initiative to have a roundtable discussion on the topic of Ex Post Evaluations and Analysis of the Actions and Resources of Competition Authorities. This topic is important for a continuous improvement of the quality of work of Competition Authorities.

The Danish Competition Authority (DCA) has done several ex post evaluations and analyses of actions and procedures of the DCA. In this paper we present a brief description of these considerations.

## 1. Merger regulation

Merger regulation has existed in Danish competition law since 2000. The Danish merger regulation leaves the DCA with a timeframe of three months from the completion of a notification-form to decide on approval or rejection of the merger.

The relative short time to establish a thorough analysis and assessment of often large and complex mergers demands clear and effective procedures. As a consequence of this, procedures and methods to asses the merger is codified in a case handler manual on mergers.

After the completion of a case the merger team meet with the board of directors to discuss the case. The outcome of these discussions often results in corrections or additions to the case handler manual on mergers.

Each year the DCA publish a report on competition issues. In the 2004 edition a chapter took stock of the experiences gained through the handling of merger cases.

In order to asses market power effects the analysis focused on analysing stock market data before and after the mergers where approved by the DCA. This analysis was inspired by a working paper by Duso, Neven and Röller: *The political Economy and European merger control: evidence using stock market data*. The main result of the investigation is that the DCA has generally been correct in assessing which mergers could be cleared without the parties giving commitments (to sell of assets etc.)

Another analysis shows that the major mergers approved have not led to increased consumer prices. Most of the approvals given also appear to work, and the Authority has, only in a few cases, received complaints from competitors about the approvals. In particular, the sale off of assets (production systems etc.) has, so far, taken place as specified, and the assets sold are still producing for competitors.

The mergers approved have only been operative for a few years, and their full effect has hardly been realised yet. Therefore, the results must be interpreted with caution.

Finally, using the DCA's experiences as a starting point, the advantages and disadvantages of the various types of remedies that can be used in merger cases were analysed. The question is often whether structural approvals (e.g. sale of production system or ownership interests in competitors) or behavioural approvals (e.g. requirements concerning the company's pricing or trading terms) are best suited to deal with the competition effects of the mergers.

It was concluded that experience from Danish merger cases seems to indicate that a broad range of remedies (both structural and behavioural) is often best suited to correct the competition effects of the mergers.

## 2. Discussions with Competition Appeal Tribunal

The decisions and case handling of the DCA and the Competition Council are not influenced by the ministry or the minister, but are subject to appeal before the Competition Appeal Tribunal and subsequently the ordinary courts.

It is not solely in relation to merger regulation the DCA do ex post evaluations. Each year the DCA meets with the Competition Appeal Tribunal to discuss potential improvements in the case handling by the DCA.

The discussions with the Competition Appeal Tribunal have e.g. lead to more focus on different aspects of market delineations.

## 3. Cartels

In November 1998 the most extensive cartel ever discovered in Denmark was detected. The cartel concerned the fact that electricians coordinated there bidding in tenders.

In 2001 the DCA assessed the effect of detecting the cartel. The DCA did several analyses to reach the conclusion: The cartel raised prices in the long run with 12 percent. This result was based of comparative studies – but not explicit ex post studies. However the DCA also asked several property companies to evaluate the effect of detecting the cartel.

The majority of the property companies had noticed a change in the market. Furthermore one of the largest property companies estimated a price reduction of 10 percent after the diction of the cartel. The estimation was based on general observations in the market.

## 4. Yearly competition report

Each year the DCA evaluate the intensity of competition in the Danish economy. The evaluation is bases on a number of indicators jointly implying the status of competition in approx. 500 Danish sectors.

Among the indicators are concentration ratios, prices, market share mobility and entry. The indicators show that 53 Danish sectors are characterised by serious competition problems.

One of the objectives of the yearly status on competition is to give the DCA a basis to have an indication whether competitive interventions have been effective or not. Furthermore the status also helps the DCA to decide if focus on a sector should be intensified.

In the 2004 edition it appears that the goal of the Danish Government for competition in Denmark is to be at level with the top countries in the OECD. To achieve this goal, simply amending competition legislation and prioritising the work of the competition authorities is not enough. A change in the competition culture throughout Danish society is necessary. Action must be taken by competition authorities and other authorities as well as companies and consumers. Each year the status on competition in Denmark will be used to make out if the competition policy is on the right track.

# FINLAND

## 1. On the FCA's evaluation in general

The operational goals of the FCA, like those of other Finnish agencies and public bodies, are derived from the goals of the whole administrative sector (in this case, the Ministry of Trade and Industry) and ultimately, from the objectives set by the State Council. Rough goals are set each year in the context of preparing next year's budget, which are then specified in the annual discussions with the Ministry. The fulfilment of the objectives written down in the so-called "result agreement" is monitored twice a year with special follow-up reports.

An annual report is delivered to the Ministry of Trade and Industry by the end of March. The report evaluates the fulfilment of goals on both social impacts and effectiveness of activities. The basic criteria in the evaluation of effectiveness include efficiency, outputs, quality control and the management and development of intellectual assets.

The evaluation of efficiency is intended to show how efficiently the FCA's activities are organised and implemented. More specifically, the objective is to investigate how efficiently the FCA has used and allocated its resources. Efficiency is composed of economic efficiency and productivity, the measurement of which requires the definition of outputs, process descriptions, a functional information management system and follow-up of working hours and costs. As regards outputs and quality control, the development of output production and the level of service is evaluated, in particular.

The goals on internal efficiency are set as indicators, which are easy to follow. They typically concern the developments in the number of cases and processing times. So far, it has not been possible to develop similar indicators for social impacts.

The annual report is organised into basic functions, which, at the FCA, include cartel control, monopoly control and competition advocacy. The results of FCA's international activities and external communications are also reported each year. The personnel section includes numerical information on the FCA's staff, its structure, the level of expertise and job satisfaction. For example, turnover and absentee figures are used to evaluate job satisfaction.

A detailed (roughly 50 pages) annual report is published on the FCA's web pages after it is completed, which ensures that all interested parties have easy access to it. The corresponding information is published in the FCA's Yearbook, published annually. The annual report is distributed to the entire FCA staff and it is used in the planning of next years' activities.

Since 2002, the Ministry of Trade and Industry has also published its comments on the annual reports of the agencies under its jurisdiction. The comments particularly assess how well a specific agency has promoted the fulfilment of the common strategic goals in its administrative sector. These documents are also available over the Internet.

The method of evaluating the activities of the agencies of the state administration described above has been used in Finland for several years and it is constantly developed. The system forces the agencies to constantly assess their activities and boost them e.g. to develop appropriate indicators for evaluation. One

of the problems is that the system is more or less based on self-evaluation and frequently no points of comparison can be found from within Finland to compare with each other units which have their own specific goals and activities.

It is also required, however, that the annual report lists the possible other evaluations made on the FCA's activities, such as international comparisons and so-called overall assessments, the objective of which is to produce a larger amount of information for example on the structural factors affecting the development of impacts and efficiency. Overall assessments can also be used to review the FCA's strategies and plans made thereon, or the appropriateness of the strategic choices already made. Only one such overall assessment has been made of the FCA, and this took place in year 1995. The evaluation procedure and its results are detailed in the next section.

Government agencies are also urged to investigate, at regular intervals, their customers' and staff's satisfaction with their activities. At the FCA, the last such investigation on external interest groups was conducted in 2000. The target group was composed of lawyers and other company representatives, MPs and reporters. The investigation was based on a sample and it was made as a series of telephone interviews.

The questions dealt primarily with issues related to the FCA's external image, and the results were used to develop the desired image of the community and other communications. The next such investigation is expected to be conducted in the near future, possibly supplied with questions on customer satisfaction.

## 2. External evaluation of the FCA

The evaluation of the FCA's activities conducted in 1995 was commissioned by the Ministry of Trade and Industry and conducted by the Institute of Public Management (HAUS). Chief executive officer Jaakko Kuusela from HAUS was appointed as responsible administrator of the evaluation. Sweden's former Competition Ombudsman, Gunnar Hermansson, was appointed as an international expert. In addition, HAUS appointed three other persons to assist in the evaluation process.

The objective was to establish how well the FCA had succeeded in its activities. Following the evaluation, the compliance of the FCA's activities with the goals imposed and the organisational functioning, efficiency and economic efficiency as well as the social impact and appropriateness of the activities were to be assessed. Based on this evaluation, proposals for the development of the FCA's activities, organisation and use of resources were to be made.

### *2.1 Implementation and methodology of the evaluation*

The evaluation was conducted based on three principal standpoints, i.e. taking into account the impact, compliance with the goals imposed and efficiency. In evaluating the impact, essential questions were, whether the FCA's activities and actions were correctly aimed, i.e. at matters which are the most important ones for the prevention of competition infringements, and whether the handling of customer relations and case-handling was of good quality.

Since the FCA is an expert organisation, it was not possible to measure its activities in the same way as organisations producing routine outputs. As the cases handled at the FCA are each in a way unique, it was not justified to use classification based on the level of competence required for solving them. The principal question was how the organisation succeeded in maximizing the number and quality of outputs by using granted resources.

The criteria used in the evaluation of the efficiency of the FCA combined different aspects. The criteria used aimed at examining a) how the activities corresponded to the external goals and how well the

planning worked, b) the implementation of goals on performance and the functioning of the follow-up, c) the development of the aggregate output, d) the efficiency of the organisation and working processes and e) the use and development of resources.

The majority of the new material produced during the evaluation was based on interviews carried out at the FCA. In addition to the management, the heads of units and several employees of each unit were interviewed. The data used was qualitative and the analysis was based on a qualitative comparison of the material collected from different parties and documents. Other material used for the evaluation included the FCA's plan of action and budget, annual reports as well as other reports.

The evaluation encompassed several years for individual criteria, but focused otherwise mainly on the situation at the time of the evaluation. This was due to the fact that (as a consequence of insufficient follow-up information) a traditional evaluation of economic efficiency and productivity could not be conducted. The evaluation thus focused on whether the FCA had means to ensure the compliance with the goals imposed for its activities or whether it used procedures which ensured effective operation. Furthermore, the evaluation assessed whether the FCA did the "right things" in the light of the defined tasks.

### *2.2 Results of the evaluation*

According to the evaluation, the FCA operated very independently and, to a large extent, set itself its goals and defined the areas where the focus should be. This independence was, in the view of the evaluators, justified by the characteristics of the activities. The evaluators found, however, that the Ministry of Trade and Industry could be more active at least in defining the objects of the follow-up and in giving evaluation feed-back to the FCA.

The evaluation found that the FCA's planning procedures strived for systematic strategic planning, but well-defined decisions on necessary tools for the strategic work had not always been taken. Nor had a systematic analysis of the (operating) environment or hearing clients been deemed as necessary.

The focus of the FCA's activities had been permanent and comprehensive aiming at covering all branches. As a result, it had not sufficiently steered the activities. The resources had been allocated when selecting the projects each year. However, the FCA endeavoured to accomplish projects in all areas where the focus of its activities was and priorities had not been set.

In order to steer long-term project work and unpredictable requests for action at the same time, such tools for strategic work were required on the basis of which the focus of the activities and annual strategic projects could be chosen regardless of unit boundaries, priorities could be set and preconditions defined for the projects enabling handling of significant requests for action.

The handling of requests for action would require well-defined principles, which would be used in order to classify the importance of the cases and the level of competence required for handling them. Cases of minor importance should be decided swiftly and it would be important to ensure that cases were not left pending for a long time.

The evaluation also showed that the FCA had limited possibilities to dedicate to its own research and hence the importance of assistance provided by research institutes was increasing. Consequently, the FCA had invested in developing the cooperation especially with the state provincial offices and research institutes. The evaluation report found that an augmentation of the benefit of the cooperation would, nonetheless, require a well-defined plan for the years to come.

The appropriateness of the activities was evaluated by relating the actions and outputs to the goals set by the FCA. This demonstrated that the FCA accomplished its goals of performance comparatively well in 1994. Nevertheless, when setting goals the FCA did not sufficiently balance the goals against the use of resources. This was due to the fact that an effective follow-up system was not put in place. Instead partly overlapping follow-up methods were used. The follow-up of working hours was at that time only about to be established.

The efficiency of the FCA was examined by comparing the utilization rate of the capacity or by balancing the activity against the development potential. The evaluation showed certain efficiency deficits, but it was not possible to say, whether the deficits were more substantial at the FCA than at other agencies in general.

Based on the evolution of the aggregate output, the development of the economic efficiency of the activities was positive. There were also no other indications showing that the FCA would be less efficient than other agencies. However, the FCA had not made use of all opportunities and could improve in this respect.

The evaluation report found that FCA's organisation of that time strengthened the development of the knowledge of competition law and competition restriction types and created opportunities for working methods that were independent of sectoral interests. Instead of the unit-based work, forms for team work should be developed.

Moreover, the responsibility for projects was not divided in a fair manner at the FCA and the development of the knowledge among the personnel was characterized by a negative polarization. The development was positive for a majority of the personnel, as challenging projects increased the knowledge and skills. But a part of the personnel handled tasks which did not result in an increased knowledge. In order to handle new tasks, the human resources should be developed and made fully use of. The evaluators suggested a well-defined personnel strategy for the whole FCA as a solution to this problem.

### *2.3 Distribution of the results*

The evaluation report was finalized in August 1995. The FCA also organized a development seminar where the content and the significance of the evaluation was explained to the whole personnel. In addition, the Ministry of Trade and Industry issued a press release on the evaluation in September 1995.

### *2.4 Impact on the future activities of the FCA*

The evaluation demonstrated that the workload of the FCA was immense. As a consequence two kinds of measures were taken. First, the organisation of the FCA was reformed as from March 1996 and the organisation model based on different types of competition restrictions was abandoned. Projects defined as strategically important were concentrated into two units, the Market Units 1 and 2, whereas other competition restriction cases were allocated into the Complaints Unit. At the same time, a special R&D Unit, responsible for developing legislation, strategic preparation, research cooperation, developing tools and coordination of training, was established.

Second, a better use of resources required legislative amendments. Consequently, upon a proposal of the FCA, the Ministry of Trade and Industry established a working group with the task to prepare – in addition to substantial rules – proposals for such procedural rules which would make it possible for the FCA to concentrate its activities on that what is essential.

Following the evaluation, the FCA introduced a system for internal evaluation, conducted by an internal Rapporteur and initiated a system for case classification. The case classification system aims at an ex ante evaluation of the impact and competence classification of new cases.

### *2.5 Conclusions*

What is positive about the evaluation is that it was conducted by a third party and involved an expert on competition matters (Hermansson). This contributed to the evaluation being more objective. A clear drawback is, nevertheless, that the evaluation was to a large extent based on viewpoints from within the FCA, as the persons interviewed belonged to the FCA's personnel. Furthermore, due to the indicator problem the results might not tell the whole truth because, at that time, the internal indicators available today were non-existing. Similarly, there were and are still no reliable external indicators.

## 3. Internal evaluations of the FCA

At the end of 2000, a project was launched which aimed at evaluating and developing the FCA's working processes. The project was conducted by an employee of the FCA. The aim of the project was to reform the FCA's working processes so that unnecessary bureaucracy would be abolished and the new working processes would make optimal use of FCA's information management and intranet systems.

A year later, the FCA started a project, the objective of which was that all cases that had been pending for a long time should be decided as quickly as possible. This project continued throughout the years 2002 and 2003. In addition, the FCA carried out a so-called input project in 2002 in order to identify new means for speeding up the handling of new requests for action.

The last-mentioned projects had the common objective of guaranteeing the establishment of courses of action that would tie a minimum of resources to the cases of minor significance. The personnel resources thus freed were allocated to the handling of cases that are essential to the performance of the national economy.

Both of these projects were successful as the FCA's work processes were considerably improved, although it would take some time before the effect on the average handling times of requests for action became evident. In fact, the FCA's intensive effort to solve more cases lengthened the average handling times temporarily in 2002 and 2003.

At the beginning of October 2002, the FCA's organisation was reformed again as a result of an internal evaluation launched in the autumn of 2001. The objective of the organisational reform was to improve the efficiency of the agency by making better use of the expertise related to different types of competition restrictions and other expertise in the agency. Hence, the new organisation is again composed of units handling different types of competition restrictions.

## 4. Nordic benchmarks in 2003 and 2005

The FCA has twice participated in Nordic benchmark projects initiated by the Danish Competition Authority. The objective of the benchmarks has been to compare the performance of the authorities in selected fields in order to learn from each other and compare experiences. The first benchmark was conducted in 2003 and it compared data from 2001 and 2002. The second benchmark, which has been carried out in 2005, compares data from 2003 and 2004.

Each benchmark consists of three main parts. The first one encompasses the results of the competencies and quality of the competition authorities. The second part includes the results relating to

efficiency and productivity. Finally, the third part presents the results with regard to service, openness and information.

The first part thus focuses on customer satisfaction, appealed decisions and the evolution of the competencies of the personnel. The second part related to efficiency and productivity examines indicators with regard to budget and personnel, case statistics and duration of case handling. The third part assesses the customer satisfaction with the duration of case handling, the reasoning of the decisions and the service level in general.

The data for the FCA consists of different kinds of statistics. However, the FCA had no data concerning customer satisfaction. Furthermore, the task to provide comparable data was not always easy, as e.g. the definitions vary somewhat from country to country. Moreover, the data is often fairly limited and it is hence not always possible to make very reliable comparisons based on only a handful of cases. Nevertheless, the benchmarks provide a useful overview of how well the FCA is performing in general in comparison to the other Nordic countries.

The results of the benchmarks were discussed during the Nordic meetings of the Director-Generals in 2003 and 2005. Furthermore, within the FCA the personnel was informed about the benchmark results at a general level. The benchmark reports are, however, not public and are to be regarded as internal guidance and development projects.

## 5. Concluding remarks

The continuous evaluation of activities is a good incentive to develop indicators and methods for a more accurate and reliable evaluation. The evaluation also gives an overall picture of the effectiveness of the activities as well as provides a comparison to the performance of previous years. It demonstrates which areas are problematic and require improvements. Similarly, the evaluation helps to determine which areas of the activities should be prioritised and how the resources could be allocated in a more efficient way.

The FCA finds that the general Finnish planning and follow-up system of the public administration supports fairly well the authorities' own endeavours to develop their activities. The problem with the system is that the evaluation of activities is primarily based on the agencies' own estimate, supplemented by an assessment of the supervising agency, at most. Studies on customer satisfaction and other external interest groups complement the evaluation.

So-called overall assessments are also needed. As regards the evaluation of 1995, it was clearly a useful exercise in spite of its deficiencies and resulted in concrete attempts to improve the efficiency of the FCA's organisation and procedures. Not only was the organisation reformed, but systems for internal evaluation and case classification were also introduced. As a result of the evaluation, new procedures were put into place in order to address problems related to setting priorities and allocation of resources, hence contributing to a more efficient implementation of the activities.

Furthermore, international comparisons are increasingly needed, due to the special nature of the work of the competition authorities. From the Finnish perspective, proper benchmarks can be found from the Nordic countries and from within the EU and OECD.

The FCA finds that the activities of the competition authorities can be evaluated from many different perspectives, which include the administrative, legal and economic. The FCA is hence likely to find partners who would be interested in conducting such evaluations from several university departments and research institutes both from Finland and abroad. The FCA itself seeks to motivate various instances to conduct such investigations and, when required, is willing to participate in corresponding international projects.

# IRELAND

## 1. What steps has the competition authority taken to conduct or participate in evaluation of:

### *1.1 The effects of one or more past law enforcement initiatives, cases, advocacy projects, reports, or other applications of its authority?*

The Competition Authority ("the Authority") has to date only conducted evaluations of its law enforcement initiatives, cases, advocacy projects, reports and other applications of its authority on an *ad hoc* basis. Such evaluations have typically been informal and based on crude calculations. Some examples include (1% of Irish GDP is approximately €1.4bn):

i. Milk – The Competition Authority v Patrick Jennings, Dermot Lally & others - This case dates back to October 2000 when the Authority obtained an injunction against certain named farmers from blockading a dairy. The estimated savings due to this action by the Authority was €100m. This figure was based on milk prices before and after competition intensified.

ii. Lending to SMEs – In 2002 the Authority began a study of non-investment banking in Ireland. The focus of the study was on competition issues arising in the provision of personal current accounts and lending to SMEs. The study found, among other things, competition problems, but no breach of the law, in the provision of working capital facilities to SMEs. The estimated cost of weak competition was €85m. This figure was based on incomplete pass through of ECB rate changes.

iii. Aer Lingus & Travel Agents – The Irish Travel Agents' Association submitted a complaint to the Authority concerning a unilateral decision by Aer Lingus to reduce the commissions paid to travel agents for air travel sales. The Authority concluded that the commissions paid were not excessively low, and abusive, as claimed. Aer Lingus's 2003 annual report stated that their action resulted in savings in the region of €40 million.

iv. Taxis – In November 2000 quantitative restrictions on taxi licences were removed. The estimated value of the removal of this restriction is €250m. This figure was based on the pre-deregulation value of licences.

v. Liquor licensing – The liquor licensing regime in Ireland is restrictive. The estimated cost of the restrictions is in the region of €1bn. This figure is based on the value of licences in the sector.

4. The estimates provided in items i – v sum to approximately 1% of Irish GDP.

### *1.2 The effectiveness of existing forms of internal organization and procedure, such as the mechanisms for establishing priorities for the allocation of resources?*

The Authority has conducted evaluations of the effectiveness of existing forms of internal organization and procedure on a number of occasions.

i. The principal evaluation was undertaken in 2000 by external consultants, Deloitte & Touche. This review led to the reorganisation of the Authority into Divisions with an associated management structure.

ii. Since the Deloitte & Touch review of 2000, the Authority has received additional resources and functions In particular, since 2003, the Authority has had responsibility for merger control – this necessitated the reorganisation of the divisional and management structure. In 2005, in response to an increasing level of activity in the Authority, an additional division was established – The Policy Division. Internal evaluations of organisation and procedure accompanied each of these changes.

iii. The Authority is required to produce a Strategy Statement every three years. This involves reviewing the work of the Authority over the previous three years and relating that to the old Strategy Statement. A new Strategy Statement is then developed in this context. The Authority is due to produce a new Strategy Statement in late 2005 and we may use external consultants to assist with the review. Smaller, internal evaluations of processes within the Authority are carried out as required. For example, in 2003 a review was undertaken of how complaints are dealt with and how issues identified advance to full investigation. This review led to a more streamlined and effective case handling process. A review of how the Authority undertakes market studies is due to commence during the summer of 2005.

**2. How has the competition authority conducted or participated in the evaluation?**

***2.1 By using its own resources and personnel?***

***2.2 By retaining outside experts to conduct the evaluation?***

***2.3 By cooperation with external organizations (e.g., a university or think tank) or with outside experts who perform evaluation with their own funds?***

See response to question 1.

**3. What was the methodology of the evaluation exercise?**

***3.1 Did the exercise rely on empirical data, qualitative data or both? How was the data collected?***

5. For items i, iv and v above, informal market inquiries were sufficient for the exercise. For item ii, detailed data requests were issued to banks. For item iii, the information was available from the company's annual report.

***3.2 Did the competition authority convene or participate in conferences or workshops to solicit the views of external observers about the effects of its activities?***

No. This however is recognised as good practice and there are plans to consult external stakeholders, for example, during the Authority's review of studies, and review of strategy later in 2005.

***3.3 What methodological difficulties has the competition authority encountered in performing evaluation, and how has it tried to solve them?***

As the Authority has not developed a systematic approach toward the evaluation of the effects of its activities, it is difficult identify specific methodological problems. However, as described in iv and v above, the value of licences was used to estimate the cost of the restrictive licensing regimes in the taxi and

liquor licensing sectors. Restrictive licensing regimes exist in other areas of the economy, but licences are not tradable. For example, the licensing regime in the retail pharmacy sector is restrictive, but since the licences are not traded, there is no value upon which to base an estimate. Other methodological problems include the poor availability of data, the lack of an appropriate counterfactual (e.g., how do you assess the effect of a blocked merger) and the measurement of deterrent effects.

**4. What were the results of the evaluation?**

For monetary estimates see items i – v above.

**5. How were the results of the evaluation exercise distributed?**

***5.1 Only to officials within the competition authority?***

***5.2 Only to public officials inside and outside the competition authority?***

***5.3 To public audiences, with appropriate editing to prevent the disclosure of non-public information?***

Typically, the figures developed in items i – v above are used for competition advocacy purposes. Accordingly, the estimates are distributed as widely as possible – in annual reports, press releases, speeches and articles for example. Where required, efforts are made to conceal commercially sensitive information, e.g., item ii – lending to SMEs.

**6. What impact did the evaluation have on the future activities of the competition authority?**

***6.1 Did the results of the evaluation motivate adjustments in the authority's allocation of resources, organization or procedures?***

No – evaluations of the type outlined in items i – v above, have had little discernible impact on the Authority's allocation of resources.

Evaluations of the type outlined in items vi – viii above, are undertaken so that the Authority's allocation of resources, organization and procedures may be adjusted.

**7. What impact did the evaluation have upon constituencies outside the competition authority?**

***7.1 Did the results motivate the legislature to adopt new legislation or allocate additional funds to correct weaknesses in the agency's authority or operations?***

No.

***7.2 Did the evaluation help educate external constituencies the value of specific forms of intervention?***

Certainly, the profile of the Authority has risen over the past number of years and external constituencies appear to have a greater understanding and appreciation of the Authority's mission. However, it would be difficult to attribute the change in perceptions of the Authority to the informal evaluation exercises outlined in items i – v above.

# JAPAN

## Introduction

On April 1, 2002, the "Government Policy Evaluations Act" entered into force in Japan, introducing a system for evaluating measures taken by each administrative institution. In accordance with this law, evaluation of policies—such as enforcement measures of laws (the Antimonopoly Act, the Premiums and Representations Act and the Subcontract Act) under jurisdiction of the Japan Fair Trade Commission (JFTC) and advocacy activities concerning competition policy (such as preparation of guidelines and public relations activities)—has been conducted and made available to the public.

The following three points may be cited as the significance of policy evaluation:

- to realise results-oriented administration by making it clear what results are sought;
- to realise an efficient and high-quality administration commensurate with the input of resources for realising policy objectives; and
- to achieve accountability to the general public and to secure its understanding concerning the administration of the JFTC.

## 1. Approach

### *1.1 What steps has the competition authority taken to conduct or participate in evaluation of:*

*1.1.1 The effects of one or more past law enforcement initiatives, cases, advocacy projects, reports, or other applications of its authority?*

*1.1.2 The effectiveness of existing forms of internal organisation and procedure, such as the mechanisms for establishing priorities for the allocation of resources?*

As mentioned in the "Introduction", the JFTC regularly conducts evaluation of policies concerning law enforcement. (Please refer to the ANNEX concerning policy evaluation conducted so far.)

*Re. law enforcement initiatives, cases*

While it may be the most accurate if we can gauge the degree of welfare improvement the market brought by the elimination of anticompetitive practices in the market, in reality it is difficult to do so (to gauge it). We assume that the elimination measures of anticompetitive measures (cease and desist orders) themselves naturally embody positive effects of law enforcement measures i.e. welfare improvement to the market through recovery of competition. Thus, the number of measures implemented by the JFTC during the review period is the starting point of our evaluation.

Nevertheless, to the extent possible, it is also important to try to examine the significance of cases qualitatively. The JFTC, for instance, regards the public utilities sector and intellectual property rights sector as prioritised sectors in addition to hard core cartels for enforcement of the Antimonopoly Act. It is

therefore important to examine if law enforcement has been adequately implemented in these two sectors, and evaluation thereof has actually been conducted in such a way. In addition, a decision on illegal practices that have not been taken up in the past is another example to be highlighted. Such a decision will have a considerable ripple effect as it will set a precedent in the application of laws and establish a norm for the conduct of enterprises. Enforcement against various types of violations and the average period of investigation for anticompetitive conduct are among the subject of policy evaluation.

In order to examine the effects of law enforcement measures in detail, we have taken up some specific cases and examined the actual effects of those cases. In the past evaluations, we tried to grasp the effects of administrative activities in specific cases using the methods provided below.

Concerning violations of the Antimonopoly Act

Before-after analysis

In cases of bid-rigging, by comparing the successful bid ratio (contract price/planned price pre-set by public agencies; hereinafter "RCP") during the period of bid-rigging with the RCP following after ceasing bid-rigging bid-rigging, an educated guess is made on the degree to which the RCP has declined due to JFTC measures. Based on this, the effects of contract amounts saving are estimated. (Please refer to 4-b.)

Concerning violations of the Subcontract Act

In order to examine if trade practices had been improved to comply with the Act after JFTC guidance, we conducted a questionnaire survey of subcontractors of enterprises who had violated the Act. (Please refer to 4-c.)

Concerning violations of the Premiums and Representations Act

In order to examine any ripple effects of law enforcement, we conducted a questionnaire survey of industries to which companies given cease-and-desist orders belonged. We try to ascertain if each company had reviewed its own representations and established a system to comply with the Act based on cease-and-desist orders (Please refer to 4-d.)

*Re. advocacy*

Meanwhile, advocacy activities measures are diversified. It is hard to illustrate standard methods to grasp the effects of such measures. The JFTC gauged effects of its public relations activities by the volume of press releases cited in news paper articles in the policy evaluation made public in July 2004. (Please refer to 4-e.)

## 2. Method

### *2.1 How has the competition authority conducted or participated in the evaluation?*

*2.1.1 By using its own resources and personnel?*

*2.1.2 By retaining outside experts to conduct the evaluation?*

*2.1.3 By cooperation with external organisations (e.g., a university or think tank) or with outside experts who perform evaluation with their own funds?*

The policy evaluation system in Japan aims at improving the quality of policies through self-evaluation by each administrative institution which implements policy measures. At the same time, expertise of a third party is to be utilised so that the evaluation shall not suit the convenience of the institution undertaking the evaluation or become intentionally favourable to it.

The JFTC is not an exception. Each section concerned evaluates its policies from the standpoint that each section should, by itself, grasp the effects of measures implemented by it and discover problems need to be requiring improved (e.g. an investigation section in the case of elimination measures against antimonopoly practices, or a M&A section in the case of M&As [stockholding, merger, division, and acquisition of business]). Then, in order to secure objectivity of evaluation, the JFTC hears comments on the drafting of policy evaluation from outside experts and reflects their opinions on the final evaluation of policies. The JFTC commissions 5 outside experts to participate as members of a Policy Evaluation Committee (an expert on the Antimonopoly Act, an expert on economics, an expert on policy evaluation, a certified public accountant, and a fellow of a think tank).

For certain cases, in order to assist each section's evaluation, the JFTC has entered into contracts with outside think tanks, outsourcing a part of its policy evaluation work (such as gauging effects by questionnaires).

### *2.2 What was the methodology of the evaluation exercise?*

*2.2.1 Did the exercise rely on empirical data, qualitative data or both? How was the data collected?*

*2.2.2 Did the competition authority convene or participate in conferences or workshops to solicit the views of external observers about the effects of its activities?*

*2.2.3 What methodological difficulties has the competition authority encountered in performing evaluation, and how has it tried to solve them?*

Evaluations are conducted by several methodology. For evaluations using administrative output (such as the number of legal measures) as criteria, data within the JFTC are used.

As mentioned in item 2, in an evaluation where the JFTC ascertains savings in a contract amount during a certain period through ceasing and desisting of antimonopoly practices, outside statistical data, etc., are utilised. Enforcement effects of the Premiums and Representations Act and the Subcontract Act are grasped through a questionnaire survey of entrepreneurs. In policy evaluation of public relations activities, the volume of newspaper reporting was gauged.

It is enormous work to collect data which are not available in the JFTC. Collecting such data by the JFTC itself would cause interference with normal administration. Therefore, the JFTC conducts outsourcing. Still, money is set aside for this outsourcing, and not small costs are required to do high-

quality evaluation. Questions on how much resources should be spent for policy evaluations, and how to allocate the resources among evaluations, have not necessarily been resolved.

As mentioned in item2, the JFTC commissions five outside experts as members of the Policy Evaluation Committee. The Committee hears members' comments on evaluation planning and draft evaluation reports through meetings.

## 3. Results

### *3.1 What were the results of the evaluation?*

A brief summary of the results of main policy evaluation from among the policy evaluation measures listed in the ANNEX is provided below.

#### *3.1.1 Measures against practices violating the Antimonopoly Act during fiscal year 2003:*

The JFTC issued recommendations in twenty-five cases, which represented a decrease from the previous year. However, the content of these recommendations diversified: there were 14 cases of bid-rigging, 3 cases of price cartels, 1 case of private monopolisation, and 7 cases of unfair trade practices. The total amount of surcharge payment ordered was 3,870 million yen (about 36 million US dollars).

The average period of investigation for cases in which legal actions were taken was about 9 months, which was about one month shorter than the previous year.

#### *3.1.2 Measures against practices violating the Antimonopoly Act during fiscal year 2001 (Before-after analysis of economic effects concerning two cases of bid rigging)*

Evaluation was made on two bid rigging cases of agricultural engineering works in Shinjo City and Mogami Ward of Yamagata Prefecture ordered by Yamagata Prefecture (Case No. 1), and automobile testing machines and equipment ordered by the District Transport Bureau and others of the Ministry of Land, Infrastructure and Transport (Case No. 2).

**The declines in RCP observed as a result of JFTC enforcement measures**

| | Average RCP during bid-rigging | Average RCP after cessation of bid-rigging |
|---|---|---|
| Case No. 1 | 97.23%<br>(Apr.1, 2000 to Feb. 6, 2001) | 92.22%<br>(Feb.7, 2001 toDec.31, 2001) |
| Case No. 2 | 97.68%<br>(Apr. 1, 1997 to Feb.21, 2001) | 69.02%<br>(Feb. 23, 2001 to Dec.31, 2001) |

*Note: ( ) indicates the period observed.*

The economic effects of measures to eliminate a violation, in tentative calculations for the limited periods (observation period of RCP after cessation of the bid rigging shown in the above table), are estimated to amount to 63 million yen in Case No.1, and 483 million yen in Case No.2. The method for calculation is given below:

[Estimated economic effect] = [Total amount of planned prices after ceasing and desisting of bid-rigging] x [average RCP during bid-rigging] - [total amount of actual contract prices]

The approximate cost incurred by the JFTC to investigate Case No. 1 and Case No. 2 was 35 million yen and 21 million yen, respectively (calculated based on the total of personnel and travel expenses

required to deal with said cases by the staff. In both cases, the costs were lower than the estimated economic effects. We can evaluate that the investigation by the JFTC highly from the viewpoint of cost-performance.

*3.1.3 Measures against violations of the Subcontract Act during fiscal year 2003*

The number of cases of violations of the Subcontract Act in which recommendations and warnings were issued was 8 and 1,357 respectively. The number of recommendations was double that of the previous year and the largest in the past 20 years.

In a questionnaire survey of subcontractors who held subcontracts with parent entrepreneurs who had been the subject of recommendations or warnings (questionnaire mailed to 540 subcontractors, 249 of whom replied), 78.3% replied that the practices that had been in violation of the Subcontract Act (such as reduction in contract price or late payment) ceased after recommendations or warnings issued by the JFTC, while 5.6% replied they remained the same (the remainder did not reply).

*3.1.4 Measures against practices violating the Premiums and Representations Act during fiscal year 2003*

The number of cease-and-desist orders against practices violating the Premiums and Representations Act reached 27, which was the largest such number in the past 20 years. In a questionnaire survey of life insurance companies (questionnaire mailed to 39 companies, 28 of whom replied), 60.7% replied that they had reviewed their own representations, and 78.6% replied that they had formulated internal rules on checking systems, based on the cease-and-desist order against Nippon Life Insurance Company in fiscal year 2003.

The average number of days required for cease-and-desist orders to be issued was 183 days per case in fiscal year 2003, indicating the time required for investigation of cases has become longer since fiscal year 2000.

*3.1.5 Public relations activities concerning the Antimonopoly Act, etc.:*

A total of 276 press releases were issued in fiscal year 2003. The volume of newspaper articles was found to amount to 41,190 lines (149 lines per press release).[1]

***3.2 How were the results of the evaluation exercise distributed?***

*3.2.1 Only to officials within the competition authority?*

*3.2.2 Only to public officials inside and outside the competition authority?*

*3.2.3 To public audiences, with appropriate editing to prevent the disclosure of non-public information?*

It is provided that the results of Government policy evaluation and the gist thereof must be made available to the public. In the case of the JFTC, press releases on evaluation reports are also issued. Evaluation reports and press releases are listed on the JFTC website for easy access by the general public.

Since evaluation reports are prepared on the assumption that they will be made available to the public, confidential information is not included.

## 4. Effect

### *4.1 What impact did the evaluation have on the future activities of the competition authority?*

*4.1.1 Did the results of the evaluation motivate adjustments in the authority's allocation of resources, organisation or procedures?*

The main objective of policy evaluation is to establish a policy cycle in the administration process as follows: Plan → Implement → Review → Plan …. It has been generally pointed out that, prior to the introduction of the policy evaluation (system), Japanese Government policy processes leading to See (Review) and Plan were inadequate and might have resulted in unnecessary actions.

The JFTC, in its policy evaluation, has endeavoured to grasp not only the effects of policy measures but also the cost necessary to implement them, and has presented issues for future consideration based on cost-performance analysis of policy measures as part of evaluation. The JFTC is improving its policies and making budget requests in order to cope with those issues presented through policy evaluation. Concerning law enforcement in particular, rooms for efficiency improvement e.g. shortening of dealing time with cases have been pointed out. Based on this, the JFTC has strengthened its organisation and function including reinforcing the number of its staff.[2]

### *4.2 What impact did the evaluation have upon constituencies outside the competition authority?*

*4.2.1 Did the results motivate the legislature to adopt new legislation or allocate additional funds to correct weaknesses in the agency's authority or operations?*

*4.2.2 Did the evaluation help educate external constituencies about the value of specific forms of intervention?*

In Japan, efforts toward budget formulation that reflects policy evaluation are currently under way. As was mentioned in item 6, the JFTC is making budgetary requests based on policy evaluations. Fiscal authorities request the JFTC to submit policy evaluation reports. In the process of budget assessment, it is natural that the results of policy evaluation shall be taken into consideration.

## NOTES

1. The length of a line is approximately 5.3 inches.

2. The total number of the staff of the JFTC has been increasing recently (e.g. 607 in FY 2002, 643 in FY2003, and 672 in FY2004).

## ANNEX

## POLICY EVALUATION CONDUCTED BY THE JFTC SO FAR

| | Issues for policy evaluations | Publication date | Reference |
|---|---|---|---|
| 1 | Measures against practices violating the Antimonopoly Act during fiscal year 2001 | October.31, 2002 | |
| 2 | Notice of law system concerning provision of electric record under trade of subcontract | June.26, 2003 | |
| 3 | Consideration of problems on internet, etc under the Premiums and Representations | June.26, 2003 | |
| 4 | Review and consideration of law system | June.26, 2003 | |
| 5 | Measures against practices violating the Antimonopoly Act during fiscal year 2002 | August.29, 2003 | |
| 6 | Measures against practices violating the Premiums and Representations Act during fiscal year 2002 | August.29, 2003 | |
| 7 | Measures against practices violating the Antimonopoly Act during fiscal year 2001 (analysis of economic effects concerning two cases of bid rigging) | August.29, 2003 | 4-(ii) |
| 8 | Preparation and publication of *"Guidelines for Promotion of Competition in the Telecommunications Business Field"* | August.29, 2003 | |
| 9 | System of consultation and guidance concerning business activities | August.29, 2003 | |
| 10 | Approach to on line system of administration procedures, etc (application and notification under the Antimonopoly Act) | August.29, 2003 | |
| 11 | Measures against practices violating the Antimonopoly Act during fiscal year 2003 | July.28, 2004 | 4-(i) |
| 12 | Measures concerning mergers and acquisitions during fiscal year 2003 | July.28, 2004 | |
| 13 | Measures against practices violating the Subcontract Act during fiscal year 2003 | July.28, 2004 | 4-(iii) |
| 14 | Measures against practices violating the Premiums and Representations Act during fiscal year 2003 | July.28, 2004 | 4-(iv) |
| 15 | Hearing procedures based on the Antimonopoly Act during fiscal year 2003 | July.28, 2004 | |
| 16 | Public relations activities concerning the Antimonopoly Act, etc | July.28, 2004 | 4-(v) |
| 17 | Promotion of institution of electronic government | March.23, 2005 | |

# KOREA

## 1. Introduction

Countries around the world have introduced competition law and policy and are strengthening its enforcement on the ground that competition policy brings about positive effects throughout the economy, such as enhanced consumer welfare and economic development. Theoretical and empirical studies have proved to some extent that vigorous competition among companies has an important influence on economic development by raising efficiency and expanding social welfare.

It is difficult, however, to find cases that empirically researched on the effect of competition policy on consumer welfare and national economy. As a matter of fact, there are certain limitations in proving the effect of competition policy by empirical means. This is because other factors, such as trade and investment liberalisation, regulatory reform and privatisation, are so closely intertwined that it is not easy to draw clear lines among them. Furthermore, the history of competition policies in many countries is not long enough to make a chronological analysis on the effect of competition policy. Lastly, it is hard to discover appropriate variants for measuring the intensity of a country's competition policies.

Despite these difficulties, the Korea Fair Trade Commission (KFTC) tried to conduct empirical study in several cases on the effect of competition policies. The researches were carried out as part of efforts to win public support for the KFTC policies by proving effects of competition policy. Nevertheless, those studies have their limits in research method in that it presumed the positive influence of the competition policy on consumer welfare or social welfare through individual case studies. Yet, those researches have estimated such effects numerically and can be seen as successful in raising public support for the competition policy.

## 2. Case Studies

### *2.1 <Case 1> Correction of Student Uniform Manufacturers' Cartel*

Over the past 25 years since the enactment and implementation of the Monopoly Regulation and Fair Trade Act (MRFTA) in 1981, the KFTC, has made strenuous efforts to correct unfair and anti-competitive practices and prevent monopolistic market structure from being formed. At the same time, the KFTC has done its best to improve anti-competitive regulations. As a result, a consensus has been reached among ordinary citizens as well as the government and businesses that competition is an inevitable choice.

With competition culture being established, the KFTC began to explore more efficient measures for competition law enforcement. The KFTC recognised that despite continuous efforts, the correction of law-violating behaviour and the improvement of anti-competitive regulations had been pursued separately and, thus, not been effective in establishing a competitive market, the goal of competition law enforcement.

In this recognition, the KFTC took a comprehensive and industry-oriented approach in 2001, instead of the previous approach focusing on individual cases, in order to raise efficiency in competition law enforcement. The Clean Market Project was introduced not only to correct unfair practices but also to improve relevant anti-competitive regulations as a whole in the industries with frequent law violations and consumer complaints or with monopolistic market structure.

To implement the Project effectively, law violations began to be handled by KFTC divisions in charge of their relevant industry, aside from the type of cases. This change led to in-depth investigations and analyses by industry. As a result, detection of cartels has become more effective. One example is the student uniform manufacturers' cartel. The case was dealt with by the Deregulation and Legal Affairs Division of the Competition Policy Bureau at the KFTC.

Three major student uniform manufacturers conspired to fix consumer prices for student uniforms. In May 2001, the KFTC reported the case to the prosecutor's office and took strong measures against the manufacturers, including injunction order and imposition of a total of 11.5 billion won in surcharges.

As of 2000, the Korean student uniform market was around 300 billion won in size with sales of about 1.5 million uniforms. The three manufacturers held nearly 50% of market share at that time. They agreed to increase the price of uniforms with 80,000~100,000 won in factory price to 150,000~200,000 won.

According to market survey after the corrective measures were imposed, the prices for winter uniform decreased from 175,000 won to 145,000 won for the three cartel participants and from 155,000 won to 125,000 won for small- and medium-sized manufacturers. In case of summer uniform, prices fell from 50,000 won to 40,000 won. The dissolution of the cartel created an estimated 60 billion won of the annual income transfer effect. The amount was the result of calculation adding benefits for winter uniform (30,000 won * 1.5 million = 45 billion won) to those for winter uniform (10,000 won * 1.5 million = 15 billion won).

In addition to this annual reduction of consumer burden, the KFTC measures helped parents associations actively participate in cooperative purchase of uniforms. Cooperative purchase means a purchase made by consumers, like a parents association, at a lower price through public bidding. The three cartel conspirators also interfered with cooperative purchase by parents associations. The KFTC also take a corrective measure against this practice.

This cartel case is a good example that well shows how much negative impact a cartel case can have on consumer welfare and how great and substantial influence a preventive and detective competition policy can have on correcting distortion of resource allocation and expanding consumer welfare. The survey results were covered by the media through a press release, and the anti-cartel measures received active support from the public, mostly parents.

### *2.2 <Case 2> Abolition of Services Fee Regulations in Certified Professions*

Some cartels had been authorised by the government as exceptions until the legislation and enactment of the Omnibus Cartel Repeal Act in 1999. With the Act, the KFTC streamlined 20 different cartels on prices, production quantity and division of sales area. For example, the regulatory standards for service fees in nine certified professions such as lawyers and accountants were eliminated. Since then, the KFTC has reported changes in fees for those professional services on a regular basis in order to help consumers make a rational choice in using the services (twice in 1999, once in 2000, 2001 and 2002, respectively).

According to the reported figures, the elimination of price regulations has generated greater variation between the maximum and minimum fees. This variation can be attributed to price differentiation in accordance with the quality of service. Initially, the level of service rates in some certified professions increased, but later average service rates began to decline or stabilise on the whole.

Service fees for patent lawyers, for instance, rose until the second half of 2000. However, according to a research conducted in December 2001 on fees in professions concerned with patent applications, fees dropped 10.2% from the latter half of 2000. In case of lawyers' fees, rates have been dropping steadily since the market was liberalised, from 4.56 million won in the second half of 1999 to 4.35 million won in

the first half of 2000 and again to 4.07 million won in the second half of 2001. For certified accountants, fees have also fallen gradually since the fee regulation was abolished. Auditing service fees decreased an average 9.9% between 1998 and the second half of 2001. These changes can be interpreted as the results of price competition and new optimum prices being reached in the market. By providing these survey results to consumers, the KFTC assisted them in making a rational choice when using the professional services. As a result, people have had more access to consumer information and effective competition has taken root within the certified professions.

### *2.3 <Case 3> Correction of Bid Rigging for Public Construction Projects*

The KFTC launched investigations into and imposed strict sanctions against public construction project bidding cases, one on a bridge construction in 1994, another on the rolling stock purchase in 1996 and the third on the West-Coast Expressway construction in 1999. This served as an impetus for sweeping off the chronic practice of bid rigging in the industry. The KFTC also reinforced the supervision on public constructions with the "Information Collection System" launched in 1998. Under the system, public organisation or agencies ordering a large-scale construction project are required to notify the KFTC of bid-related information, and the information is used as the data for cartel investigations.

In result, competition began to increase in the bidding for public construction worth 20 to 30 trillion won each year. Also, an estimated four trillion won of government budget is saved every year as the average contract-awarding rate fell from 87% in 1997 to 75% in the mid-2000. (The average contract-awarding rate is defined as the percentage ratio of the awarding price to the awarding price expected by the ordering party. The 75% rate means that the contract was awarded at a price valued at 75% of the expected price and that competition was fierce among bidders.)

This case demonstrates how cartels aggravate burdens on the national economy and reduce its efficiency. The KFTC's corrective measures and their expected effects on the economy were covered by the media through press releases, and contributed to raising corporate awareness of cartels.

### *2.4 <Case 4> Correction of International Cartel of Graphite Electrodes*

In March 2002, the KFTC decided to impose a surcharge of 8.5 million dollars on six graphite electrode manufacturers from the U.S., Germany and Japan which participated in international cartel of graphite electrodes. (Graphite electrodes are used in electric arc furnaces to generate intense heat that is necessary in steel-making.) The six companies accounted for approximately 80% of the global graphite electrode market share. The participants held meetings in London and Tokyo to fix prices and allocate markets among themselves during the period of 1992-1998. Korea is 100% dependent on graphite electrode imports. During the same period, import price rose as much as 48.9% while price of imports from non-cartel members increased only 9.1%. The damage on the product purchasers in Korea incurred by the cartel was estimated at about 139 million dollars. (The calculation was based on the average price per ton in 1992.)

This cartel case is significant in that it was the first case of the MRFTA being applied to anti-competition action committed by foreign companies located outside Korea. Led by the International Cooperation Division that has well-established channels with foreign competition authorities, the KFTC dealt with the case in close cooperation with its relevant divisions such as the Cartel Division and the General Counsel.

Possible impacts of corrective measures and other related information were made public through press releases and media coverage. This shows the KFTC's determination to apply competition laws of Korea to concerted behaviour by foreign companies when such behaviour is highly likely to harm domestic

companies and consumers. The KFTC's decision not only served as a strong deterrent against international cartels targeting the Korean market, but also brought about educational effects such as raising corporate awareness of competition law compliance and preventing domestic companies from participating in international cartels. This case is also estimated as a momentum for Korea to explore effective cooperative measures, including bilateral cooperation agreement, with competition authorities of other countries in order to carry out efficient investigations into international cartels.

## 3. Conclusion

As we have seen in the cases mentioned so far, by letting the public know the consumer benefits from competition law enforcement, the KFTC was able to receive public support for the competition law and policy and raise awareness among companies about anti-competitive practices.

In each case, the effects of law enforcement were traced and analysed through surveys and comparisons of market prices before and after the law violations. Changes in prices were also analysed chronologically for a certain period after the corrective measures were taken against the law-violating practices.

The results of analyses were made public through press releases and media coverage, which contributed to increasing support from citizens for the competition policies. The case of graphite electrodes, in particular, served as a motive for concluding various bilateral cooperation agreements for international cooperation.

# NEW ZEALAND

## 1. Introduction

This paper responds to the request for a written contribution to the June 2005 roundtable on Ex Post Evaluation and Analysis of the Actions and Resources of Competition Authorities. The paper is split into two parts. Part one focuses on how resources are allocated to New Zealand's competition authority, the Commerce Commission ("the Commission"). Part two considers the level of resources and the allocation decisions the Commission makes within this framework.

The New Zealand Government has recently completed a series of reviews relating to ownership aspects of its relationship with the Commission. Independently, the Commission has conducted internal reviews.

## 2. Evaluation of the Commerce Commission

### *2.1 Drivers of the Reviews*

The reviews were initiated in recognition that there had been significant changes in the depth and breadth of the Commission's work.

The Commission is an independent quasi-judicial Crown entity established under the Commerce Act 1986. Its purpose is to promote dynamic and responsive markets so that New Zealanders benefit from competitive prices, better quality and greater choice. The Commission's roles and responsibilities have grown substantially over the last five years, reflecting new regulatory frameworks and a general increase in the complexity of the Commerce Act 1986 and the Fair Trading Act 1986.

Prior to 2001 the Commission only enforced the Commerce Act 1986 and the Fair Trading Act 1986. In 2001 the Commission's role was increased with the addition of enforcement responsibilities under the Electricity Industry Reform Act 1998 (EIRA), the Telecommunications Act 2001 and the Dairy Industry Restructuring Act 2001 (DIRA). Commission functions were further increased in 2003 when it assumed responsibility for the enforcement of the Credit Contracts and Consumer Finance Act 2003 (CCCFA).

### *2.2 The Reviews*

The reviews focused on how the current structural and resource constraints impacted on the Commissions' operations and asked whether adjustments were merited. The reviews relating to the Government's ownership aspects of the Commission were:

a) Accountability and purchasing arrangements applying to the Commission;

b) Commission's litigation fund; and

c) Baseline funding for general enforcement activities (including competition law enforcement activities).

Running parallel and independent with the above reviews were the Commission's internal reviews.

### *2.2.1 Governance*

A Steering Committee was established to oversee and guide the ownership reviews. The Committee was led by the Ministry of Economic Development[1] and comprised of representatives from government stakeholders[2], including the Commission.

**Part one**

## 3. Allocation of Resources - Framework

The ability of the Commission to operate effectively is influenced by the framework within which it operates. The purpose of the reviews was to ensure this framework enables appropriate decisions to be made.

The accountability and purchasing review sought to identify the appropriate balance between Commission accountability to the Government and Commission flexibility to allocate resources to their highest value use, while recognising the statutory independence of the Commission.

The purpose of the review of the Litigation Fund was to consider whether the Fund was the appropriate mechanism to fund litigation activity and, if so, to consider a number of specific issues related to the operation of the Fund.

### *3.1 Accountability and Purchasing Arrangements*

The Minister of Commerce is responsible for the Commission and is the main purchaser of its services (namely general market enforcement activities). Additionally, the Minister of Commerce purchases DIRA enforcement services on behalf of the Minister of Agriculture and Forestry. Ministers with telecommunications and electricity responsibilities purchase enforcement services separately from the Commission.

Three key principles guided the review:

1. *Flexibility*; the Commission should be in a position to deploy its resource in the most efficient manner and should not be overloaded with excessively burdensome administrative arrangements.
2. *Transparency/Accountability*; Parliamentary monitoring should be facilitated. There should be sufficient transparency as to link funding sources with particular outputs.
3. *Efficient Functioning of Government*; ensure that Ministers have the opportunity to participate in discussions regarding the attainment of Government's policy objectives, particularly where trade-offs are likely.

#### *3.1.1 Application of the Principles*

The principles were considered against the following factors for each of the Commission's responsibilities:

a) The roles and responsibilities of Ministers under the legislation enforced by the Commission and, in particular, the extent to which Ministers have direct statutory responsibility for the production of Commission outputs;

b) The extent to which, in practice, the Commission finds it necessary or desirable to re-allocate resources; and

c) Whether Commission activity funded through industry levies should be treated differently from Crown-funded activity.

Flexibility to reprioritise resources between commerce and consumer protection enforcement was found desirable because the two areas complement each other. Having a well conceived competition policy and enforcement of that policy (in terms of the Commerce Act) is not of itself sufficient to achieve the objectives of competitive prices, better quality and greater choices for consumers. Competition laws may not always achieve these objectives because of lock-in and switching costs. Moreover effective competition relies on honest and fair trading, but competition itself can create incentives to trade unfairly.

Accountability stems from the Commission's overriding purpose – to promote market efficiency by fostering healthy competition, informed choice by consumers and sound economic regulation. The Commission is responsible to the Government for achieving this purpose.

Flexibility is possible because the Commission's commerce and consumer protection enforcement functions are conducted independently from Ministers and funded out of general government rather than industry levies.

In contrast, sector specific regulation is characterised by industry levies and direct statutory responsibility for Ministers. The use of levies has been an important driver behind separating sector specific activities out from the aggregated commerce and consumer protection enforcement activities. There needs to be an ability to match the levy received and the funding appropriated, which places emphasis on transparency and accountability. Additionally if Ministers have direct statutory responsibilities then a more direct ability to influence the level and allocation resources is required.

Consequently the review concluded that funding for sector specific activity (dairy, electricity and telecommunications) remain separated and individually accounted for.

While in theory the loss of flexibility could prevent resource transfers and impede the Commission's ability to undertake effective regulation, in practice this is unlikely. There is limited reallocation of resources between sector specific functions themselves and commerce and consumer protection functions. This is largely attributed to the continuous monitoring requirements for sector specific areas and the high level of industry specific knowledge required.

### *3.2 Methodology*

Accountability and purchasing arrangements were assessed by external consultants, PricewaterhouseCoopers ("PWC"). Interviews with Commissioners, Commission staff, Government officials and a small number of external stakeholders who are familiar with Commission's work and the way it operates were consulted. PWC's report formed the basis of the review.

### *3.3 Litigation Fund Review*

Litigation is a key component of the Commission's enforcement activities, and also arises through appeals and reviews of its adjudication and regulatory decisions. In order to facilitate the Commission's litigation activity it has a standing capability, which is funded separately from other activities.

#### *3.3.1 Objectives of the Fund*

6. The objectives of the Fund are as follows:

1. *Flexibility* – to enable the Commission to take prompt legal action in major litigation that is unpredictable in terms of its size, occurrence and timing without having to seek *ad hoc* funding from government.
2. *Litigation credibility* – to provide the Commission with flexible and immediate access to appropriate levels of funding to maintain its litigation capability. This is necessary to limit the risk of defendants with deep pockets seeking to avoid sanctions by exhausting the Commission's limited resources.
3. *Deterrence* – to deter potential offenders. The Fund is a visible and credible demonstration of the Commission's ability to act where necessary.
4. *Independence* – to enable the Commission to readily access funding without having to seek approval from government. It is important that the Commission be independent, and be perceived as independent, from government in markets that it regulates, in particular where the Crown is a participant.
5. *Transparency and accountability* – to provide enhanced transparency and accountability to government, and ultimately Parliament, regarding use of public money.
6. *Risk management* – to manage any ownership risk to the Crown by ensuring the Commission is adequately resourced to carry out its functions and is able to manage any awards by the courts against the Commission that may arise in the course of carrying out its statutory activities.

The review found that the Fund (as a dedicated appropriation) was an effective mechanism to meet these objectives.

*3.3.2 Access to the Fund*

The Fund is available for the full range of the Commission's responsibilities. However the Commission may only access the Fund in relation to "major litigation", being that which cannot easily be accommodated within the Commission's normal operational budge given its unpredictability and size. For cases to be eligible the following elements are critical:

- the involvement of international, national, major network, or other major companies, or a major issue affecting a particular industry;
- a requirement of senior external legal counsel or consultants and expert witnesses (e.g. economic, accounting, engineering, scientific); and/or
- a minimum total direct cost estimated.

The review concluded that the current coverage of the Fund for "major litigation" only should be retained, as reflected in the above criteria.

*3.3.3 Level of Fund*

Pressure has been building on the Fund over the years. The review attributed this to the lack of a commensurate increase in funding when the Commission undertook sector specific responsibilities post 2001, and a constant increase in litigation expenditure that has escalated in the last two years.

Several factors indicate that this pressure will continue. Firstly, the Commission's increased regulatory responsibilities are now beginning to result in litigation activity. Secondly, there has been an

increase in the sophistication and complexity of proceedings, as evidenced in the recent Qantas/Air New Zealand appeal to the High Court. These issues are outlined in the second part of the paper.

The review concluded that the effect of the on-going pressures and the possibility of high cost, extraordinary cases occurring again indicates that the level of the Fund should be reconsidered.

### *3.4 Methodology*

The review was undertaken by government officials under the guidance of the Steering Committee.

## Part two

## 4. Allocation of resource – level and targets

The framework on how resources are allocated to the Commission was found to allow the Commission to operate effectively in the direction of the Government's goals, as set out in the relevant competition, consumer protection and sector specific legislation.

The objective of the baseline review was to determine the appropriate budget for the general market enforcement (competition and consumer protection) undertaken by the Commission. Attention was given to changes in the environment that the Commission operates in and how resource allocation decisions are made.

The internal reviews recently undertaken by the Commission feed into the baseline review. These reviews aimed to enhance efficiency and effectiveness, and included; developing a more strategic approach to targeting its enforcement activity, developing a framework to prioritise investigation and enforcement activity, and undertaking a legal services review.

The baseline review found that the Commission exhibits many of the characteristics expected of an efficient and effective organisation, and concluded that there are no fundamental concerns regarding the Commission's efficiency.

### *4.1 Changes to the Environment*

The depth and breadth of the Commission's work has substantially altered from the assumptions which funding allocations have been based on in recent years.

#### *4.1.1 Changes to the Commission's work*

Changes made to competition thresholds have impacted on the Commission's workload. The Commerce Amendment Act 2001 changed the market power threshold in section 36 to a "substantial degree of market power" and the mergers threshold in section 47 was amended to a "substantial lessening of competition". The previous threshold focused on whether or not a dominant market position would result (or be strengthened). While the number of clearances and authorisations has not changed materially, the intensity of the investigations and analysis required, on average, for each clearance and authorisation has significantly increased.

The change has had two impacts. Firstly, it has required the Commission to focus more on the behaviour of markets including, in particular, the interaction between businesses in the market rather than the behaviour of the dominant firm in the market. Second, the change in threshold has broadened the scope of businesses that are potentially on the margin of the threshold. Both impacts have increased the workload of the Commission because they have to have regard to a larger pool of businesses and because

more focus has to go on trying to anticipate behavioural outcomes. Consequently the level of resource required to deal with each case under the new competition thresholds has increased significantly.

Because adjudication on clearance and authorisation applications is nondiscretionary under the Commerce Act these have priority on the Commission's resources. Consequently, the impacts of these changes are felt in other areas of the Commission's work.

There has also been an increase in general enforcement work due to the recent sector specific regulation. In the late 1980s New Zealand abolished most industry-specific regulation in favour of generic competition legislation (the Commerce Act and the Fair Trading Act). Since 2001, however, sector-specific regulation has been introduced into the electricity lines (EIRA) telecommunications (Telecommunications Act) and dairy industries (DIRA). The spin-off effects relate to the dairy industry (high levels of market concentration), the electricity sector (high degree of concentration and vertical integration) and the telecommunications sector (e.g. access terms and conditions). These sectors are still subject to the generic competition framework, with sector-specific regulations supplementing the Commerce Act.

Other general enforcement areas are also demanding attention. The Commission is encouraging increased use of its leniency policy by members of cartels. In brief, the policy provides the opportunity for a member of a cartel to "break ranks" and, in return, obtain amnesty from protection. Leniency applications have some specific implications for the Commission's workload. Most significant of these is the need to react swiftly once an application is received. The nature of cartels is such that once one member breaks ranks, the incentives on the others to follow suit are very strong. Thus, if the Commission is to take advantage of an application, it needs to mobilise resource quickly to investigate the other members of the cartel before they have the opportunity to disband and cover-up any evidence of the cartel having existed.

#### *4.1.2 Changing nature of investigations*

An increase in sophistication in infringements and advances in technology has induced changes in the way that some businesses operate. Electronic technology, in particular, is an increasingly important part of the normal functioning of many businesses. This can have implications for investigations, for example, seizing data from a business for the purposes of an investigation must capture both hard copy and electronic records. This increases the need for swift action and skills in recovering data from electronic storage.

The other influencing factor is the trend towards more emphasis on the quantification of detriments and benefits. The underlying drivers in this regard are both the courts and businesses. An example of both is the recent Air New Zealand/Qantas authorisation. This case placed considerable emphasis on whether or not the anticompetitive detriment that would arise would be outweighed by public benefit. Air New Zealand/Qantas developed sophisticated economic models to estimate detriment and benefit impacts. The Commission had to respond to this and, in doing so, invest considerable resource in reviewing the applicant's model and developing its own model.

### *4.2 Targeted Allocation – Within Framework*

The review asked whether the mix of outputs undertaken by the Commission is appropriate in terms of the goals set out in the relevant competition and consumer protection legislation. It noted that assessing this question is far from being an exact science. The linkages between the various interventions in the Commission's toolkit and outcomes of competitive prices, better quality and greater choice for New Zealanders are fuzzy rather than precise and well defined.

The accountability and purchasing review outlined above concluded that the Commission was in the best position to make resource allocation choices for general market enforcement. However, the Commission is constrained by legislative requirements, for example the obligation to consider clearance and authorisation applications within statutory deadlines. Resources are often required to be diverted when adjudication applications arrive.

*4.2.1 Strategic Targeting*

It is not feasible or efficient for the Commission to investigate every potential breach of competition law that comes to its attention. Choices have to be made. Reprioritisation issues are being addressed by the Commission taking a more strategic approach to targeting its monitoring and surveillance activities.

The Commission does not have analytical tools for determining (in a formalised way) the optimal allocation of resources. Reality is, however, sufficiently complex, that application of mechanistic tools/rules for allocating resources, even if they existed, would be unlikely to result in the right answer. Judgement is required, but judgement needs to be informed by analysis.

*4.2.2 Enforcement criteria*

The enforcement criteria play an important role in this regard. The objective of the criteria is to focus resources toward areas where risks of non-compliance are known to be high, where the potential detriment is largest and where the nature of the behaviour is particularly insidious. To guide its decision making in terms of whether or not to commence or continue an enforcement action, the Commission applies three enforcement criteria:

- Extent of detriment;
- Seriousness of conduct; and
- Public interest.

The decision making processes that the Commission follows in relation to enforcement activity implicitly makes the assessment of benefits in relation to costs. This is consistent with the general principle that when budgets are fixed (as is the case for the Commission) the allocation of resources should be guided by the ratio of benefits to costs.

*4.2.3 Market Behaviour and Market Structure Activity*

A consequence of the strategic targeting approach is that the Commission's attention is directed towards section 36 of the Commerce Act cases involving the misuse of market power, rather than market structure. The review deemed this appropriate, given that:

- behaviour is inherently more difficult to assess and prove than is structure;
- in general, there are clearer criteria for identifying issues in a structural sense than in a behavioural sense;
- there are more instances of behaviour giving rise to potential concerns than there are instances of mergers and acquisitions;

- tools such as safe harbours can be used as an effective screening tool in structure investigations. There is no comparable tool for behaviour investigations; and

- the voluntary clearance regime results in most mergers that are likely to be problematic coming to the Commission as an adjudication matter.

*4.2.4 Role of Research*

The right mix and level of enforcement tools requires ongoing analysis to account for changes in the business environment. Analysis is informed by research, and the review noted several areas where research could provide information to assist in determining the allocation of resources:

- research into business and consumer perceptions of the effectiveness of the Commission;

- reviews of past Commission decisions to ascertain what happened, why and whether outcomes were in line with expectations;

- research into best practice legal and economic approaches to competition law generally, and development of analytical models specifically; and

- measuring business' awareness and compliance with regulatory requirements.

*4.2.5 Stakeholder Acceptance*

Decisions taken by the Commission are subject to review and challenge in the Courts. In this regard, there is an external check on the quality and reasonableness of the Commission's work. The Commission reports on the number of adverse judicial comments in relation to the conduct of litigation and the review noted that, in this regard the Commission performs highly. However, the Commission does not survey stakeholders in any systematic way to gauge how they perceive the Commission and the way it operates.

*4.2.6 Methodology*

The Commission's effectiveness and efficiency was assessed by external consultants, PWC. They applied a methodology recognised internationally[3], as well as conducting interviews with Commissioners, Commission staff, Government officials and a small number of external stakeholders who are familiar with Commission's work and the way it operates. PWC's report formed the basis of the review.

### *4.4 Commerce Commission Legal Services Review*

One recent review of particular importance was the review covering legal services to the Commission. This area was identified as requiring attention given that the areas the Commission has responsibility for all require legal support.

The Commission's Strategic Plan states that the Commission will "achieve excellence and best practices across the organisation through formalising the evaluation of organisation performance and effectiveness." The review was conducted with this objective. The report noted that the demand for legal services within the Commission had increased significantly in recent years for reasons consistent with those described previously.

The key outcomes from the review for the Legal Services Branch:

- The Branch will focus its resources on core services where it has a clear comparative advantage and outsource non-core services.

- The Branch will not, for the time being, expand materially beyond its current size in structure, rather the General Counsel will focus on the joint aspects of professional leadership and business leadership, and build a challenging high performance business unit, with a client-centred culture.

- All providers of legal services (whether in-house or external) must meet the highest quality standards, both technically and in terms of client service. In line with this, a template will be developed for the engagement of external legal providers so as to clarify the Commission's relationship and responsibility expectations with them.

- Protocols are being developed between the legal services branch and the operational branches that identify how they will work together to achieve business outcomes.

- To assess the performance of the Branch, client surveys will be initiated to obtain systematic feedback, and qualitative as well as quantitative tests will be applied.

- The Branch will give priority to developing its internal knowledge of precedents, opinions and practice notes, as well as the knowledge base of guidelines and protocols for the use by the Commission's non-legal staff.

- The introduction of an effective matter management system enabling more streamlined management of transactions and reporting.

*4.4.1 Methodology*

An external panel was asked to conduct the core of the review and provide a report with recommendations for any subsequent changes to the way that legal services are provided to the Commission. The external panel included key legal representatives, including the Solicitor-General.

## 5. Expected impact of reviews

The reviews have generally confirmed that the framework for resource allocation strikes an appropriate balance between flexibility for the Commission and accountability to Government. Additionally, the internal resource allocation criteria used by the Commission was found to be sensible, though the difficulty in addressing the question of effectiveness was noted.

The baseline review identified that increased complexity and demand and changes in the business and policy environments are placing strain on the Commission's resources. While in the short term the meeting of statutory obligations is the priority, an effective regime in the longer term requires a mix of enforcement tools. In particular, strong monitoring and sophisticated analytical tools are required to maintain effectiveness and credibility.

The Government recognises the importance of having a strong and efficient institution to enforce its competition regime. Following the reviews it is anticipated that the budget allocated to the Commission, in particular for its enforcement of the competition and consumer protection regimes will be increased. An increased budget will enable the Commission to focus on areas that have a longer term focus.

## NOTES

1. Incorporated general competition, electricity and telecommunications interests.

2. Namely; Treasury (fiscal responsibility), Ministry of Agricultural and Forestry (dairy interest) and Ministry of Consumer Affairs (consumer protection interest).

3. The methodology is described in Leclerc, G., W.D Moynagh, J.P. Boisclair and H.R. Hanson (1996) "Accountability, Performance Reporting, Comprehensive Audit – An integrated Perspective" Ottowa, Canadian Comprehensive Audit Foundation.

# PORTUGAL

## A Pilot Project for the Institutional Assessment of the Portuguese Competition Authority

## 1. Introduction

The Portuguese Competition Authority (Autoridade da Concorrência, AdC) is a fairly young organisation. It started operations in late-March, 2003 and as such it has barely completed its second anniversary. At the time of its creation, 30 seconded staff was available; no installation period was foreseen; no grace period was granted; no budget was approved; no dead-line was waved. As of end-2004, 77 staff were on board, 56% of which with an academic background equal or above Masters level [1]; a € 5.8 million budget was secured under dedicated financing arrangements [2]; a total of 90 mergers have been subject to prior review, of which 8 were approved with remedies; a portfolio of 42 restrictive practice cases were under active investigation; fines in the amount of € 3.3 million were imposed in a major cartel decision; 15 major economic and market studies were in the process of being finalised; six Recommendations were made to Government, of which three have been already adopted into policy; and its Web Site registered a monthly average of 8,000 visits. Key indicators of AdC activity for 2004 are summarised in Annex 1.

But equally important is the fact that markets are becoming aware that an independent Authority exists as an active promoter of competition policy and as a restless enforcer of competition legislation. In his strive for economic efficiency and consumer welfare improvements, Authority management has appropriately emphasised the importance of internal organisational in making things happen. To this extent, a lean-and-clean matrix system was adopted; management by objectives is being implemented; competitive outside recruitment is the norm; pay scales are competitive; performance incentives are built into the pay scales; and a comprehensive staff training program is available, with an average 1.7 SWs of training in 2004. AdC´s Organisation Flow Chart is attached as Annex 2.

As AdC completes its second anniversary, management has realised that most of its attention as so far been dedicated to outputs, and to attracting, recruiting and training staff, as well as to the diffusion of a competition culture in a country with an history of state intervention. With these basically in place, management considered that increased concern should now be put on improving internal efficiency. As such, time has been considered right for AdC to have its institutional performance independently assessed. To this extent, the OECD Competition Division was approached in view of their comparative advantage in international evaluations, peer reviewing and benchmarking. The challenge was accepted, and as November 2004 the Competition Division and AdC have entered into a cooperative Pilot Project for institutional assessment (the Project).

## 2. The Pilot Project

### *2.1 Objectives*

The Project objectives were to develop and implement an assessment and improvement methodology for AdC, following a prototype methodology to be developed by OECD Competition Division. This methodology was to be applied in cooperation with AdC, the ultimate goal being the development of a baseline for the preparation of the Authority 2006-2008 Business Plan.

### *2.2 Background*

Over the past 20 years within Organisation Development a relatively simple methodology has been developed to help private and public sector organisations establish and improve themselves. The methodology has been widely used both to build new organisations and improve existing ones. The steps in this methodology are relatively straightforward:

- articulate the core principles of the type of organisation that is desired;
- convert these principles into behavioural or substantive indicators**;**
- create an assessment device using these indicators;
- apply the assessment, essentially with the management group of the organisation or in some circumstances with external experts;
- turn the results of the assessment into the framework for a building or improvement plan of action; and
- re apply the assessment device on a regular basis to ensure continued application of the principles for the organisation and its processes.

However, each of these steps is not easy to complete. Articulation of the core principles of the type of organisation that is desired is rarely done. Most organisations are certainly created with a *vision* in mind by their originators, but subsequently they *adapt* over time in ways that are not always obvious or understood. Even originators of organisations are more likely to focus on the outputs they want the organisation to produce, rather than on the type of organisation that it takes to make that happen.

At times a need to change an organisation emerges as performance deteriorates. Change, however, most often tends to be *piecemeal* rather than a complete overhaul to create the type of organisation which is really desired. It is particularly important when creating an organisation to have a thought-out framework on which to grow.

### *2.3 The Assessment Framework*

As indicated above, Organisation Development provides a basic framework to assess institutional performance. A wealth of experience is also available in its successful application to the corporate world. However, right from the start, the singularity of Competition Authorities was recognised and the need to appropriately characterise key determinants of their performance identified. To this extent, recourse was made to key *informants*, i.e. those who have an in-depth understanding of the working of successful competition authorities, including process and substance. Key *informants* were selected by OECD Competition Division among those currently within an Authority, other government bodies, and the international bodies that have an in-depth knowledge of competition law and policy.[3]

Expert knowledge was subsequently gathered from the *informants*, with a view to establish key dimensions of Competition Authorities when they are operating successfully. Dimensions include issues such as relationships with other government departments or functions, relationships with the private sector, engagement of current employees and speed of work process. These interviews and dialogue allowed for the identification of the larger institutional performance dimensions, as well as of key attributes within each dimension.

As a result, it has been possible to identify nine key organisation and management dimensions providing a blueprint for building a Competition Authority or evaluating an existing Authority in order to identify areas for improvement. Attributes for each dimension were also identified, as indicated in Annex 3. Overall, the nine dimensions are as follows:

- strategic Direction;
- leadership;
- organisation;
- operating Processes and Management Processes;
- performance Standards;
- human Resource Utilisation;
- relations with Government Institutions;
- relations with relevant *Publics*; and
- performance Review.

In evaluating what currently exists, these dimensions were used as organising dimensions for an enquiry. The dimensions are the basis for dialogue between an *examiner* and the organisation and / or for those within the Competition Authority as they self-assess how it is delivering against goals and objectives. This lead to the formulation of a 'questionnaire' and a measurement tool that seeks judgment about current performance and evidence for the judgments made. In order to allow for a metric, an assessment score of points from a possible 1,000 points has been given as part of the enquiry.

### *2.4 Applying the Framework*

Upon development of the enquiry, and of a scale of measurement, an OECD preparation mission visited Lisbon, January 13, 2005. The evaluation mission was subsequently undertaken, February 21-24. This mission was led by Mr. Bernard Phillips, Division Chief, Competition Division, and comprised Messrs. Lennart Goranson, Head, Competition Outreach, and Paul Malyon, Consultant. The main objective of the mission was to carry out a series of interviews, with key Authority stakeholders as well as high level management. To this extent, a total of 16 interviews have been pre-arranged, of which eight with external stakeholders.

Outside interviewees included Judges from the Lisbon Commerce Court, the Court of Appeal for Authority decisions; Sector Regulators; a leading Competition Lawyer, and former President of the Court of First Instance; the President of the Confederation of the Portuguese Industry; the Secretary-General of the major Consumer Association; the Economic Advisor to the Minister of Economy; and a leading Economic Journalist and respected Opinion-maker. The criteria for selection emphasised interviewee direct knowledge of Authority activities, as well as their diverse affiliation among key stakeholders. Interviewees were informed beforehand of the overall objective of the mission visit, although not of the precise scope of the questionnaire. This was considered important, in order to avoid any bias resulting from a pre-assessment of replies. Interviewees were further re-assured of the total confidentiality of their replies, and made aware that no Authority staff would be attending the interviews.

Results of the interviews were subsequently processed by the OECD mission, and shared with AdC during a subsequent visit to Lisbon which took place on March 18. The instrument used was a facilitated Workshop with Authority Management. Results of the questionnaire and of the mission assessment were candidly shared with participants. These were subsequently divided into three subgroups, each handling one of the following issues: strategic direction, leadership and process management. Each subgroup came up with a series of recommendations which were subsequently shared with the plenary. As a result, it was possible to identify key performance improvement actions to be considered in the preparation of the 2006-2008 Business Plan.

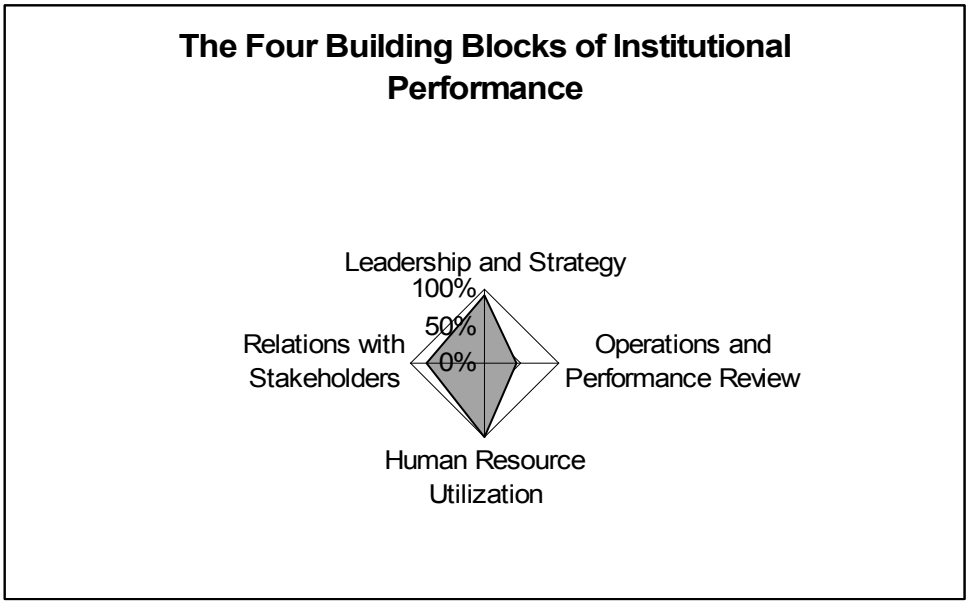
### *2.5 Notional Scoring*

As indicated above, when the focus is upon assessing what currently exists, an assessment score of points from a possible 1,000 points has been given as part of the enquiry. Assessment points were separately given by each member of the OECD mission after completing the interviews, and subsequently checked for consistency. It is the mission view that few deviations were registered among team mission members while scoring the various dimensions. It is worth noticing, at this point, that the maximum is just a notional figure, not an empirically observed one. Indeed, the mission informed that in similar exercises carried out in the corporate world a score of about 700 is associated with leading international organisational performance. Accordingly, this is probably a useful value for benchmarking purposes.

The institutional assessment model uses nine dimensions for evaluation purposes. This multidimensional evaluation framework is key for data gathering at the survey stage. However, and when moving from assessment to strategy formulation, it is very important that organisational attention be concentrated on fewer dimensions. At a premium are not only scarce managerial resources as is the need to communicate inside the institution key areas for improvement that staff at all levels can easily identify with. Moreover, it is equally important for implementation and regular monitoring that responsibilities be assigned, as much as possible, along specific functional areas. It is to this extent that the following composite components were considered as the four building blocks for institutional performance assessment:

- Strategy and Leadership;
- Operations and Performance Review;
- Human Resources; and
- Relations with Stakeholders.

The following exhibit indicates the rating of the Portuguese Competition Authority as the percentage achievement vs. the leading international corporate performers four the four building blocks. The relationship between the four building blocks and the nine dimensions used during evaluation is presented in Annex 4.




From the above assessment, it becomes clear that the block of highest score is strategy and leadership, followed by human resource utilisation and relations with stakeholders. The block of lowest score is operations and performance review, as it could be expected in the case of a two-year old institution. This is the block which deserves priority focus for improvement as the Authority matures and consolidates its internal operating and evaluation procedures. Accordingly, they will be been given appropriate emphasis in the preparation of the Businesses Plan, 2006-2008.

### *2.6 Lessons Learned*

Several lessons have been learned through the implementation of the Pilot Project. First, it has allowed for the development of an institutional assessment methodology targeted at Competition Authorities. To the extent that specific expert knowledge was, for the first time, encoded into an organisation evaluation model this is, by itself, no small achievement. Moreover, the pioneer application of this model to a concrete situation, the one of the Portuguese Competition Authority, has clearly shown that the methodology is robust and that it can be applied in a credible fashion. Testimony to this fact is the candidness of feedback received from interviewees, unlikely to materialise outside the *controlled* environment of the Project. Moreover, sharing feedback from interviewees in a facilitated management workshop was instrumental in shaping the necessary internal discussion. Indeed, this would be more difficult to achieve in a stand alone, un-facilitated, retreat. Furthermore, the methodology could be applied in a relatively short period of time and at a reasonable cost.

As to the methodology, it is both a development tool and an educational instrument. It communicates the significant dimensions of a 'successful' Authority. But on the other hand, the notional scoring has quite a few limitations. As a matter of fact, it is not yet fully applicable for benchmarking purposes, since there is no evaluation data basis for Competition Authorities as such. That stated, notional scoring allows for some degree of assessment of the stronger and weaker dimensions of an Authority, leading to the opportunity that performance objectives for future years become based upon some evidence assessment rather than less grounded information.

Overall, the consequences or opportunities created by developing and using an evidence based assessment can be summarised as follows:

- the assessment tool communicates the important dimensions that an Authority should focus upon and build development plans around;

- the scores that result from an assessment become the baseline for improvement and development of the Authority over time; and

- *momentum* is created among management to gradually implement needed improvements.

## 3. Preparation of the Business Plan 2006-2008

### *3.1 President's 2005 Statement*

In 2005 the Competition Authority enters the third year of its activities. As the Portuguese authority entrusted with the task of disciplining the markets in terms of competition, in close co-operation with the European Competition Network, it will carry out its duties of supervising compliance with competition law by the economic agents and promoting a competition culture and will contribute to developing legal and economic science and policy in the field of competition. ***These aims are embodied in the Authority 1995 Activity Program.***

As to compliance with competition legislation, the Authority will:

- investigate and conclude at least 5 restrictive practice cases in significant markets and 4 restrictive practice cases in regulated markets;

- reinforce the pipeline of restrictive practice cases, by raising awareness of their negative effects on economic agents;

- improve the economic instruments available for analysing mergers; and

- launch of a joint campaign with other public institutions to uncover cartels connected with large contracts or public invitations to tender.

Regarding its institutional strengthening, the Authority will:

- produce the Case Manual and standardised forms of basic procedural briefs;

- complete the Personnel, Career and Performance Assessment Regulations;

- install and make it fully operational the new document management system;

- improved internal organisation; and

- continue of the effort to provide staff with professional training.

In what concerns the development of relationships with stakeholders, the Authority will:

- organise the first Forum with competition lawyers;

- launch awareness-raising campaigns with business associations;

- improve its relationship with the legal system in order to streamline and speed up appeals;

- organise the first seminar on competition for ***the judiciary***; and

- cooperate with universities in developing competition science and policy.

To improve market efficiency from the welfare point of view, the study of the competitive conditions in the markets will be pursued.

- these studies are essential if indicators are to be compiled on structural action that needs priority, under competition policy, for Authority intervention or possible recommendations to the Government, sector regulators or economic agents, in particular. For 2005, the following studies will be completed: telecommunications (June-July); forestry and the purchase of wood for paper pulp; and pharmacy sector (retail medicine sales and public markets supplying medicines);

- given their importance, possible vertical restrictions on the efficient functioning of the following markets will continue to be monitored and studied: large food distributors and their suppliers (conclusion); car distribution market; and retail and wholesale fuel market;

- the following markets will remain subject to continuous monitoring by the Authority: fuel, and cereal flour;

- the following legislative initiatives for improving competition instruments will be undertaken: integration of Regulation 1/2003; clemency rule; and improvement in the legal procedure.

To strengthen and promote a competition culture, the Authority will:

- continue the campaign to explain the benefits of competition to the general public; and

- produce materials to inform the public about competition policy instruments and those for detecting restrictive practices.

In co-operation with the European Commission, the ECN and ECA, the Authority will:

- co-operation with the sector studies launched by the Commission in the financial and energy sectors;

- conclude the work on the liberal professions; and

- provide leadership for an ECA study on the creation of the single energy market.

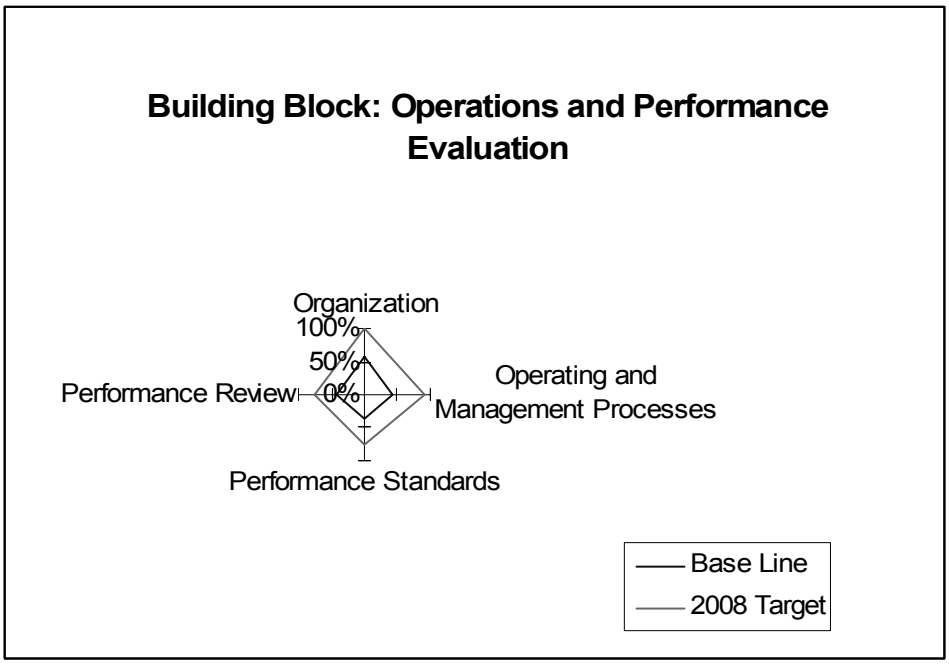
The Authority will strive for the development of legal and economic science and policy in the field of competition, by:

- organising the 1st Lisbon Conference on Competition Law and Economics (November 3-4), an international conference with eminent world experts from Europe and the USA; and

- promote high quality studies on topics at the forefront of competition science and policy, in co-operation with universities and specialist institutes

### *3.2 Building block on Operations and Performance Review*

30. As indicated above, the building block Operations and Performance Review is the one in which a focused effort by management would be required towards aligning performance with the remaining building blocks and, indeed, with best international corporate practice. To this extent, and building upon the President's 2005 Statement, a specific Action Plan was developed as a preparation for the upcoming 2006-2008 Business Plan. This action plan specifies measures to address identified issues under each assessment dimension, as well as their completion dates, key responsible and envisaged impact. The Action Plan is attached as Annex 5. Should the resulting targets, as indicated in the following exhibit, be reached, then the overall institutional assessment score of the Authority would move to almost 90% of leading corporate performance worldwide. This assumes, of course, that the remaining building blocks maintain the same performance. Ambitious as it may seem, such achievement is realistic, and in line with past performance improvement of the Authority. In any case, a follow-up review of institutional performance will be launched in 2007, towards a new independent assessment of progress.



## NOTES

1. A 50% increase in Authority high-level staff was registered as a result of recruitment undertaken in mid-2004.

2. Up to 7.5% of charges collected by Sector Regulators, as levied on regulated undertakings. Achieving sustained financing was a key element towards independence and implementation of a long-term strategy.

3. The key informants who have helped prepare the dimensions of a successful authority under this project are Allan Fels (former Chairman of the Australian Competition and Consumer Commission), Lennart Goranson (former Deputy Director General of the Swedish Competition Authority), Bill Kovacic (General Counsel of the US Federal Trade Commission), Matti Purasjoki (former Director General of the Finnish Competition Authority), Fernando Sanchez Ugarte (former President of the Mexican Federal Competition Commission) and Michael Wise (author of 20 reviews of Competition Authorities).

## ANNEX 1

### *KEY INDICATORS OF ADC ACTIVITIES, 2004*

**Size:** 77, of which 51 working in competition enforcement (24law, 19ec, 8other)
**Other duties besides competition:** none
**% focused on competition**: 100 per cent
**Budget**: € 5.8 m
**Percentage spent on salary**: 61 per cent
**Name of leader**: Prof. Abel Mateus
**Years until next leadership change**: 3 years (2008)
**Bureau of economics**: No*
*Establishing bureau upon appointment of Chief Economist, expected 2006
**Name of chief economist**: Awaiting appointment (Prof. Luis Cabral is the Lead Economic Advisor).
**Name of Chief Legal Officer**: Awaiting appointment (Prof. Eduardo Paz Ferreira, Prof. Germano Marques da Silva, Prof. Rui Pinto Duarte, Prof. Vítal Moreira, and Prof. Marcelo Rebelo de Sousa integrate the Legal Scientific Advisory Board)
**Av. age of your staff**: 46 years
**Av. tenure of staff: open-ended appointments**
**Percentage of staff leaving in 2004**: 4 per cent
**Percentage of leavers taking retirement**: 0 per cent
**Percentage of staff who've worked in commercial sector**: 15 per cent

**PRIORITIES**

**% of staff working on mergers**: 18 per cent
**Other resource deployment**: anti-cartel: 37 per cent, dominance related issues: 35 per cent, advocacy: 10 per cent
**Priorities in 2004**: Telecoms, utilities, means of payment, insurance, motor fuels, paper wood, great distribution.
**Largest matters of 2004**:

1. Energy merger.
2. Insurance merger.
3. Potential abuse of market power in telecoms.
4. Cartel in pharmaceuticals.

**Work planned for 2005**: Pharmacy sector, public procurement, and liberal professions, these in addition to the ones indicated for 2004.
**When last peer reviewed**: OECD pilot institutional review ongoing
**Synopsis of review**: ongoing

**MERGERS**

**No. of mergers filed**: 48

**% of filings that led to a request for further info***: 80-90* per cent
**% of filings sent to in-depth review**: 17 per cent
**Results of merger review**: none blocked; one withdrawn; 87 per cent of challenged mergers approved with conditions

**ANTI-CARTEL**

No. of companies which received fines:: 5

**Total amount of cartel fines in 2004:** € 3,290,000

**Av size of cartel fines per company in 2004:** € 658,000
Av length of cartel case in this jurisdiction: 1.5 years

**ABUSE OF DOMINANCE ISSUES**.
**No of abuse of dominance investigations underway in 2004**: 16
**% of these that were opened in 2004**: 56 per cent
**Av length of an abuse-of-dom. file**: 2 to 2.5 years.
**No of cases resulting in a remedy**: no data*
**Breakdown of remedies used**: no data, the agency was set up in March 2003

**POLICY WORK AND ADVOCACY**

**International committees that are chaired by this agency**: European Competition Authorities (ECA) Energy Working Group.

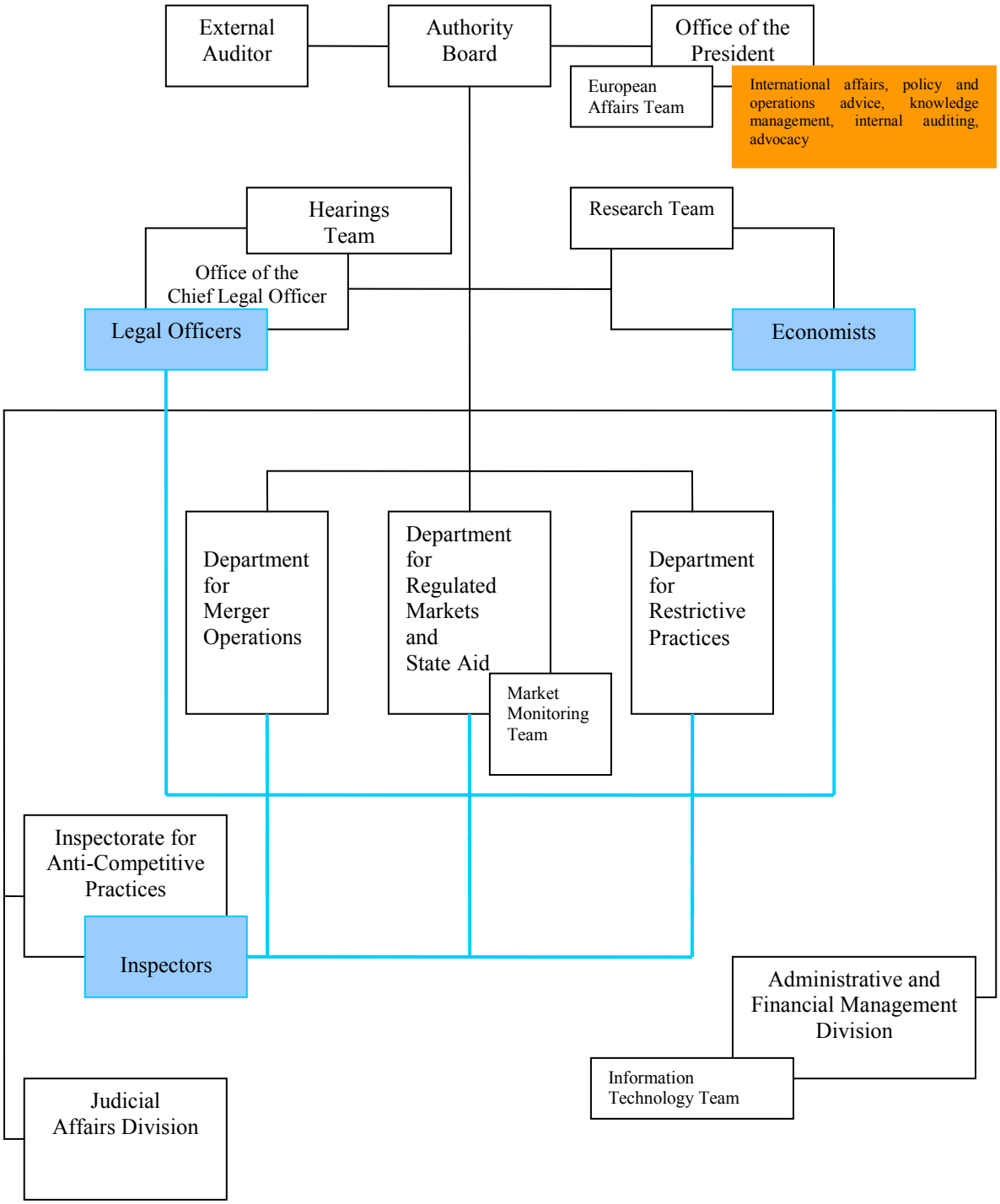
**No of mentions on broadcast news**: 140
**No column inches**: 2,000 columns, 12.2x1.97 inches
**Change in media profile in 2004**:
**Advocacy priorities for 2004**: Fostering of competition culture among economic agents. Training of judges.
**Notably advocacy results in 2004**: Recommendations made to Government were accepted and regulations changed accordingly: 1) mandatory tendering of communications services by central and local government services 2) removal of entry barriers in the provision of pumping stations by hypermarkets
**Other advocacy output**:
Advocacy priorities for 2005: **economic harm caused by cartels, and structural issues in telecom and energy.**

**ORGANISATION**

**Any change to the organisation's structure in 2004**: None
**New powers received in 2004**: None
**Increase in budget**: 81 per cent

## ANNEX 2

### *ORGANISATION FLOW CHART*



## ANNEX 3

## *ATTRIBUTES OF EACH DIMENSION*

### Strategic Direction

- Legislative and government regulatory environment
    - Is the competition act recent?
    - Has the competition act been reviewed or updated?
    - Is legislation that impacts competition narrow in focus or broadly spread across many parts of government?
    - Is the legislation a topic or issue of which the public is aware?
- Strategic Direction
    - Is the strategic direction distinct from competition legislation?
    - Does the strategic direction form part of a 'energising purpose' of the CA?
    - Is the strategic direction recent?
    - Has the strategic direction been reviewed?
    - How is the strategic direction used?
- CA approach to Strategic Direction
    - What efforts are made to ensure that the strategic direction is kept up-to-date within the CA?
    - How are people within the CA engaged with the direction?
    - What processes are used to keep the direction alive, current and applicable?
- CA application of Strategic Direction
    - Can the link between the organisation and its direction be seen?
    - Are there transparent connections with the organisation processes?
    - Is the strategic direction applicable to the workings of the CA on a daily basis?

### Leadership

- The Leadership Role
    - What guidelines / expectations exist for the leadership role?
    - Is a sense of mission, passion and personal values integral to the leadership?
    - How are personal values and commitments seen in the roles played by the leaders?

- The internal Leadership functions

  - How is leadership organised across the CA?
  - How are leadership functions enacted internally?
  - Do the leaders actively create and sustain the sense of mission, passion and commitment to a competition culture?
  - What are the processes for recruitment and selection to leadership positions?

- The external Leadership functions

  - Are there different groups playing different leadership roles?
  - How do the top-ranking officials who present the CA to the external environment fulfil their role?
  - How is the external and the internal CA leadership perceived from the outside?
  - Is an external role part of an overall leadership function?

**Organisation**

- The organisation structure

  - How is the CA organised?
  - Does the structure reflect the strategic direction?
  - Is it transparent to those on the inside of the CA?
  - Is it transparent to those on the outside?

- Impact of structure on output

  - Is the structure seen to be a 'barrier' to effective output?
  - Does the structure facilitate output?
  - What are the examples of both?

**Operating and Management Process**

- Are the operating processes clearly articulated?

- Are the operating processes transparent in definition both internally and externally?

- Are there measures of process effectiveness clearly articulated?

- Are these measures known to people internally and externally?

- Are these effectiveness measures used to manage the processes and improve operations?

- What is the relative positioning and role of law enforcement within the overall operating processes of the CA?

- Have the processes for effective management of the resources and goals-objectives of the CA been clearly defined?

- Are these processes used?

- In describing the management processes of the CA, is it evident that they are aligned with the values and strategic direction of the CA?

**Performance Standards**

- What are the performance standards of the CA?

- Can performance standards be described?

- Are the performance standards publicly available?

- Is performance against the stated standards regularly measured?

- With special reference to law enforcement, are the standards with respect to decisions to pursue, preparation of cases (including evidence collection) and eventual judicial presentation stated ?

- Are there guidelines in place for the installation of transparent performance standards?

- What are the processes and behaviours that ensure performance standards are followed – used by the CA?

**Human Resource Utilisation**

- Does the CA have human resource policies and practices that are in line with the employment environment and the political and governmental context of the CA?

- In operating the human resource policies, does the CA follow the best practices within its context for the engagement of all employees and managers?

- Knowing that the CA is ultimately greatly dependent upon people with a sense of passion for the values of competition, does the HR practice ensure that these values are nurtured and protected?

**Relations with Government institutions**

- Horizontal relations with government departments that may have conflicting, competing and / or contiguous goals and objectives, advocacy being an essential policy in respect of these horizontal government relations;

- Vertical relations with the political environment of government - upward to politicians and downwards to the electors.

**Relations with the wider public**

- How are relations conducted with the variety of interest groups / audiences?
- How are relations with the 'general public' managed?
- What is the policy and practice of being proactive in communicating and building a public face for the CA?
- To what extent is the CA as a whole involved in building a public relationship?
- What is the position of the employees of the CA in respect of building - supporting the public face of the competition authority?

**Performance Review**

- How is performance review policy articulated?
- To what extent is performance review policy enacted?
- How does performance review influence the development of strategy, organisation, operations and ultimately the legislative environment?
- What is in place to build a fundamental value and a 'culture' of performance management?
- To what extent is performance review part of the fabric for how the CA operates?
- Assessment of CA Impact
    - Does it achieve real-world impact?
    - Does it win its cases and achieve its objectives, prevail when challenged, persuade other decision-makers in its regulatory initiatives?
    - Is there compliance with its decisions?
    - Do the cases and regulatory initiatives protect or promote the process of competition?
    - Over the longer-term, does the CA examine whether it achieves its goals?

**ANNEX 4**

***THE FOUR BUILDING BLOCKS OF INSTITUTIONAL PERFORMANCE***

| Building Blocks | Dimensions | Notional Maximum | Assumed Benchmark |
|---|---|---|---|
| Strategy and Leadership | Strategic Direction | 275 | 193 |
| | Leadership | | |
| Operations and Performance Review | Organisation | 450 | 315 |
| | Operating and Management Processes | | |
| | Performance Standards | | |
| | Performance Review | | |
| Human Resources | Human Resource Utilisation | 100 | 70 |
| Relations with Stakeholders | Relations with Government Institutions | 175 | 123 |
| | Relations with Relevant Publics | | |

**ANNEX 5**

***ACTION PLAN ON OPERATIONS AND PERFORMANCE REVIEW***

| Dimension | Action | Date | Responsible | Impact |
|---|---|---|---|---|
| Organisation | Ensure that annual evaluation reflects agreed Departmental targets | December 2005 | Board/Directors | Improve internal accountability |
| | Monthly meetings between Board and Directors | March 2005 | Board | Disseminate information internally |
| | 1st Meeting of Competition Lawyers Forum | September 2005 | Chief of Staff | Greater outside awareness of how the institution works |
| Operating Processes | Operations Manual on Mergers | December 2005 | Director, Mergers Department | Improved interface with outside stakeholders |
| | Guidelines on Restrictive Practice Cases | June 2006 | Director, Restrictive Practices Department | Greater consistency and predictability in case handling |
| | Objective case screening criteria | December 2005 | Board | Improved resource allocation |
| | Staff interchange with the Netherlands Competition Authority | April 2005 | Chief of Staff | Development of a case handling culture |
| | Project Management Course | January 2006 | Chief of Staff | Improved overall process management |
| Performance Standards | Appointment of the Chief Economist | June 2005 | Board | Quality enhancement |
| | Appointment of | December 2006 | Board | Formulation of |

| Dimension | Action | Date | Responsible | Impact |
|---|---|---|---|---|
| | the Chief Legal Officer | | | standards |
| | Selected ex-post case review | December 2005 | Lead Economic Advisor | Feedback into operational outputs |
| | Setting up an external Legal Scientific Advisory Board | May 2005 | Board | Improvements in legal analysis |
| | New Seminars on the legal aspects of competition law | Seminar program for 2005 already adjusted | Board | Greater emphasis in procedural aspects |
| Performance Review | Clear internal communication at Departmental and personal level | 2006 | Board/Directors | Improved alignment of individual incentives with institutional objectives |

# SWEDEN

## 1. Summary


- Well-conducted evaluations are likely to promote best practice implementation, and may serve as a source of legitimacy for competition policy systems.

- Most evaluation methods fall into one of three broad categories: benchmarking of bureaucratic productivity, assessing the quality of decisions, or assessing the impact of competition policy on a macro level.

- The Swedish Competition Authority has used a wide range of methods in all three categories to evaluate the quality and effect of its activities. With the exception of an annual survey of interest groups these evaluations have mainly been of an ad hoc character, directed to specific cases and decisions.

- There seems to be much to win from a more systematic approach to ex post evaluation. Making evaluation techniques transparent and comparable between authorities and countries should enable multilateral learning and gain.


## 2. Introduction

In recent years there has been an increasing awareness of the importance of policies that promote long-term economic growth. Sound structural policies in general, and sound competition policies in particular are seen as fundamental for achieving long-term growth. Evaluations of the efficiency and effectiveness of competition policies and of enforcement of the competition rules are likely to be conducive for implementing best practices in this area. Such evaluations are also likely to serve as a source of legitimacy for the policy system, given that the resources consumed by the policy system normally can be more readily and easily measured than its positive effects.

In practice, such evaluations are rarely done. This is not unique for the field of competition policy – in practice very few areas are regularly and systematically evaluated. Naturally this is to no small extent due to substantial practical difficulties in making such evaluations.

The purpose of this memorandum is to provide a brief summary of the Swedish Competition Authority's (SCA) experiences in evaluating the effectiveness and efficiency of its enforcement measures.

Analytically it seems that most evaluation methods fall into one of three broad categories. First, competition enforcement at one authority can be bench-marked against other similar authorities, or compared over time. Second, the effectiveness of competition enforcement can be measured by evaluating the quality of individual decisions or of decisions in general. Third, competition enforcement can be evaluated by studying the impact of regulatory interventions on the functioning of the market. In its efforts to evaluate the effectiveness and efficiency of its enforcement, the SCA has used methods from all three categories.

## 3. Benchmarking bureaucratic productivity

Benchmarking studies can be used to measure and evaluate the productivity of the competition authorities, although it, arguably, often does so in a simplistic manner. The simplest measure of the efficiency of competition enforcement would be to measure the total number of cases handled per year divided by (average) staff enrolment or budget. Naturally this is a very crude measure.

Because of differences in national legislations, the average complexity of cases varies between different competition authorities. For example, if the thresholds for compulsory merger notifications are very low, the authority will handle a large number of relatively uncomplicated cases. If the thresholds are high, there will be fewer cases but the average complexity will be higher. Finally, if merger notifications are not compulsory and if, instead, the authority can open merger investigations at its own discretion, there will be few or no uncomplicated merger cases. If, in an international comparison, productivity is measured as the number of cases per staff member, a competition authority will automatically appear to be more productive with a low notification threshold, and less productive if notifications are never compulsory.

As a simple illustration, SCA handled approximately 1600 merger cases between 1993 and 2002. During the same period, the EU Commission made 1990 final decisions in merger cases. The resources used by SCA during a typical year in merger cases corresponds to approximately six person-years, while the size of EU's Merger Task Force, which handled only slightly more cases per year, was several times larger. Naturally, this is due to the much higher average complexity of merger cases handled by the Commission and, consequently, this comparison says very little about relative productivity.

In order to be meaningful, benchmarking studies must therefore to some extent take quality of work into account. In 2003 and 2005, the competition authorities of the Nordic countries[1] have carried out a benchmark study that tries to give a meaningful comparison through a relatively fine-grained set of parameters, and attempts at comparing quality of activities.

## 4. Assessing the quality of decisions

Much of the academic literature of law scholars focus on the quality of individual decisions, while "Gallup" surveys of the perception of competition authorities can be seen as attempts to measure overall decision quality.

Certainly, the academic law literature plays an influential role when it discusses the quality of the authorities' decision-making. It can contribute to the development of best practice and safe-guard against poor decision making. The court system, of course, has a fundamental role in maintaining decision quality. Potentially, the courts' case-by-case quality check can be aggregated into a single measure of the authority's decision-making quality. For instance, the share of cases won in court can be used as a measure of quality, although differences in legal systems may make international comparisons of this number less useful.

The Swedish Competition Authority uses evaluation techniques in this category partly to learn from experiences of specific decisions or court cases and partly to assess attitudes and overall perceptions of the SCA's quality in our national context.

In addition to its enforcement tasks, the SCA contributes to competition related research in the disciplines of economics and law. In 2004, SCA funded approximately 7.2 million SEK[2] to competition research projects. For this purpose the SCA has a Council for Competition Research as an affiliated body, consisting of senior academics in the relevant disciplines. This arrangement has the added benefit of giving the SCA access to a network of external experts with an in-depth understanding of SCA's work.

On a number of occasions, this has led the SCA to contracting members of the Research Council for evaluations and analyses of decisions and court cases that have been deemed to be of special interest. Parameters that have been analysed include the SCA's handling of cases in court as well as the underlying legal and economic analyses.

The Competition Authority also commissions research by Swedish academics in a number of relevant academic disciplines. This concerns questions where the Competition Authority sees a direct need to investigate or highlight a specific issue. One recent example of such a commissioned study analyses all court cases where SCA has been part during the period 1993 to 2004. The study, carried out by a PhD student of EC Competition Law at Stockholm University, gives analyses, evaluations and offers suggestions for improvements.

The mentioned type of case-by-case studies is useful for evaluation of individual decisions, and lessons drawn from such studies can of course be used for general recommendations on future action. "Gallup"-style surveys that compare a number of competition authorities may be more useful for benchmarking purposes. Although such studies typically suffer from methodological problems, they can nevertheless give an indication of how the authority's overall quality of decisions is perceived by relevant actors. Global Competition Review carries out an annual rating based on the views of "users" of the competition regime as well as the authorities themselves. In 2004 Sweden scored 3.5 stars out of 5, putting it on par with Finland, Denmark, Ireland and Spain.[3]

Since 1994, SCA has conducted an annual survey of interested parties who have a great interest in and importance for national competition policy. The aim of the surveys is to study what these parties think about the SCA and its activities, as well as these parties' awareness and knowledge of, and attitudes towards the Swedish Competition Act.

The annual surveys are carried out by a market survey consultancy. Each year, about 400 interviews are made with a randomised selection of the following groups:

- Small and medium-sized companies (up to 200 employees)
- Large companies (more than 200 employees)
- Municipalities and county councils
- Commercial lawyers
- Journalists
- Trade associations

These groups are asked nearly identical questions about their awareness and knowledge of the Competition Act and their attitudes towards it, as well as their degree of confidence in the Competition Authority and its abilities to fulfil its tasks.

The results indicate that the awareness of the Competition Act is complete or virtually complete among all groups with the exception of the category of smaller undertakings. In that group 78 per cent state that they are aware of the Act. The levels are so high that better results can hardly be expected in the future. Awareness that the SCA is responsible for applying the Competition Act has increased in all groups over the period. 94 per cent of commercial lawyers were aware of this, while the level among smaller undertakings was 36 per cent.

Knowledge about the Competition Act has improved in all groups over the studied period. The respondents are asked seven questions concerning the Act. In 2004 the average number of correct answers was 5.9, with group averages ranging from 5.4 to 6.3. Attitudes towards competition legislation have also

become somewhat more positive over the period. The share of respondents mainly positive varied from 51 per cent (small undertakings) to 76 per cent (large undertakings) in 2004.

The 2004 survey also showed that all groups except trade associations show an increased confidence in the Competition Authority. Among commercial lawyers, also the group which had most contact with SCA, 64 per cent indicated that their confidence in the SCA was high or very high.

The annual surveys are an instrument for SCA to estimate interested parties' perception of overall decision quality, as well as a means to find out which parts of the competition rules that are not so well-known, well understood or well liked. This information can therefore be used both to measure the outcome of SCA activities and to plan future activities. The longish time series further provides an opportunity to see long-term trends in knowledge and attitudes.

## 5. Assessing the impact of competition policy

Ultimately, what is most interesting is the effect of competition policy (law as well as enforcement) on the efficiency of the economy at large and its ability to increase consumer welfare. There are two principal ways to address such an issue. One can be labelled a top-down strategy and he other a bottom-up strategy. A top-down strategy would look at the whole of the economy and then try to infer the benefits that accrue from competition law and enforcement, for instance by comparing markets or countries which are subject to different forms of competition rules, or by comparing the same country over time, in order to identify the effect of policy reforms. A bottom-up strategy would look at individual cases, and then estimating the effect of all decisions.

There are, of course, grave methodological problems with both approaches. The problem with a top-down strategy is to isolate the effect of competition policy from other factors that influence welfare and economic growth. The problem with a bottom-up strategy is that the most important effect of competition policy is that it serves to make market actors abstain from anti-competitive actions in the first place. If competition rules and enforcement is effective, firms will not enter into cartel agreements or attempt to abuse dominant positions, and they may not even try to get approval for anti-competitive mergers.

In a series of studies, SCA has analysed the relation between Sweden's general price level and the a number of its likely determinants. The results suggest that the price level is higher than it should be, considering i.a. Sweden's GDP per capita and taxes. The results suggest that the Swedish economy may be less competitive than that of the average EU-15 Member State. However, it appears far-fetched to attribute the relatively high price level in Sweden to ineffective competition law and enforcement. For example, a legacy of product market regulations may contribute to a lower average degree of competition.

A few attempts at a bottom-up strategy have also been employed by SCA. In one of the cases when SCA has contracted members of its Research Board to carry out evaluations of cases, the study has also included a follow-up of the market effects of the final court decision in a merger case.[4]

In another specific case, SCA has followed up the results of a decision concerning a merger by looking at market effects two years later.[5] The study compares the simulation results for a merger in the Swedish bread market with the actual outcome after the merger. The simulations were performed as a part of SCA's investigation of the merger in February and March 2003. The merger was unconditionally cleared in March that year, and detailed market data gives an opportunity to compare the actual market outcome with what was predicted in the simulations. In short, the analysis shows that the simulation results underestimated the average market price increases, possibly due to deficiencies in the demand function model.

For SCA, studies such as these are important in two respects. First, they give the opportunity to observe actual market effects of enforcement decisions. Second, they serve to identify factors for improvement in a rather specific manner – thus enabling qualitative improvement of enforcement.

## 6. Conclusions

There are a number of methods that can be used to evaluate the effectiveness of competition policy. All of these methods have weaknesses and particular difficulties, although one type of approach may be better suited than others in response to a particular question.

The Swedish Competition Authority has used a wide range of methods in a number of studies to evaluate the quality and effects of its activities. Worth noting is, however, that these evaluation efforts have mainly been of an ad hoc-character. With the exception of SCA's annual interest group surveys and the broad benchmarking study on administrative matters, the evaluation efforts have been directed to specific cases and decisions.

The case specific focus of evaluation studies quite naturally gives a biased sample of SCA activities that are chosen for further analysis. Since most of the evaluation efforts are directed towards cases where there are perceived problems, a generalisation from those studies does little to legitimise the policy, as discussed in the introduction. In order to fulfil that purpose, broader approaches are probably needed.

One conclusion is that there is much to be gained from a systematic approach to ex post evaluation. Different questions will need different methods to find an answer, but they should be set in a system that remains roughly stable over time. Making evaluation techniques comparable between authorities and countries enables multilateral learning.

In accordance with this, the Swedish Competition Authority welcomes the Competition Committee's initiative and efforts to identify good examples for multilateral learning and development. A common understanding and transparency on how to efficiently evaluate competition policy could well lead to improved possibilities for making broader comparisons of rules and enforcement.

## NOTES

1. Denmark, the Faroe Islands, Finland, Norway and Sweden

2. Approximately € 785 000 (1 EUR = 9.164 SEK)

3. Global Competition Review vol. 7, Issue 3, April 2004.

4. Acquisition by Optiroc Group AB of Stråbruken AB in July 1998.

5. Nilsson, A. & N. Strand, *On Simulation and Reality: an Example*, under publication.

# TURKEY

## 1. Evaluation of Activity of the Turkish Competition Board

This paper aims to provide information on the work carried out by the Turkish Competition Authority as a contribution to roundtable of the actions and resources of competition authorities.

First of all, one of the duties of the Turkish Competition Board (the Board), the decision making body of the Turkish Competition Authority (the Authority), imposed by the Act on the Protection of Competition No. 4054 (the Act) is to issue an annual report on its works, and the situation and developments in its field of study. The Board, via annual reports, regularly communicates to the public relevant information on its enforcement activities in the form of infringement of competition, exemptions, negative clearances, mergers and acquisitions, statistical information, legislative preparations, opinions for legislation and privatisations; international relations; symposiums, panels and conferences; publications; and educational activities. Such reports also include general assessments regarding the works of the Authority; competition policy; and prospective works of the Board. Such reports are good media for those interested to be familiar with the enforcement activities conducted by the Board and the developments in the field of competition. They are an important aspect of the accountability of the Board who, via such reports, tries to prove that the resources allocated are spent to achieve the desired results.

Moreover, the effectiveness of the Act has been consistently assessed by taking into account the experience derived from its enforcement since 1997 by the Authority. The professional staff combine their experience gained while handling cases. This experience has led to detection of some weaknesses of the Act and to the proposal for changes in some of the articles of the Act accordingly. For instance, it was seen that judicial review of Board decisions had led to significant difficulties in the process of collecting fines imposed by the Board. Under Article 55 of the Act as originally enacted, fines were not required to be paid until judicial review proceedings were complete, and the passage of several years during the pendency of appeals meant that inflation eroded the weight of the fine assessed. A 2003 amendment to Article 55 addressed the problem by specifying that fines must be paid within thirty days of the Board's order, whether or not an appeal is taken. In late 2004, the requirement was modified to extend the payment period from thirty to ninety days due to allow the undertakings to raise necessary money to pay the fines. Another change was related to on-the-spot-inspections carried out by the professional staff to find out the necessary evidence. The problem that emerged with respect to on-the-spot inspections was that penalties for prevention of such inspections by the undertakings were not strong to deter the undertakings that could simply prefer to pay the daily penalty until they could remove the relevant documents. The article concerning on-the-spot-inspections was amended as proposed to perform the inspection with the decision of a criminal magistrate. One more change deserves to be mentioned is the removal of provision enabling the Board to keep 25% of the fines collected as income due to the criticisms that such a clause would create conflict of interest.

Another point to mention while evaluating the effectiveness of the implementation of the Act is the developments in European Competition law that is of peculiar importance due to the relationship between Turkey and the EU and the commitments of Turkey for the European Union membership. These developments together with the experience of the Authority staff raised the necessity to prepare some further proposals for amendment in the Act. These proposals include the elimination of the compulsory notification requirement for anti-competitive agreements, concerted practices and decisions in line with the

new understanding of the European Commission and adoption of a leniency programme (reduction in fines for those informing against the cartels) which is the most efficient and speediest way to unearth a cartel.

So far, the internal evaluation of the enforcement record from the points of experience and the reference EU competition law was mentioned. Another evaluation method employed so far is external contribution by OECD. Turkey's competition policy legislation and enforcement record were subjected to examination within the framework of peer review by the OECD. First was the report named "The Role of Competition Policy in Regulatory Reform" prepared for the OECD Review of Regulatory Reform in Turkey published in November 2002 and finally the report of "Peer Review of Competition Law and Policy of Turkey" discussed in Global Competition Forum in February 2005. These reports are highly valuable because they are prepared by experts after having consulted third parties such as practitioners, academics, business associations' members, governmental officials working for various governmental agencies in addition to the officials of the Authority. Recommendations highlight the points to be taken into account to better the enforcement record and therefore they are paid great attention by the Authority while evaluating the enforcement of the Act. Moreover, some of the recommendations in those reports overlapped the findings by the Authority's own experience. For instance, report of 2002 described some shortcomings of the Act, as the Authority were already aware for some time, as the weakness of the administrative sanctions in easing investigations, deterrence of fines imposed and the share, 25% of fines imposed which was accrued into the budget of the Authority. Moreover, the recommendations of the peer review report of 2005 were also regarded as highly educative in terms of what the Authority should do to increase the effectiveness of its enforcement record. It also has overlapping items with the internal works of the Authority regarding items that require change such as the issue of leniency, revised standard for mergers and modification of merger control deadlines, increase in maximum fines for violations other than substantive infringements, elimination of mandatory notification of agreements, establishment of a procedure for the settlement of cases by consent, increase in the numbers and expertise of TCA lawyers and enlarging the Authority's industrial organisation competence. The findings of both reports are encouraging for the Authority because they praise its working. The peer review report summarises its findings as well as those of the previous report as part of regulatory reform of 2002 as "*The previous Report found that the Turkish Competition Authority ("TCA") had made a good start since it began operations in late 1997. The agency has continued to make excellent progress since 2002, and has developed a reputation as one of Turkey's most effective and best administered agencies. It has pursued its mission with energy, imagination, and integrity and has won respect and support from leaders in the business community. Most importantly, it has played a critically important role in moving the Turkish economy forward to greater reliance on competition-based and consumer-welfare oriented market mechanisms.*"

Apart from such evaluations, the State Supervision Council[1] (the Council), also carried out examinations in the Authority and produced a report in 2002. The Council aimed to supervise the works and transactions of the Authority for the years 1999-2000 and 2001 including but not limited to its enforcement duties, its incomes and expenditures and methods of expenditures, reorganisation of the Authority to make its services efficient and the necessary changes in the Act that must be realised. With respect to enforcement, the report urged the Authority to conduct researches in the sectors of the economy, increase cooperation between sectoral regulators and the Authority to avoid contradicting decisions, shorten the periods to publish reasoned decisions, to clarify the standing of the public undertakings that are granted monopolies and exclusive rights vis-à-vis the Act, to change the Act to empower the Authority to deal with abuse of market power falling short of dominance, to change the Act to abolish the handicaps of long judicial review process by collecting fines despite judicial review, to restructure the filing system to define, classify and protect the trade secrets to avoid their disclosure, to reorganise its structure to provide services in efficient and quality manner, to establish real cooperation between the Office of Legal Counsel and the technical departments and to establish the necessary mechanism to avoid the extravagant

expenditures. Utmost care was paid to realise the conclusions of the report in general and those regarding publication of the decisions promptly, change of collection of fines during judicial review in particular.

## NOTES

1. State Supervisory Council is attached to the Office of the Presidency of the Republic with the purpose of performing and furthering the regular and efficient functioning of the administration and its observance of law. It is empowered to conduct upon the request of the President of the Republic all inquiries, investigations and inspections of all public bodies and organisations, all enterprises in which those public bodies and organisations share more than half of the capital, public professional organisations, employers' associations and labour unions at all levels, and public benefit associations and foundations. Here it is important to state that State Supervisory Council is a different institution from the Council of State which is the appeal Court for the Authority's decisions.

# UNITED STATES

## 1. Introduction

The Department of Justice (DOJ) and the Federal Trade Commission (FTC) periodically conduct ex-post evaluations of their enforcement actions and procedures. These evaluations serve several important functions. First, a careful review of how the Agencies have exercised their authority improves understanding of the impact and effectiveness of past enforcement actions. Second, such evaluations provide the Agencies critical insight on how to improve their enforcement processes. Finally, these evaluations provide a window into the Agencies' decision-making process and thus greater transparency in antitrust enforcement.

The Agencies carry out ex-post evaluations in a variety of ways. For example, to assess the efficacy of merger enforcement, the Agencies have analysed the effects of past enforcement efforts, including decisions not to take enforcement action. The DOJ and the FTC also have joined forces to hold hearings on significant competition issues and to provide guidance for future actions. In addition, the Agencies, both individually and jointly, have taken a close look at their own internal procedures to ensure that they are efficient and effective.

As the scale of ex-post evaluation varies, so does its cost. Full-scale retrospective analyses of completed mergers, for example, can demand significant agency resources including considerable attorney and economist time because data can be difficult to obtain. These efforts necessarily involve opportunity costs as resources used to examine the results of past actions are not spent on current Agency enforcement activity. Other types of evaluations in which data are more easily available consume less time and resources. An example of this is the "hot documents" study discussed in the next section. One of the least costly sources for evaluations of past activity is from legal and economic scholars outside the Agencies. Both the DOJ and the FTC closely monitor journals and working papers for useful analyses of Agency activities.

An additional caveat is that no retrospective can forecast future outcomes with complete accuracy. Economic conditions change and the legal climate can vary from court to court. Retrospectives provide useful guideposts, not crystal balls, and agencies must balance the cost versus the likely benefit in determining which tools of evaluation to employ.

Despite their costs and limitations, ex-post evaluations can provide the Agencies with valuable insight into developments in antitrust enforcement policy and into their internal operating practices and procedures that allow them to fulfil their mission more effectively. Ex-post evaluations, which can provide greater transparency in antitrust enforcement, are important to good public administration.

The following discussion illustrates the U.S. Antitrust Enforcement Agencies' continuing efforts to evaluate their enforcement activities, priorities, and procedures.

## 2. Specific Categories of Review and Evaluation Procedures

### *2.1 Merger Enforcement Review*

The Agencies have undertaken analyses of past merger enforcement actions focusing on key variables relevant to the potential for anticompetitive effects, and the nature and likelihood of significant procompetitive effects, including the efficiencies that can arise from mergers. A deeper understanding of these variables can provide the Agencies with greater ability to evaluate prospective mergers.

For example, in 2003, the Agencies comprehensively reviewed their horizontal merger investigations and cases. Each Agency conducted its own internal review, but also cooperated closely with the other to ensure that they used comparable methodologies and procedures and to resolve any methodological problems during the course of the review. The goal of the review was to provide the business community and antitrust practitioners with more and better information about challenged mergers, thereby making merger enforcement policies more transparent. In addition, the review informed the Agencies about the adequacy of their internal procedures for maintaining and accessing relevant merger data.

As a result of the review, the Agencies, in December 2003, publicly released Herfindahl-Hirschman Index (HHI) data for their horizontal merger challenges for fiscal years 1999-2003, providing HHI data for 173 mergers and 1,263 markets.[1] The data did not reveal the identity of any specific case or any confidential information. In February 2004, the FTC released additional data reflecting the presence or absence of "hot documents" and "strong customer complaints" identified during the investigation.[2] Finally, the Agencies held a joint workshop in February 2004, which examined a variety of topics that their reviews and other research identified as needing further exploration. *See* Section II 3 below.

In October 2004, the DOJ publicly released an *Antitrust Division Policy Guide to Merger Remedies*.[3] The Guide was the result of the Division's internal evaluation of its past practices in crafting merger remedies and close examination of the legal and economic principles underlying those practices. The Division relied solely on its in-house attorneys and economists to conduct this evaluation and prepare the Guide. The Guide sets forth important principles and policy considerations for the design, implementation, and enforcement of remedies in Division merger cases. Similarly, the FTC has a page on its website entitled *Merger Best Practices*, which provides links to documents on best practices for cooperation in merger investigations, for negotiating merger remedies, and for data, economic, and financial analyses in antitrust investigations.[4]

In addition, the staff of the FTC's Bureau of Economics has examined the aftermath of mergers that were "close calls" and not ultimately challenged. These retrospective analyses include: *The Economic Effects of the Marathon - Ashland Joint Venture: The Importance of Industry Supply Shocks and Vertical Market Structure*;[5] *The Union Pacific/Southern Pacific Rail Merger: A Retrospective on Merger Benefits;*[6] and *The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study*.[7] In January 2005, the FTC held a conference entitled *Estimating the Price Effects of Mergers and Concentration in the Petroleum Industry: An Evaluation of Recent Learning*.[8] At the conference, a panel of distinguished economists evaluated two conflicting studies on the price effects of particular petroleum mergers, examining the techniques and assumptions used in analyses of merger effects in these studies and the various difficulties in conducting a study of merger effects that is of sufficient reliability to inform policy.

The FTC staff also has been investigating the competitive effects of several consummated hospital mergers. In one of these instances, the Commission authorised an administrative complaint against the transaction.[9] In another, the Commission closed the investigation on the ground that the investigation did not find evidence that the transaction harmed competition.[10]

Staff economists at DOJ have also examined the aftermath of mergers that DOJ did not challenge. These evaluations include the analysis of the effect of the "Big Eight" accounting firm mergers in the U.S. on the market for audit services[11] and of several mergers in the airline industry,[12] including the effects of past airline alliances, code shares, and immunity grants. DOJ economists are currently undertaking research on past mergers in a variety of other industries as well.

It is important to recognise that ex-post studies of various degrees of sophistication are a common part of many civil investigations at both Agencies. In this context, they are sometimes referred to as "event studies" and are an effort to understand, for example, how a previous merger in a market being investigated affected prices and output. They are often undertaken by consulting economists on behalf of parties in an investigation. Also, the Agencies carefully monitor journals and working paper series to examine analyses of past acquisitions and other events affecting competition. Such studies by outside authors have covered a wide range of industries, including specialised microfilm,[13] airlines,[14] railroads,[15] and paper.[16]

Finally, both Agencies have examined competition concerns in the context of a particular industry.[17] For example, in 2004, the staff of the FTC's Bureau of Economics released a report *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement*.[18] The report presented a detailed review of the structural changes and the FTC's efforts to enforce the antitrust laws in the petroleum industry over the past 20 years. Consistent with the purpose of enhancing professional and public understanding and improving policy making, the report also elaborated on the analytical process the FTC uses when reviewing petroleum-related mergers. Similarly, the DOJ has written several in-depth studies concerning the competitive performance of many regulated industries, including insurance, milk marketing, ocean shipping, and various energy industries. The studies were conducted "to create greater public awareness of the costs of regulation and [to] advance reform efforts."[19]

### *2.2 Additional Evaluations of Merger and Civil Non-Merger Litigation*

The Agencies periodically conduct ex-post evaluations of both their merger and civil non-merger litigation in several different contexts.

First, when the litigation has resulted in a judgment in an Agency's favour, the Agency monitors and enforces compliance with the judgment. These monitoring and enforcement activities are staffed internally with Agency lawyers and economists highly familiar with the industry and firms in question and involve regular contact with not only those subject to the judgments but also industry participants more generally. The Agencies gain a great deal of knowledge about the effectiveness of their enforcement activities through these contacts.

Second, the Agencies fully analyse completed litigation. This analysis includes an evaluation of the performance both of the Agency staff who worked on the matter and of any retained consultants (including both testifying and non-testifying experts), a review of the legal and economic underpinnings of the case to understand the potential for their application to other matters under review, and an examination of both pre-litigation and litigation techniques to assess their effectiveness.

Third, the Agencies engage in regular industry monitoring and outreach efforts. Publicity of Agency litigation efforts often results in industry participants contacting the Agencies regarding industry developments that reflect on remedies contained in judgments. All of these contacts allow the Agencies to maintain their awareness of developments that can shed light on not only the potential need for further enforcement action but also the success of prior enforcement activities.

Finally, as part of annual reports to Congress, both Agencies compile various summary statistics on their enforcement achievements, including estimated volumes of commerce in affected markets and gains

to consumers. For example, regarding their merger enforcement efforts, the Agencies calculate aggregate annual estimates of consumer harm avoided. These estimates are derived from empirical merger simulations completed in investigations or calculated afterwards based on realistic assumptions. Examining trends in these annual statistics provides both Agencies with useful feedback on enforcement programs.

### *2.3 Joint Agency Hearings and Workshops*

Hearings and workshops also can be powerful policy development tools. They allow the Agencies to bring together experts from business, government, law, and academia to engage in in-depth analyses of competition issues, including support for and criticism of the Agencies' previous actions and views. The following are several examples of how the Agencies have deployed these tools to help evaluate the effectiveness of their enforcement programs.

#### *2.3.1 Intellectual Property Hearings*

In 2002, the DOJ and FTC held joint hearings entitled *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*.[20] The Agencies heard testimony from distinguished panellists who represented a wide range of interests and addressed a plethora of topics central to the antitrust/intellectual property debate, such as patent pooling and cross-licensing, and the use of intellectual property in industry standards. The Agencies utilised the hearings and testimony both to re-evaluate their own enforcement practices and to guide their future enforcement initiatives in this area. Lawyers and economists from both Agencies have been closely examining how their enforcement policies might be improved and made even more transparent.

In October 2003, the FTC issued a report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy,*[21] which made ten recommendations to reduce the number of questionable patents. Among other steps, the report recommended new procedures for challenging patent validity, careful application of patent law to prevent or invalidate obvious patents, and thoughtful integration of economic insights into patent law and policy. Two of the recommendations are under consideration by the House Subcommittee on the Courts, the Internet, and Intellectual Property as part of a Committee Print that is being discussed as the basis for a proposed bill. They are 1) a recommendation to enact an administrative process for post-grant review of a patent, available only for a limited time and with limited discovery and deadlines for completion, so that it does not duplicate litigation; and 2) a recommendation to limit the availability of damages for wilful infringement of a patent to situations in which an alleged infringer has received specific written notice of the alleged infringement or there is deliberate copying. The report's other recommendations have likewise received serious attention.

Building on the report's recommendations, a 2004 report on the patent system by the National Research Council of the National Academies, and the commentary and analysis regarding these reports prepared by the American Intellectual Property Law Association, the FTC has joined with the National Academies' Board on Science, Technology, and Economic Policy and the American Intellectual Property Law Association in sponsoring a series of Town Meetings on Patent Reform. The sessions have sought suggestions and reactions from the public on a variety of topics including establishing a system of post-grant review within the United States Patent and Trademark Office; limiting the doctrines of wilful infringement and inequitable conduct in litigation; eliminating the best mode requirement; converting to a system for awarding patents to the first inventor to file; and establishing a statutory exemption for certain research uses.

### *2.3.2 Health Care Hearings*

The FTC held a workshop on health care competition in 2002, and in 2003, the DOJ and FTC held 27 days of joint hearings to examine the state of the health care marketplace and the role of competition, antitrust, and consumer protection in providing high-quality, cost-effective health care. The hearings gathered testimony from approximately 250 panellists, including representatives of various provider groups, insurers, employers, lawyers, patient advocates, and leading scholars on subjects ranging from antitrust and economics to health care quality and informed consent. The workshop and hearings resulted in a joint FTC/DOJ report, *Improving Health Care: A Dose of Competition*, released in July 2004, in which the Agencies distilled and analysed the information collected.[22] The report addressed two broad questions: 1) what is the current role of competition in health care, and how can it be enhanced to increase consumer welfare? and 2) how has, and how should, antitrust enforcement work to protect existing and potential competition in health care? The Agencies have already used the knowledge they gained through this process as a basis for additional competition advocacy in health care and to further enforcement initiatives.[23]

### *2.3.3 Merger Workshop*

In February 2004, the Agencies conducted a three-day merger enforcement workshop. The primary purpose of the workshop was to assess the practical application and efficacy, as well as the current viability, of the *1992 Horizontal Merger Guidelines*. The public workshop allowed the Agencies to receive input from leading antitrust practitioners and economists and the business community on a wide range of topics that arise frequently in horizontal merger investigations. The workshop confirmed the analytical soundness of the Merger Guidelines and provided the Agencies with important suggestions and insights on how best to employ the Guidelines to ensure the most effective enforcement of our antitrust laws. Copies of the presentations and transcripts of the workshop were made publicly available on the Agencies' web sites.[24]

As a follow-up to the merger workshop, the Agencies intend to produce a Commentary on the Horizontal Merger Guidelines. The goal of the Commentary will be to use the learning from the workshop, together with the Agencies' experience in implementing the Merger Guidelines in individual cases, to provide the business community, the antitrust bar, and others with further guidance on how the Agencies analyse mergers. The Agencies intend to use their own resources and personnel to prepare the Commentary and will rely on information and data that the Agencies developed in the course of merger investigations and cases.

## ***2.4 Evaluations of Competition Advocacy Activities***

The Agencies' core competition mission is to enforce the antitrust laws. Another effective tool, however, is competition advocacy.[25] The Agencies, both individually and jointly, have submitted filings supporting competition principles in a wide range of fora and to various state executives, including: national professional organisations; state legislatures, regulatory boards, and state and federal courts; and other federal agencies.

For example, from 2001 to April 2005, the Agencies filed seven joint comments on proposed restrictions on competition in real estate closings.[26] In the majority of states, non-lawyers compete with lawyers to provide real estate closing services. However, in the last few years, several state bar associations and legislatures have sought to adopt opinions that declare real estate closing services to be the practice of law, and thus prevent non-lawyers from competing with lawyers to close real estate transactions. The Agencies have also commented on proposed restrictions on the provision of limited service real estate brokerage.[27]

DOJ Assistant Attorney General for Antitrust R. Hewitt Pate, urging the rejection of proposed legislation that would restrict competition in the real estate market, noted, "Competition in marketplaces across the country has demonstrated that many consumers save money by using only selected services from their real estate brokers. The proposed legislation would deprive . . . citizens of the benefits of competition, such as lower prices and customised service levels, provided by fee-for-service brokers."[28] The Agencies closely monitor, and internally evaluate, the results of their competition advocacy efforts, seeking to learn not only the immediate results of such efforts, but also how they can improve future competition advocacy.

The FTC and others have done qualitative evaluations of the advocacy program, finding that the comments were of value to the decision-making process.[29] FTC Chairman Deborah Platt Majoras recently gave a speech that reviewed a selection of these competition advocacy filings and attempted to quantify the benefits of these actions.[30] She concluded that the competition advocacy program had greatly benefited consumers and was well worth the effort.

In addition, the Agencies file amicus briefs in court cases brought by others. For example, the DOJ and the FTC jointly filed briefs with the U.S. Supreme Court in *Verizon Communications, Inc. v. Trinko* and *F. Hoffman-LaRoche Ltd. v. Empagran S.A.* advocating positions beneficial to consumers and competition that the Supreme Court in large measure adopted.[31] The Agencies consistently evaluate the results of their amicus briefs to increase the effectiveness of their competition advocacy programs.

While the Agencies typically do not conduct formal empirical studies of the results of their competition advocacy, they assess the results of their efforts by determining how the recipients perceive such advocacy and whether they adopt the Agencies' recommendations. Understanding the efficacy of particular competition advocacy filings can help the Agencies both improve their competition advocacy performance and determine whether continued pursuit of such advocacy is in the public interest.

### *2.5 Review of Agency Processes*

In addition to improving the intellectual and empirical basis for their work, the Agencies also undertake ex-post evaluations to improve the effectiveness of their internal procedures.

For example, in October 2002, the DOJ implemented a Merger Review Process Initiative to improve and lower the costs of merger review. The Initiative was designed to identify more quickly critical legal, factual, and economic issues regarding a proposed transaction, to facilitate more efficient and focused investigative discovery, and to provide for an effective process for the evaluation of evidence. Now that two years have passed since the Initiative was announced, the DOJ, relying on internal empirical and qualitative data and the use of its own personnel, has conducted an internal evaluation to see how both the DOJ and the Bar have responded to the Initiative.

On review, it appears that two of the Initiative's objectives are largely being accomplished but that a third has made little progress. First, there have been improvements in the DOJ's use of the initial Hart-Scott-Rodino pre-merger waiting period, with more reliance on voluntary requests for information and dialogue between the DOJ's staff and the merging parties. In the full two fiscal years since the Initiative (2003-2004), there has been a decrease of 32% in the issuance of Second Requests compared to the prior four full fiscal years (1999-2002). Second, almost every merger that presents significant competitive concerns has a scheduling agreement in place to allow for an orderly review of the matter before the parties meet with the DOJ's senior officials. Moreover, because of the increased dialogue between the staff and the merging parties, the meetings with senior officials are focused on critical issues. A review of DOJ records and anecdotal evidence indicates that this is an improvement from prior practice. However, the effort to streamline Second Requests has been less successful. In part, this appears to result from the

merging parties' unwillingness to give the DOJ additional time for post-complaint discovery in return for narrow Second Requests.

Similarly, the FTC has engaged in internal assessment of its merger review in 1998, 2000, 2001, and 2002. In 2002, the Agency posted a Statement on Guidelines for Merger Investigations, which was the outcome of a Best Practices Review initiated earlier that year. The Guidelines were intended as an important interim step in improving Agency practice in this area, and identified seven policies aimed at relieving burden on parties. Several of these policies have proven helpful to parties, such as no longer requiring the sorting of documents by specification number but allowing the documents to be produced in the order and sequence in which they are maintained in the ordinary course of business, and release of hearing transcripts as soon as available. Not all of the policies have been effective, however. For example, although the Guidelines outlined policies for electronic production of documents, these policies are currently under revision due to the rapid changes in technology and will likely be modified to reflect such changes.

Most recently, FTC Chairman Majoras, following up on issues with the Second Request process identified in the 2004 Merger Enforcement Workshop, established a task force of FTC attorneys and economists to recommend ways to further improve the FTC's merger review process. The goal of the task force is to take the many best practices identified in the past and combine them with current thinking on improvements to create practical working solutions to ease the burden on affected parties and increase internal efficiency. Using a "no-stone-unturned" approach, the task force is assessing the process in detail. It is expected that improvements will span a broad range, from potential Hart-Scott-Rodino rulemakings to streamline the pre-merger Notification and Report Form, to finding better methods to identify relevant material and custodians in the second request process. One focus will be on the increasing use of electronic documents, which has resulted in an ever-increasing volume of responsive documents produced to the Agency. Contemplated improvements include increasing the Agency's ability to receive electronic productions, developing instructions and specifications for electronic productions, and further improving the timeliness and efficiency of the review process.

The DOJ has also made efforts over the past few years to streamline its civil non-merger investigations and ensure that the investigations are focused and timely. Indeed, the DOJ periodically reviews the efficiency of its civil non-merger investigations and where appropriate utilises that information to improve efficiency. In addition, the Attorney General's Intellectual Property Task Force Report, issued October 12, 2004,[32] was a retrospective analysis of all aspects of the DOJ's approach to intellectual property enforcement and recommended to the Attorney General proposals to strengthen the Department's role in protecting valuable U.S. intellectual property resources.[33] Three of the 23 specific recommendations for the Attorney General's consideration related to the DOJ's antitrust enforcement practices with respect to intellectual property rights. These three recommendations were based on an internal review of the DOJ's relevant policy statements and enforcement practices, information about the marketplace acquired during the 2002 Intellectual Property Hearings, and the DOJ's experience engaging in working groups or more formal conferences or multinational meetings with foreign antitrust authorities.

Finally, as the sole Agency responsible for criminal enforcement of the federal antitrust laws, the DOJ routinely evaluates and improves upon its criminal enforcement practices. Indeed, Assistant Attorney General Pate has described criminal cartel prosecution as "at the top of [the] hierarchy" of antitrust enforcement.[34]

In 1993, the DOJ evaluated and revised its corporate leniency program to make it more attractive for companies to approach and cooperate with the U.S. Government.[35] Upon evaluation, the DOJ realised the program was not being utilised with any frequency. It revised the program so that the amnesty application process is more transparent and predictable.[36] To ensure the program is working effectively, the DOJ

conducts periodic internal reviews. By tracking the number of applications filed and the amount of criminal fines collected from cases subsequently filed in the resulting investigations, for example, it has learned that the number of amnesty applications and amount of fines have risen dramatically since the program's inception.[37]

The DOJ also evaluates the effectiveness of its criminal enforcement program overall by annually measuring the frequency and amount of criminal fines collected and jail sentences obtained. This enables the DOJ to understand more accurately how its criminal enforcement practices are impacting competition. For example, the data show that the average jail sentences in DOJ cases have doubled in the last five years, and over 100 years of imprisonment have been imposed on antitrust defendants during this period.[38] Criminal fines in fiscal year 2004 totalled over $350 million, which is the second largest amount collected in Antitrust Division history, with six fines totalling $10 million or more.[39]

Although the data show that the DOJ's criminal enforcement program has been a great success, the DOJ utilises its internal review procedures to detect any areas of potential improvement that can be addressed internally or by Congress. For example, just last year, after Assistant Attorney General Pate suggested that criminal enforcement might be improved by increasing criminal penalties and limiting damage recovery from a corporate amnesty applicant,[40] Congress passed a legislative amendment that increased the maximum Sherman Act corporate fine to $100 million, and the maximum individual fine to $1 million, and increased the maximum jail term to 10 years, to bring antitrust criminal penalties in accord with penalties in other white-collar crimes. The legislation also provides enhanced incentives for corporations to self-report to the DOJ by de-trebling an amnesty applicant's damages when the applicant also cooperates with private antitrust plaintiffs who are victims of the conspiracy (a key method of developing cases and cracking cartels).[41]

With the proliferation of antitrust enforcement regimes around the world, the DOJ has also looked for ways to strengthen its ability to detect and prosecute international cartel activity using increased cooperation with foreign antitrust authorities and foreign governments. Since 1999, the Antitrust Division has participated in international enforcement workshops attended by cartel prosecutors from over 35 jurisdictions. These workshops provide a forum for U.S. antitrust prosecutors to reflect on current enforcement strategies and share their "best practices" with foreign enforcers. The ideas exchanged among prosecutors from multiple jurisdictions not only serve as a basis for future working relationships and enhanced cooperation, but also enable the enforcement agencies to evaluate and improve current practices and procedures, and more effectively prosecute international cartels.[42]

## 3. Conclusion

Ex-post evaluations of the Agencies' actions and procedures have been and continue to be a critical part of their antitrust enforcement programs. While extremely valuable, these evaluations are not costless. They require a substantial investment of Agency resources, both in maintaining and compiling the information and in tracking, analysing, and reporting on outcomes. Expending such resources on ex-post evaluations entails the opportunity cost of using the resources for enforcement or other Agency priorities. In addition, no retrospective can forecast with complete accuracy likely future outcomes. At best, they can identify the most important factors in success and failure and suggest more efficacious legal and theoretical approaches and more efficient ways to deploy Agency resources.

## NOTES

1. The data can be found at http://www.usdoj.gov/atr/public/201898.htm or at http://www.ftc.gov/os/2003/12/mdp.pdf.

2. The data can be found at http://www.ftc.gov/os/2004/08/040831horizmergersdata96-03.pdf.

3. Antitrust Division Policy Guide to Merger Remedies (2004), *available at* http://www.usdoj.gov/atr/public/guidelines/205108.htm.

4. The page can be found at http://www.ftc.gov/bc/bestpractices/index.htm.

5. Christopher T. Taylor & Daniel S. Hosken (Working Paper, 2004), *available at* http://www.ftc.gov/be/workpapers/wp270.pdf. This paper finds no price effect from a large horizontal merger in Louisville, Kentucky.

6. Denis A. Breen (Working Paper, 2004), *available at* http://www.ftc.gov/be/workpapers/wp269.pdf. This paper finds that the efficiencies claimed by the merging firms turned out to be real.

7. Michael G. Vita & Seth Sacher (Working Paper, 1999), *in* 49 J. Indus. Econ. 63 (2001), *available at* http://www.ftc.gov/be/workpapers/hospitals.pdf. This paper finds a 15% price increase relative to control hospitals following a merger.

8. Conference materials and papers available at http://www.ftc.gov/ftc/workshops/oilmergers/index.htm.

9. In the *Evanston Northwestern Healthcare Corporation and ENH Medical Group* matter, the Commission vote to authorise an administrative complaint was 4–1, with Commissioner Pamela Jones Harbour dissenting. *See* FTC Press Release, FTC Challenges Hospital Merger That Allegedly Led to Anticompetitive Price Increases (Feb. 10, 2004), *available at* http://www.ftc.gov/opa/2004/02/enh.htm.

10. *See* Statement of the Federal Trade Commission in *Victory Memorial Hospital/Provena St. Therese Medical Center* (July 1, 2004), *available at* http://www.ftc.gov/os/caselist/0110225/040630ftcstatement0110225.htm.

11. *See, e.g.,* Mary W. Sullivan, The Effect of the Big Eight Accounting Firm Mergers on the Market for Audit Services, 45 J.L. & Econ. 375 (2002). The study finds that the mergers reduced the marginal costs of auditing large clients and created no apparent anticompetitive effects.

12. *See* Craig Peters, Evaluating the Performance of Merger Simulation: Evidence from the U.S. Airline Industry (Working Paper No. EAG 03-1, 2003); Gregory J. Werden et al., *The Effects of Mergers on Price and Output: Two Case Studies from the Airline Industry*, 12 Managerial and Decision Economics 341 (1991).

13. Roger Sherman & David Barton, *The Price and Profit Effects of Horizontal Merger: A Case Study*, 33 J. Indus. Econ. 165 (1984).

14. *See, e.g.,* G. Bamberger, D. Carlton, and L. Neumann, *An Empirical Investigation of the Competitive Effects of Domestic Airline Alliances*, 47 J.L. & Econ. 195 (2004); E. H. Kim & V. Singal, *Mergers and Market Power: Evidence from the U.S. Airline Industry*, 83 Am. Econ. Rev. 549 (1993).

15. J. Karikari, S. Brown & M. Nadji, *The Union Pacific/Southern Pacific Railroads Merger: Effect of Trackage Rights on Rates*, 22 J. Reg. Econ. 271 (2002).

16. M. Pesendorfer, *Horizontal Mergers in the Paper Industry*, 34 Rand J. Econ. 495 (2003).

17. Ex -post studies of this nature may be based on publically available data. If such data are not available, an enforcement agency may need specific statutory authority to compel production of the data. *See, e.g.,* Federal Trade Commission Act § 6, 15 U.S.C. § 46 (2000).

18. Report *available at* http://www.ftc.gov/os/2004/08/040813mergersinpetrolberpt.pdf. In 1982, the FTC released its first petroleum merger report, which provided information on the structure of the industry, the level of merger activity and its impact on industry structure during the preceding decade, the reasons for industry mergers, and, importantly, the FTC's methodology for reviewing petroleum mergers. FTC, *Mergers in the Petroleum Industry* (Sept. 1982). In 1989, the FTC released a Bureau of Economics staff report that provided a limited update of the Commission's 1982 Merger Report. Staff Report of the Bureau of Economics, FTC, *Mergers in the U.S. Petroleum Industry 1971-1984: An Updated Comparative Analysis* (May 1989). The 1989 study focused mainly on merger activity between 1982 and 1984.

19. *See* U.S. Dep't of Justice, Antitrust Division Manual at V: A(2)(c) (3d ed. 1998, rev. 2002), *available at* http://www.usdoj.gov/atr/foia/divisionmanual/five.htm (citing *Competition in the Oil Pipeline Industry: A Preliminary Report* (1984); *Competition in the Coal Industry* (1983); *Antitrust Advice on the License Application of the Texas Deepwater Port Authority* (1979) (pursuant to Section 7 of the Deepwater Port Act of 1974); *Outer Continental Shelf Federal/State Beaufort Sea Oil and Gas Lease Sale No. BF* (1980); *[R]eport of the Department of Justice to Congress on the Airline Computer Reservation System Industry* (1985)).

20. More information about the Intellectual Property Hearings can be found on the FTC's website, *available at* http://www.ftc.gov/opp/intellect/index.htm.

21. The report is available at http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

22. The report is available at http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf .

23. *See, e.g.,* Comments of the Staff of the FTC to Representative Greg Aghazarian (Sept. 7, 2004), *available at* http://www.ftc.gov/be/V040027.pdf. What DOJ learned regarding state certificate of need laws, for instance, influenced its thinking in a recent enforcement action concerning two West Virginia hospitals that misused such a law to effectuate a horizontal market allocation. *See* DOJ Press Release, Justice Department Requires Two West Virginia Hospitals to End Illegal Market-Allocation Agreements: West Virginia Certificate-of-Need Authority Does Not Shield Agreements from Federal Antitrust Review (Mar. 21, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/208209.htm.

24. Workshop materials are available at http://www.usdoj.gov/atr/public/workshops/meworkshop.htm or at http://www.ftc.gov/bc/mergerenforce/index.html.

25. For some history of the competition advocacy program and various views of the program see James Cooper, et al., *Theory and Practice of Competition Advocacy at the FTC*, __ ANTITRUST L.J. __ (forthcoming), *available at* http://www.ftc.gov/ftc/history/040910zywicki.pdf.

26. Letter from the Department of Justice and the FTC, to the Kansas Bar Ass'n (Feb. 4, 2005), *available at* http://www.ftc.gov/be/v050002.pdf; Letter from the Department of Justice and the FTC to the Massachusetts Bar Ass'n (Dec. 16, 2004), *available at*

http://www.ftc.gov/os/2004/12/041216massuplltr.pdf; Letter from the Department of Justice and the FTC, to Indiana State Bar Ass'n (Oct. 1, 2003), *available at* http://www.ftc.gov/os/2003/10/uplindiana.htm; Letter from the Department of Justice and the FTC, to the State Bar of Georgia (Mar. 20, 2003), *available at* http://www.ftc.gov/be/v030007.htm; Letter from the Department of Justice and the FTC, to Speaker of the Rhode Island House of Representatives, *et al*. (Mar. 29, 2002); Letter from the Department of Justice and the FTC, to President of the North Carolina State Bar (Jul. 11, 2002); *available at* http://www.ftc.gov/os/2002/07/non-attorneyinvolvementpdf; Letter from the Department of Justice and the FTC, to the North Carolina State Bar (Dec. 14, 2001), *available at* http://www.ftc.gov/be/V020006.htm.

27. *See* Letter from Deborah Platt Majoras, Chairman, Federal Trade Commission and R. Hewitt Pate, Assistant Att'y Gen. to Loretta R. DeHay, Gen. Counsel, Texas Real Estate Comm'n. (Apr. 20, 2005), *at* http://www.usdoj.gov/atr/public/press_releases/2005/208653a.htm.; letter from R. Hewitt Pate, Assistant Att'y Gen. to Oklahoma State Representative Todd Heitt (Apr. 8, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/208486.htm#letter.

28. DOJ Press Release, Justice Department Urges Oklahoma State Legislature to Continue to Allow Choice in Real Estate Services (Apr. 8, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/208486.htm.

29. *See, e.g.,* Arnold C. Celnicker, *The Federal Trade Commission's Competition and Consumer Advocacy Program*, 33 ST. L. UNIV. L. J. 379, 379-405 (1989). The FTC staff updated that survey about a year later with similar results.

30. Deborah Platt Majoras, *A Dose of Our Own Medicine: Applying a Cost/Benefit Analysis to the FTC's Advocacy Program,* Remarks Before the Charles River Associates (Feb. 8, 2005), *available at* http://www.ftc.gov/speeches/majoras/050208currebttopics.pdf.

31. A copy of the *Trinko* and *Empagran* amicus briefs can be found, respectively, at http://www.usdoj.gov/atr/cases/f201000/201048.pdf and http://www.usdoj.gov/atr/cases/f202300/202397.pdf.

32. Report of the Department of Justice's Task Force on Intellectual Property (Oct. 2004), *available at* http://www.usdoj.gov/olp/ip_task_force_report.pdf. [hereinafter "DOJ IP Task Force Report"].

33. In addition, the Task Force consulted with other government agencies and outside sources, including academics, community groups, and intellectual property rights holders. DOJ IP Task Force Report, at i.

34. R. Hewitt Pate, International Anti-Cartel Enforcement, Address Before the 2004 ICN Cartels Workshop (Nov. 21, 2004) at 1, *available at* http://www.usdoj.gov/atr/public/speeches/206428.pdf. *See also* R. Hewitt Pate, Remarks Before Roundtable Conference with Enforcement Officials (April 2, 2004) at 3, *available at* http://www.usdoj.gov/atr/public/speeches/203088.pdf.

35. Corporate Leniency Policy, *available at* http://www.usdoj.gov/atr/public/guidelines/0091.pdf.

36. Under the current program, amnesty for a company (and its officers, directors and employees) is automatic before an investigation has begun if the applicant can meet six objective criteria; there is an alternative type "B" amnesty that applies even after the investigation has begun.

37. Currently the DOJ receives two applications per month, compared to the one application per year under the old regime. The program has also brought in hefty criminal fines – almost $2 billion collected to date. Just recently, the DOJ collected its third-largest fine ever – $185 million from a Korean company engaged in a price-fixing conspiracy in dynamic random access memory (DRAM) technology within U.S. borders. DOJ Press Release, Korean Company – Hynix – Agrees to Plead Guilty to Price Fixing and Agrees to Pay $185 Million Fine for Role in DRAM Conspiracy (Apr. 21, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/208655.htm.

38. *See* Scott D. Hammond, An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program, Remarks Before the American Bar Association Midwinter Leadership Meeting (Jan. 10, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/207226.pdf.

39. *Id.*

40. R. Hewitt Pate, Vigorous and Principled Antitrust Enforcement: Priorities and Goals, Remarks Before the Antitrust Section of the American Bar Association, Annual Meeting 3-7 (Aug. 12, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/201241.pdf.

41. *See generally*, DOJ Press Release, Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on Enactment of Antitrust Criminal Penalty Enforcement and Reform Act of 2004 (June 23, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/204319.pdf.

42. For more information see Hammond, *supra* note 38, at 5-7.

# UNITED KINGDOM

This paper describes a number of different studies recently commissioned in the UK to analyse the effectiveness of competition interventions and enforcement decisions alongside the procedures these involve, as well as the benefits of the UK's competition regime more generally. Previous evaluation work has examined the overall costs and benefits of policy interventions, the consequences of decisions made by the competition authorities and the perceptions and awareness of key stakeholders. Some of this work, and other forthcoming evaluation, is described in more detail below.

## 1. Government policy considerations and assessing the benefits of competition

These targeted and specific evaluation studies carried out on the work of the UK's Office of Fair Trading and the Competition Commission can be framed within the broader context of the UK Government's drive for evidence-based policy making.

The UK Government recognises the importance of developing policy based on detailed evidence and the necessity of conducting full evaluation of a policy's impact after it has come into effect. This is reflected in the Modernising Government White Paper (1999) commitments to ensure that all policies are subject to ex-ante appraisal and ex-post evaluation in an explicit effort to ensure that genuinely evidence-based policies are created.

Evaluation is particularly important as it allows the success of the policy to be assessed, any unintended consequences of the policy to be observed, and provides evidence and information to support any changes necessary to ensure the policy comes closer to meeting its objectives.

The UK competition regime has faced considerable changes in recent years with the introduction of the wide-ranging reforms embodied in the Competition Act 1998 and the Enterprise Act 2002. This is now one of several areas of legislation currently being evaluated.

In evaluating competition policy, the Government's overarching focus is to assess the regime against the Government's high-level target of a "world-class competition regime". This high-level objective is evaluated through a biennial process of peer review against international comparators. Future peer reviews will also provide a useful overview of how the recent legislative changes have affected the performance of the regime. Further work and case studies, described below, aim to evaluate more detailed aspects of the competition regime, namely overall competition policy objectives and the performance of the UK's competition authorities.

The evidence gathered through these evaluation exercises can be used to inform future Government policy-making and the interventions of the UK competition authorities to ensure they are focused, effective and make the best use of resources.

## 2. Case studies

### *2.1 DTI Study: The Benefits of Competition*

In 2004 the Department of Trade and Industry published a study it had commissioned from academics at the University of East Anglia[1] which assessed the benefits resulting from the introduction of competition in a number of sectors where previously competition had been muted[2]. Using a case study approach, the research evaluated policies promoting sectoral liberalisations and deregulation, in addition to competition interventions by the OFT and the Competition Commission. These interventions and policy changes were assessed against the policy objectives of removing market imperfections and thereby reducing prices for consumers.

The report found that the introduction of competition can sometimes lead to substantial reductions in price. For both international telephone calls, which were deregulated in the UK, and European economy airfares, which were affected by the liberalisation of the sector across the European Union, average price was more than halved within a decade of the intervention. Prices of new cars fell by around ten per cent following an investigation by the Competition Commission and in the market for replica football shirts, prices fell on average by 15 per cent following the OFT's intervention on price fixing. In the latter case, the report found that the outcome vindicated the changes to the competition regime brought about by the introduction of the Competition Act 1998. However, in two of the sectors examined (book sellers and retail opticians) the results were not conclusive.

The report also illustrates that introducing competition into a market can promote innovation, for example the new business model introduced by budget airlines. Assessing innovation ex-ante is unpredictable, but the benefits derived highlight that introducing competition can have wider benefits than simply lowering prices. Overall, the study found little conclusive evidence of any harmful side effects as a consequence of the policy intervention and showed, in general, that the competition policies had been a success.

### *2.2 The PwC Economics Report on ex-post Evaluation of Mergers*

A report published in March 2005 was commissioned jointly by the Office of Fair Trading (OFT), the Competition Commission (CC) and the Department of Trade and Industry (DTI) from external consultants PwC Economics. PwC were asked to carry out an ex-post evaluation of mergers occurring between 1990 and 2002, which following consideration by the OFT, had been referred by the Secretary of State for Trade and Industry to the CC and subsequently cleared by the CC.[3]

Aims, methodology and limitations of the evaluation exercise

The PwC study aimed to determine the actual impact on competition of cleared mergers, set against the CC's expectation that the mergers would not lead to a substantial lessening of competition. More specifically the key areas under examination were:

- whether the CC was correct in its beliefs that mergers would not impede competition;
- when mergers were not anti-competitive, whether this was for the reasons indicated by the CC in its rationales for clearance; and
- when there was a lessening of competition, how markets responded.

And more generally the study aimed to elucidate how markets adjust to significant increases in concentration.

The study addressed ten of the 29 mergers that the CC cleared without remedies between 1991 and 2002, out of the 120 mergers referred by the OFT during this period. Since the study was intended to help the OFT and the CC improve their merger analysis, PwC chose a qualitative methodology which aimed to reveal not just whether the markets were more or less competitive post-merger, but also to explore why.

PwC's approach was to conduct in-depth interviews with different market participants (buyers, competitors, new entrants, third parties and the merged parties themselves). Buyers eventually constituted the largest group of interviewees because they were felt to be in the best position to interpret whether markets were working well, and because buyer power was among the reasons most frequently cited by the CC for clearing mergers. The interviews sought to ascertain participants' views on market developments both immediately following the mergers and in the longer run, in terms of key indicators of competition (prices; market structure and definition; technology; and changes in buyers' behaviours), rather than asking them whether they felt the CC got it right. These views were compared to a detailed evaluation of the factors that the CC's own reports cited as being critical in its decision to clear the merger. If, for example, the CC had noted low barriers to entry as an important source of competitive constraint, PwC would assess whether substantial entry had occurred. Thus the evaluation of each case actually contained many separate assessments of how accurately the CC's analysis was borne out by subsequent market developments.

The report recognised several methodological limitations:

- To meet the study's objective, it was felt that only ten of the 29 clearances could be explored in depth. The 29 were initially screened to identify those most likely to throw up challenging questions (in addition, cases that were too old, where there was a conflict of interest or where there was an ongoing competition investigation were excluded from the ten selected clearances). The scope was set this narrowly because it is in principle easier to assess a clearance than a blocked merger. After a clearance, if prices rise (or market power otherwise manifests itself) then that indicates the decision may well have been wrong. If a merger is unnecessary blocked (or substantially remedied), it is harder to prove the decision right or wrong as the circumstances under consideration simply do not arise. It is recognised that this creates a bias in the analysis.

- The interview based approach deals in subjectivities and although PwC always sought to corroborate interviewees' opinions with public information, this was not always possible. The CC has no data-gathering powers outside its inquiries. Public data on prices or market shares is unlikely to correspond to the market definitions used by the CC and may therefore provide an inaccurate or biased picture of developments in the relevant markets. These problems made it necessary to conduct qualitative analyses – possibly informed by data analysis – rather than formal econometric exercises.

- The interview-based approach, which relied on parties' opinions, raises confidentiality issues. Most opinions were included with due concern for anonymity but sometimes the markets were such, for example small enough, that the opinions themselves would have identified those expressing them against their wishes, and so had to be omitted.

- The counterfactual is among the most difficult factors to address ex-post, since by definition it cannot be observed. For merger clearances, a pragmatic choice of the counterfactual is the market situation pre-merger. However, where there are failing firms or innovations are expected in a market, the pre-merger market situation may be a less reliable indicator of likely conditions

following a blocked merger. Consequently, appraising a clearance then becomes more contentious.

Findings of the study

The findings of the PwC study were encouraging. It concluded that:

- **Following** clearance**, there appeared to be effective competition in all cases considered with only one possible exception.** In this one case, competition was hard to gauge because the merger had occurred shortly before the study and the market was in flux following an exogenous event – the failure of a grain harvest in a merger of a glucose syrups producers.

- **In only two of the ten cases did there appear to have been any short-run competition concerns resulting from a merger. In both cases these were resolved through new entry.**

- **The CC is generally good at assessing competitive constraints ex-ante. The study found that the competitive constraints deemed salient by market participants ex-post were for the most part those identified ex-ante by the CC. Notably, the CC's record is very strong in predicting where new entry (or threat thereof) is likely to resolve competition problems.**

- **The CC was, however, less successful in assessing one competitive constraint ex-ante – buyer power. The CC occasionally anticipated a reduction in buyer power, for example in markets served by few suppliers, where none actually** occurred. Conversely, the CC sometimes expected there to be more buyer power than actually resulted post-merger in markets where there were a number of credible suppliers.

This last point has wider significance. The PwC study concluded that the CC had difficulties with buyer power because it is actually a more complex issue than is often reflected in competition assessments. The PwC consultants stated that many competition authorities focus narrowly on the likely future availability of credible alternative sources of supply to predict buyer power, but the literature on bargaining theory suggests that buyer power should depend more broadly on the relative severity and credibility of threats buyers and sellers can make in a negotiating 'game'. Whilst likely future availability of supply is relevant, the power of threats is influenced by other factors including: the information buyers have about sellers' costs; the effort and patience buyers commit to negotiations; and the incentives buyers are able to impose on sellers, through contracts for example.

The PwC report has been published and is available on the OFT, and CC's websites.[4] The report was presented internally to OFT, CC and DTI staff, as well as to a public seminar, to which lawyers, consulting economists, academics and other members of the competition community were invited.

## 3. Evaluation of undertakings and orders – The OFT's role in reviewing past remedies

The OFT has an advisory role in the review of orders and undertakings. Remedies can take two forms: (1) undertakings signed by both parties after discussions with the OFT or the CC; (2) orders, a statutory instrument which are imposed. Both have the same legal basis once they are in place, in that they are enforceable through the civil courts, but historically orders have taken longer to install due to procedural requirements – they were laid before Parliament under the previous competition law framework. Orders will more often be relevant when a number of firms in large industry need to be controlled, whereas undertakings may be a more pragmatic option where it is the behaviour of only a few firms which requires modifying.

Under the Enterprise Act 2002, the OFT advises the CC on whether a remedy should be varied, revoked or superseded. Under the Fair Trading Act regime, the OFT had advised the Secretary of State for Trade and Industry.[5] The CC can vary undertakings unilaterally, but orders can only be altered or revoked on the advice of the OFT. Thus, the OFT is the lead agency within the UK regime for appraising past enforcement decisions.

The OFT has conducted reviews of approximately half a dozen remedies during the last two years, from among the thirty or so market-based remedies still outstanding. Many more merger-based remedies have been made but since these are usually quite specific and time-dependent (for example where two merging supermarkets are required to divest a number of stores), they fall away naturally and require little evaluation resource.

Reviews of past remedies will normally lead to some form of action given that the dynamic nature of markets tends to change the relevance of any given remedy. Typical scenarios include:

- A remedy is revoked because subsequent legislation has enhanced powers over the practices the remedy was designed to correct. For example, in 2004 the OFT recommended to the Secretary of State for Trade and Industry that a 1982 Restriction on Agreements Order placed on car manufacturers be lifted. The Order had made it unlawful for manufacturers or importers to impose agreements on retailing franchises which contained exclusive buying provisions relating to replacement car parts. However, on review the Order was found to have been superseded by EC legislation and was thus no longer required.

- A remedy is revoked because it has ceased to be relevant to a market which has evolved, and for example has become more competitive, since the remedy was applied. In 2002, the OFT recommended that undertakings made in 1982 to the Secretary of State by suppliers of roadside advertising services be lifted following consolidation in the industry. The undertakings had barred joint selling agreements between suppliers which were concluded when the industry was more fragmented, ostensibly to provide better coverage for customers undertaking national advertising campaigns but with the effect of hampering price competition. However, by 2002, there were only three main suppliers of roadside hoardings each offering national coverage and competing aggressively.

- A remedy is modified when it is found to be operating inefficiently. For example, in 2003 the OFT recommended that undertakings made in 1994 to the Secretary of State for Trade and Industry by wholesale distributors of newspapers be rendered more favourable to newsagents. The undertakings had limited the monopoly power of wholesalers in distribution by allowing retailers to sell newspapers amongst themselves under certain conditions. This was a practice wholesalers had previously prevented. Conditions were applied as it was deemed appropriate for wholesalers to retain some monopoly power since economies of scale rendered newspaper wholesaling a natural monopoly where intense competition can be inefficient and lead to higher costs and prices. However, the OFT review of the remedy found that the conditions in the undertaking where affording wholesalers too much pricing power and advised that they be rescinded.

## 4. Internal Studies undertaken by the Competition Commission

Following the developments brought about by the Enterprise Act 2002, the CC made a number of changes to its procedures. The CC has since initiated a number of studies to consider specific aspects of its work (procedural and analytical) may of which are being carried out internally but a study is currently in progress using consultants (see para V) below.

These various studies (alongside the PwC) may bring a number of benefits. By becoming aware of the evolution of markets following decisions, decision-making can be improved in various ways:

- Better understanding of the likely meaning of key indicators now for market developments in the future;
- Better understanding of the robustness of certain analytical techniques;
- The effectiveness of different forms of remedy and issues affecting the effectiveness of different types of remedies

This improved understanding can have an immediate and direct effect when the CC is assessing mergers or other types of cases.

The studies may also influence the CC's processes and procedures though will not necessarily result in changes to the provisions to be found in legislation of the CC's rules. For example, the review of analytical procedures used by the CC's economists (see para V below) is intended to lead directly to improved internal working methods.

A factor which is relevant when deciding whether to conduct the study internally or to use outside experts is whether the use of outside experts will bring a wider perspective than might be possible internally. Views are mixed as to whether market participants are more forthcoming when interviews are conducted by consultants rather than CC staff. PWC indicated that they thought the participants would have been more forthcoming if the interview was conducted in-house though experience in the CC internal studies has been mixed. However, one of the reasons for conducting certain of the studies in-house was because of the belief that it would provide interviewees with greater confidence over the handling of their information.

The CC will be considering the suitability of publishing material relating to a number of the specific studies when they are completed. While the CC will be constrained by the need to keep certain information confidential, it is hoped that the CC will be able to publish key point and principles drawn out of the studies.

### *4.1 Competition Commission internal ex-post evaluation of a ten CC inquiry decisions (in progress)*

Following the publication of the PwC report in March 2005 the CC commissioned an internally-staffed follow-up to the PwC work, broadening the analysis to blocked mergers and other types of CC inquiry: market inquiries and regulatory appeals. The approach essentially follows the PwC methodology of interviewing market participants, although in some cases the work will be supplemented with quantitative analysis. Another change is that in two cases it seems likely that published data and analysis can provide the necessary information, to be confirmed through interviews. At this stage, it appears that the interviews are again producing a very clear story of "what happened next" and in most cases the CC is confident that it will be able to assess the value of CC decisions, in terms of customer benefits. The CC recognises a potential bias (similar to the PWC report), in that the benefits of intervention by competition authorities are easier to measure than the benefits of non-intervention.

### *4.2 Competition Commission internal ex-post evaluation of four CC studies to remedy adverse effects of mergers (in progress)*

This study by the CC aims to discover whether merger remedies implemented in recent past cases have worked as expected. This is a relatively small study of four merger cases (all of which were assessed under the Fair Trading Act 1973). The study aims to cover (1) why a particular remedy was chosen, and the factors influencing the choice and design of the remedy; and (2) what happened after the report, including how it was implemented and how it affected different participants in the market.[6] The study has involved telephone interviews, following background research, with the interviewee receiving a topic guide prior to the interview. This method has proved particularly useful to the study. Approximately eight to ten people were interviewed in respect of each of the four merger cases, including personnel at the merged firm and the firm's competitors.

### *4.3 Competition Commission on-going evaluation of cases*

The CC carries out continuous evaluation of its approach in a number of formats. This includes case-management review both during and on completion where the focus is upon identifying new or novel issues and potential risks (e.g. unavailability of relevant persons) and the efficient allocation of resources. Particularly since the CC is operating under a fairly new regime these reviews assist with the development of good procedures and practice. The CC also have regular roundtable meetings involving Commission members and staff (representing the various disciplines such as economics, accountancy and law) at which specific issues (such as co-ordinated effects, use of market definition) are discussed.

## 5. Competition Commission Review of Analytical Procedures (in progress)

As mentioned, a number of aspects of the CC's procedures are to be studies. Economic consultants (NERA) are currently being used in the first of what evaluating the analytical procedures of Competition Commission economists in the first two weeks of a Competition Commission merger inquiry. This qualitative study is primarily desk-based but the consultants have also interviewed CC staff (economists and others). The aim is to assess the effectiveness with which the CC begins the analysis of an inquiry, especially the production of information-gathering instruments and the assessment of the theoretical framework for the analysis, as these are time-critical.

1. During this first two weeks, CC staff economists need to rapidly get to grips with the key aspects of the industry within which the merger reference occurs, in order to plan the economic assessment of the merger and to send out information requests to both the main parties and third parties.

2. The consultants are assessing a number of inquiries, by considering the information requests produced with and without the benefit of hindsight, in particular, assessing the relevance of the questions asked in the information request to the subsequent analysis and final report. Through hindsight, their experience of work in other jurisdictions and the perspective gained by looking across inquiries, the consultants should be able to identify some best practice processes.

3. This review of analytical procedures is intended to lead directly to improved internal working methods within the CC. In some cases, it might be appropriate to codify these procedures in documents and reflect them in standard resource allocation budgets. It is envisaged that the principal benefit as with the PwC report and the internal studies will arise through spreading better practice by those planning and managing merger inquiries within the CC.

## 6. DTI Competition Commission Stakeholder Study (concluding shortly)

The Department of Trade and Industry commissioned a stakeholder survey of the Competition Commission to ascertain stakeholders' perceptions of the CC's performance and the importance to them of certain elements of the CC's work.

The survey involved telephone interviews conducted with CC stakeholders, which included respondents from businesses who had given evidence in recently completed inquiries, their advisors, referring bodies (including the OFT), trade associations and consumer groups with a view to gathering data about perceptions of the CC and the importance of certain elements of their work.

It is intended to provide a range of data of key indicators that will feed into the CC's performance indicators. It will be of use to the CC and the DTI to monitor and review progress in a number of key areas.

The study is expected to be published soon.

It is anticipated that similar studies will be commissioned in future years.

## 7. The OFT's Evaluation Programme

Following the Government's Comprehensive Spending Review[7] in July 1998, the OFT was required to establish by March 2002 separate consumer savings targets for its activities against anticompetitive mergers and non-merger interventions. Designing appropriate objectives - and quantitative indicators of whether they have been met - has been challenging.[8]

Going forward, the OFT also needs to evaluate the impact of market studies under the Enterprise Act as well as formal competition law interventions. As well as considering if the OFT is promoting competition by ambiguous price metrics, a holistic approach will need to consider more pragmatic, qualitative benchmarks to judge how problem behaviours, market structures, innovation and the like are evolving. Surveys can ascertain whether the OFT is efficaciously championing competition, whether market participants are mindful of their changing rights and responsibilities under remedial actions, and if Government is responding to our policy advice. Indeed, the UK has previously commissioned external reports to investigate these issues.

The OFT is now creating a small full-time team to focus on the multi-faceted process of evaluating its work. This will involve developing appropriate methodologies, but also looking more broadly at what the OFT achieves than can be identified from individual cases alone (for example, the benefits from deterrence effects). Another key element of the role will be considering how the results from evaluation can help the office organise, and prioritise its resources, more effectively.

## 8. Future Evaluation Work

Both the OFT and the CC carry out on-going evaluation work with regards to the development and refinement of policy and procedures as well as regular internal meetings, for example case-management reviews, for the purposes of resource allocation and prioritisation.

The OFT is also looking to broaden the range and depth of the evaluation work it undertakes. Research aimed at estimating the benefits arising from competition policy interventions can be recast as the cost of not intervening in markets when it is appropriate to do so. This work is, in many ways, quite well developed. What is currently less well developed, however, is the cost from condemning welfare increasing practices (i.e., inappropriate intervention).

The OFT is intending to undertake research into improving its understanding of such costs in the context of Article 82 (abuse of dominance) cases. The research will be geared towards improving the OFT's understanding of the nature and magnitude of these costs, and how they might vary according to the type of abuse, industry or competition. It is envisaged that this research will help shape the design of economic-based rules and approaches for Article 82 abuses.

## NOTES

1. Davies, S., Coles, H., Olczak, M., Pike, C. and Wilson, C (2004) 'DTI Economics Paper No.9: The benefits of competition: some illustrative UK case studies'

2. The particular sectors chosen were: Retail Opticians, International Telephone Calls, Net Book Agreement, Passenger Flights in Europe, New Cars, Replica Football Kits

3. The UK competition authorities have a bipartite structure under which the OFT, a body with broad responsibilities for market investigations and enforcement, has discretion to refer merger cases (among others) to the CC for fuller consideration. The legislative framework governing the assessment of mergers in the UK is presently the Enterprise Act 2002 but at the time of the mergers considered in the PwC study it was the Fair Trading Act 1973. Under the Enterprise Act 2002, the role of the Secretary of State for Trade and Industry is much more limited. The advent of the Enterprise Act also changed the formal test for merger referral and clearance, from a broad public interest basis to a test of a substantial lessening of competition. However, in recent years even under the FTA the test was applied largely on a competition basis.

4. http://www.oft.gov.uk/NR/rdonlyres/4E8F41F9-5D96-4CD4-8965-8DDA26A64DA8/0/oft767.pdf
http://www.competition-commission.org.uk/our_role/evaluation/ex_post_evaluation_of_mergers.pdf

5. Under the current UK competition framework, the OFT enforces the Competition Act 1998 (CA98), prohibiting any behaviour (for example, anticompetitive agreements or concerted practices) by market participants which prevent, restrict or distort competition or abuse a dominant position. More recently, the Enterprise Act 2002 (EA02) allows the Competition Commission to take referrals from the OFT for market-wide investigations when competition appears not to be working well, but the problems do not fall under the CA98 provisions, e.g. problems due to uncoordinated parallel conduct by firms or structural features of an industry. The CC also takes referrals from the OFT on proposed mergers if there is a possibility that these could hinder competition. While the EA02 has largely replaced the Fair Trading Act 1973 (FTA73), some remedies remain from the old framework. As mentioned above the EA02 replaced the broad public interest basis for proposed mergers to a test of substantial lessening of competition. However, given that the EA02 framework only came into force in 2004, at present the OFT mainly reviews remedies made under the old framework, to which it needs to be sensitive.

6. A point worth emphasising is that previously under the Fair Trading Act (and now under the Enterprise Act 2002), the remedies were implemented after the CC had completed its report (and either delivered it to the Secretary of State under the FTA or published it under the Enterprise Act).

7. And subsequent policy documents, notably: HM Treasury (1999), *The Government's Measures of Success: Output and Performance Analyses*.

8. Academics commissioned by the OFT to investigate the development of appropriate targets highlighted the assessment of the counterfactual case (for example, assessing what price rises were prevented by blocking a merger or negotiating a voluntary code of conduct) as the greatest challenge in evaluating market interventions. ( Prof Stephen Davies & Adrian Majumdar (2002), *The development of targets for consumer savings arising from competition policy,* OFT Economic Discussion Paper 4). A meaningful counterfactual would also need to consider, absent intervention, how productivity, costs, synergies, innovation, market structure and other markets might have developed. This study was successful in terms of synthesising economic theories on industrial organisation in order to develop ways of modelling counterfactuals.

However as a first stage, the study could only deliver rule of thumb estimate of consumer benefits from competition policy intervention.

# EUROPEAN COMMISSION

## 1. What steps has the competition authority taken to conduct or participate in evaluation of:

### *1.1 The effects of one or more past law enforcement initiatives, cases, advocacy projects, reports, or other applications of its authority?*

#### *1.1.1 Evaluations of antitrust legislative instruments and policy programmes*

In the past few years, in the field of antitrust, the European Commission has carried out several evaluations of legislative instruments and policy programmes such as block exemption regulations (BER) and guidelines. In this context, the evaluations of existing rules are always intended as a preparatory step to the adoption of new regulations or policy communications.

Examples of such evaluations include[1]

- review of the Commission policy on vertical restraints prior to the adoption of a new Commission regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (Regulation 2790/1999; "Block Exemption Regulation Vertical Agreements"), as well as of the corresponding guidelines on vertical restraints;

- review of the Commission policy on horizontal co-operation agreements prior to the adoption of the new regulations on the application of Article 81(3) of the Treaty respectively to categories of specialisation agreements and R&D agreements (Regulations 2658/2000 and 2659/2000), as well as of the corresponding guidelines on applicability of Article 81 to horizontal co-operation agreements;

- review of the second car block exemption regulation (Regulation 1475/95) prior to the adoption of a new Commission regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (Regulation 1400/2002; "Car Block Exemption Regulation");

- review of the technology transfer agreements block exemption regulation (Regulation 240/96; TTBE) prior to the adoption of a new Commission regulation on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (Regulation 772/2004) and of the corresponding guidelines on the application of Article 81 of the Treaty to technology transfer agreements;

- review of the antitrust implementing regulation (Council Regulation 17/62) which lead to the adoption of Council Regulation 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty and of several related guidelines ("the antitrust modernisation exercise");

- review of the of Commission Regulation 1617/93 on the application of Article 81(3) to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports.[2];

- review of the Council Regulation 4056/86 applying Articles 81 and 82 to maritime transport ("maritime BER")[3]. The Commission is planning a legislative proposal for the amendment of Regulation 4056/86;

- review of the Commission's past practice as to the application of remedies in the antitrust field[4].

The block exemption regulations (BER) have *in certain cases contained a self imposed obligation for the European Commission to prepare an evaluation report* on the operation of the regulation either before its expiry or in mid-term (a couple of years after its entry into force). This was the case for instance with the review of the car block exemption regulation and the technology transfer agreements block exemption regulation.

In other occasions the review has been prompted by the fact that the BER was about to expire. In these situations the Commission has taken the opportunity to update the policy orientation of the BER on the basis of the experience gained with the application of the former one. *No specific evaluation report* was drafted, but the European Commission Directorate General for Competition (DG Competition) launched public fact finding exercises (with questionnaires, discussion and/or consultation papers identifying specific questions and elements which may be of particular interest in the evaluation) and hearings, which allowed it to gather factual information and allowed interested parties to present their concerns already at the beginning of the review process. Following this fact finding exercise, the Commission consulted interested parties on its policy conclusions by means of so called Green Papers or White Papers outlining proposed modifications of the BERs.

The major review of the antitrust enforcement system, on the other hand, resulted from the growing recognition that the highly centralised authorisation system, based on prior notifications and the Commission's exemption monopoly, was no longer appropriate in the enlarged Community.[5] Effective supervision of competition required more decentralised implementation of the Community competition law.

### *1.1.2 Merger Remedies Study*

In the merger control area, over the past three years, the Commission has been conducting a broad-based empirical study of the effectiveness of its remedies policy in merger control. This Merger Remedies Study will catalogue in detail the Commission's experiences with merger remedies, based on a sample of 40 cases in which more than 100 distinct remedies were imposed in the years 1996 to 2000. The findings will concern both procedural and substantive aspects of the Commission's merger remedies policy.

### *1.1.3 Ex-post evaluation of effectiveness of Commission merger decisions*

In the coming years, it is our intention to regularly make ex-post evaluations of effectiveness of selected individual Commission decisions in merger control cases. Although the Commission has made occasional ex-post assessments of market developments several years following clearance decisions, it is intended that this should be done more systematically in future. The purpose of these studies will be to gain further insight into the impact of mergers on competition and to evaluate the effectiveness of the Commission's merger control enforcement policy in this regard. The work will consist in assessing the impact of individual Commission decisions to prohibit, approve or approve with conditions proposed mergers notified to it under the EC Merger Regulation. The studies will be focused on the competition assessment made in these decisions, and selection will be made so as to ensure that the impact of various aspects of the Commission's analytical approach is examined.

Although the ambit of the work to be carried out has yet to be precisely defined, it is expected that it will involve a case study assessment of the impact of Commission decisions to approve, prohibit, or approve with conditions mergers notified. Of the cases approved, those which appeared in the earlier stages of the investigation to raise particular competition concerns (concerns that justified the opening of an in-depth enquiry), are particularly likely candidates. It is in the context of such "border-line" cases that the Commission expects to obtain the most useful insights into the main factors that played a role in the impact of the merger in question on competition. It is possible that also prohibition cases will be selected for ex post analysis, although it will be particularly complex to establish the appropriate "counterfactual" for such a case (see also below).

The Commission will select appropriate candidates for ex post evaluation among the mergers notified to it in the previous 3-6 years. This is to allow a sufficient period over which to evaluate the impact of the merger. The assessment will be carried out by the Commission services (DG Competition) with the assistance of an external consultant.

The ex-post analysis will not only include an assessment of actual market developments in that period, but also of likely market developments in the presence of various alternative hypotheses (for example: the approval of a merger prohibited by the Commission; the prohibition of a merger approved by the Commission; the approval of a merger subject to various hypothetical conditions; etc.). The market analysis (some of which may be conducted by the external consultant) is likely to be a complex one, involving a study of both supply and demand-side evolutions during the relevant period. This is likely in particular to involve an assessment of price evolutions, technological developments, shifts in capacity and investment levels, competitor reactions, customer reactions and any other developments relevant to a proper understanding of the dynamics of the markets in question.

The ex post evaluation will most likely be undertaken both on the basis of interviews with the market players concerned (merging parties, competitors and customers) and on the basis of empirical analysis of market data.

*Commission antitrust decisions*

Up to now no ex post evaluation has been carried out on individual Commission decisions in the antitrust field, but it is not excluded that such evaluations will be done in the future.

### *1.2 The effectiveness of existing forms of internal organisation and procedure, such as the mechanisms for establishing priorities for the allocation of resources?*

European Commission Directorate General for Competition does at the top management level constant monitoring on effectiveness of its internal organisation and procedures, including the mechanism for establishing priorities for the allocation of resources.

The specific Commission and Council Regulations, together with the EC Courts' case-law, in the competition policy area and the general Commission internal rules on procedures set the framework for our procedures in the competition policy filed. Within this framework DG Competition constantly reflects on improvements of the procedures and in particular on the working methods that we employ.

This reflection is not necessarily structured as formal "ex post evaluation" but rather it concerns experience that grows in the organisation and internal discussions on the basis of such experiences. As a part of such reflection, DG Competition may for instance establish in-house working groups to examine specific organisational and procedural/working method issues. The main emphasis on such groups' work is in development of proposals for improvements, but an analysis of the experiences of past practices is usually the starting point of that work. With their analysis and proposals, the working groups contribute to

the internal reflections that include discussions at all levels of the organisation and, depending on the subject matter, also with the Member of the Commission responsible for the Competition policy.

In the past few years working groups have been established for instance concerning: reorganisation of DG Competition; priority setting after modernisation of the antitrust implementing rules; design of a workforce scheduling system and streamlining of DG Competition working methods in antitrust and merger field following the recent reorganisation.

**2. How has the competition authority conducted or participated in the evaluation?**

***2.1 By using its own resources and personnel?***

***2.2 By retaining outside experts to conduct the evaluation?***

***2.3 By cooperation with external organisations (e.g., a university or think tank) or with outside experts who perform evaluation with their own funds?***

*2.3.1 Evaluation of antitrust legislative instruments and policy programmes:*

The fact-finding and the evaluation has mostly been carried out by internal staff of DG Competition. We have also occasionally resorted to outside experts as one part of the evaluation exercise. In such cases, the consultancy work has been used to complement the fact-finding and/or analysis conducted by our own personnel. Here are two examples on how we have combined the use of own resources and the use studies done by outside experts:

In the case of the review of **the second car block exemption regulation**, only own resources were used for the gathering of the information, preparing the evaluation and the writing of the report. No outside expert was involved in the preparation of the report. But the Commission ordered a number of studies from experts and universities and studies were used by the Commission for the report. Two consultants were also asked to further analyse certain findings of the report.

In the review of **the maritime BER** we have relied both on own resources and personnel and commissioned two studies. The review process started in March 2003, with the publication of a DG Competition Consultation Paper setting out the main questions to be addressed. Member States, foreign Governments, carriers and transport users were invited to submit comments. In the first study a team of economists was commissioned to assist in processing the replies to the Consultation Paper. The replies to the Consultation Paper and the final report have been posted on the Commission's web-site. The second study is an economic impact assessment study, which is in the process of being awarded through a public tender.

The April 2002 report of the OECD Secretariat on Liner Shipping provided also a very important contribution to the maritime review process, because it cast doubt on the core justifications for the EU liner conference block exemption. On the basis of the report, the OECD had invited member countries to 1) re-examine exemptions for common pricing and rate discussions, with the goal of removing them, except where specifically and exceptionally justified; 2) have the discretion to retain exemptions for other operational arrangements so long as they did not result in excessive market power.

*2.3.2 Merger Remedies Study:*

In conducting the Merger Remedies Study, we have relied entirely upon our own internal resources and personnel.

However, the Commission carried out a parallel quantitative ex post evaluation study of a smaller number of remedies in two economic sectors based on simple economic evaluation models, relying on the assistance of external consultants. These findings will be published at the same time as the Commission's Merger Remedies Study.

*2.3.3 Ex-post evaluation of effectiveness of Commission merger decisions:*

As is explained in response to Q. 1(a) above, it is intended that this should involve the use of our own internal resources as well as those of external consultants.

**3. What was the methodology of the evaluation exercise?**

***3.1 Did the exercise rely on empirical data, qualitative data or both? How was the data collected?***

*3.1.1 Evaluation of antitrust legislative instruments and policy programmes:*

The Commission has relied on variable types of data and used varying means of data collection, depending on data availability and on the question at hand.

First, the Commission has consistently collected empirical data in the review processes. Depending on the nature of the question at hand, empirical data we have gathered has been either qualitative or quantitative or both. For instance, in the case of sector specific evaluation exercises, such as reviews of car, airline or maritime block exemptions, more quantitative data has been available than in the case of policy review exercises that cut across sectors. The common feature on all this data collection has been the aim behind it: to increase our understanding of market realities (including recent market developments and emerging new features of business activities) and to identify the possible drawbacks of the existing rules.

Empirical information has been gathered from the stakeholders (e.g. producers, distributors, consumer organisations and worker representatives) and to some extent also from publicly available sources, depending on availability of public information. The survey methods used when gathering information from stakeholders have been mainly questionnaires and interviews. We have either sent the questionnaires directly to interested parties that we have identified ourselves or we have launched the questionnaires at the Commission web-site (or used the combination of both ways).

In each review process, relevant empirical information has also been provided by our experience with the enforcement of the rules and as a result of complaints we have received from customers or consumers concerning the types of business practices that we were reviewing.

Second, in addition to empirical data collection, a major part of the exercise has consisted of a review and analysis of relevant economic and legal theories. We have also carried out comparisons of policies and practices in different jurisdictions. The competition authorities of the EU Member States and of some third countries have also provided information on their practices.

To illustrate the above, we give herewith some concrete examples on the fact finding exercises:

- *Vertical restraints review*: At the first stage of the evaluation DG Competition engaged in several bilateral interviews with industry players located in different Member States. Several dozen manufacturers, retailers (also wholesale, import-export) and associations, both at European level and national level, were contacted. The questions focused on the functioning of the existing BER and on the trend of distribution practices. The majority of the interviews concerned the area of consumer goods, both food and non-food. In addition, a number of interviews were held with research institutions or individuals with specific knowledge about marketing or distribution techniques in the various industry sectors. Further feedback was received following the publication of a Green Paper which both requested feedback on the existing regulation and laid down policy options for the new the BER.

- *Review of the policy in the field technology transfer agreements*: Interested parties were invited to fill in a questionnaire. The questionnaire was sent to industry and consumer associations, certain research-intensive companies, specialised organisations and law firms[6]. It was designed to acquire factual information covering both the main aspects and the emerging new features of technology licensing activities as well as the perceptions of third parties of the operation of the BER. In addition, the experience acquired by the Commission in the practical implementation of the BER was examined. The competition authorities of the Member States were also asked to provide information on their practice in the area of IPR.

- *Review of the car BER*: The Commission sent eight different questionnaires to interested parties: car manufacturers, associations of consumers, dealers, independent repairers, independent resellers and intermediaries, independent importers, spare part producers and to Internet operators. The questionnaires were intended to provide three types of information, namely on: recent developments in the motor vehicle distribution trade; whether the objectives set out in the Regulation had been achieved; and whether technical developments do not call into question the very basis of a specific regulation for the motor vehicle distribution trade (in this context the Commission wished to check whether the "natural" link between the distribution of new vehicles and the provision of after-sales service still existed). In total 117 questionnaires were sent, to which 101 replies were received. The report was based on these replies, some recent studies on the motor vehicle industry and on motor vehicle distribution, the Commission's biannual car price report and also the Commission's own experience in dealing with competition issues within the motor vehicle industry.

- Review of the maritime BER: As mentioned above, the review started off with the publication of a DG Competition Consultation Paper setting out the main questions to be addressed. After making a preliminary identification of issues that appeared to require further examination, the paper presented a non-exhaustive list of questions to which Member States, foreign Governments, carriers and transport users were invited to reply and on which they were asked to comment. The questions asked both qualitative and quantitative information. The paper was published on the Commission web-site and, in total, 36 submissions were received. The Commission used outside consultants to assist it in processing the replies: a team of outside economists was commissioned for this work. As none of the submissions received contained sufficient data for economic analysis envisaged by the consultants on the impact of conferences on level and stability of freight rates, they gathered further economic and statistical data. The outcome of this first fact finding and consultation phase is set out in a DG Competition Discussion Paper which is also available on the Commission web-site. Also the consultants' report and the submissions are available on the same site. The economic impact assessment study, which is in the process of being launched, will analyse the competitive effects and the economic impact of an information exchange system that the ELAA (European Liner Affairs

Association) has proposed. In order to carry out the assessment, the contractor is expected to analyse economic and/or statistical data of the various elements of the information exchange.

*3.1.2 Merger Remedies Study*

The Study considered the implementation experience of the Commission and carried out 150 interviews with merging parties, with purchasers and with trustees directly involved in the implementation of the remedies at the time.

*3.1.3 Ex-post evaluation of effectiveness of Commission merger decisions*

Although this exercise will certainly involve reliance on empirical data, the precise methodology has yet to be defined.

***3.2 Did the competition authority convene or participate in conferences or workshops to solicit the views of external observers about the effects of its activities?***

The Commission has always been open to participating in such fora, and is always open to engaging in constructive discussion on the effectiveness of its enforcement policy in the field of antirust and merger control.

*3.2.1 Evaluation of antitrust legislative instruments and policy programmes*

The Commission has regularly participated in conferences and workshops organised by external bodies to solicit views on ongoing review exercises regarding legislative instruments and policy programmes. This has usually taken place following publication of a Commission evaluation report, discussion paper or Green/White Paper.

The Commission may also hold public hearings whereby industry is asked to present orally its views and concerns to the Commission and the Member States following publication of a Commission evaluation report, discussion paper or Green/White Paper.

As mentioned above, already since the fact finding phase, we hold regularly contacts with experts, industry representatives and associations to hear their views and to get factual information.

*Merger Remedies Study*

This is planned after finalisation of the Study.

*Ex-post evaluation of effectiveness of Commission merger decisions*

This is likely to be done following evaluations of decisions.

***3.3 What methodological difficulties has the competition authority encountered in performing evaluation, and how has it tried to solve them?***

*3.3.1 Evaluation of antitrust legislative instruments and policy programmes:*

A natural complication in our evaluation exercises is that we are covering a vast area, which is currently consisting of 25 Member States, and we need to activate respondents from across this area. On certain sectors, there are European level representations, but we need to reach also those who do not have such organisations.

Therefore, the Commission aims at getting in its review exercises a maximum balance between various groups and parties, in order to get the broadest range of existing views. Our experience is that interviews and questionnaires give a wide enough representation of views and information existing in the market for the purposes of revision proposals. Particularly in the interviews, we have tried to have a wide geographic and/or sector coverage for the samples we have made.

With the publication of the evaluation reports and invitations to the interested parties to comment in writing and in public hearings, we have sought to get further feed-back from the interested parties. Sometimes we have explicitly asked to comment on the results of our fact finding, particularly if the interested parties felt that the geographic or sector sample was not representative. We have also commissioned external economic and statistical studies to complement our own fact finding.

*3.3.2 Merger Remedies Study*

The principal methodological difficulties encountered can be summarised as follows

1. Comparison of actual market developments with counter-factual scenarios of what would have happened without the remedy or without the merger. Our response to this challenge: construction of the most likely scenarios with the help of the interviewed experts.

2. Objectivity of replies in interviews. Our response to this challenge: comparisons of replies of different interviewees concerning the same remedy and verification/double-checking with data from other sources.

3. Availability of quantitative data. Our response to this challenge: in relation to a number of remedies, additional fact-finding efforts were made, in particular via questionnaires sent out to companies to collect quantitative data.

*3.3.3 Ex-post evaluation of effectiveness of Commission merger decisions*

Not applicable

**4. What were the results of the evaluation?**

*4.1 Evaluation of antitrust legislative instruments and policy programmes*

See the response to Q. 1(a) above.

*4.2 Merger Remedies Study*

Results will be published in 2005.

*4.3 Ex-post evaluation of effectiveness of Commission merger decisions*

Question is not applicable.

*4.4 Development of internal organisation and procedures*

See the response to Q. 1(a) above.

## 5. How were the results of the evaluation exercise distributed?

### *5.1 Only to officials within the competition authority?*

### *5.2 Only to public officials inside and outside the competition authority?*

### *5.3 To public audiences, with appropriate editing to prevent the disclosure of non-public information?*

*5.3.1 Evaluation of antitrust legislative instruments and policy programmes*

All above referred Commission papers (evaluation reports, discussion papers or Green/White Papers) are normally made publicly available on the Commission's web-site. When publishing these papers, we take care that no company specific data is disclosed.

With the agreement of the respondents, all submissions of interested parties in response to the Commission policy papers are published on the Commission's web-site for transparency purposes. In some instances, respondents asked that only a non-confidential version of their submissions to be published. Also most of the studies we commission are published.

*5.3.2 Merger Remedies Study*

The study has not yet been finalised. However, it is intended to publish the results of the Study in a non-confidential report and to invite comments from the legal and business communities, with a view to updating the Commission's Remedies Notice (guidelines).

*5.3.3 Ex-post evaluation of effectiveness of Commission merger decisions*

Not yet applicable.

*5.3.4 Development of internal organisation and procedures*

Evaluation reports in this area are only for internal distribution and use.

## 6. What impact did the evaluation have on the future activities of the competition authority?

### *6.1 Did the results of the evaluation motivate adjustments in the authority's allocation of resources, organisation or procedures?*

The antitrust modernisation exercise and the internal reflections on our organisation and procedures (see Q. 1(b)) have prompted a number of internal reforms both ahead of and following introduction of the new system in May 2004.

To give a few key examples: first, we reorganised the DG Competition organisation and based the new organisation on integration of both merger control and antitrust enforcement in directorates responsible for specific sectors of the economy. The change concerning antitrust and merger functions started in summer 2003 and was completed in May 2004. The aim of the re-organisation was to enhance sector specific knowledge. The new organisation allows us to pool the market knowledge that flows from both types of enforcement - antitrust and merger - in one and the same structure where cross-fertilisation is much simpler. It also facilitates the spread of best practices developed over the years throughout the whole Directorate General and is also designed to ensure effective use of the Competition DG's scarce staff resources and increase flexibility in their allocation between merger and antitrust work.

Second, to reinforce the Competition DG's economic capabilities, we created a new position of Chief Competition Economist. The first Chief Economist was nominated to this post in July 2003. He is assisted by a team of specialised economists. In antitrust, merger and state aid cases, the Chief Economist offers an independent economic viewpoint in individual cases throughout the investigation process. He also gives advice on policy issues. In cases requiring sophisticated quantitative analysis, a member of his team of economists may be seconded to work in the case team. We decided to reinforce the Competition DG's economic capabilities also more generally. For this purpose, we accelerated the recruitment of industrial economists.

Third, DG Competition has created an internal system of peer review panels to reinforce internal scrutiny. In complex and high-profile cases, a panel composed of experienced officials scrutinises the case team's conclusions with a "fresh pair of eyes" at key points of the investigation. This results in a second opinion as to the strengths and weaknesses of a case, independent from the position of the case team, which increases the legal and economic solidity of the final decision. We have applied this panel system since autumn 2003 with positive results.

In order to enhance the co-operation between the European competition authorities in the shared enforcement task of EC antitrust rules after modernisation and to guarantee a coherent enforcement, the European Commission and the EU Member States competition authorities created the European Competition Network (ECN). In this network the authorities discuss and deal with questions on case-allocation, coherence, cooperation and information exchange (including confidential information) between European competition authorities for the purposes of applying EC antitrust rules. In its internal reorganisation, DG Competition set up an "ECN Network unit" to deal with matters involving this network and the cooperation with national courts.

## 7. What impact did the evaluation have upon constituencies outside the competition authority?

### *7.1 Did the results motivate the legislature to adopt new legislation or allocate additional funds to correct weaknesses in the agency's authority or operations?*

### *7.2 Did the evaluation help educate external constituencies the value of specific forms of intervention?*

*7.2.1 Evaluation of antitrust legislative instruments and policy programmes*

See the response to Q. 1(a) above.

*7.2.2 Merger Remedies Study and Ex-post evaluation of effectiveness of Commission merger decisions*

Not applicable

## NOTES

1. The list is not exhaustive.

2. This project is still pending.

3. This project is still pending.

4. This project is at an early stage.

5. The Community had grown to 15 Member States and was faced with the challenge of enlargement to include the countries of central and Eastern Europe and Cyprus.

6. Replies received from individual companies represented a cross-section of industry sections: e.g. electronics, mechanical engineering, automotive, pharmaceutical, healthcare, chemical and foodstuffs.

# SUMMARY OF THE DISCUSSION

The Chairman proposed that the discussion be divided into two principal segments: an initial round of country presentations that focus mainly on the evaluation of the processes by which competition authorities operate and on the assessment of specific actions of competition authorities, and a presentation by the OECD Secretariat of a new type of performance measurement system, followed by feedback from Portugal, which recently has used the approach. The chairman then invited Professor W. Kovacic to introduce the note he prepared as background to the roundtable.

Professor Kovacic began by offering three rationales for having Competition Authorities engage in efforts to evaluate how they have done. The first is a basic, increasing need to respond to the demands of legislatures and other institutions of government that Competition Authorities to demonstrate the effectiveness of their policies. A second important rationale is to understand more completely the sources of programme success and the causes of failure. A habit of asking difficult questions about individual endeavours can illuminate superior techniques and overcome the complacency that sometimes begets breakdowns in what seem at the moment to be successful programmes. The third, closely-related rationale is to identify areas for improvement in programs and operations – a result that can be achieved only through a critical, recurring assessment of what we do.

The focus for evaluation suggested in the paper has two elements: 1) to examine specific, discreet episodes of intervention -- a case, an advocacy project, a report -- to assess exactly what the intervention accomplished, and in some instances to establish the positive difference it made; 2) to evaluate the approach taken to operations and to pursue improvements for the reason that good technique has a tendency to produce good substantive results.

The fear that the evaluation will unmask a shortcoming, which will bring discredit to the agency is however an obstacle. Overcoming the hurdles of designing an evaluation methodology is another challenge.

Professor Kovacic concluded in noting that a last challenge in this process is to make sure that the lessons actually affect future behaviour.

## 1. Process Oriented Performance Measurement

### *1.1 Merger Remedies*

Referring to a number of country contributions which focus on merger control and evaluation of merger remedies, the **Chair** invited United States, the European Community, the United Kingdom, Denmark and Belgium to discuss their experience with the evaluation of the effectiveness of merger remedies, focusing on the evaluation of the process more than on the evaluation of a specific merger.

According to a delegate from the United States**,** consent decrees which are common in merger cases, amounting to about a couple of dozen a year, provide many opportunities to learn. This gradual learning process has resulted into a guide to merger remedies, described as “best practices”, available on the website. It lists a few principles for merger remedies, which have to fit the theory of the case. Consent decrees usually require the divestiture of assets, and the divestiture solution typically is intended to endow

the purchaser of the assets to sustain the level of competition that existed in the market place before the merger. The divestiture package also has to include appropriate complementary assets to create a package that somebody would be interested in purchasing and would be able to operate effectively. Another principle is that a remedy should entail, to the greatest degree possible, only minimal and temporary oversight. This is why asset divestitures, rather than controls on conduct, usually are the preferred remedies in merger cases. Furthermore,, the remedy must be completed rapidly, within a few months if possible, to prevent or limit negative impacts on corporations in these periods of uncertainty.

The European Commission Representative pointed out that the process of looking at effectiveness of the merger remedies policy, from both procedural and substantive perspectives, is still ongoing. The EC has been examining its practice concerning merger remedies since December 2000, when the merger remedies notice was published. The Commission has chosen to examine some 40 cases, in which in total 100 distinct remedies were imposed. To derive lessons from the implementation of the remedies in these matters, the EC interviewed the merging parties, purchasers, and trustees directly involved in implementation of the remedies in question, all with an eye to gaining a wide view from the different parties involved. The EC also commissioned a parallel quantitative expert study that evaluated a smaller number of cases involving specific economic sectors. All of these different findings will be completed and published at the same time and will inform revisions of the merger remedies notice, accounting for both substantive and procedural aspects of existing EC practice..

The merger remedies study has encountered various methodological difficulties. One related to the comparison of actual market developments with counter factual scenarios of what would have happened without the remedy or without the merger. The response was to construct the most likely scenarios with the help of the interviewed experts. A second problem was to derive an accurate view of actual experience from the interviews, where the objectivity of replies might vary considerably. This challenge was addressed by interviewing a wide range of observers, by comparing replies of different interviewees, and then double checking data from outside sources, from the market information especially. Another issue was availability of quantitative data, and this was fixed in sending questionnaires out for companies to collect quantitative data, in addition to the qualitative observations.

The delegate from the United Kingdom stated at the outset that the Office of Fair Trading (OFT) is under pressure (as are a number of competition authorities) from the government (Treasury) to provide evidence that it is doing a good job -- and it is pulling together a small team of economists to that effect. The Department of Trade and Industry also is undertaking a stakeholder study of the performance of the competition commission; a study by the National Audit Office, which reports to Parliament, of the effectiveness of the new UK competition *régime* under the Competition Act (which follows Articles 81 and 82 of European Law) will appear in the autumn; the Treasury and the Department of Trade and Industry are as well carrying out a review of the Enterprise Act 2002 to see how things appear to be stacking up, given the expectations at the time of the White Paper whose recommendations helped guide the development of new legislation to implement the Act.

Looking at procedures, the UK delegate made some broad points. The Enterprise Act of 2002 required changes in procedures. For example, the Act imposed a strict time limit to complete the Stage I analysis of a merger. The OFT publishes findings in all of its main cases, and that requires the authority to think about the way things were done, how quickly they were done etc. The Competition Commission, which takes final decisions if mergers go to Stage II, also has been reviewing its procedures. Last, within the OFT, staff is now looking at how it handles projects, whether they are market studies, investigations, or competition cases, to deliver outputs on time and to a high quality. The UK delegate added that the Competition Commission has made significant changes to its procedures. It now publishes its provisional findings as well as notes on possible remedies (including suggestions by the parties), thus making the process more transparent. The Commission also recently provided additional guidance both on remedies

and divestiture. On the subject of merger remedies, the Competition Commission is now looking at four cases carried out under the old legislation and is focusing on the reason for choosing particular remedies, the experience in implementing the remedy, and the impact of the solution on the market players. To that end, the Commission looks through case files and, to obtain a broader-based perspective, interviews industry officials and other outsiders.

In addition, OFT has kept under review many market-based remedies that followed what used to be called "monopoly reports" and addressed problems with broad markets. In some cases the OFT has found a need to continue the remedy, and in others it has identified the need for changes. Through this process of good administration, the Office is forced to think about the effect of remedies and whether they are still worth maintaining.

In response to the Chairman, the UK delegate clarified that these evaluations amount to about 500-600,000 euros a year, certainly a growing sum in the future.

The delegate from Denmark referred to a case based study on the effect of merger remedies, categorised in six or more groups as to their type: sale of physical assets, shares etc; sale of intellectual property rights (IPR); sale of shares in financial infrastructure; obligations to abstain from discrimination; third-party access to infrastructure in a broader sense; and other behavioral remedies. Remedies were also categorised according to their desired effect: the creation of a new competitor; the removal of barriers to entry; the limitation of incentives or possibilities for enterprises in the sector to collude. Then, all economic indicators that could be found in the markets covered by all these remedies were sampled in the study, the most important ones being development in the market share for the incumbent or the dominant firm. According to the study's conclusions, which were discussed with lawyers and the confederation of industries of enterprises in Denmark, a more balanced approach may be the appropriate one. Contrary to the text book view that the competition authority always should prefer structural remedies to other remedies, the study's findings show that a combination of structural and behavioral remedies often may be the best solution, and that behavioral remedies can often be used to ensure the effects of a structural remedy. Also, in most cases the study finds that remedies have been appropriate and sufficient, and in none of these mergers it is felt that competition is worse off than before the merger. The study has given rise to interesting discussions on the Danish related jurisprudence.

The delegate from Belgium pointed out that the resource of the Competition Authority has recently increased with 6 "rapporteurs" (from two previously) and 40 staff members to review the cases. Specifically on merger reviews, the threshold for notification was significantly increased, thus limiting the number of cases to be reviewed, and the process simplified. This alleviation has resulted in more time and resources to focus on the most harmful anticompetitive practices, such as hard core cartels.

### *1.2 Government-wide performance measurement mandates*

Moving away from initiatives to assess merger remedies (measures which seem to be yielding informative results and valuable insights), the C**hairman** turned to the situations where there is a government mandate to a large number of government agencies, including to the competition agency, to develop a performance measurement system. He called on Japan and Finland to describe the situation in their country.

The delegate from Japan confirmed that his country introduced a government-wide policy evaluation system with three main objectives: strengthening the government's accountability to the general public; achieving effective and high-quality public administration; shifting to results-oriented public administration. The government policy evaluation act, which was enforced in April 2002, requires each of the government agencies, including the Japan Fair Trade Commission (JFTC), to conduct policy

evaluations, (local governments are not involved in this system), which in the end are released to the public to give it an opportunity to express its opinion.

Each section of the JFTC evaluates the effect of the measures taken to see if and how the problems were solved. Every year the JFTC usually selects six or seven of its former decisions and assesses them from the viewpoint of necessity, effectiveness and efficiency. Up to now, about 17 cases have been reviewed. Several methods are used, such as before and after comparisons, questionnaires, and cost-benefit analysis. Recourse to outside experts is also very important when a high level of specialisation and practical knowledge are needed and to ensure objectivity. The JFTC invited five outside experts with solid and diversified backgrounds to participate in the process of evaluation as members of the Commission's internal policy evaluation committee. Once completed, JFTC evaluation reports are made available to the general public through press releases and on its website. This policy evaluation entails implementation costs which must be taken into account, notably through an increase in staff resources.

The delegate from Finland explained that the regular evaluation of the FCA's activities, which follows the general Finnish planning and follow-up system of the public administration, is threefold. First the FCA sets each year rough goals while preparing the budget for the next year. These rough goals are then specified in the annual talks with the Ministry of Trade and Industry, whose area of administration includes the FCA. Second, the FCA has to account for how well it has achieved these objectives. Third, follow-up reports, twice a year, monitor how these objectives have been met. This evaluation also gives a good overall picture about the effectiveness of the FCA's activities. It shows where there is room for improvements, which areas are particularly problematic, where more resources should be applied, which kind of cases should be prioritised, and how resources could be better allocated. This also provides an opportunity for the FCA to engage in a real dialogue with the Ministry of Trade and Industry, and together to develop common goals for the competition policy.

But indicators used in this evaluation are very artificial, and each competition case tends to be very different. Another major problem stems from the evaluation itself, which only assesses whether the objectives set by the FCA are achieved and not if it is focusing on the right things.

The Finnish delegate concluded in stressing the need for an external and objective evaluation, which would focus in particular on the areas where the FCA is active to find out if these are the areas the FCA should focus its activities on. It would also be important to find some kind of methodology to assess the impact and effectiveness in general of the FCA's activities. And the methodology used when carrying out an evaluation would need to be evaluated, as well.

### *1.3 Performance measurement as a resource allocation tool*

The Chair noted from the Finnish intervention the limits of a self evaluation approach and the merits of getting an outside evaluation to add to the depth of the exercise; he also mentioned the use of the evaluation to allocate resources and turned at this point to the delegate from New Zealand, where there is a kind of systematic attempt to use performance measurement to allocate resources.

The delegate from New Zealand referred to two reviews, one related to the performance of the New Zealand Commerce Commission and another on the processes and procedures of the Commission's internal legal branch. With the first review it was clear that the Commission was struggling with its level of funding for a couple of reasons. One is that the Commission's role had been extended to take into account sector-specific regulation and electricity, telecommunications and dairy. While not directly related to competition law enforcement, these extensions increased the Commission's capability and the complexity of the work, and that developed an expectation that the Commission would apply that higher level of capability and complexity to the competition work. In addition, at that time the Commission

improved its performance reporting and internal data collection to closely monitor the work that it was doing, the cost of that work, and to try to measure the complexity of it. An external consultant was hired to look within the Commission at the efficiency, at the cost of the outputs, the way they were produced, the processes, and procedures. To study the organisation's effectiveness, the consultant spoke to external stakeholders and checked the effect on the market. The effectiveness study was subjective and qualitative and did not go into great detail. The information collected in the study indicated that there was a perception outside the Commission that it was at least effective. That review produced a substantial report that went to the Government, and resulted in an increase of funding for the Commission (over 50% increase in the baseline funding for the competition law and consumer law enforcement). One key issue with the review was the amount of information provided to show that the complexity, the capability, and the costs had increased.

The second review looked at the provision of legal services within the Commission (separate legal and economics branches provide advice both during the investigative phase and during litigation). It unveiled tensions with lawyers who wanted more resources and greater control, and the rest of the organisation who wanted better quality and more collegiality. An external panel of well-regarded lawyers reviewed the procedures, looked at the role of the lawyers within the organisation and tried to identify the bottlenecks. Even though the panel's conclusions were not surprising (the legal branch had too much to do and a significant increase in its size was needed), the review helped inspire some relatively simple but effective changes. These included a reduction in the workload by getting rid of the non-core work; the development of principles for defining what the "core work" should be; and the enhancement of tools for investigators. Also, accountability throughout the organisation has changed, and the lawyers are more directly involved in the cases from an early point.

### *1.4 Performance measurement as a stimulus for internal reform*

Echoing to the remarks from New Zealand on ways that an assessment can be used for changes, the Chairman asked the European Commission to discuss how the EC's merger review procedures were changed after assessment.

The EC delegate agreed that quite a lot of organisational changes have occurred recently with the complete overhauling of the organisation (started in summer 2003 and completed in May 2004). These include the dismantling of the merger task force and the combination of merger control and anti-trust enforcement in directorates responsible for specific sectors of the economy. This was followed by the creation of a cartels' directorate to improve the cartel enforcement work.

To reinforce the EC's economic capabilities, a chief economist was nominated in July 2003. Since then, the chief economist has been involved in a large number of cases, as well as in general policy matters and legislative processes. The EC set up an internal system of peer review panels to strengthen internal scrutiny on highly important cases before they are taken to decision. The internal scrutiny panel is composed of experienced officials, including the chief economist's team and the legal service. With the EC's anti-trust modernisation programme came the need to develop a co-operation system with the member states' competition authorities. The European Competition Network was created, with each competition authority having an internal unit particularly responsible for coordinating work within the network.

With this ongoing internal monitoring at top management level, the EC can now better focus its resources to track down the most harmful restrictions of competition.

## 2. Performance Evaluation of Specific Competition Agency Interventions

### *2.1 Effects of enforcement against cartels*

The Chairman turned to the use of performance evaluation for analysing specific competition agency interventions, as opposed to the more general working of the agency itself, and invited three countries (Korea, Canada and the United Kingdom) to discuss their use of evaluations to assess the effectiveness of their anti-cartel enforcement programmes.

The delegate from Korea described the student uniform manufacturers' cartel which emerged as of 2000. The Korean student uniform market was around 300 billion won in size, with the sales of about 1.5 million uniforms. The three manufacturers' market share was nearly 50% at the time. They agreed to increase the price of uniforms from 80,000 to 100,000 won in factory price to 150,000 to 200,000 won. In May 2001 the KFTC took strong sanctions against the three manufacturers including an injunction order and imposition of a total of 11.5 billion won in surcharges. According to a market survey after the correcting measures, the prices for winter uniforms decreased from 175,000 to 145,000 won for the three cartel participants, and from 155,000 to 125,000 won for small and medium sized manufacturers. The total benefit estimated from the enforcement in this case was about 60 billion won. This cartel case shows the negative impact of a cartel on consumer welfare, and how great and significant an influence an effective competition policy can have

The delegate from Canada explained that only one formal study was engaged in the cartel area, and it sought to figure out how to move cartel files forward and whether the Competition Bureau could be more efficient. But in the area of merger review, Canada looked at the effects of enforcement in a more formal way. A highly respected outside firm with experience in econometrics in particular, was hired to perform a post-merger type review, to look at whether there had been any price impacts once the merger had taken place. Access to data of price effects was particularly challenging, although Statistics Canada keeps some data and some expert companies collect data in this area. Sufficiently long time series to look into various effects were difficult to find, and geographic markets did not correspond perfectly to the geographic markets for which data were available. In the end, regression analyses showed that the level of certainty sought after was not reached. The Canadian delegate acknowledged the need to go beyond just publicly available data and to get proper tools to carry out this type of work, while admitting that confidentiality was also an issue. The delegate added that engaging in interviews with suppliers, as the EC did, may be a useful suggestion worth exploring.

According to the delegate from United Kingdom**,** looking at cartels in particular has not really started, and he agreed that critical self assessment is important. In 2000, the competition authorities got the powers to tackle cartels in a systematic way, and then a new act gave them criminal powers, which led to completely rethinking the way procedures were handled. The OFT built on experiences of other prosecution authorities in the UK, the Serious Fraud Office and the Inland Revenue, and this has forced the competition authorities to look again at the way they handle things. They are slowly building up a number of cases, and the delegate referred to two big price fixing cases. One involved replica football kits for fans of Association Football, and the other was price fixing on toys, which were not hard core cartels as such, but certainly horisontal price fixing cases (before and after effects could be observed)

The National Audit Office study of the Competition Act is covering cartel-related enforcement work, including procedural changes introduced since criminal powers have been granted. This study will be published, and its lessons are expected to be very useful for the future. Interviews using outside consultants, a guaranty for transparency and honesty of the criticism, will continue.

### *2.2 Studies by external bodies*

The Chairman, referring to previous interventions which alluded to the confidentiality concern associated with the use of outside consultants, turned to Sweden to describe its experience in hiring academics or outside people to do assessments.

The delegate from Sweden pointed out that an assessment of the Swedish Competition Authority's operations has been developed for more than a decade to learn and adjust policies, and also to make them credible through increased transparency. In 2004 research projects amounted to about 800,000 euros. For evaluation purposes, the arrangement has two direct benefits: it gives access to a network of external experts with an in-depth understanding of the authority's work; the Authority can draw on those resources and that network to conduct studies that are going to be of special value to it. About one fifth of the research budget goes to studies directly decided by the authority; for example, an analysis of all major court cases, where the authority has played a part between the years 1993-2004 was recently carried out by a law researcher from Stockholm University. The report, available on the Swedish Authority website, goes through all these cases and classifies the court decisions as a loss or win or partial win for the authority, and then tries to determine what accounts for the outcomes. By looking at such a large body of material (about 100 cases), the study gives valuable insights into how the authority handled those cases and gives a better understanding.

### *2.3 Evaluation as a means to identify needed reforms in statutes or regulations*

The Chairman turned to Turkey's delegation to explain the use of evaluation as a means to identify needed reforms, not only in the working of the institution, but actually in the statutes, the rules and the regulations on competition.

The Turkish delegate pointed out that in the country's drafting of its original Competition Act, competition law enforcement experience was minimal, and therefore potential procedural enforcement issues were not foreseen. However, as the board began to apply the act, severe problems emerged and were discussed in regular meetings within the Turkish Competition Authority by senior executives and the case handlers. This proved to be a key step in solving the problems as the case handlers are in the best position to detect the weaknesses and find solutions to cure them.

However external help is also important, and in the case of Turkey it came from the OECD and its in-depth competition law and policy review reports. The 2002 OECD report which described some shortcomings of the Act and the recommendations of the 2005 peer review report were very informative and helped to increase the effectiveness of the Authority enforcement record (some overlapped with the internal findings of the Authority). They concern the introduction of a leniency programme, a revision of the merger control deadlines, an increase in maximum fines for violations other than substantive infringements, elimination of mandatory notification of agreements, establishment of a procedure for the settlement of cases by consent, increase in the numbers and expertise of TCA lawyers and enlarging the Authority's industrial organisation competence.

### *2.4 Evaluation of advocacy initiatives*

The Chairman turned to the United States and Ireland which in their contribution address the difficulties of measuring the impact of advocacy. On that occasion, he remembered a discussion in the Committee some years ago on communication by competition authorities, which showed that there was not necessarily a close correlation between the actions of the competition authorities, particularly in advocacy, and the understanding of what the competition authorities stand for.

The delegate from the United States acknowledged that this was indeed a particularly delicate task for several reasons. One, this is purely a persuasive role, with no coercive powers to convince other policymakers in whose hands the decision ultimately rests to either take an action or not take an action based on what is perceived as the competitive ramifications of that action. Secondly, because there are a lot of factors that go into a policymaker decision, it's often hard to tell what the effect of a particular advocacy was. Occasionally one gets very clear signals, for example last year the California legislator passed a bill that regulated the contracting and disclosure of requirements for companies that handle the drug prescription programme for insurance companies), and the FTC filed a comment with the legislator stating that this could have some bad competitive effects, and as a result, the Governor, Arnold Schwarzenegger, vetoed the bill and decided that the FTC letter was one of the reasons why he did it.

According to US delegate, the FTC has gone through different periods of activity with competition advocacy, sometimes very active, sometimes less active. In 1989 after a particularly active period of competition advocacy, an academic study by Arnold Celnicker tried to assess the impact of advocacy efforts. This study found that the outcome of the advocacy efforts was positive. Turning to a specific example of competition advocacy, the US delegate referred to a regulation that the Federal Department of Housing and Urban Development (HUD) was considering. The regulation in question had a particular disclosure requirement for one type of loan (through a mortgage broker) versus another type of loan, from a direct lender. The FTC staff filed a comment with HUD and expressed concerns about how the proposed regulation could disadvantage the broker loans over the direct lender loans. An empirical study by the Bureau of Economics tested this disclosure and showed that it actually confused consumers into choosing a loan that was more expensive rather than a loan that was less expensive. The study was issued and the Office of Management and Budget told HUD to pull back the rule and to start over, based on the FTC evaluation. So that was a case where an *ex post* evaluation increased the FTC's credibility in the process of commenting and giving this kind of advice on what it thinks the competitive effects would be.

The delegate from Ireland explained that very little has been done so far about *ex post* analysis at the Authority but it has been decided to do much more work, including in merger review, in cartel cases and monopoly related cases. The limited experience in this domain results partly of data and methodological issues, but also because for smaller agencies the numbers of data points are fewer and developing internal expertise takes time. In the advocacy area, like the US delegate, the Irish delegate felt often difficult to attribute the advocacy work of the authority to a particular change, in that there are a number of factors that obviously contributed to that. The taxi markets in Ireland provide one example where the competition authority had advocated the removal of quantitative restrictions for a long time. These restrictions eventually were removed, but the cause of the adjustment was a court decision and not anything that the authority was able to force through. In terms of evaluating the benefits to consumers based on the aggregate value of licences pre liberalisation, it can be estimated at around 250 million euros or so. The number of taxis on the streets jumped from around 2,000 to 11,000 in just three years with obvious pro-consumer benefits.

Another example of ad hoc methodology is the Aer Lingus case, which after the events of September 11 had to achieve efficiencies to get prices down in consumer markets and open up new routes. The Authority did not back travel agents and supported the company when it changed its distribution from being through travel agents to rely more on remote means over the internet, notably. The value of that change was estimated to about 40 million.

The liquor licensing and the retail banking areas are two examples where changes have not yet occurred but where the harm can be assessed. In the latter area, the potential value is estimated to 85 million *per annum*.

## 3. Innovations in Performance Management: the OECD Assessment framework in Portugal

The Chairman invited the Secretariat to present a process oriented assessment framework that it has developed and Portugal to discuss its experience with the use of this measurement technique.

The Secretariat introduced its remarks in going back to the early 80s when organisational assessment was looked at in a very broad way, looking at all the dimensions of an organisation, because it was felt that change would be stuck if only one part was changed not the other ones. At that time, organisation change was seen as very much dependent upon integrated efforts. In the early 80s, models of organisation development that were brought to private sector or public sector, adopted a quite competitive aspect in the sense of being able to measure oneself as a whole organisation against other organisations. It introduced the notion of peer recognition of the efforts, which is a very positive motivator for people to prove what they do.

Only gradually have the models of organisational assessment been built much more from what good organisations actually do, and it is important to stress that this kind of device only seems to work effectively if people have a real commitment to change. Key benefits of looking at an organisation are identifying key criteria, keeping them in front of people, creating a model of how an organisation should work, and getting some fact-based decisions about how to make changes happen rather than just theoretical decisions.

The Secretariat then focused on the model worked out for the Portuguese Competition Authority. It was built on nine dimensions created with the staff into a clear scale with a sense of behavioural anchors for each point on the scale. Under each dimension, which was paired with a notional scoring, some separate attributes were developed with the staff who was asked, for example what leadership would you like, what organisation would you like, or what performance review would you like, and those specific dimensions underneath the titles are very much things that have been drawn from the work of the competition authority itself. Evidence data of how staff is working were then collected from people working in the Authority, an assessment of the information from the Authority was made with them and then improvement plans were built.

According to the Secretariat representative, moving towards self assessment is important as it starts to build performance review evaluation into the fabric of the organisation. The more it is done on the outside, the less it becomes part of the fabric of the organisation. It must be result focussed. Also once done this organisation assessment gives the opportunity to do it again on a regular basis and to see improvements.

The delegate from Portugal stated at the outset that strong and efficient institutions are needed together with good policy analysis or framework, and this is a challenge when staff resource is scarce. He described the Portuguese experience with the model developed by Secretariat. The most important stakeholders (judges from the courts that controlled the Authority, sector regulators, competition lawyers, industry and public opinion makers.) met the OECD team, and their talks were kept confidential. These interviews were complemented by meetings with senior staff in the Authority that also made some kind of self assessment. As a result, the team drafted a paper that was shared with the Authority, and which helped classify the dimensions referred to in the Secretariat model

Then a management workshop, which was divided into three groups (one on strategic direction, one on leadership and another on process management), was held with all the directors of the Authority to analyse the response of the stakeholders and observations of the team, and to define some of the areas where the authority needs improvement. The results were quite positive on leadership and strategy: the Authority has had a business plan for the first three years of its operation; relationships with stakeholders are good as a result of significant advocacy efforts to disseminate a competition culture in Portugal. The

main problems stem from operations and performance review. The Authority needs to get experience in case handling first and then to lay down the rules in manuals and not the reverse. On the Authority yearly business plan, this exercise emphasised the need to pinpoint major priorities and take out just two pages of what has really to be achieved.

The Chairman invited Professor Kovacic to comment on previous interventions and to tell the Committee what useful work could be done between now and two years from now, when the Committee resumes this discussion, as suggested by a number of delegates.

Professor Kovacic stated that the discussion was an accurate picture of the extensive amount of activity that is taking place. To a great degree, this activity is attributable to the work of the Competition Committee, whose case seminars, peer review exercises, discussions of merger remedies, and other initiatives have encouraged delegates to engage in evaluation endeavours. Concerning future work, he suggested:

1. to take these results as they come forward and do side-by-side comparisons of what some of the outcomes are; in particular on merger remedies, to take the forthcoming European Commission's study and the US studies (the Department of Justice, the Federal Trade Commission), and see what kinds of general lessons can be extracted about the formulation of merger remedies;

2. to have a readily available set of information for members to draw upon for their own consultation, but also as a point of reference for future work. The Competition Committee could become the repository of individual intervention-specific studies as they are done and make those readily available to members, in electronic form, to permit members to go and examine specific case-related studies and outcomes with all of the qualifications;

3. to continue discussion

   - about methodology and data collection based on case studies, which would illuminate where data are readily assembled, and would also permit a discussion about impediments;

   - about the actual mechanism for doing assessments. Should that be vested in a specific office that has responsibility for this kind of power? Is this a mechanism that promises to be more successful or not?

   - about the development of a possible organisational design which would make sure that lessons are fed back into routine management and operation of the institution, so that they are not simply a momentary point of illumination for the institution, but integral part of what it does over time**.**

The Chairman then opened the floor for general discussion.

The delegate from Australia referred to a current research project with the Australian National University, which tries to measure what has been achieved after 10 years of very active enforcement compliance work, and the effectiveness of the tools used. It is expected that the issues about methodology and confidentiality raised by Canada in particular, have been managed in that process. The results will be soon made available and should contribute to the future discussions in the Committee.

The delegate from Canada found this discussion extremely instructive as she got lots of ideas that might be worked on for the Competition Bureau. Waiting a full two years before getting the benefit of this

sort of input may be too long. She asked for clarification about the repository for information that was mentioned by Professor Kovacic.

A delegate from the United States argued that one can learn about process, about how industries work, about economics. But after a case is lost, there is not always a clear consensus of what went wrong and it is not always clear that one could have done things differently. It is not worth worrying about making wrong decisions, unless there's a process-related reason for making wrong decisions.

The delegate from Finland stressed how important it is to evaluate the strategies and visions of the competition authority. What is its core competence? How does it implement it with its personnel?

The delegate from Denmark agreed that this work should continue, and the Secretariat be encouraged to take this up at some point, while avoiding to replicate the ICN's work, in particular concerning proper processes in merger reviews. In the future some categorisation should be made between measure of individual cases and measure of the overall stance of an economy, of a system of a management or organisation like Portugal. He added that on the model of Nordic countries, on a voluntary basis, Competition Authorities could benchmark each other on some indicators, on some performance and processes, and then look into the reasons why they lose cases, because you learn from the cases you lose much more than the cases you win.

The **d**elegate from Norway supported the principle of follow-up work in this area, but wanted a more focused roundtable in the future. Either the internal process of the organisation should be addressed or the issue of *ex post* evaluation of market performance after a decision has been made, for example *ex post* merger evaluation.

The European Commission Representative supported the views expressed by Denmark and Norway to have a more focussed discussion in the future. This discussion served to cover the basics and to look at where Authorities are going, what sort of issues they are investigating, and this was very helpful as it shed light on areas where really several authorities have ongoing common issues and where they have a lot to learn and share with each other. The area which in his view, really deserves a new discussion on a case basis is Merger remedies, and the EC evaluation project on EC merger cases about to be launched could serve that purpose.

The delegate from Portugal agreed to continue this discussion in the Committee, and emphasised that the reasons for the Portuguese Authority to rely on an outside reviewer – the OECD-- was not only expertise and credibility but also the peer pressure that can follow from it. It is very important, according to him, to measure three different elements: institutional efficiency; output as distinct from efficiency; overall impact assessment.

The Chairman concluded in noting the interest of delegates for continuing this discussion on the many issues to look at. He remarked that experience of those Round Tables tells that they are only worth if there is something new to be said, and since a number of studies will become public or completed in the next two years, it seems clear that the Committee will have, then, new experiences to share. But the possibility of having a Round Table, next June, should not be eliminated if some issues deserve another discussion at that time.

He proposed to set up an electronic discussion group which could serve several purposes: 1) to have the Secretariat being the repository of existing Country studies that delegates could look at; 2) to see whether in all the themes discussed more or new elements need to be discussed in a more focused Round Table next year. It would bring in an easy forum access to whatever exists, and the Chairman encouraged delegates to post on this EDG any studies, references they are aware of. The Committee will see if this

EDG leads to an intensive exchange on a particular set of issues, and whether this set is consistent enough and could give rise to a focussed roundtable in 2006, which would precede the roundtable that will take place in any event two years from now.

# COMPTE RENDU DE LA DISCUSSION

Le Président propose que la discussion soit subdivisée en deux grandes parties : d'abord une série d'exposés par pays portant essentiellement sur l'évaluation des modes d'intervention des autorités de la concurrence et sur l'évaluation d'actions spécifiques menées par celles-ci, et ensuite un exposé du Secrétariat de l'OCDE présentant un nouveau système de mesure des performances, suivi d'une intervention du Portugal qui a récemment expérimenté ce système. Le Président invite alors le Professeur W. Kovacic à présenter brièvement la note qu'il a rédigée pour servir de référence durant la table ronde.

Le Professeur Kovacic commence par décrire les trois motivations qui ont conduit les autorités de la concurrence à tenter d'évaluer leurs propres méthodes d'intervention. La première fait écho à la nécessité croissante de répondre aux sollicitations des parlements et autres institutions publiques invitant les autorités de la concurrence à apporter la preuve de l'efficacité de leurs stratégies. La deuxième motivation importante est liée à une volonté d'appréhender de manière plus complète les facteurs qui expliquent le succès, ou a contrario, l'échec d'une stratégie donnée. Prendre l'habitude de poser des questions difficiles peut donner jour à des techniques d'excellente qualité et permettre d'éviter l'autosatisfaction qui précède parfois les désillusions à propos de programmes paraissant pourtant à un moment donné probants. La troisième motivation, étroitement corrélée aux deux autres, réside dans le souci de mettre en évidence les aspects sur lesquels les programmes et les activités des autorités de la concurrence peuvent être améliorés, sachant que cet objectif ne peut être atteint qu'au prix d'une évaluation critique récurrente de leurs actions.

Le principal objectif des efforts d'évaluation proposé dans le document de référence pour la discussion comporte deux aspects: 1) il s'agit d'une part d'examiner des situations spécifiques et sans rapport les unes avec les autres dans lesquelles les autorités de la concurrence ont été amenées, que ce soit sur un dossier, dans le cadre d'un projet de sensibilisation ou à l'occasion de la rédaction d'un rapport, à évaluer précisément à quoi a abouti leur intervention, et dans certains cas, à démontrer l'impact positif qu'elle a eu ; 2) il s'agit d'autre part d'évaluer dans quelle optique sont menées les activités des autorités de la concurrence et de continuer d'améliorer leur démarche en considérant que le recours à des méthodes de qualité garantit généralement l'obtention de résultats également concluants sur le fond.

La crainte que l'évaluation ne mette en lumière une défaillance qui jetterait le discrédit sur l'organisme concerné constitue toutefois un obstacle. Reste en outre à éviter les écueils qui ne manquent pas lorsqu'on s'efforce d'élaborer une méthode d'évaluation.

Le Professeur Kovacic conclut son intervention en soulignant que le dernier défi à relever dans ce processus consiste à s'assurer que les enseignements de l'expérience sont effectivement mis à profit pour faire mieux par la suite.

## 1. Mesure des performances intéressant les procédures

### *1.1 Mesures correctives en cas de fusion*

En se référant à un certain nombre de contributions reçues de différents pays qui mettent l'accent sur le contrôle des fusions et l'évaluation des mesures correctives prises dans des affaires de fusion, le Président invite les États-Unis, la Communauté européenne, le Royaume-Uni, le Danemark et la Belgique à faire le point sur ce que leur a appris l'expérience dans le domaine de l'évaluation de l'efficacité des

mesures correctives dans des affaires de fusion, en centrant leur propos sur l'évaluation des procédures plutôt que sur une affaire de fusion en particulier.

Selon un délégué des États-Unis**,** les jugements d'expédient qui sont monnaie courante dans des affaires de fusion, et dont le nombre s'élève à une douzaine par an environ, sont riches d'enseignements de tous ordres. Le processus d'apprentissage progressif par l'expérience a ainsi donné lieu à la rédaction d'un guide des mesures correctives décrites comme des « pratiques exemplaires », disponible sur Internet. Ce guide dresse la liste des quelques grands principes auxquels doivent obéir les mesures correctives prises dans une affaire de fusion, sachant que ceux-ci doivent être transposés en fonction de la nature du dossier. Les jugements d'expédient exigent en règle générale des cessions d'actifs, cette solution ayant en principe pour objet de placer l'acquéreur de ces actifs dans une situation de concurrence équivalente à celle qui existait sur le marché avant la fusion. Cette option doit en outre comporter le transfert d'actifs complémentaires afin de constituer un ensemble qui puisse intéresser un acquéreur éventuel et fonctionner en tant que tel. Autre principe à respecter : une mesure corrective ne doit exiger, dans la mesure du possible, qu'une surveillance minime et temporaire. C'est pour cette raison que les cessions d'actifs sont la formule généralement privilégiée, de préférence à la surveillance des comportements, dans les affaires de fusion. Par ailleurs, les mesures de cette nature doivent être complétées à brève échéance, dans un délai de quelques mois si possible, par des dispositions destinées à prévenir, ou tout au moins à restreindre, les retombées négatives qu'elles pourraient avoir sur les entreprises pendant le laps de temps où règne l'incertitude.

Le représentant de la Commission européenne attire l'attention sur le fait que le processus d'examen de l'efficacité des stratégies suivies concernant les mesures correctives, tant au niveau des procédures que sur le fond, n'est pas encore achevé. La CE a entrepris de se pencher sur ses propres pratiques en la matière en décembre 2002, date à laquelle la note sur les mesures correctives dans les affaires de fusion a été publiée. La Commission a retenu une quarantaine de dossiers ayant donné lieu au total à quelque 100 mesures correctives distinctes. Pour tirer les enseignements de l'application de ces mesures dans les affaires en question, la CE a organisé des entretiens avec des représentants des parties aux opérations de fusion concernées, des acquéreurs et des intermédiaires directement affectés par la mise en œuvre des mesures, le but étant à chaque fois de dégager une vision d'ensemble des points de vue des différents acteurs. La CE a commandité parallèlement auprès d'experts une étude à visées quantitatives portant sur un plus petit nombre de dossiers intéressant des secteurs économiques spécifiques. Ces exercices d'évaluation seront achevés et les conclusions qu'ils auront permis de dégager publiées en même temps : parce qu'ils permettront d'en savoir plus sur les pratiques suivies actuellement par la CE, tant sur le plan des procédures que sur le fond, ils éclaireront le processus de révision de la note sur les mesures correctives dans les affaires de fusion.

L'étude des mesures correctives en cas de fusion a soulevé diverses difficultés d'ordre méthodologique, dont l'une tient au fait que l'on est amené à comparer des évolutions réelles qui se produisent sur le marché avec des scénarios fictifs portant sur ce qui ce serait passé en l'absence de mesures correctives ou si la fusion n'avait pas été réalisée. La solution a consisté à bâtir, avec l'aide des experts interrogés, les scénarios les plus vraisemblables. Il est par ailleurs délicat de se faire une idée exacte de ce qui s'est réellement passé uniquement à travers des entretiens sachant que l'impartialité des réponses est très variable selon les personnes rencontrées. Pour palier cette difficulté, les auteurs de l'étude se sont adressés à un large éventail d'observateurs et ont comparé les réponses obtenues des différents interlocuteurs rencontrés avant de procéder à une double vérification des données en ayant recours à des sources extérieures et en utilisant en particulier des informations provenant du marché. Enfin, le problème de la disponibilité des données quantitatives a été résolu par l'envoi de questionnaires grâce auxquels les entreprises ont collecté des données quantitatives en plus des observations de nature qualitative.

Le délégué du Royaume-Uni déclare d'emblée que (à l'instar d'un certain nombre d'autres autorités de la concurrence), l'Office of Fair Trading (OFT) est soumis à des pressions de la part du gouvernement (du Trésor) qui exige de lui des preuves qu'il accomplit sa mission de façon satisfaisante, ce qui l'a conduit à constituer une équipe resserrée d'économistes chargés de répondre à cette demande. Le ministère du Commerce et de l'Industrie a pour sa part entrepris d'examiner les réalisations de la Commission de la concurrence ; une étude du National Audit Office, qui a pour objet de rendre compte au Parlement de l'efficacité du nouveau cadre régissant la concurrence institué par le Competition Act (d'après les articles 81 et 82 du traité CE) sera publiée à l'automne ; le Trésor et le ministère du Commerce et de l'Industrie mènent en outre une étude portant sur l'Enterprise Act adopté en 2002 qui vise à mettre en regard ce qui s'est passé dans les faits avec ce qu'on attendait de ce texte au moment de la parution du livre blanc contenant les recommandations qui ont contribué à orienter les travaux d'élaboration de la nouvelle législation d'application.

S'agissant des procédures, le délégué du Royaume-Uni formule quelques observations de portée générale. L'Enterprise Act de 2002 exige une évolution des procédures. Il impose par exemple un délai strict pour l'exécution de l'analyse de la Phase I d'une fusion. Pour tous les grands dossiers qu'il traite, l'OFT publie ses conclusions, ce qui l'oblige à réfléchir à la manière dont ceux-ci sont traités, à la rapidité avec laquelle ils sont traités, etc. La Commission de la concurrence, qui tranche en dernier ressort si les dossiers atteignent la Phase II, a également procédé à un réexamen de ses procédures. Enfin, au sein même de l'OFT, le personnel réfléchit actuellement à la manière dont il doit s'y prendre, qu'il ait à réaliser des études de marché ou des enquêtes ou à traiter des dossiers de fusion, pour pouvoir produire dans les délais voulus des résultats de qualité. Le délégué du Royaume-Uni ajoute que la Commission de la concurrence a beaucoup modifié ses procédures. Elle publie désormais ses conclusions provisoires, ainsi que des notes relatives aux mesures correctives envisageables (notamment les propositions émanant des parties elles-mêmes), ce qui rend le processus plus transparent. La Commission a également rendues publiques il y a peu des instructions complémentaires sur les mesures correctives et les cessions d'actifs. S'agissant des mesures correctives en cas de fusion, la Commission de la concurrence se penche actuellement sur quatre dossiers traités en application de l'ancienne législation et concentre son attention sur les raisons qui ont conduit à choisir telle ou telle mesure corrective, sur ce qui s'est passé une fois cette mesure effectivement appliquée et sur les répercussions qu'elle a eues sur les acteurs en présence sur le marché. Elle procède à cette fin à un examen approfondi des dossiers et, pour dégager une vue d'ensemble, rencontre des responsables d'entreprises et d'autres parties extérieures à l'opération de fusion.

Par ailleurs, l'OFT continue à étudier un grand nombre de mesures correctives à caractère commercial prises à la suite de « rapports concernant des concentrations » et à réfléchir aux problèmes des grands marchés. Dans certains cas, l'OFT s'est aperçu qu'il convenait de maintenir la mesure corrective, et dans d'autres, il a jugé souhaitable de modifier le dispositif. C'est dans un souci de saine gestion que l'OFT se voit contraint de s'intéresser aux retombées des mesures correctives prises à son initiative et de se demander s'il y a lieu de les maintenir.

En réponse au Président, le délégué du Royaume-Uni explique que le coût de ces évaluations ressort à environ 500 à 600 000 euros par an et que cette enveloppe est certainement appelée à augmenter à l'avenir.

Le **d**élégué du Danemark se réfère à un exercice fondé sur des études de cas et portant sur les retombées des mesures correctives prises dans son pays dans des affaires de fusion, celles-ci étant réparties en six catégories : cessions d'actifs corporels, d'actions, etc. ; cession de droits de propriété intellectuelle (DPI) ; cessions de participations à des montages financiers ; obligation faites aux parties de s'abstenir de toute discrimination ; obligation de donner aux tierces parties accès à l'infrastructure au sens large ; et autres mesures d'accompagnement. Les mesures correctives ont également été classées en fonction de l'effet qu'on en attend : entrée en scène d'un nouveau concurrent ; suppression d'obstacles à l'entrée sur le marché ; prévention du risque de collusion entre entreprises dans le secteur concerné ou élimination des

facteurs favorisant les comportements collusoires. Les auteurs de l'étude réalisée au Danemark ont ensuite procédé à un échantillonnage de tous les indicateurs économiques susceptibles d'être trouvés sur les marchés concernés par l'ensemble des mesures correctives, au premier rang desquels la variation de la part de marché du fournisseur historique ou de l'entreprise en position dominante. Si l'on en croit les conclusions de l'étude, qui ont été examinées par des juristes et des représentants de la confédération patronale danoise, il se pourrait que la solution exige une stratégie plus équilibrée. A rebours de l'idée que les autorités de la concurrence devraient toujours donner la préférence aux mesures structurelles, il en ressort qu'un bon dosage de mesures structurelles et de mesures d'accompagnement est souvent la meilleure voie, et que l'on peut dans bien des cas avoir recours à des mesures d'accompagnement pour garantir l'efficacité d'une mesure structurelle. Par ailleurs, l'étude arrive dans la plupart des situations à la conclusion que les mesures correctives se sont révélées adaptées et suffisantes, et il n'est apparu dans aucun des dossiers de fusion examinés que la concurrence avait pâti de l'opération. L'étude a déclenché au Danemark des débats fructueux sur la jurisprudence.

Le délégué de la Belgique indique que les effectifs de l'autorité de la concurrence de son pays ont été renforcés et portés à 6 "rapporteurs" (au lieu de deux précédemment) et 40 agents chargés de traiter les dossiers. En particulier en ce qui concerne les dossiers de fusion, le seuil de notification a été sensiblement relevé, de façon à restreindre le nombre d'affaires à traiter, et la procédure a été simplifiée. Ces assouplissements ont permis de dégager des ressources et du temps pour accentuer l'effort de lutte contre les pratiques anticoncurrentielles les plus dommageables, notamment contre les ententes injustifiées.

### *1.2 Mesure des performances à l'échelle de l'administration*

En dehors des initiatives destinées à évaluer les mesures correctives en cas de fusion (dont on peut, semble-t-il, tirer des résultats éclairants et des indications précieuses), le **Président** fait référence aux situations où les pouvoirs publics ont enjoint un grand nombre d'organismes publics, et notamment l'autorité de la concurrence, de mettre au point un système de mesure des performances. Il invite les représentants du Japon et de la Finlande à décrire la situation dans leurs pays respectifs.

Le délégué du Japon confirme que son pays a adopté à l'échelle de l'administration toute entière un système d'évaluation obéissant à un triple objectif : renforcer l'obligation faite aux administrations de rendre des comptes aux citoyens ; assurer l'efficacité et la qualité des services des administrations publiques ; passer dans le secteur public à une gestion axée sur les résultats. La loi sur l'évaluation de l'action gouvernementale entrée en vigueur en avril 2002 oblige chaque organisme public, y compris la Japan Fair Trade Commission (JFTC), à procéder à des évaluations de leur action (les administrations locales ne sont pas couvertes par le dispositif) qui sont finalement publiées de façon à donner au grand public l'occasion de s'exprimer.

Chacun des départements de la JFTC évalue l'effet des mesures prises dans le but de déterminer si et comment elles ont permis de résoudre les difficultés rencontrées. Chaque année, la JFTC choisit en principe six ou sept décisions prises par elle dont elle va chercher à apprécier la nécessité, l'efficacité et l'efficience. Jusqu'à présent, elle a examiné environ 17 décisions et eu recours à différentes méthodes : comparaison entre la situation antérieure à la décision et ce qui s'est passé depuis la décision, questionnaires et analyse coût-avantage. Il est également jugé très important de faire appel à des experts extérieurs lorsque les connaissances pratiques et le niveau de spécialisation requis le justifient, ainsi que dans un souci d'objectivité. La JFTC a ainsi invité cinq experts extérieurs possédant une expérience solide et diversifiée à prendre part au processus d'évaluation en siégeant au comité d'évaluation de la stratégie interne de la Commission. A l'issue de l'exercice, les rapports d'évaluation de la JFTC sont rendus publics par voie de presse et diffusés sur Internet. L'évaluation de l'action de la JFTC impose des coûts de mise en œuvre qu'il convient de prendre en compte, notamment en prévoyant une augmentation des ressources en personnel.

Le délégué de la Finlande explique que les évaluations régulières des activités de la FCA, qui s'inscrivent dans le cadre du système global de planification et de suivi des activités des administrations publiques, portent sur trois aspects. Premièrement, la FCA définit chaque année de grands objectifs au moment de l'élaboration du budget pour l'exercice suivant. Ces grands objectifs sont ensuite précisés lors des négociations annuelles avec le ministère du Commerce et de l'Industrie dont relève la FCA. Deuxièmement, la FCA doit rendre compte de la mesure dans laquelle elle a tenu ses objectifs. Troisièmement, des rapports de suivi, mettant en évidence dans quelle mesure les objectifs visés ont été atteints, sont établis deux fois par an. Ce processus d'évaluation offre également une précieuse vue d'ensemble de l'efficacité des activités de la FCA. Il montre dans quels domaines des améliorations sont possibles, quels sont ceux qui soulèvent des problèmes particulièrement délicats, à quels emplois il convient d'affecter davantage de ressources, à quels types de dossiers il convient de donner la priorité, et comment optimiser la répartition des ressources. Il offre en outre à la FCA l'occasion de nouer une véritable dialogue avec le ministère du Commerce et de l'Industrie et d'assigner, en concertation avec lui, des objectifs communs à la politique de la concurrence.

Les indicateurs utilisés pour ces évaluations sont toutefois très artificiels, et chaque dossier présente des spécificités que le rendent très différent des autres. L'autre grande difficulté réside dans l'objet de l'évaluation à proprement parler, qui consiste uniquement à déterminer si les objectifs définis par la FCA sont atteints et ne permet pas de vérifier si cette dernière oriente convenablement son effort.

Le délégué de la Finlande termine en soulignant la nécessité de procéder à une évaluation indépendante et objective, axée en particulier sur les domaines dans lesquels la FCA est active, de façon à savoir si c'est bien dans ces domaines qu'elle doit concentrer ses activités. Il indique également qu'il serait souhaitable de mettre au point une méthodologie pour évaluer de manière générale l'impact et l'efficacité des activités de la FCA, sachant que la méthodologie utilisée pour mener à bien une évaluation doit elle aussi être évaluée.

### *1.3 La mesure des performances en tant qu'instrument d'affectation des ressources*

Le Président retient de l'intervention du délégué de la Finlande les limites de toute méthode fondée sur l'auto-évaluation et l'intérêt qu'il y a à compléter et étoffer l'exercice par une évaluation extérieure ; il fait également référence à l'utilisation des évaluations en tant qu'instrument d'affectation des ressources et se tourne sur ce point vers le délégué de la Nouvelle-Zélande pour recueillir son témoignage sur les efforts déployés par son pays pour tenter de systématiser l'utilisation des mesures des performances à des fins d'affectation des ressources.

Le délégué de la Nouvelle-Zélande fait référence à deux études, l'une consacrée aux performances de la Commerce Commission néo-zélandaise, et l'autre aux règles et procédures appliquées par le service juridique de la Commission. Le premier exercice fait clairement ressortir que la Commission est en permanence en proie à des difficultés compte tenu du montant des ressources dont elle dispose et ce, pour deux raisons. En premier lieu, ses missions ont été élargies de façon à couvrir la réglementation sectorielle, ainsi que l'électricité, les télécommunications et la filière laitière. Même si cette extension de ses missions n'intéresse pas directement la mise en application du droit de la concurrence, elle correspond à un élargissement de ses compétences et rend sa tâche plus complexe, et fait en outre naître l'espoir que les activités de la Commission dans le domaine de la concurrence bénéficieront de ce renforcement de ses compétences et de sa capacité de traiter des dossiers plus complexes. Par ailleurs, la Commission a réussi dans le même temps à améliorer ses circuits internes de notification des performances et de collecte de données afin d'exercer un suivi plus étroit de ses travaux et du coût de ses activités et de tenter d'en apprécier la complexité. Un consultant extérieur a été recruté et chargé d'enquêter au sein même de la Commission sur l'efficacité, les coûts des interventions, les modes d'intervention, les procédés et les procédures. Pour apprécier l'efficacité de la Commission, ce consultant s'est entretenu avec des parties

prenantes extérieures et s'est efforcé de mesurer les effets qu'avaient eus les interventions de la Commission sur le marché. Cet exercice avait par nature un caractère subjectif et qualitatif et n'entrait pas vraiment dans le détail. Les informations ainsi recueillies indiquent toutefois que la Commission est considérée à l'extérieur comme à tout le moins utile. Il a donné lieu à la rédaction d'un rapport volumineux qui a été transmis au gouvernement et a débouché sur une augmentation des crédits octroyés à la Commission (augmentation de plus de 50 % de l'enveloppe affectée à la mise en application du droit de la concurrence et du droit de la consommation). L'un des principaux défauts de ce rapport est en fait la qualité des informations fournies pour montrer en quoi les tâches confiées à la Commission sont devenues plus complexes, plus spécifiques et plus coûteuses.

La seconde étude portait sur la prestation de services juridiques au sein de la Commission (deux unités distinctes, le service juridique et le service économique, interviennent pour dispenser des conseils tant durant la phase d'enquête que pendant la phase contentieuse). Elle a révélé des tensions entre les juristes, qui souhaitent disposer de davantage de ressources et entendent affirmer leur emprise, et les autres services de la Commission, qui veulent privilégier l'amélioration de la qualité et la collégialité. Un groupe d'experts extérieurs composé de juristes de renom a passé en revue les procédures suivies, réfléchi au rôle des juristes au sein de la Commission et tenté de recenser les points de blocage. Même si les conclusions du groupe d'experts ne sont pas surprenantes (le service juridique est submergé et il est indispensable d'accroître sensiblement ses effectifs), l'étude a contribué à inspirer quelques évolutions relativement simples, mais efficaces, au nombre desquelles une réduction de la charge de travail, obtenue par l'élimination des activités ne relevant pas des missions essentielles de la Commission, l'élaboration de principes permettant de définir ce qu'il convient de considérer comme des « activités essentielles », et l'amélioration des outils mis à la disposition des enquêteurs. La reddition de comptes a également évolué dans tous les services de la Commission, et les juristes sont plus directement associés au traitement des dossiers à un stade plus précoce de la procédure.

### *1.4 La mesure des performances en tant que catalyseur des réformes internes*

Faisant écho aux observations formulées par la Nouvelle-Zélande sur l'utilisation des évaluations en tant qu'outils au service du changement, le Président invite la Commission européenne à s'exprimer sur la manière dont les procédures d'examen des fusions de la CE ont changé après avoir été évaluées.

Le délégué de la CE convient que de nombreux changements ont été décidés récemment à l'occasion d'une refonte complète de l'organisation (entamée à l'été 2003 et achevée en mai 2004), qui s'est notamment traduite par le démantèlement de l'équipe chargée des concentrations et la réunion des fonctions de contrôle des fusions et de lutte contre les ententes au sein des directions responsables de secteurs économiques spécifiques, suivis par la création d'une direction des cartels ayant vocation à intensifier les activités de mise en œuvre de la législation sur les ententes.

Pour renforcer les compétences économiques de la CE, un économiste principal a été nommé en juillet 2003. Il a depuis lors pris part au traitement d'un grand nombre de dossiers, ainsi qu'aux réflexions engagées sur des sujets stratégiques de portée générale et sur les processus législatifs. La CE a mis en place sur le plan interne un système d'examen par les pairs destiné à donner plus de rigueur au processus d'examen des dossiers jugés les plus importants avant la prise de décision. Les groupes chargés de conduire les examens par les pairs se composent de responsables expérimentés, et notamment de membres de l'équipe entourant l'économiste principal et de représentants du service juridique. Le programme de modernisation des équipes responsables de la lutte contre les ententes a conduit à élaborer un système de coopération avec les autorités de la concurrence des États membres C'est ainsi qu'est né le Réseau européen de la concurrence, l'autorité de la concurrence de chaque pays disposant en son sein d'une unité plus particulièrement chargée de la coordination des travaux entrepris par le réseau.

Grâce à ce mécanisme interne de suivi permanent au plus haut niveau, la CE est désormais mieux à même de mobiliser en priorité ses ressources au service de la lutte contre les atteintes à la concurrence les plus dommageables.

## 2. Évaluation des performances portant sur des interventions spécifiques des autorités de la concurrence

### *2.1 Impact des mesures de mise en oeuvre de la législation sur les ententes*

Le Président aborde la question de l'utilisation de l'évaluation des performances aux fins d'analyser des interventions spécifiques des autorités de la concurrence, par opposition aux activités de portée plus générale de ces organismes, et invite trois pays (la Corée, le Canada et le Royaume-Uni) à expliquer comment ils ont utilisé les évaluations de performances pour apprécier l'efficacité de leurs programmes de mise en œuvre de la législation sur les ententes.

Le délégué de la Corée décrit une affaire d'entente entre des fabricants d'uniformes pour étudiants qui a éclaté en 2000. Le marché coréen des uniformes pour étudiants représentait 1,5 millions d'uniformes, soit un chiffre d'affaires d'environ 300 milliards KRW. Les trois fabricants incriminés s'adjugeaient à l'époque une part de marché de près de 50 %. Ils ont décidé de s'entendre pour relever le prix sortie d'usine des uniformes et les porter de 80 000 à 100 000 à 150 000 à 200 000 KRW. En mai 2001, la KFTC a prononcé des sanctions sévères à l'encontre des trois fabricants concernés, et notamment une injonction d'acquitter une somme de 11,5 milliards KRW au total. D'après une étude du marché réalisée après que les mesures correctives eurent été prises, les prix des uniformes d'hiver ont baissé, passant de 175 000 à 145 000 KRW, chez les trois fabricants parties à l'entente, et de 155 000 à 125 000 KRW chez les petits fabricants et les fabricants de taille moyenne. Le bénéfice total de la mise en oeuvre des mesures correctives est estimé dans ce cas précis à quelque 60 milliards KRW. Cette affaire illustre l'impact négatif que peut avoir une entente sur le bien-être des consommateurs et montre l'ampleur et l'importance des effets qu'on peut escompter d'une politique de la concurrence bien menée.

Le délégué du Canada explique qu'une seule étude officielle a été réalisée au Canada dans le domaine des ententes et qu'elle visait à trouver des moyens pour faire avancer plus vite les dossiers et améliorer l'efficacité du Bureau de la concurrence. En ce qui concerne le contrôle des fusions, le Canada s'est penché de façon plus méthodique sur les effets de la mise en application de la législation. Un cabinet extérieur jouissant d'une excellente réputation et possédant une solide expérience en économétrie a en particulier été chargé d'exécuter une étude portant sur la situation après la réalisation d'opérations de fusions afin de déterminer si celles-ci avaient eu une incidence sur les prix. La recherche de données relatives à l'impact sur les prix a représenté une véritable gageure bien que Statistique Canada dispose de certaines informations et que des sociétés spécialisées recueillent également des données de cette nature. Il s'est en effet révélé difficile de trouver des séries de données suffisamment longues pour analyser les divers effets, et il est apparu que les marchés géographiques qui intéressaient les auteurs de l'étude ne correspondaient pas parfaitement aux marchés géographiques sur lesquels ils disposaient de données. Finalement, les analyses de régression ont fait apparaître que le niveau de certitude recherché n'était pas atteint. Le délégué du Canada reconnaît qu'il est indispensable de ne pas se contenter des données déjà publiées et de se doter d'outils adéquats pour mener à bien ce type de travail tout en admettant que la confidentialité des données est aussi un obstacle. Il ajoute qu'organiser des entretiens avec des fournisseurs, ce qu'a fait la CE, est peut-être une bonne solution qui mérite d'être étudiée plus avant.

Le délégué du Royaume-Uni indique que son pays n'a pas encore vraiment commencé à se pencher sur les affaires d'ententes en particulier et admet qu'il importe que le Royaume-Uni envisage de procéder à une auto-évaluation critique de son système de mise en application. En 2000, l'autorité de la concurrence a été investie du pouvoir d'intervenir de façon systématique dans des affaires d'entente, puis une nouvelle loi

l'a dotée d'une compétence pénale, ce qui l'a amenée à repenser totalement la conduite des procédures en vigueur. L'OFT s'est servi des enseignements de l'expérience acquise par d'autres instances habilitées au Royaume-Uni à engager des poursuites judicaires, à savoir le Serious Fraud Office et l'Inland Revenue, et s'est alors vu contraint de revoir sa façon d'aborder les dossiers. Il se forge petit à petit une expérience propre, et le délégué fait référence à deux affaires importantes d'entente sur la fixation de prix. L'une d'entre elles concernait des articles destinés aux membres de clubs de supporters de football, et l'autre des jouets : il ne s'agissait pas à proprement parler d'ententes injustifiables, mais assurément d'ententes horizontales sur la fixation de prix (pour lesquelles il a été possible d'observer la situation avant et après la conclusion des ententes).

L'étude sur le Competition Act réalisée par le National Audit Office couvre les activités de mise en application de la législation sur les ententes, et notamment l'évolution des procédures survenue depuis que l'autorité de la concurrence a été investie de compétences pénales. Elle sera publiée, et les enseignements qu'elle permettra de dégager devraient être très profitables. Les entretiens conduits par des consultants extérieurs, garantie de transparence et d'objectivité des critiques émises, se poursuivront.

### *2.2 Études réalisées par des organismes extérieurs*

Le Président, faisant référence à des interventions précédentes ayant évoqué le problème de la confidentialité des données que pose le recours à des consultants extérieurs, se tourne vers le représentant de la Suède pour l'inviter à décrire comment la participation à des exercices d'évaluation d'universitaires ou d'experts extérieurs est gérée dans son pays.

Le délégué de la Suède précise qu'une évaluation des activités de l'autorité suédoise de la concurrence a été entreprise il y a plus de dix ans afin de mettre à profit l'expérience acquise et de moduler les stratégies suivies, mais aussi d'œuvrer à la crédibilité de ces stratégies grâce à une transparence accrue. En 2004, le coût de ces projets entrepris à ce titre s'établissait à environ 800 000 euros. À des fins d'évaluation, ce système présente deux avantages directs : d'une part, il donne accès à un réseau d'experts indépendants possédant une connaissance approfondie des activités de l'autorité de la concurrence, et d'autre part, l'autorité de la concurrence peut pour sa part puiser dans les ressources que lui offre le réseau et s'adresser à des membres qui en font partie pour exécuter des études qui vont lui être d'une grande utilité. Environ un cinquième du budget consacré à des travaux de recherche sert à financer des études directement commanditées par l'autorité de la concurrence ; une analyse de l'ensemble des grandes affaires portées devant la justice dans lesquelles l'autorité de la concurrence avait joué un rôle pendant la période 1993-2004 a ainsi été réalisée récemment par un chercheur en droit de l'Université de Stockholm. Son rapport, qui peut être consulté sur le site de l'autorité suédoise de la concurrence, passe en revue tous ces dossiers et classe les décisions des tribunaux, selon que l'autorité de la concurrence a perdu, gagné ou en partie gagné, avant de tenter de mettre au jour les facteurs expliquant le résultat final. Parce qu'elle porte sur une masse considérable de données (une centaine de dossiers), l'étude permet de dégager des indications éclairantes sur la manière dont l'autorité de la concurrence a traité ces affaires et de mieux comprendre comment elle fonctionne.

### *2.3 L'évaluation en tant qu'instrument de repérage des règles et des réglementations à réformer*

Le Président s'adresse à la délégation de la Turquie pour l'inviter à expliquer en quoi les évaluations peuvent être utilisées pour repérer les réformes qu'il convient d'engager, non seulement au niveau du fonctionnement de l'institution, mais aussi dans les règles, les codes et les réglementations ayant trait à la concurrence.

Le délégué de la Turquie souligne qu'au moment où son pays a rédigé le projet initial de loi sur la concurrence, il n'avait guère d'expérience de la mise en œuvre du droit de la concurrence et n'était donc

pas en mesure de prévoir les difficultés de procédure qui risquaient de surgir au stade de la mise en œuvre des textes. Néanmoins, lorsque la Commission turque de la concurrence a commencé à faire appliquer la loi, divers problèmes se sont posés et ont été examinés lors de rencontres périodiques réunissant de hauts responsables de l'autorité de la concurrence et des personnes chargées de traiter les dossiers. Ce dispositif a permis de réaliser des avancées considérables dans la résolution des problèmes grâce à la présence des chargés de dossiers qui sont les intervenants les mieux placés pour détecter les lacunes du système et trouver les moyens d'y remédier.

Le concours d'intervenants extérieurs compte toutefois également beaucoup selon lui, et dans le cas de la Turquie, cette aide extérieure est venue de l'OCDE qui a procédé à des examens approfondis de la politique et du droit de la concurrence de la Turquie. Le rapport 2002 de l'OCDE, qui décrit certains des points faibles de la loi, et les recommandations formulées dans l'examen par les pairs réalisé en 2005 ont été très riches d'enseignements et ont contribué à améliorer l'efficacité de l'action de l'autorité de la concurrence dans le domaine de la mise en application (certaines observations énoncées dans ces documents recoupant d'ailleurs les conclusions auxquelles les propres services de l'autorité de la concurrence étaient parvenus). Ces documents préconisaient notamment la mise en place d'un programme de clémence, une révision des délais impartis pour les examens des fusions, un relèvement des amendes maximales infligées en cas d'infraction autre qu'une violation de la législation sur le fond, la suppression de la notification obligatoire des accords, l'instauration d'une procédure amiable de règlement des litiges, l'augmentation du nombre et le renforcement des compétences des juristes de la TCA et l'élargissement des compétences de l'autorité de la concurrence en matière d'analyse des filières industrielles.

### *2.4 Évaluation des actions de sensibilisation*

Le Président s'adresse aux représentants des États-Unis et de l'Irlande qui, dans leurs contributions respectives, traitent de la difficulté qu'il y a à mesurer l'impact des actions de sensibilisation. À cette occasion, il rappelle une discussion qu'a eue le Comité quelques années auparavant sur la politique de communication des autorités de la concurrence, dont il est ressorti qu'il n'existait pas nécessairement de corrélation étroite entre les actions menées par celles-ci, en particulier dans le domaine de la sensibilisation aux problèmes de concurrence, et la compréhension des missions qui leur sont confiées.

Le délégué des États-Unis reconnaît que la sensibilisation est effectivement une tâche particulièrement délicate pour plusieurs raisons. D'une part, elle repose uniquement sur la persuasion, puisque les autorités de la concurrence n'ont aucun pouvoir coercitif pour influencer les responsables d'autres sphères de l'action gouvernementale auxquels appartient en dernier ressort la décision d'intervenir, ou au contraire de ne pas intervenir, compte tenu des incidences sur la concurrence d'une intervention éventuelle. D'autre part, parce que les facteurs entrant en ligne de compte dans la prise de décision sont nombreux, il est souvent difficile d'isoler l'influence d'une action de sensibilisation en particulier. On perçoit parfois des signaux très clairs : l'année dernière par exemple, une loi réglementant les obligations en matière de contrat et de diffusion d'informations des sociétés gérant le programme de remboursement des médicaments prescrits pour le compte des compagnies d'assurance a été votée en Californie ; la FTC a émis un avis par lequel elle indiquait que cette loi pourrait avoir des effets négatifs sur la concurrence, et le Gouverneur, Arnold Schwarzenegger, a opposé son veto à l'entrée en vigueur de la loi, décision certainement motivée au moins en partie par le commentaire de la FTC.

Selon le délégué des États-Unis, la FTC a traversé plusieurs périodes successives et s'est montrée parfois très active, et à d'autres moments moins dynamique sur le front de la sensibilisation. En 1989, après une période d'activité particulièrement intense en faveur de la sensibilisation au problème de la concurrence, une étude a été réalisée par un universitaire nommé Arnold Celnicker pour tenter d'évaluer l'impact des efforts déployés. Il en est ressorti que les actions de sensibilisation avaient eu des retombées positives. Pour illustrer son propos par un exemple précis d'action de sensibilisation au problème de la

concurrence, le délégué des États-Unis fait référence à une réglementation que le Federal Department of Housing and Urban Development (HUD) envisageait d'adopter et qui imposait des exigences particulières en matière de diffusion d'informations pour un certain type de prêt (les prêts contractés par l'intermédiaire d'un courtier) par opposition aux prêts contractés directement. Les services de la FTC ont adressé à l'HUD un avis dans lequel ils faisaient état de leur crainte que la réglementation proposée ne soit préjudiciable au premier type de prêt par rapport au second. Une étude fondée sur l'observation du Bureau of Economics a permis de tester le dispositif et révélé que celui-ci semait en effet la confusion chez les consommateurs au point de les amener à choisir des prêts plus onéreux. Cette étude a été publiée, et l'Office of Management and Budget a invité l'HUD à renoncer à cette réglementation et à revoir sa copie à la lumière des observations de la FTC. Il s'agit bien là d'une situation où une évaluation a posteriori a rehaussé la crédibilité de la FTC dans l'accomplissement de sa mission consistant à formuler des avis et à dispenser des conseils concernant les effets sur la concurrence de telle ou telle ou décision.

Le délégué de l'Irlande explique que l'autorité de la concurrence irlandaise n'a guère mené jusqu'ici d'analyses a posteriori, mais qu'elle a décidé d'intensifier nettement son effort dans ce domaine, notamment en ce qui concerne le contrôle des fusions et dans les affaires d'ententes et de monopoles. Ce sont en partie des problèmes de disponibilité des données et de méthodologie qui ont posé des limites à son action, mais aussi le fait que, lorsque les organismes sont plus petits, les centres de collecte de données sont moins nombreux et l'acquisition de compétences au niveau interne prend davantage de temps. Le délégué de l'Irlande, comme celui des États-Unis, estime qu'il est souvent difficile d'attribuer une évolution précise aux efforts de sensibilisation de l'autorité de la concurrence dans la mesure où les facteurs qui jouent un rôle sont à l'évidence multiples. En Irlande, l'autorité de la concurrence plaide depuis longtemps pour la suppression des restrictions quantitatives sur le marché des services de taxis. Les restrictions ont finalement été levées, mais à la suite d'une décision de justice, et non sous l'effet d'une mesure quelconque que l'autorité de la concurrence aurait été en mesure d'imposer. Si pour évaluer les avantages pour le consommateur, l'on se fonde sur la valeur totale des autorisations d'exploiter un service de taxis accordées avant la libéralisation, celle-ci peut être estimée à environ 250 millions d'euros. Le nombre de taxis en circulation a en effet grimpé de 2 000 environ à 11 000 en trois ans seulement, hausse à l'évidence bénéfique pour les consommateurs.

Le dossier Aer Lingus offre également un exemple d'application d'une méthodologie adaptée à la situation considérée. Après le 11 septembre, cette compagnie a dû réaliser des gains d'efficience pour pouvoir abaisser ses tarifs et ouvrir de nouvelles lignes. L'autorité de la concurrence n'a pas soutenu les agences de voyages et a pris le parti d'Aer Lingus lorsqu'elle a décidé de revoir son système de distribution et de délaisser les agences de voyages au profit des systèmes de vente à distance, notamment par Internet. La valeur de cette réorientation stratégique a été estimée à environ 40 millions.

Dans deux secteurs aussi différents que celui des débits de boissons et des banques commerciales, on peut d'ores et déjà évaluer les dommages que pourraient causer des changements qui ne se sont toutefois pas encore produits et dont la valeur est estimée, dans le second exemple, à 85 millions par an.

## 3. Innovations dans la gestion des performances : application par le Portugal du cadre d'évaluation élaboré par l'OCDE

Le Président invite le Secrétariat à présenter le cadre d'évaluation axé sur les procédures qu'il a mis au point, et le Portugal à faire part des enseignements qu'il a tirés de la mise en pratique de cette méthode de mesure.

Le Secrétariat introduit ses observations en remontant au début des années 80, période durant laquelle l'organisation des services des autorités de la concurrence a fait l'objet d'une évaluation de très vaste portée qui a permis de l'appréhender dans toutes ses dimensions : on considérait en effet à l'époque que

tout changement serait voué à l'échec s'il ne concernait qu'une section et pas les autres. Parallèlement, on estimait que la réussite d'un changement d'organisation était fortement conditionnée par le déploiement d'une action coordonnée sur tous les fronts. Au début des années 80, les modèles d'organisation proposés par le secteur privé ou le secteur public s'inscrivaient dans une optique fortement axée sur la concurrence en ce sens qu'une organisation était censée s'auto-évaluer par comparaison avec d'autres organisations homologues. La notion de reconnaissance par les pairs a par la suite fait son apparition, et ce virage a eu des effets très positifs sur la motivation des instances concernées à démontrer leur capacité de mener à bien leur mission.

Ce n'est que petit à petit que les modèles d'évaluation des organisations ont commencé à être davantage bâtis sur ce que faisaient réellement les organisations performantes, et il importe de souligner que ce genre de processus ne semble porter ses fruits que si les acteurs concernés sont véritablement déterminés à introduire des changements. Lorsqu'on analyse le fonctionnement d'une organisation, l'un des objectifs essentiels consiste à recenser les principaux critères d'évaluation qui seront utilisés, à les soumettre aux responsables concernés et à élaborer un modèle de fonctionnement, et enfin à définir les décisions fondées sur l'observation des faits qu'il convient de prendre pour mener à bien les changements au lieu de se borner à tracer des orientations théoriques.

Le Secrétariat cible alors le débat sur le modèle mis au point pour l'autorité de la concurrence du Portugal qui s'articule autour de neuf critères définis en concertation avec le personnel et assortis d'une échelle précise dont les degrés correspondent à des comportements de référence. Pour chaque critère faisant l'objet d'une notation, des caractéristiques distinctes ont été définies, en collaboration avec le personnel qui a par exemple été invité à indiquer comment la direction devrait être organisée, comment l'organisation elle-même devrait être structurée ou encore comment les examens des performances devraient se dérouler, sachant que les facteurs précis auxquels font référence les intitulés sont en très grande partie dégagés à partir des propres travaux de l'autorité de la concurrence. Des données d'observation relatives aux méthodes de travail du personnel ont été ensuite recueillies auprès des agents employés par l'autorité de la concurrence et il a été procédé à une évaluation des informations émanant de celle-ci, en concertation avec les agents concernés, afin de formuler des projets destinés à améliorer le système.

Selon le représentant du Secrétariat, le passage à l'auto évaluation est une étape importante dans la mesure où il signe le début de l'ancrage de l'évaluation des performances dans la structure même de l'organisation. Plus il est fait appel à des intervenants extérieurs pour l'exécuter, moins l'examen des performances s'enracine dans la structure de l'organisation. Il doit quoiqu'il en soit être axé sur les résultats. Une fois achevée, l'évaluation de l'organisation doit encore offrir des possibilités de suivi régulier et des perspectives d'amélioration.

Le délégué du Portugal affirme d'emblée qu'il faut pouvoir s'appuyer sur des institutions fortes et efficaces, ainsi que sur un cadre d'action bien conçu ou des analyses pertinentes de l'action menée, et que c'est là une gageure lorsque les ressources en personnel sont rares. Il décrit les enseignements que le Portugal a retirés de son expérience de mise en pratique du modèle élaboré par le Secrétariat. Les principales parties prenantes (juges auprès des tribunaux soumis à l'examen de l'autorité de la concurrence, organismes sectoriels de réglementation, spécialistes du droit de la concurrence, représentants des milieux d'affaires et relais d'opinion) ont rencontré des membres de l'équipe de l'OCDE et la teneur de ces entretiens est restée confidentielle. Ces échanges ont été complétés par des réunions avec de hauts responsables de l'autorité de la concurrence qui se sont également livrés à une sorte d' auto-évaluation. Au terme de ce processus, l'équipe de l'OCDE a rédigé un document qui a été communiqué à l'autorité de la concurrence du Portugal et qui a facilité la classification des critères auxquels fait référence le modèle établi par le Secrétariat.

Un atelier, dont les participants ont été répartis en trois groupes (le premier chargé de réfléchir aux orientations stratégiques, le deuxième aux problèmes d'encadrement et le troisième à la gestion des procédures), a ensuite réuni l'ensemble des directeurs de l'autorité de la concurrence qui ont procédé à une analyse des réponses des parties prenantes et des observations formulées par l'équipe de l'OCDE, avant de recenser les domaines dans lesquels l'autorité de la concurrence devait s'améliorer. Les résultats ont été très concluants sur les aspects intéressant l'encadrement et la stratégie : un programme d'activité avait été défini pour les trois premières années d'existence de l'autorité de la concurrence ; les relations avec les parties prenantes sont satisfaisantes grâce à l'effort considérable de sensibilisation qui a été consenti pour valoriser la culture de la concurrence au Portugal. Les principales difficultés rencontrées concernent le fonctionnement de l'autorité de la concurrence et l'examen de ses performances. Il est en effet préférable que l'autorité de la concurrence acquière d'abord une certaine expérience du traitement des dossiers avant de publier des recueils de règles. S'agissant de son programme d'activité annuel, le processus a souligné la nécessité de dégager de grandes priorités et de résumer en deux pages les objectifs à atteindre impérativement.

Le Président invite le Professeur Kovacic à faire part de ses commentaires sur les interventions précédentes et à indiquer au Comité les travaux qu'il pourrait se révéler utile d'entreprendre dans les deux ans à venir, c'est-à-dire entre maintenant et la date à laquelle le Comité reprendra la discussion, comme l'ont suggéré un certain nombre de délégués.

Le Professeur Kovacic précise que la discussion a permis de brosser un tableau fidèle à la réalité du large éventail des activités menées actuellement, dont l'ampleur est dans une large mesure imputable aux travaux du Comité de la concurrence, dont les table rondes consacrés à des études de cas, les examens par les pairs, les débats sur les mesures correctives en cas de fusion et autres initiatives de natures diverses, ont encouragé les délégués à porter leur attention sur l'évaluation. En ce qui concerne les travaux futurs, il propose :

1. de recueillir les résultats d'études au fur et à mesure qu'ils deviennent disponibles et de mettre en parallèle, pour les comparer, les résultats obtenus, en particulier pour ce qui est des mesures correctives en cas de fusion, de prendre connaissance des conclusions de l'étude la Commission européenne à paraître prochainement et des études effectuées aux États-Unis (par le ministère de la Justice, la *Federal Trade Commission*), et enfin de tenter de dégager les enseignements de portée générale qui peuvent être tirés de l'expérience acquise pour l'élaboration des mesures correctives susceptibles d'être prises à l'avenir en cas de fusion ;

2. de rassembler les informations d'ores et déjà disponibles afin que les membres puissent les consulter pour leurs propres besoins, mais aussi en tant que référence dans la perspective de travaux futurs. Le Comité de la concurrence pourrait recueillir les résultats des études portant sur des interventions spécifiques et les mettre à la disposition des membres sous forme électronique de façon à permettre à ces derniers de les passer en revue et d'en exploiter les résultats avec tout le soin voulu ;

3. de poursuivre le débat :

   - sur la méthodologie et la collecte de données à partir d'études de cas permettant de déceler en quels lieux les données sont d'ores et déjà rassemblées, et aussi d'organiser un débat sur les obstacles à surmonter ;

- sur les dispositifs existants en matière d'évaluation. La réalisation des exercices d'évaluation doit-elle être confiée à un service spécialisé investi du pouvoir d'exercer une telle responsabilité ? Une telle solution paraît-elle plus prometteuse ?

- sur la mise au point d'une structure organisationnelle qui garantirait que les enseignements de l'expérience sont effectivement mis à profit pour la gestion au quotidien et dans le cadre des activités de l'institution et que, loin de servir uniquement à projeter momentanément un éclairage sur ses activités, ils font partie intégrante de son mode de fonctionnement**.**

Le Président invite alors l'assistance à un débat général.

Le délégué de l'Australie se réfère à un projet de recherche mené par l'Australian National University qui a pour objet de mesurer les résultats obtenus au terme d'une dizaine d'années d'efforts très actifs de mise en application de la législation, ainsi que l'efficacité des instruments utilisés. On peut penser que les problèmes de méthodologie et de confidentialité soulevés par le Canada en particulier sont pris en compte dans cette étude. Les résultats seront publiés prochainement et devraient alimenter les discussions à venir au sein du Comité.

La **d**éléguée du Canada juge les échanges extrêmement instructifs : ils lui ont permis de glaner une multitude d'idées dont pourrait s'inspirer le Bureau de la concurrence. Il est peut-être regrettable de devoir attendre deux ans pour pouvoir exploiter une telle matière. Elle demande des éclaircissements sur le dispositif de recueil d'informations évoqué par le Professeur Kovacic.

Un délégué des États-Unis fait valoir qu'il est possible de tirer de toutes ces discussions des leçons sur les procédures, sur le fonctionnement des filières industrielles, sur la marche de l'économie en général, mais que lorsqu'une mauvaise décision a été prise sur un dossier, il n'est pas toujours facile de se mettre d'accord sur ce qui n'a pas fonctionné, ni sur ce qu'il aurait fallu faire pour que le choses se passent différemment. Il ne sert donc à rien de revenir sur les mauvaises décisions, sauf lorsque celles-ci s'expliquent par un dysfonctionnement au niveau des procédures.

Le délégué de la Finlande souligne à quel point il est important d'évaluer les stratégies et les options privilégiées par l'autorité de la concurrence. Quelle est sa mission essentielle ? Comment l'accomplit-elle grâce aux ressources en personnel dont elle est dotée ?

Le délégué du Danemark convient que les travaux doivent se poursuivre, et que le Secrétariat doit s'en charger à un moment ou à un autre en évitant tout double emploi avec les travaux de l'ICN, en particulier en ce qui concerne les procédures suivies pour les examens des fusions. Dans le futur, il conviendrait d'introduire une classification entre les mesures utilisées pour évaluer des dossiers individuels et les mesures employées pour apprécier la tenue globale d'une économie, d'un système, d'un mode de gestion ou d'une organisation telles que celles utilisées par le Portugal. Il ajoute qu'en s'inspirant du modèle des pays nordiques, les autorités de la concurrence pourraient de leur propre initiative s'étalonner les unes par rapport au autres à l'aide de quelques indicateurs, en comparant leurs performances et leurs procédures respectives, afin d'analyser ensuite les raisons de leurs échecs, sachant qu'on apprend davantage de ses échecs que de ses succès.

Le **d**élégué de la Norvège est favorable à l'idée de mener à bien des travaux de suivi dans ce domaine, mais souhaite que le thème de la table ronde soit plus circonscrit à l'avenir. Il convient selon lui d'axer le débat soit sur l'organisation interne, soit sur l'évaluation a posteriori de l'impact commercial d'une décision, par exemple sur l'évaluation a posteriori des retombées d'une fusion.

Le représentant de la Commission européenne se rallie à l'avis du Danemark et de la Norvège qui se sont déclarés favorables à un ciblage plus étroit du débat à l'avenir. La discussion a porté sur les principes fondamentaux, elle a permis d'examiner dans quelle direction s'orientent les autorités de la concurrence et sur quel type de dossier elles enquêtent, et d'en tirer des renseignements extrêmement précieux sur les domaines dans lesquels les autorités de la concurrence rencontrent effectivement des problèmes communs aux unes et aux autres et ont beaucoup à échanger et à apprendre les unes des autres. Les mesures correctives en cas de fusion constituent l'un des thèmes qui, de son point de vue, appelle véritablement un nouveau débat prenant appui sur l'analyse de situations réelles, et le projet d'évaluation de la CE portant sur des dossiers de fusion qui est sur le point d'être lancé pourrait dans cette optique fournir des éléments utiles.

Le délégué du Portugal est d'accord pour poursuivre cette discussion au sein du Comité, et insiste sur le fait que les raisons pour lesquelles l'autorité de la concurrence du Portugal fait appel à un examinateur extérieur, à savoir l'OCDE, tiennent non seulement aux compétences et à la crédibilité de l'Organisation, mais surtout à la pression exercée par les pairs dans son enceinte. Il faut selon lui impérativement prendre la mesure de trois facteurs différents : l'efficacité des institutions, les résultats, par opposition à l'efficacité, et l'impact global.

Le Président conclut en prenant note de l'intérêt que suscite chez les délégués la poursuite du débat sur les multiples points à aborder. Il fait remarquer que l'expérience acquise durant les tables rondes montre qu'elles ne sont enrichissantes que lorsque de nouveaux éléments viennent alimenter les délibérations, et ajoute que, sachant qu'un certain nombre d'études seront publiées ou achevées au cours des deux prochaines années, il semble évident que le Comité aura à l'issue de cette période de nouvelles données d'expérience à partager. L'éventualité d'organiser une table ronde en juin prochain ne devrait toutefois pas être écartée si certains points méritent d'être à nouveau abordés à ce moment-là.

Il propose de mettre en place un groupe de discussion électronique dont la création servirait plusieurs objectifs : 1) faire en sorte que le Secrétariat répertorie les études par pays que les délégués pourraient examiner ; 2) déterminer si pour tous les thèmes abordés, des éléments nouveaux ou complémentaires méritent d'être débattus l'année prochaine dans le cadre d'une table ronde plus ciblée. Cette solution permettrait d'offrir un accès aisé aux données disponibles, et le Président encourage les délégués à soumettre au groupe de discussion électronique toutes les études ou références dont ils auraient connaissance. Le Comité appréciera si le groupe de discussion électronique donne lieu à des échanges nourris sur un choix donné de questions, et si ce choix est suffisamment cohérent et peut constituer la matière d'un débat plus ciblé dans le cadre d'une table ronde organisée le cas échéant en 2006, avant la table ronde prévue en tout état de cause d'ici deux ans.