



International  
Competition  
Network

International Competition Network  
Competition Policy Implementation  
Working Group

SEMINAR ON COMPETITION AGENCY  
EFFECTIVENESS

Summary report  
Brussels  
January 2009

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*[www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)*



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# INTRODUCTORY SPEECHES





**NEELIE KROES -COMMISSIONER FOR COMPETITION,  
EUROPEAN COMMISSION**

Before going into substance, may I thank all of you for coming to Brussels for this seminar – nearly 100 heads and senior officials of competition agencies, this is a quite a gathering I think you will agree. To make this effort in winter, and on top of your busy schedules is a testimony to the value of the International Competition Network and, of course, the need to be effective in these difficult times.

First of all, let me borrow a well known French phrase: *Gouverner, c'est choisir!* – to govern is to choose. In other words, we need to prioritize. We cannot catch every infringement, we cannot investigate every market. To be effective, we have to take action where we can have the greatest impact. And we must know both ourselves and the markets very well, so that these choices are not mere guesses, but well-managed risks.

Secondly, we are accountable. Competition authorities are public institutions paid by taxpayers' money. Hence, we have to give an account about our activities and need to duly quantify or qualify the effectiveness of our work. This is how we can prove that we are effective. At DG Competition we are proud of our metrics. We clearly deliver more benefits to the economy than we cost taxpayers. Direct consumer savings of at least €8bn in 2008, which compares favourably to our operating costs of around €100 million. And this does not even begin to take into account the indirect benefits of deterrence. Plus, of course, the fact that the fines we levy are returned to the European taxpayer through lower national contributions to the EU budget.

Importantly, we gather evidence showing that competition enforcement does make a difference and that it does contribute in the medium- and long-term to a better economy. In fact maintaining competition is especially true in times of difficulty and economic turbulence – such as those in which we are living now. We help keep markets on track and help to deliver the value for money that consumers need and the innovation that creates jobs.

Finally we can only be effective and accountable if we communicate well and if we are allies. Working and delivering our results in an effective way is, in itself, not enough – we have to build a competition culture by educating and engaging citizens and businesses, and we have to explain what we do if we are to be accountable to the people we serve. Defending consumers' interests – irrespective of whether a competition agency is directly trusted with consumer protection issues or not – is at the heart of the efforts of all competition policy. We all know that communicating these benefits to the citizens and consumers is a very difficult task. Yet, we are only truly effective if we do reach citizens by having a strong enforcement policy that makes a difference to their lives, and we take the time to explain this.

In saying all of this, I don't believe there is a single model for being effective – I am simply sharing what I think are some of the basic requirements we can all recognise. I know that while we all think fighting cartels is a priority, there are also important differences in our respective economic, legal and institutional working environments. Only you can know what will be most effective in your own environment.

Let me briefly tell you about a couple of the distinctive features of DG Competition's set-up. First, our decision making process. Our competition system grows out of the Treaty establishing the European Union. So while DG Competition and its 800 staff do the groundwork it is actually the Commission's College of Commissioners that takes the major decisions, and in turn this obliges us to align with the Commission's five-year strategic objectives and annual policy programmes.

Moreover, we can export our *savoir-faire* to other policy areas. To give you concrete examples: Our "effect-based-approach" - focusing on the likely effects on consumer welfare – has had an important impact on overall EU policies, where the approach is now common.

We can also feed our sector knowledge into more specific Commission policy-making. Prominent examples include our sector inquiries, such as the Energy inquiry. The market knowledge we obtained has significantly affected the energy and climate change agenda, and continues to underpin action pursued by other parts of the Commission. This is also likely to be the case for the ongoing pharmaceutical sector inquiry.

I think it also fair to say that the structures of the Commission have ensured DG Competition has had and will continue to have an important voice during the financial crisis.

It is easy to see how a panic amongst governments or a subsidy race between governments could have started in late 2008. By acting calmly, quickly, flexibly and with an eye on maintaining a level playing field, DG Competition was able to play a leading role in avoiding such outcomes whilst supporting financial stability. Instead of exporting national problems to each other, Member States decided to export common-sense and goodwill instead. Our ability to shape that response would have been much less if we were separated from the main working structures of the Commission.

This role of course, has also meant new demands and new criticisms of us and forced us to work faster and harder than ever. But that is a price worth paying in order to be effective.

Together those challenges emphasize, the importance of this seminar. We all have to make unpopular decisions, we all have to make sure that our houses are in order; that we work effectively, and that we let people know it. I cannot emphasize enough the importance we attach to giving due account to the world about our work's effectiveness.



**PHILIP LOWE - DIRECTOR-GENERAL, DIRECTORATE-GENERAL FOR COMPETITION, EUROPEAN COMMISSION**

I am delighted to see so many of you here today.

As Mrs Kroes has emphasised, competition enforcement has never been more crucial than in the current economic climate. And scrutiny of our actions and our effectiveness will - rightly - never be closer.

This seminar combines several strands of discussion that have taken place during recent years between competition authorities. These discussions are reflected in the ICN work on mergers, on cartels and on unilateral conduct. The purpose of our seminar today is to focus on the way in which we organise ourselves, so as to best achieve our objectives and to follow the best practices we have set up in the context of the ICN.

It gives us a chance to pool our experiences, so let my contribution be a brief description of how DG Competition operates.

***Shaping the organisation to enhance effectiveness***

*The internal organisation of DG Competition*

We have made significant changes to our organisational structure over the last few years.

In two waves - in 2003/04 and then in 2007 - we reorganised DG Competition into a matrix structure. This structure integrates merger, antitrust and state aid units in five 'market and cases' directorates dedicated to enforcement action in key sectors of the EU economy - such as energy, telecoms, transport, financial services and information technology.

The advantages of this structure are that it pools and increases market knowledge so that investigations are more informed and effective; it promotes more flexible use of staff across the policy instruments and helps spread best practices; it promotes effective competition advocacy; and, it facilitates dialogue with other parts of the Commission as well as other competition authorities and regulators within and outside the EU.

For a priority project - such as a big merger or a sector inquiry – we create teams of staff drawn from different parts of the DG. Case teams can be created by bringing together staff who have sector-specific knowledge, and/or staff who have instrument-based experience. This flexibility is invaluable, as demonstrated recently in the context of the financial crisis. In order to respond to the urgency of the situation we were able to rapidly re-allocate additional resources to the financial services units from other parts of DG Competition. In addition we have called for extra resources from other parts of the Commission and, indeed, externally.

Where market knowledge is not as important as instrument knowledge, we believe that an instrument based organization is more effective. Hence, cartel cases remain in one single Directorate.

In 2003, reflecting the emphasis on economic analysis, and the need for rigorous internal scrutiny processes, we also created the role of Chief Economist - who reports directly to me. The Chief Economist is assisted by a team of 20 PhD economists.

### *Objectives and resources*

We attempt to translate the strategic objectives of DG Competition – protecting competition on the market as means of enhancing consumer welfare; supporting growth, jobs and the competitiveness; and fostering a competition culture – into operational objectives which we plan in advance, monitor during their execution, and evaluate afterwards. This means that we have to be able to target resources towards these objectives in a flexible way.

### **Remaining challenges**

#### *Measuring performance and impact*

The question is though, how effective are we really? It is important that we try to measure this. I see three main indicators for effectiveness: productivity, quality and impact.

Taking productivity, for internal management purposes we use workload and performance indicators that are largely harmonised across our different fields of activities. We quantify incoming workload and upcoming trends, then we measure relevant intermediate and final achievements (such as Statements of Objections and Decisions) and finally we compare achievements with our projections. In this way we try to measure efficiency in the use of resources (by comparing the resource input with the output).

There are many variables to this apparently simple exercise: for instance, we could simply measure output in terms of the number of decisions adopted. This might work for cartels, but it wouldn't take account of the variety of work undertaken by other antitrust staff, which includes dealing with complaints, discussing potential commitments, and other policy work that has an impact without going to a formal decision. Or, we could just look at the number of pages of text we send for translation every year – though again, a lot of work goes on that doesn't need to be translated.

Regarding quality, we try to monitor the procedural quality of our activities and the timeliness of our work. Internally, our enforcement action is subject to scrutiny and peer review processes. Externally, the European courts provide the ultimate in quality control by reviewing our decisions – and I am happy to report that largely our decisions survive this scrutiny. We are also planning a comprehensive stakeholder survey in the coming months about the perceived quality of our work and how we communicate. This will involve citizens,

stakeholders – and we will ask for your views too! We plan to have results by autumn this year.

Finally in order to really know whether we achieve our objective of making markets work better, we need to measure the impact of our decisions on those markets. For management planning purposes we estimate the direct future customer savings resulting from our cartel, antitrust, liberalisation and merger cases. For 2008 we calculated that this was at least 9 billion euro. This is a very simplified calculation – for instance it doesn't take into account deterrent effects. But it allows us – even if only in rough terms – to have some idea of consumer savings that result from our work.

We are also working on some more refined evaluations of our activities. But there are a number of issues that can be raised. Some argue that stopping a cartel doesn't have that much impact, as we tend to only hear about those cartels that are already dying out? Or how do we assess the deterrent effect of our merger assessment activities? We need to be able to look back and say to ourselves: what difference did our activities and decisions really make? I suspect that we would find that sometimes we had a dramatic effect, and other times we had no or little effect. And sometimes it may be our advocacy work or our statements of policy that may have the most profound impact.

At any event we recently finalised a market impact study for our cartel activities. We estimated the harm cartel harm has already caused at EUR 7.6 billion and the harm prevented by our decisions at EUR 4.6 billion. In order to take deterrence into account, we applied the very simple rule that each prevented cartel prevented another one to be created – so that the benefits would double. The future challenge is to extend these more refined calculations to the other instrument areas. At present we are working on quantifying the impact of merger policies.

### **Conclusion**

In my view achieving effectiveness is always going to be an ongoing process. It is a question of continually monitoring and assessing our legal framework, our processes and our resources, in order to ensure that they reflect developments in case-law, in economic thinking, and the economy as a whole.

The seminar today will provide us all with an excellent opportunity to exchange best practices. The plenary sessions are intended as scene-setters, but I think that the real work will be done in the breakout sessions, where everyone will have a chance to contribute and learn from one another. For a successful seminar it is essential that we get to hear about every agency's experiences.

And now I pass the floor to Carlos Ragazzo, Commissioner at the Brazilian Council for Economic Defence and co-chair of the Competition Policy Implementation working group of the ICN, who will talk a little about the past and present ICN work in the field of agency effectiveness.



**CARLOS RAGAZZO - COMMISSIONER, BRAZIL, COUNCIL FOR ECONOMIC DEFENCE**

It is a pleasure for me to be here at the CPI meeting. My duty today is to describe the results of the Agency Effectiveness Report prepared last year by the Competition Policy Implementation Working Group (Sub-Group 1). To begin my quick remarks on such results I reckon that it is important to stress that ICN working groups have always devoted great efforts in elaborating recommended practices in day-to-day to complex cases. ICN members are constantly sharing and / or donating expertise to their peers.

However, the implementation of best practices in cases is not the only factor that assures agency effectiveness. Resources are scarce and staff is limited to handle the growing number of cases. And the workload increases constantly as well as the complexity of the cases. Therefore, agencies' heads understand that it is necessary to constantly assess efficiency and effectiveness of their competition authorities.

Taking these facts into account, CPI has proposed a two-phase project to address: (i) the issue of effectiveness of competition policy, and (ii) the design of the competition agencies that best accomplishes effectiveness.

The first phase of the Project, named "The Agency Effectiveness Project", which I will address in detail in a few minutes, had the purpose of evaluating agencies' organizational and operational frameworks by collecting information from 20 ICN member agencies. The second phase, to be presented in the 8<sup>th</sup> ICN Annual Conference in Zurich, will focus on effectiveness of ultimate agencies' decisions, assessing the authorities' abilities to obtain compliance with remedies and sanctions.

The Agency Effectiveness Report has approached objective settings, proactivity, different experiences with strategic planning, resource allocation, prioritization and its criteria, evaluation instruments, and accountability. The CPI WG chose to divide these subjects in three main topics, which were: (i) Defining Objectives and Priorities; (ii) Resource Allocation, and (iii) Decisions' Effectiveness. It was assumed that the process of organizational decisions can be one of the main causes of presence or lack of effectiveness of an agency. Such assumption was based on the premise that there is a direct link between effectiveness, and conscious and planned prioritization.

In the "defining objectives and priorities" topic of the report, the purpose was to identify how the agency's objectives are chosen and prioritized. Despite the scarcity of resources, agencies are willing to be more proactive, rather than merely reactive, especially regarding advocacy matters and ex-officio investigations of anticompetitive conducts. This change of pattern also reflects in the profile of the agents responsible for running a competition authority or

even divisions. Heads and senior officers are no longer merely judges or investigators. They must also have increasing executive skills.

It is, therefore, no surprise that the report shows that seventy-five percent of the participant agencies carry out some sort of strategic planning in order to prioritize their resources. Strategic planning was discussed as a mechanism to attain effectiveness of the agencies under budget, human resources and legal constraints. In this regard, I quote Bill Kovacic's words: "one measure of true greatness in an agency's leadership is the capacity to define and communicate the overarching themes that will guide the institution's work." I entirely agree with him. As we can see, the competition authorities are aware of the importance of drawing up strategic planning to guide their work.

Prioritization is carried out in different manners, for instance: (i) by the establishment of thresholds for merger review or for conduct investigations; (ii) by sector prioritizing (choosing specific sectors to concentrate efforts), or (iii) by a principled driven approach, as carried out by the OFT, which takes into account the (i) direct and indirect effect on consumer welfare in the market in which the intervention will take place; (ii) strategic significance of the work; (iii) risks (the likelihood of a successful outcome); and (iv) resource implications of engaging in the enforcement or advocacy work.

Moving forward to the topic related to Resource Allocation, the report clearly shows that this session is linked not only to prioritization, but also to executive decisions related to human resources management, such as the implementation of "rotation programs", as carried out by the Canadian Competition Bureau. Not only is this kind of initiative a valuable motivational tool for the staff, but also allows development and improvement of the necessary flexibility to act effectively in more proactive endeavors of the competition authorities. Identification of different profiles and different capacities/skills within the authority's agents are essential to setting strategies.

Resource Allocation management must also be foreseen in the strategic planning. While capacity building, career planning and staff retention policies are costly actions to take, they are necessary to attain effectiveness. There are several actions taken by competition authorities to minimize employee turnover, such as: (i) offering learning and training opportunities; (ii) drawing reward and remuneration strategies; (iii) improving the work environment; and (iv) allowing professional growth by gradually increasing responsibility.

Lastly, there are some interesting conclusions that can be drawn from the answers on Decision's Effectiveness. The report identified a great creativity in regards to evaluation instruments. In general, agencies are not limited to the issuance of Annual Reports or other statistical reports. Indeed, it can be noticed that two major trends are rising substantially lately: (i) a broader use of wider *ex post* assessments, such as a Peer Review, and (ii) the acknowledgment by competition agencies of the need to carry out continuous evaluation processes, rather than episodic ones.

However, although the report confirms that there is a concern in carrying out some sort of planning aiming at effectiveness, it is curious that accountability is

not generally considered a relevant issue in prioritization procedures. Some agencies responses considered the question on accountability as “not applicable” or did not answer it. On the other hand, some agencies are making use of quantitative and qualitative assessment tools as a routine and the results are publicized, what leads to transparency and accountability. Besides, access to these data makes it possible for external agents to assess internal proceedings and productivity of competition agencies, thus contributing to their effectiveness. These external agents can be professors, consultants, consumer associations or even other governmental bodies with intersection with competition.

From the Agency Effectiveness Report and from what we expect to witness here in this seminar, we can identify on a first glance at least five main characteristics of a modern competition authority, which is concerned with effectiveness:

First, the profile of chairmen and senior officers from competition authorities are becoming more comprehensive, encompassing not only technical skills, but also more and more administrative skills. Chairmen and commissioners are no longer mere decision-makers or investigators. They are public managers with administrative skills in order to be able to face the challenge of competition policy effectiveness;

Second, as a logic consequence of this commitment to effectiveness goals, agencies often create mechanisms for prioritization and better resource allocation;

Third, another consequence of this commitment entails the change of authorities profile towards a proactive role, rather than reactive, by investing more and more in advocacy initiatives; perhaps the main trace of such a trend;

Fourth, although the evaluation processes are yet to present a common ground among competition agencies, it has become clear all around the globe the need for ex-post assessment procedures, therefore conveying the idea of continuous evaluation of agencies' effectiveness; and

Fifth, there is at least some room for different players of society to participate in the evaluation process, thus assessing the priorities chosen and incidentally the allocation of resources made by competition agencies. Therefore, we should take a closer look at accountability and communication initiatives within our agencies. Those initiatives not only will be relevant to measure leadership, as Bill Kovacic says, but also play a crucial role in agencies' credibility and competition awareness in general.

To sum up, I have just reported the work we have done so far. Taking into account such an extensive background, it is now the moment to discuss what we did right or wrong as well as the strategies we could or should adopt to achieve effectiveness. I invite you all to further discuss these topics and to share your own experiences in the next four sessions today and tomorrow.

## REPORT ON COMPETITION AGENCY EFFECTIVENESS



## I. INTRODUCTION

The activity of a competition agency (leaving aside other responsibilities which the agency may have, such as consumer protection, control of public procurement or subsidy control), can be grouped into a number of categories: enforcement activity (that is, cases), communication and advocacy, and studies such as market studies, which could lead to either enforcement activity or advocacy as follow-up. The effectiveness of a competition agency depends on its ability to achieve positive impact in the real world via its various activities. Achieving effectiveness involves a number of pre-requisites, including inter alia: good planning and prioritisation (both strategic and operational); efficiency in use of resources and project management; evaluation of activity, in order to assess its impact, and good communication, as a large part of the impact of a competition agency comes via perceptions and awareness of the value of competition by various economic actors.

Competition agencies have recently been paying more attention to adopting modern practices and sharing best practices in the area of effectiveness. One example of this is the project on effectiveness of the Competition Policy Implementation Working Group of the ICN, launched at the 2007 ICN annual conference. The project, in two phases, will address: (i) the issue of effectiveness of competition policy, and (ii) the design of the competition agencies that best accomplishes effectiveness. The first phase of the Project, presented at the 2008 ICN annual conference, had the purpose of evaluating agencies' organisational and operational frameworks by collecting information from ICN member agencies. The second phase, to be presented in the 8th ICN Annual Conference in Zürich, is focusing on effectiveness of ultimate agencies' decisions, assessing the authorities' abilities to obtain compliance with remedies and sanctions.

In discussions between competition agency heads at the 2008 ICN conference, it was decided that a high-level face-to-face event devoted entirely to competition agency effectiveness would be useful. DG Competition of the European Commission offered to host the event, and it took place on 22 and 23 January 2009 in Brussels, the first such event of its type. The event was for agency heads and senior staff only, with participation limited to 100. The structure was arranged around plenary sessions, which set the scene for smaller concurrent break-out discussion sessions. The subjects of the sessions (in addition to introductory speeches and a wrapping-up session) were:

- strategy and prioritisation;
- effective project delivery;
- evaluation;
- accountability and communication.

The purpose of this document is to report on the discussions at the seminar, both in the plenary sessions and in the individual break-out sessions, highlight the main points which were made, and raise ideas as to future ICN work. It is not minutes of the seminar. However, the four main themes of the seminar are

reflected in this report. Statements in this report are unattributed; all statements in the report were made by at least one participant in the seminar at some point, but statements have been rearranged somewhat in order to try to make coherent reading.

## **IIA. STRATEGIC PLANNING AND PRIORITISATION**

An agency must decide what it wants to achieve in broad terms over a period of a few years (such as the mandate of a college of Commissioners or a President). This constitutes its strategy or strategic objectives. This may be liberalisation of certain economic sectors, a strong push against cartels, greater awareness of the merits of competition among the business community in general (a "competition culture"), and so forth. There was general agreement that the setting of a clear strategy is an important factor in being an effective competition agency.

A strategy should focus on policy and qualitative goals, and should be sufficiently clear to provide a basis for prioritisation of activities (otherwise moving down a level from strategy to work programme can be difficult). The legal framework will be the starting point for the setting of a strategy, and some broad elements of it will certainly be set down in law. Strategy should be such as to motivate and inspire management and staff, and therefore buy-in from both is essential. Establishment of the strategy and priorities is one of the main ways in which the leadership of an agency expresses its leadership (but staff should be encouraged to make an input). It can be helpful to consult with non-government stakeholders in the setting of strategy.

Agencies should have some plan for implementing their strategy. Over a shorter period, often one year, many agencies have established some type of a *work programme*, containing a broad allocation of resources between the main activities of the agency, and defining the "deliverables". Such work plans are sufficiently flexible so that they can be revised when necessary to accommodate promising types of cases, changes in the economic environment (e.g., drop in merger filings), and other unanticipated factors. Sometimes, the work programme is part of the national budgeting cycle, and constitutes a bid for resources on the part of the agency. Agencies have found such work programmes to be helpful in ensuring effective implementation of their strategies: one of the major challenges is to link the two. Often, such work programmes address the basic resource allocation between enforcement and non-enforcement activity (communication/advocacy, market studies etc.). Work programmes may also facilitate the prioritisation of cases.

Finally, on a more regular basis, an agency needs to carry out *prioritisation of tasks*, such as selecting cases for in-depth investigation. It should be possible to determine which types of activities are priority and which are non-priority. Prioritisation involves deciding what not to do as much as what to do. Competition agencies have limited resources and cannot possibly investigate all potentially worthwhile cases. An agency's limited resources should logically be

focussed on high-impact or high significance cases and markets (impact can be direct economic impact on the market in question, significance can be via deterrence value or value in setting precedent or policy). It is important to note that the agency should not completely neglect the sectors or areas that are not a high priority. One possible schema for conducting prioritisation is to weigh potential impact and significance on one side of the equation, with potential risk and resources consumed on the other side. It is important to use the results of evaluation of previous agency activity to inform priorities.

Each of these different levels of planning should flow from the higher level in a coherent way. A number of agencies mentioned that their strategy and work programme are normally public documents, while task prioritisation is more of an internal matter. Some larger agencies have additional levels of planning, making a distinction between "mission" (which is more or less permanent), "vision", and "objectives".

The degree of autonomy of competition agencies in setting their strategic objectives and work plans can of course vary. Regarding strategy, many agencies which are more closely integrated into government must align their strategy with government strategy and indeed their strategy may be part of a government strategy. An annual work plan may be part of the planning cycle of a government or quasi-governmental organisation, such as the European Commission. And on the level of prioritisation of individual activities, certain cases or sectors may be "under the spotlight" to such an extent that there is great pressure to prioritise them.

Agencies must also clearly take into account its obligatory enforcement activity. Many agencies are obliged to deal with merger notifications or complaints, and the agency planning process must reflect this. However, agencies faced with a high proportion of obligatory activity tend to develop tools for achieving some flexibility, such as dealing with some obligatory matters, which clearly pose no competition issues, in a more cursory way.

One important way in which some agencies have focused on particular priorities is via sector enquiries or other non-case-related projects. For these agencies, such work can form a compromise between the desire of agency leadership to invest for the future via non-case work, and outside pressure to do high-profile activities. Some agencies however can be requested/obliged by government to carry out a study in a particular sector.

The need for adequate information as a basis for strategy setting and prioritisation was emphasised. This includes information on past agency investigations and interventions and their outcomes, and information on markets. Some agencies mentioned that they organise such information in databases, which can be a helpful management tool. Sector regulators can also be a useful source of information.

Smaller or younger agencies may face particular problems in setting strategic objectives and work programmes. In particular, they may suffer from extreme lack of resources, inadequate investigatory powers, absence of a culture of competition in the jurisdiction, and/or political pressure. The smaller the agency,

and the lower the level of resources, the more important it can be to set clear and firm priorities.

It was felt that given the diverse situations of the ICN member agencies, it would be useful to get a more thorough understanding of what agencies are doing in the area of strategic planning and prioritisation. Exchange of good practices, which work well for particular agencies in particular jurisdictions, would be very helpful in allowing agencies to find the practices which would work best for them.

Possible next steps:

- \* exchange of good practices on how to balance discretionary and non-discretionary workload;
- \* collation of the strategic objectives or mission documents of ICN member agencies;
- \* exchange of experiences on drawing up work programmes and criteria used by agencies for case prioritisation.

## **IIB. EFFECTIVE PROJECT DELIVERY**

Three main issues were discussed in the framework of this topic: case and project management, agency structure, and human resources issues (particularly recruitment and retention).

### *Management of cases and other projects*

A project, in the context of a competition agency, will most often be a case investigation, but can also be a market study or an advocacy or information campaign.

Regarding cases, a starting point is clear prioritisation criteria, as discussed in the previous section, especially (but not only) for agencies with a large amount of non-discretionary work, where there is necessarily a large portfolio of open cases, some of which will be technically open, but not actively investigated. The criteria for selecting a case for in-depth study will normally include, not only its degree of congruity with the work plan and objectives, but the potential impact of the case (direct economic impact and deterrence value), and the prima facie strength of the evidence and the theory of harm.

Involvement of senior management in deciding on priority status of case early on in the procedure – with possible regular follow-up to continue to check priority – is important. Some agencies have a two-stage process for selecting cases for detailed investigation, with a first filtering carried out by a group or committee which makes recommendations to senior management, and senior management taking a final decision. It can be useful to think of project management as a "pipeline", with some projects at the stage of preliminary ideas for evaluation, others at an early investigation phase and others more

advanced. In some agencies prioritisation may lead to the elimination of potentially easy or clear cut cases which are not in line with the agency's objectives or which have limited economic impact.

Following this preliminary sifting of cases, there are two other stages at which review of cases is commonly carried out (although additional reviews are also common):

- an intermediate stage, following preliminary investigation (some agencies refer to this as a "go/no go" decision);
- an advanced stage, immediately prior to the preparation of a final decision/prosecution.

Not stopping an unpromising case can be very costly in terms of resources. Ideally, capacity used on non-viable cases would be minimised, by terminating such cases as early as possible in their progress (recognizing, however, that close calls are sometimes involved as many cases are not clear-cut). Review and support in the early stages of a case investigation is essential, to identify problems, and stop a case as early as possible if it is unpromising. Ongoing review at defined intervals is also important. Deadlines help in focusing resources. For cases to which no legal deadlines apply, it can be helpful for management to set internal "milestones", i.e. targets with fixed dates, for the case team to reach specific stages of the investigation, and submit their progress to management (or peer) review.

In some agencies management reviews the case portfolio regularly (e.g. every two weeks) to get "early warning" of possible problems, and takes major decisions on project continuation/discontinuation on a regular basis (e.g. quarterly). Another tool which can be used is "peer group reviews" at certain defined stages of the investigation (particularly the "go/no go" stage), in which staff members not involved in the case review the evidence and theory of harm, and give their opinion on the strength of the case. This can be motivating for staff and help discipline the investigations, but requires considerable staff time. It is important to get the balance right between case work and case review and scrutiny (not falling into the trap of having more scrutiny than real case work).

Tools such as software applications to allow management to review the casework portfolio at any time can be useful, but it was mentioned that they must not be overly burdensome or allowed to be used in a formalistic bureaucratic way. Some more sophisticated such tools allow recording of man-days spent on different tasks, and thus allow better planning of work. Security of such applications is important, as they often have case documents uploaded. Cost of such applications is also an issue. Staff resistance to new reporting applications was noted in certain cases.

Speed and quality was widely felt to be a false dichotomy. Clear case management tools and criteria and deadlines, with effective management oversight, assist staff to be efficient quickly. It was mentioned that staff generally understand the value of legally binding deadlines, which impose efficiency upon the agencies and parties.

### *Agency structure*

Agency organisation and structure for effective project management was discussed. The basic options are a sectoral-based organisation, and an instrument-based organisation. Some agencies have a hybrid structure. Sometimes an instrument-based approach is necessary, when the different instruments require very different skills (e.g. criminal cartel investigations vs. merger review). A sectoral-based structure where some work is discretionary and other work is not (e.g. merger cases are obligatory but other cases are discretionary) could result in the obligatory work crowding out the discretionary work. The most appropriate structure depends on agency size, legal setup, and balance of agency work and priorities. Flexibility in re-allocation of resources internally (i.e. a project-based allocation of resources) is essential.

Case management issues can be different in younger agencies, which tend to be small. Organisational methodology may be less of an issue, resources are often lacking for sophisticated software tools, and the case portfolio is sufficiently small for management to easily keep track. There can a strong focus small number of cases, to establish agency reputation through early successes. Advocacy work often takes a high priority. All these factors can impact on agency structure.

### *Human resource issues*

Recruitment and retention of staff was covered in the seminar as an essential adjunct to project management; projects are carried out by people, and the best project management techniques cannot succeed without competent and motivated staff.

Since competition agencies need to have highly-qualified staff, and most agencies cannot compete in salary with private sector employers (especially law firms), there was consensus that agencies need to do more than most public sector employers to motivate and retain staff, including high-quality training, opportunity to engage in academic work, work-life balance and family-friendly atmosphere, career development advice etc. In any pyramidal organisation, not all staff members with management potential can progress to management, but for those staff who do not progress upwards, it is challenging for competition agencies to find a rewarding variety of work over a full career, given their limited size and range of tasks.

But the best single thing which an agency can do, in order to recruit and retain staff, is to maintain an excellent reputation, so that it becomes an "employer of choice". Otherwise, there is a risk that agencies will be staffed by relatively inexperienced graduates, who go to the private sector after gaining a few years of agency experience, thus ensuring a structural personnel advantage of law firms against agencies in cases and litigation.

However, a certain level of staff turnover is healthy, to ensure development opportunities for those who remain, and avoid stagnation. Maintaining good relations with agency alumni can be beneficial (they may constitute useful contacts outside the agency). In any case, former staff may return, and a spell

elsewhere can be motivational, as long as the door is kept open for a return. Knowledge management systems -- or some mechanism for preserving institutional memory -- are however necessary in case of high staff turnover.

Regarding recruitment, it was mentioned that it may be beneficial to recruit some project management or business management experts (or at least have focussed training in project or business management). Competition agency staff tend to be lawyers or economists, neither of which are trained in project management.

It was remarked that training should be planned and designed to reinforce agency objectives. Sometimes training is too oriented on academic issues of competition law which rarely occur in real cases, and neglects the basics, such as good procedure. Training in communication and advocacy techniques may be less prevalent than in casehandling techniques. Participation in international events, such as ICN workshops, can be a beneficial part of staff training.

Rewards for individual staff members (bonuses, promotions...) should be based directly on the effective delivery of their personal objectives (not on the economic impact, as this often is only known some time later following evaluation, and in any case, management should collectively take responsibility for impact, since the decision on which cases go ahead is a management decision).

Objective-setting for individual staff members, and their evaluation, should flow naturally from the objectives of the organisation. Deadlines and targets for staff members should be clear. Internal communication with staff (of objectives priorities etc.) is important, but staff should not be submerged with vast quantities of information.

Possible next steps:

- \* examination of tools and techniques for optimal case management, with regard to case selection and ongoing monitoring;
- \* work on different agency structures (instrument-based, sector-based, project-based), to ascertain which structures work best in which conditions (type and size of agency, agency objectives);
- \* exchange of ideas on ways to recruit, retain and motivate competition agency staff, in the face of superior earning ability in the private sector.

### III. EVALUATION

For a number of reasons, competition agencies face challenges in retrospectively evaluating the effectiveness of their activities. The following are some of the reasons mentioned by workshop participants:

- a significant amount of agency activity is forward-looking, and its true impact can only be ascertained after some time;
- competition agency interventions may have indirect not direct effects on consumer welfare, by altering the behaviour or attitude of market participants or the structure of a market (advocacy activities may have an even more indirect effect, by influencing other public authorities to intervene on markets in regulatory or other ways);
- the impact on a market of an intervention by a competition agency needs to be isolated from all of the other factors which may have influenced developments on that market;
- the intervention also needs to be compared to the hypothetical situation which would have existed in the absence of the intervention (the "counterfactual");
- deterrence value and precedent value are other important aspects of competition cases which are difficult to measure;
- they have the choice to intervene or not to intervene, so decisions not to intervene on a particular market (not to oppose a merger, for example) also need to be evaluated.

It was mentioned that evaluation should go beyond enforcement activity, and cover all activity of a competition agency, including communication and advocacy. For this kind of evaluation, a technique based on surveys of or interviews with stakeholders, has been used. Such a technique can however lead to an evaluation of perceptions not of real impacts if not combined with more economic methods. Informal benchmarking with other agencies can be an important form of evaluation. The ICN could play a role here, and OECD peer reviews are also a very appreciated form of benchmarking.

Agencies have engaged in four basic types of evaluation:

- evaluation of the efficiency of agency procedures (including the investigative process, litigation), based on – among others - activity indicators (numbers of cases, amounts of fines, speed of adopting decisions etc) and informal internal evaluations;
- evaluation of impact of cases on the directly affected market (looking at compliance, and at levels of price and strength of competition a certain time after the decision);
- evaluation of impact of cases on markets other than the directly affected market (*deterrence effect*);

- evaluation which goes beyond cases (enforcement activity) and takes into account all the activities of the CA, including advocacy and communication.

The first of these is a type of output measurement, while the others are forms of outcome measurement. Ten years or so ago, relatively little evaluation of outcomes, as opposed to outputs, was taking place in competition agencies, but nowadays more evaluation of outputs is happening. To be fully useful, evaluation needs to be not only quantitative but also qualitative. Many agencies are obliged to do major general evaluations at periodic intervals, once every few years. Sometimes parliaments (or audit offices) carry out periodic "value for money" evaluations of competition agencies. The OECD has also developed an evaluation methodology, which has been applied in more than one OECD member country.

There is a question of whether to carry out evaluation internally or externally. Many agencies do their evaluation mainly internally, though this may be through lack of resources to carry out external evaluation. Parliamentary committees, audit offices, and the like, can also do evaluation, as can the OECD, via a peer review. Few agencies, including large ones, would have more than two or three staff members working on evaluation at any one time.

Sometimes, an in-depth evaluation of a small number of past cases is carried out. In selecting such cases, it can be useful to include cases which were clearly unsuccessful, as there may be as much (if not more) to learn from unsuccessful cases as from successful ones. Less formal evaluations of agency activities are conducted by agencies and can be important. For example, a staff that lost a case can conduct a detailed debriefing of the matter to determine what went wrong and what went right, so that the institution can learn how to better handle similar matters in the future.

The uses of evaluation are another issue to be tackled, with regard to both external transparency and internal use of evaluation. Externally, transparency with results of evaluation can be important in order to achieve accountability to stakeholders, but good defensive communication is necessary if the results are not positive. Internally, the results of evaluation must be fed back into the strategic planning process in order to make improvements. Evaluation can therefore be useful in informing on necessary internal changes and in setting future priorities.

Possible next steps:

- \* exchange of methodologies for assessing the impact of competition cases on the directly affected market and on other markets (deterrence effect).

#### IV. ACCOUNTABILITY AND COMMUNICATION

##### *Accountability*

There are different types of accountability, including formal accountability to a political body exercising oversight (Parliament, government), or more general accountability to all stakeholders, especially consumers. Different expectations among different stakeholders are a part of the life of a competition agency. Pressure from all constituencies is a constant for competition authorities. It was mentioned by some agencies that sometimes politicians claim to consumers that all problems can be solved by the competition authority or "offload" thorny issues onto the competition agency. Letting down one or other constituency gently, and explaining that the agency cannot solve a particular problem, is an important communication challenge for agencies.

Accountability is linked to the issue of independence, in that the two interact and are complementary, not antithetical (independence does not mean unaccountability). Accountability is in fact necessary to maintain independence in the longer term. Independence can be derived from the law, institutional structure, and/or the quality of the board or president. It was mentioned that an agency which is too narrowly focused on its own agenda may be politically marginalised and therefore have difficulty carrying out effective advocacy with government; it may even see its independence reined in over the longer term. But an agency which is perceived as being too close to politicians may lose credibility with consumers and businesses.

It is generally agreed that competition agencies should be "independent" – *i.e.*, that their actions should be based on the facts and the law and not political considerations. However, there is far less agreement to just how that should be accomplished as an organizational matter, and there is a multiplicity of organizational formats for competition agencies. Several jurisdictions give governments the power to overrule competition agency decisions on public policy grounds, for example on merger cases, and such powers have been used recently, in well-established jurisdictions. In some jurisdictions the agency is a government ministry; in one agency the Prime Minister deputises for the head of the agency when he is ill. In the EU competition decisions are taken collegially by the college of Commissioners. In such cases advocacy (commenting on draft laws etc.) is often more institutionalised and more structural, *i.e.* the competition agency must be consulted on draft government acts (although there may also be obligatory consultation even when the competition agency is not incorporated in the government).

Funding can affect accountability and independence. Most agencies are funded through the national budget, but some have their own sources of funding, such as filing fees. A transparent decision-making process is an important way of expressing accountability (and of safeguarding independence).

##### *Communication*

As already stated, communication (in the wide sense) is an important activity of a competition agency. Communication is linked to accountability – there can be no accountability without communication. Effective advocacy depends on effective communication. Communication considerations must be part of strategic planning (resources must be allocated to communication; it must not be an after-thought).

The goals of communication are to achieve effective enforcement, to prevent the introduction of anti-competitive legislation or regulations by other government bodies, and to build a competition culture and a common understanding of the value of competition.

Communication should be adapted to the target group. Target groups include policy makers (Government, Parliament), media, business entities/firms, consumer organizations, academia, judiciary, the private bar and educational institutions. It was widely felt that efforts should be made to develop relationships with each of these groups. Activities that seem to have yielded the highest level of success are the hosting of workshops or seminars, tailored to each separate grouping, and the publication of articles in newspapers and journals as well as newsletters. Several agencies indicated that they had established links with key media personnel, through which they disseminate information.

One of the challenges of communication is that sometimes competition agency interventions have long-term welfare benefits, but adverse short-term effects for one or other group. The impact of agency intervention is often complex and hard to explain to the man in the street. Another challenge is managing often excessive expectations of stakeholders. Sometimes defensive communication is necessary, responding to media lobbying by companies on the receiving end of agency decisions. Cartel cases are easier to explain than prohibiting mergers.

The indispensable premises of communication for competition agencies are to have effective and comprehensive competition law and to enforce that law actively. In other words, good enforcement comes first – there must be something to communicate! Communication is also essential for deterrence – there is no deterrence if agency interventions are not widely known about.

There was an extensive discussion on the conduct of investigations and the importance of disseminating information on investigations at the appropriate time and in an appropriate manner (subject, of course, to confidentiality rules). Several agencies indicated that failure to transmit appropriate information or transmitting too much information at inopportune times had affected their investigations in a negative manner, had compromised their investigations to some extent, or had tarnished their reputations.

Most larger agencies have a specialised communications team, often recruited from communications specialists not competition specialists (however, smaller agencies usually lack the resources for a dedicated communications team). Sometimes this team has a monopoly on external contacts (other than case-related contacts). In other cases case-handlers are called upon to do a greater

or lesser degree of communication. Such a communications team must not be isolated from the rest of a competition agency (especially casehandlers) but integrated. In some agencies the communications team is involved in agency decision-making. Being involved in this way the communications specialists would therefore have a good working knowledge of the case, be aware of its stage in the investigative process and would be responsible for monitoring the quality of information that is transmitted. i.e. disseminating the 'right' information to the 'right' persons at the 'right' time. Bad relations between communications team and casehandlers inevitably has adverse consequences.

Communication is a two-way street, and therefore feedback from stakeholders and the media must be received and digested within the agency, and appropriate action must be taken. But feedback should not be confused for evaluation, and any stakeholder providing feedback may well have a particular bias which needs to be taken into account.

Cost can be a constraint on the communications activities of some agencies. To mitigate this, alliances with NGOs, other public bodies etc. could be contemplated. This is especially true for newly-created agencies, which need a stronger communication effort to explain the benefits of competition to the public.

Agencies need to avoid being doctrinaire or patronising in their communications, especially with consumers. A patient pedagogical approach to the benefits of competition is necessary, particularly in times of economic recession. Honesty and consistency in communication is essential in order to maintain a good reputation. It was also asked whether competition agencies communicate too much with lawyers and businesses and not enough with consumers. Some feel that competition agency staff may find it easier to communicate with other "experts" and hard with the man in the street.

Creativity about means of communication was in evidence at the seminar. Most agencies have websites, but the video streaming website "youtube" was mentioned as an example used by one agency, and another agency carries out outreach activities in schools and uses cartoons to educate schoolchildren about competition.

Internal communication with staff is also important, and it should be two-way, with staff being able to give feedback and input. Staff should be considered as one of the constituencies of stakeholders of an agency. One issue is whether this task of internal communication should be the job of the same communications team which does external communications, the human resources team, or the management team. Communication among staff should also not be neglected, as internal information sharing can have a direct effect on agency effectiveness.

Possible next steps (building on previous work done by the CbcPI and the CPI working group):

- \* exchange of good practices on targeting communication to the various groups of stakeholders of an agency;

- \* exchange of information on the effectiveness of different media for communications;
- \* exchange of good practices on internal communication with and among agency staff.

## V. OVERALL AGENCY EFFECTIVENESS: THE CONTINUING PURSUIT FOR BETTER PRACTICES

As part of the seminar's final session, U.S. Federal Trade Commission Chairman William Kovacic shared the FTC's experience conducting an in-depth self-assessment, "The Federal Trade Commission at 100".<sup>1</sup> The assessment, carried out over the course of 2008, involved more than 30 international consultations with ICN members and NGAs, in addition to numerous domestic hearings. The focus of the inquiry was on institutional arrangements and agency effectiveness, how best to "engineer" competition and consumer protection policymaking to achieve optimal results. While the exercise was intended to inform the FTC 's future direction, many of the lessons learned are equally informative for other agencies.

The consultations for the FTC at 100 project identified seven general characteristics of good administrative practice for competition agencies, including:

- a clear statement of the agency's purpose, and with links between the aims and the agency's program and results (articulated internally and externally, and with the flexibility for change as may be needed);
- an internal planning mechanism for establishing a strategy (balancing risks and returns, estimating resources);
- a problem solving (as opposed to case-centric) approach to the agency's activities that reflect the entire range of policy and enforcement instruments;
- mechanisms for internal quality control (such as independent assessments by different operating units, devil's advocate and scrutiny panels);
- investments in building and retaining knowledge (including through relationships with collateral public agencies and academic research centers, and by devoting resources to physical infrastructure assets);
- efforts to acquire and retain good staff (including plans for individual professional development and systems for recording institutional memory);

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<sup>1</sup>

For more information about the FTC's self-assessment exercise see:

<http://www.ftc.gov/ftc/workshops/ftc100/>.

The final report is available at: <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf>.

The slides for this presentation are available at:

<http://www.ftc.gov/speeches/kovacic/090123brussels.pdf>.

- communications plan that includes education and marketing efforts and networking with other public bodies domestically and internationally;
- processes for the routine evaluation of programs, agency organization, and procedures (evaluating program outputs and outcomes as well as operations and speed, and conducting internal assessments).

Chairman Kovacic suggested these items be included in an agency “report card”, and praised the positive international trend toward an increased emphasis on institutional design and implementation, and the growing recognition that institutional arrangements affect substantive policy results. Competition for the best practice in this area was, he concluded, a competition worth having.

## **VI. MAIN ISSUES IDENTIFIED**

It became clear from the seminar that competition agencies are public administrations, sharing some of the issues and problems of any public administration, but also atypical in certain ways.

Ways in which competition agencies are like similar to other public administrations include the following:

- they are usually funded primarily from the government budget, and are thus under an obligation to demonstrate value for money to taxpayers;
- they are politically accountable, either to government, Parliament or some other oversight body;
- public sector planning resourcing and budgeting cycles apply to them;
- there are constraints which apply, by law or regulation, to their choice of activities (obligatory activities, such as dealing with merger notifications or complaints);
- they need to interact with other public bodies, such as sectoral regulators;
- there are constraints on the salaries which they can offer (though sometimes they can offer salaries higher than in the rest of the public sector);
- there is a potential risk of political influence and regulatory capture.

However, competition agencies face the following common challenges, not all of which are shared by other public administrations:

- due to the specialised nature of their work, they need to recruit and retain expert staff, who can potentially command high private sector salaries;
- evaluation of their activity is complex, as interventions of competition agencies have their effects over time and their effect on markets difficult to isolate;

- they have a multiplicity of stakeholders, with different (sometimes even conflicting) interests;
- they need to stay at arm's length from government, to demonstrate their independence, while remaining influential with government (in order to carry out effective advocacy);
- they are frequently involved in litigation with well-resourced adversaries;
- they have two functions: enforcement and advocacy (even assuming that they have no other competences, such as consumer protection or control of public procurement);
- the impact of agency intervention is often complex and hard to explain to the man in the street. For example, sometimes competition agency interventions have long-term welfare benefits, but adverse short-term effects for one or other group.

At the end of the day, a competition agency is part of the public sector and is carrying out public policy. It can only do this effectively by working together with other public bodies in a network. Working against the rest of the government and public sector is a recipe for marginalisation; a competition agency needs to be integrated.

Although the issues dealt with in this seminar are common to all competition agencies, there can be no "one size fits all" approach to the solutions. Solutions appropriate to large, well-established agencies may be unsuitable for smaller and younger agencies. For example, in an environment where the number of staff is small, budgets are low and investigatory powers limited, an agency may legitimately choose to focus its resources on conducting advocacy activities with government business and consumers, rather than doing case investigations. But it nevertheless needs to establish this as its strategy, have clear objectives, conduct its advocacy activities effectively as projects, recruit and retain the necessary staff, evaluate the results, and carry out communication (indeed, as already said, advocacy is a form of communication).

One recurring theme of the seminar, of relevance to all agencies, even though there was no specific session devoted to it, is the particularly high importance of staff in competition agencies, and the need to focus on staff well-being in order to ensure good recruitment and retention (and possibly return if they leave). Competition agencies cannot compete with private sector employers, so is it essential to offer staff a good working environment, motivating work, and the pride which comes from working for an employer with a good reputation.

In the closing session of the seminar it was emphasised that any competition agency head must have a clear idea of where he or she wants the agency to be in five years, be focused on outcomes not outputs, communicate his or her objectives to staff and listen to staff in return, establish good contacts with constituencies outside the agency, and have a good message to sell to the outside world. He/she needs to understand that organisational structures and procedures have a deep effect on results, and therefore work to get the structures and procedures right for their legal and political environment and objectives. A leader must avoid getting submerged in daily tasks, and maintain

a long-term strategic vision. Agencies must constantly resist the temptation to do what is interesting or high-profile, and instead do what has positive impact; if that impact is not immediately visible, they need to communicate better to make stakeholders understand it.

Agencies have a range of policy tools at their disposal. Nowadays, more and more agencies have a problem-centric approach: identify a competition-related problem, then identify an appropriate solution, which might be a case investigation, targeted advocacy to government or regulatory agencies, or better education of businesses or consumers.

All the areas considered in the seminar are interconnected. For example, planning should include planning of evaluation activities, and the results of evaluation should feed back into planning; good communication can enhance agency reputation, and contribute to making it a desirable employer, thus improving effectiveness via staff retention. Effective project delivery requires effective internal delivery systems and staff training. The aim of agencies should be to get into a virtuous circle of constant improvement, while remembering that perfection cannot be attained.

Although there is no one size which fits all, some universal characteristics of a "good" competition agency can perhaps be discerned:

- it has a clearly-articulated long-term strategy, and a plan for implementing that strategy;
- it understands that it has a range of policy tools at its disposal, including notably case investigations and different forms of advocacy and communication, and it has a problem-solving approach which tries to fit the right solution to each problem;
- it adapts its internal structure and processes to its environment and objectives, and keeps its internal organisation flexible;
- it uses clear criteria to select which projects to undertake, among the many (discretionary) actions which it could launch;
- it keeps ongoing activities and projects under review and terminates projects which are not meeting their objectives;
- it understands that its main resource is its staff, and tries to provide them with a stimulating pleasant and rewarding working environment, to compensate for the lower salaries than in the private sector;
- it is constantly reviewing and evaluating its activity, and feeding the results back into the planning process;
- it understands that communication is an essential part of its task, and devotes adequate resources to communication, adapted to different stakeholders;
- it understands that it cannot work alone and forms alliances with other public and non-public bodies (regulators, NGOs, academia etc.);

- it benchmarks itself against other agencies worldwide, and exchanges best practice with them.

A "healthy rivalry" between competition agencies is to be welcomed, as reflected by the interest in the annual rankings published by the Global Competition Review (though the criteria used by that publication, focussed on private legal practitioners, are not necessarily the ones which agencies themselves would use). Exchange of good practices<sup>2</sup> can also be mirrored by benchmarking between agencies. This is already happening to some extent, for example in OECD peer reviews. But the ICN could also play a role.

One option is for the ICN to look in future at specific areas of relevance for agency effectiveness. These have been noted in boxes in this report, and could include in particular:

- tools and procedures used for optimal case management, to ensure robust and timely decisions/prosecutions by competition agencies, and terminate weak investigations early;
- recruitment retention and motivation of staff, against the background that competition agencies cannot compete with private sector law firms for staff specialised in competition law and economics;
- evaluation of competition agency actions, both on the level of the impact of individual decisions and the overall strategy and prioritisation of the agency;
- communication policy, including different media used for different audiences, and methods used to explain competition policy to the man in the street.

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<sup>2</sup> "Good practices" in the ICN context being practices which work well in the context of particular jurisdictions but which may or may not work well in other jurisdictions, and thus are not "recommended practices".



## CONCLUDING REMARKS



## **PHILIP LOWE, DG COMPETITION DIRECTOR GENERAL, EUROPEAN COMMISSION**

We have spent the last two days discussing how we can better measure the effectiveness of our respective competition authorities in relation to their overall objectives. I think we have concluded that there are several requirements for effectiveness which are applicable to all kinds of public administration.

We must establish clear strategic objectives which are directly relevant to our public service mandate and these objectives must be translated into a concrete work programme. There is obviously a requirement for us to show leadership and vision in establishing these objectives and work programmes. It relies amongst other things on a rigorous assessment of the risks involved in our activities, whether it is in terms of the quality and robustness of the decisions which our institutions take, the procedural pitfalls which we can fall into, or the reputational risks which derive from decisions which are overturned in the courts, or failure to put across our cases persuasively in the media and in other public fora.

Once we know what we have to do, the next question is how we do it in an effective way. And any organisation depends for its effectiveness on the adequacy and appropriateness of its structures, its procedures, its internal information flows, its people and its wider stakeholder environment.

The structures and procedures need to reflect the core business purpose of the organisation as well as the relevance of decisions to the business realities to which they are to be applied. Procedures in particular need to allow the administration to take decisions within a timetable which is relevant to the problem they aim to solve. Information flows need on the one hand to involve all those within the organization who can contribute to the substance and form of the final decision, but on the other hand not to lead to delays and bureaucracy, resulting from any individual's capacity to block a proposal. An effective organisation equally needs to have people with the right skills profile in positions where they contribute the most added value. Surrounding any public administration there are institutions and constituencies which it is accountable to.

If a public administration is to be and be seen to be effective in achieving its objectives, it needs to develop transparent systems for allocation of resources to priorities. This assessment of priorities necessarily includes a time dimension and consequent deadlines. Given however the dynamic nature of the economic and political environment which surrounds the public body, it is equally necessary to have the capacity to deploy resources flexibility in relation to evolving priorities.

Within the organisation, ensuring that the skills profile of the staff responds to the challenges of the organisation is crucial. The motivation and commitment of staff is also dependent on their participating in the identification and confirmation of objectives and work priorities. The reward system needs to be linked to the overall objectives. And the sustainability of the organisation will also depend, given the potential levels of staff turnover, on the development of systems and practices which maintain the organisation's administrative memory and learning capacity.

The continuous evaluation and review of what an organisation has achieved and how efficiently it has achieved this, is essential in this respect. Indicators on productivity and efficiency such as work throughput statistics are essential. However, beyond this there is a need to measure final impact of decisions and other activities, however difficult this may be.

In relation in particular to the activities of competition authorities as opposed to the generality of public administrations, we have identified the distinction between things which we are obliged to do legally and others which we have the discretion to take up or not. However we also recognise that our legal obligations are not always subject to time constraints. This opens up the possibility of prioritising investigations and other work in terms of the order in which we do them even though all the work concerned must ultimately be done. Beyond activities of a discretionary nature such as ex-officio investigations or sector inquiries, we also have to build into our work programme advocacy work, which does not result in competition law enforcement but in, for example, changes in regulations which contribute to pro-competitive solutions to market problems.

We equally have to allow for the fact that new priorities, whether for policy initiatives or for cases, may arise even if they are not planned. This brings us back to a key issue: are we capable of controlling the process of initiating new cases and closing existing ones? This is not just a question of having a decision making authority or scrutiny function within our organisations. We also need to look carefully about the way in which all those concerned with the case within an organisation can participate fully in decisions on its initiation and its ongoing investigation and closure. Bill Kovacic's analogy is a striking one. To what extent are we happy to oversee a burgeoning departure board of cases in our 'competition authority airport' but not have sufficient an eye on the cases which are in the arrivals hall?

With respect to measurement of the final impact of our decisions, I think we recognise that we have frequently concentrated on short-term market effects, for example on price and new entry, and did not give enough prominence to indirect deterrent effects. Frequently too, we have underestimated the positive "halo" effect of our perceived effectiveness resulting from "big" cases which may or may not have immediate measurable impact, but which establish the rigour and influence of the competition authority's role.

Looking more at the external dimension of the role of competition authorities, we took the general view that the capacity of an authority to listen, to be adaptable and to be informed, enhances its reputation considerably. Providing upfront guidance reinforced predictability in enforcement practice. Efficiency, transparency and fair-mindedness in the way a competition authority goes about its business enhances its reputation for objectivity and independence. The capacity of an authority to take decisions in a time-scale relevant to the business timetable of the companies which it addressed is a crucial aspect of efficiency. It was equally seen as important for an authority to demonstrate independence but this should not lead it to be ill-informed and isolated nor should it limit its concept of accountability uniquely to whether a court had decided its actions were legally defensible or not. Decisions could be legally defensible but make a mockery of common sense with respect to market realities. In addition it is vital for a competition authority to remain in constant

dialogue with other public bodies that are intervening in the same markets, such as sectoral regulators or central banks.

In general, we agreed that it would be mistaken to think that there was a "one size fits all" answer to the issue of how to organise a competition authority in an effective way. There are in particular differences between small and big authorities to be addressed. However we agreed that everything was to be gained by regular internal review and external bench-marking of each authority using organisations such as the OECD and ICN to achieve this.

I should like to thank all colleagues very sincerely for the time, enthusiasm and commitment *that they've brought to the discussions.*



## ANNEX



## AGENDA OF THE ICN SEMINAR ON COMPETITION AGENCY EFFECTIVENESS

Brussels - 22nd and 23rd January 2009

Hosted by DG Competition of the European Commission

<b>DAY 1</b>	
<b>09:00 - 09:10</b>	<b>Introduction and welcome</b>
	<i>Neelie Kroes (EU Commissioner for Competition Policy)</i>
<b>09:10 - 09:20</b>	<b>Opening Remarks</b>
	<i>Philip Lowe (European Commission, DG Competition)</i>
<b>09:20 - 09:30</b>	<b>Prior ICN (CPI) work on agency effectiveness</b>
	<i>Carlos Ragazzo (Brazil, CADE)</i>
<b>09:30 - 12:45</b>	<b>SESSION 1: STRATEGY &amp; PRIORITISATION</b>
<b>09.30 - 10:15</b>	<p><b>Plenary Discussion</b></p> <p><i>Session moderators: John Fingleton (UK, OFT) and Bruno Lasserre (France, Autorité de la Concurrence)</i></p> <p>The moderators will outline the key elements of strategy and prioritisation generally, and at their agencies particular, followed by a discussion of issues for the breakout session. Issues will include:</p> <p><u>Strategic planning:</u> How do you balance short run and long run interests, i.e., between investment (in capacity, policy consistency, best practice, learning, etc) and production of cases and decisions? What are the legal or institutional constraints? Is the agency expected to provide intellectual leadership domestically?</p> <p><u>Prioritisation:</u> How do you decide what work to do? Do you have an annual planning process? Do you decide at the outset which projects will "give" if the resources are needed for a new priority?</p>
<b>10:30 - 11:15</b>	<p><b>Break-out Sessions – Strategic planning</b></p> <p><i>Session facilitators: Bruno Lasserre (France, Autorité de la Concurrence), Bernhard Heitzer (Germany, Bundeskartellamt), John Fingleton (UK, OFT), Pablo Garcia (Chile, Fiscalía Nacional Economica)</i></p> <p>The break-out sessions will be an opportunity for participants to share their experiences, where appropriate (not all agencies have carried out such evaluation), and to give their views on the issues raised in plenary.</p>
<b>11:15 - 12:00</b>	<p><b>Break-out Sessions – Prioritisation</b></p> <p><i>Session facilitators: Bruno Lasserre (France, Autorité de la Concurrence), Bernhard Heitzer (Germany, Bundeskartellamt), John Fingleton (UK, OFT), Pablo Garcia (Chile, Fiscalía Nacional Economica)</i></p> <p>The break-out sessions will be an opportunity for participants to share their experiences, where appropriate (not all agencies have carried out such evaluation), and to give their views on the issues raised in plenary.</p>
<b>12:15 - 12:45</b>	<b>Report Back and Discussion of Results by Session Facilitators</b>
<b>14:15 – 16:00</b>	<b>SESSION 2A: EFFECTIVE PROJECT DELIVERY</b>
<b>14:15 - 14:45</b>	<p><b>Plenary Discussion</b></p> <p><i>Session moderators: René Jansen (Netherlands, nMA) and Angel Lopez Hoher (Mexico, CFC)</i></p> <p>The session moderators will discuss ways of optimizing effective project handling, that minimizes costs of low priority work and maximizes output and outcomes on priority cases, how to staff projects, skills management, and resource allocation.</p>
<b>14:45 - 15:45</b>	<p><b>Break-out Sessions</b></p> <p><i>Session facilitators: Juhani Jokinen (Finland, Competition Authority), Mona Yassine (Egypt, Competition Authority), Angel Lopez Hoher (Mexico, CFC), René Jansen (Netherlands, nMA)</i></p>

	Facilitators will lead a discussion on case handling, asking participants to share their practices on project delivery that work particularly well, and giving their views on the issues outlined in plenary.
<b>16:00 – 16:15</b>	<b>Report Back and Discussion of Results by Session Facilitators</b>
<b>16:15 - 18:30</b>	<b>SESSION 2B: EVALUATION</b>
<b>16:15 – 16:45</b>	<p><b>Plenary Discussion</b>  <i>Session moderators: Graeme Samuel (Australia, ACCC) and Manuel Sebastião (Portugal, Competition Authority)</i></p> <p>The moderators will address current thinking on performance assessment (indicators and measurement) and evaluation, based on their experiences at their agencies. They will outline some of the issues raised.</p>
<b>16:45 – 18:00</b>	<p><b>Break-out Sessions</b>  <i>Session facilitators: Manuel Sebastião (Portugal, Competition Authority), Ed Humpherson (UK - National Audit Office), Melanie Aitken (Canada, Competition Bureau), Graeme Samuel (Australia, ACCC)</i></p> <p>The break-out sessions will be an opportunity for participants to share their experiences, where appropriate (not all agencies have carried out such evaluation), and to give their views on the issues raised in plenary.</p>
<b>18:15 - 18:30</b>	<b>Report Back and Discussion of Results by Session Facilitators</b>
<b>DAY 2</b>	
<b>09:00 - 11:15</b>	<b>SESSION 3: ACCOUNTABILITY AND COMMUNICATION</b>
<b>09:00 - 09:30</b>	<p><b>Plenary Discussion</b>  <i>Session moderators: Kazuhiko Takeshima (Japan, FTC) and Ronit Kan (Israel, Antitrust Authority)</i></p> <p>As preparation for the break-out sessions, the moderators will give their experiences on the issues of accountability (including the institutional position of the agency and its independence), and communication, not only with those to whom the agency is answerable (government, parliament etc) but to stakeholders more widely, including consumers. Issues to be discussed will be presented, including: how do agencies' structures promote efficient communication and coordination across the agency; how can the institutional position of the agency and its independence link to effectiveness; how is the independence of the agency ensured; how does it report to those who oversee it; how does it engage consumers; how does communication contribute to its overall effectiveness?</p>
<b>09:30 - 10:45</b>	<p><b>Break-out Sessions</b>  <i>Session facilitators: David Miller (Jamaica, Fair Trading Commission), David Lewis (South Africa, Competition Tribunal), Ronit Kan (Israel, Antitrust Authority), Kazuhiko Takeshima (Japan, FTC)</i></p> <p>The break-out sessions will be an opportunity for participants to share their experiences, and to give their views on the issues raised in plenary, based on questions raised by the facilitators.</p>
<b>11:15 - 11:45</b>	<b>Report Back and Discussion of Results by Session Facilitators</b>
<b>11:45 - 13:00</b>	<b>SESSION 4: WRAP UP AND CLOSING SESSION</b>
<b>11:45 - 12:30</b>	<p><b>Overall Agency Effectiveness</b>  <i>Session moderator: William Kovacic (US, FTC)</i></p> <p>William Kovacic will discuss the findings of the FTC at 100 projects on overall agency effectiveness, and animate a plenary debate on the subject, based on the FTC experience and the discussion so far at the seminar.</p>
<b>12.30 - 13:00</b>	<p><b>Summing-up of seminar and closing remarks</b>  <i>Philip Lowe (European Commission, DG Competition)</i></p>

European Commission

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