International Competition Network

MERGER WORKING GROUP

INVESTIGATIVE TECHNIQUES SUBGROUP

Report on Investigative techniques employed by member agencies in the area of merger review

Table of contents

R e p o r t

Introduction

1. This report is the result of a project of the ICN Merger Subgroup on Investigative Techniques as part of its mandate to develop best practices for investigating mergers.

2. A questionnaire was sent out in summer 2002 to competition authorities which were then members of the ICN. The purpose of the questionnaire was to collect information on the investigative techniques used in different jurisdictions of ICN members in Merger review procedures. The questionnaire focused on the investigation tools used by different competition authorities and how often they use them, how agencies gather information in merger review proceedings, what data they use, what enforcement powers they have and on further issues of the process of Merger review. Only non-confidential information was gathered. A copy of the questionnaire is attached, as well as a list of respondents.

3. The responses provided information on the investigative methods used in 31 ICN jurisdictions. This report summarises the replies in statistical and qualitative terms. There were some responses which were difficult to interpret with regard to some of the questions posed. Best efforts were made to reflect the views as precisely as possible, however, no further clarification was sought from the respondents.

4. The report should help inform ICN members on the advantages and disadvantages of the tools and techniques used in merger investigations around the world and enable members to make better use of the tools they currently have and facilitate the adoption of those they might like to have. This report also should help to identify areas on which the work of the ICN Subgroup on Investigative Techniques could focus in the future and provides a supporting database for further projects of the group.

Summary

The findings of the report can be summarised as follows:

1. Most agencies classify cases according to several levels of investigation intensity, and distinguish “no problem cases” from those mergers that might create substantial competitive problems.

2. The majority of the reviewed mergers do not seem injurious to competition and therefore are treated under the low intensity investigation. Consequently, the reliability of the data supplied to the agency becomes essential. Also,

expedited procedures are likely to be of material benefit to agencies and the business community alike across the ICN membership.

3. Most agencies have effective powers to sanction for non-compliance with duty to present information and those who don't - mentioned the ineffectiveness of these powers as a significant problem.

4. Agencies tend to have a wide variety of investigation tools. Each tool mentioned in the questionnaire is available to at least 75% of the agencies that replied. Whilst the intensity of use of these tools varies from one agency to another, effective use of many of the principal tools is therefore of direct interest to a large part of the ICN membership.

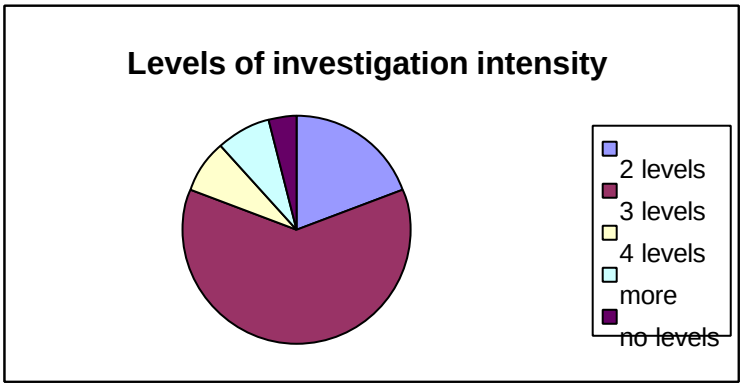
5. The frequency of use of an individual tool varies considerably according to the complexity of a case and the likelihood that the merger may be harmful.

6. In the majority of agencies economists play an important role in the investigation of cases, and are most commonly members of the case team together with other professionals.

I. Levels of investigation intensity (questions 1 and 2 of the questionnaire)

5. In a first set of questions agencies were asked to describe different levels of intensity of merger investigation which exists in their practice, and to indicate the numbers of cases dealt with at each level.

6. All responding agencies classify cases according to several levels of investigation intensity. The majority of agencies[1] apply 3 or 2 levels, although some agencies report up to five different standardised levels. The levels differ in the variety of tools used and in the extent to which external information gathering is applied. On the lowest level, the investigation is mainly limited to information provided by the parties in a notification or filing, and internal as well as public sources of information.

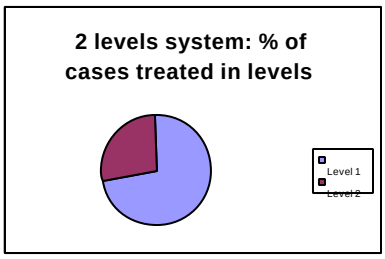


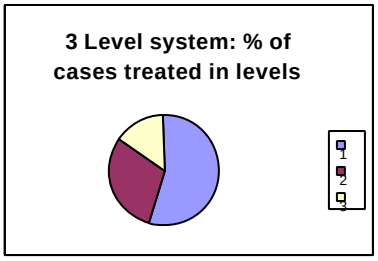
[1] When talking about proportions of "agencies", this relates to the group of agencies that responded to the questionnaire and to a given question.

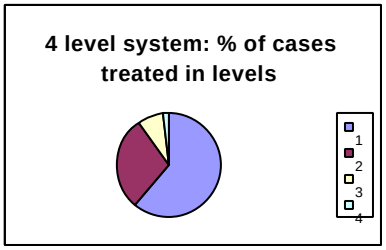
7. The most common criterion to attribute a specific case to a certain level is the overall complexity of the case. In addition, agencies apply the following more objective criteria for attributing a case to the lowest level of investigation intensity:

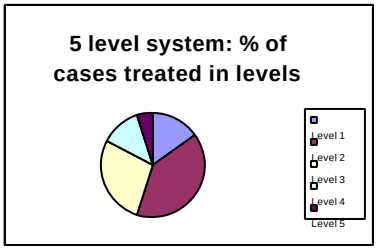
- market share thresholds (ranging between 10-25%) and HHI concentration levels,
- turnover and asset value thresholds,
- specific types of transactions, such as acquisitions by investment funds.

8. Irrespective of the number of levels available, the percentage of cases treated under the lowest level of investigation is higher than the sum of all other levels for all agencies, and ranges on average between 55% (three level systems) and 70% (two level systems)[2]. This is due to the fact that most transactions do not present competitive concerns and are therefore resolved during the initial stage.









9. Adapting the intensity of the investigation to the individual case is therefore a central issue for agencies when reviewing mergers. Furthermore, across agencies there seems to be a high proportion of unproblematic cases that are cleared with no or very limited (external) investigation, but which are nonetheless covered by pre-merger filing requirements, and therefore impose certain obligations on parties. This underlines the relevance of efficient procedures that process these cases without unnecessary burden on parties, and on scarce agency resources.

10. Due to the high proportion of cases treated with limited investigation efforts, the reliability of the data on the basis of which a case is classified as non-problematic becomes essential. Insufficiencies in this respect bear the risk of failure to identify relevant competition issues. This risk is particularly relevant as the typical information source in these cases is data provided by the parties in filings and

[2] As regards the two agencies that reported five different levels, level 1 is of less importance. However, it appears that levels 1and 2 in these systems could be considered together as one initial level of investigation with only occasional and informal external information gathering, which corresponds to the initial levels in the other systems.

notifications, which places a high level of importance on objective and verifiable information in an initial filing, as well as ensuring the merging parties have proper incentives to report fully and accurately and to provide any subjective information in a form that can reasonably be checked and evaluated.

II. Guidance procedure (q. 3)

11. Agencies were requested to indicate whether their law provides for a formalised confidential guidance procedure by which the merging parties can seek preliminary guidance on the likely assessment of a proposed merger.

12. About half of the agencies indicated that there is such a formal procedure in their system. This guidance is almost exclusively based on information provided by the parties, internal and public data. In very few cases do agencies carry out an additional investigation involving third parties.

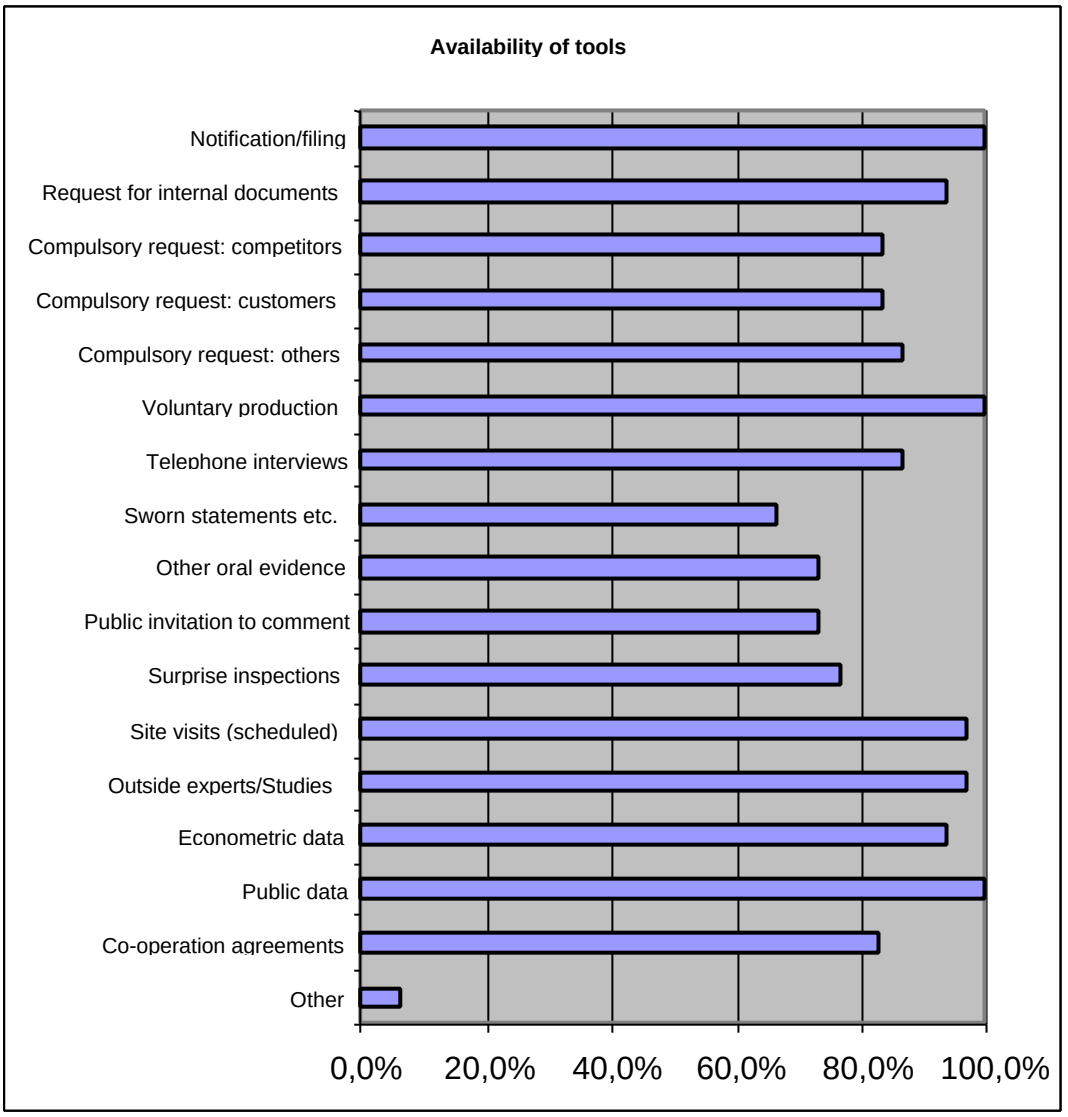
13. However, almost all other agencies mentioned that they provide for guidance in an informal manner, ranging from rather technical questions about notification thresholds and requirements to a first indication on potential problematic aspects of the transaction. In case of informal guidance, again no investigation beyond the information provided by the parties is usually carried out.

III. Investigation tools (q. 4-14)

1. Available tool set (q. 4 + 6)

14. Agencies were asked to indicate what tools they had at their disposal, starting from a list provided in the questionnaire. Agencies' replies showed that the tools listed in the questionnaire include practically all types of investigation tools available to them. The only other sources of information indicated were ad hoc comments and complaints from interested third parties outside a specific procedure, and the consultation of other agencies such as financial markets surveillance authorities. Apart from compulsory written requests to the parties, competitors and customers, agencies seek information mainly from other government agencies, parties' suppliers, trade associations, consumer representatives, investment and other banks as well as consultants.

15. Agencies generally have a wide variety of investigation tools. All tools listed in the questionnaire are available to at least ¾ of all agencies. All systems foresee some form of notification or filing as a source of information. Likewise, requests for the voluntary production of documents and also public data are employed by all agencies.



16. The overwhelming majority of countries said there is no additional investigation tool they would like to use, but which was currently not available to them. Two countries expressed limitations on introducing new investigation tools because of their evidence laws.

17. Nevertheless, six of those who made further comments emphasised that they would wish to use all of the ones they have at their disposal or at least some of them more effectively. The prime ground for concern for agencies was the legislative framework, which prevents an effective use of certain investigation tools. The problems named by the competition authorities were that they do not have a direct power to sanction in case of non-compliance or that the use of some of the investigation tools requires (financial) approval of other bodies, which makes their use much more difficult.

18. Half of the countries who made comments on the possible better uses of available tools said they would like to co-operate more or more closely with other competition authorities in terms of evidence and sharing of confidential information (see further below).

2. Overview: Investigation practice in different scenarios (q. 4)

19. The frequency of use of the different tools by the agencies varies significantly, both between different tools, and between no problem and likely intervention cases.

20. As regards no problem cases, the tools predominantly "frequently used" are:

    1) notifications/filings,
    2) public data and
    3) public invitations to comment.

21. Least frequently used in no problem cases (i.e. with the highest score in "never used") are

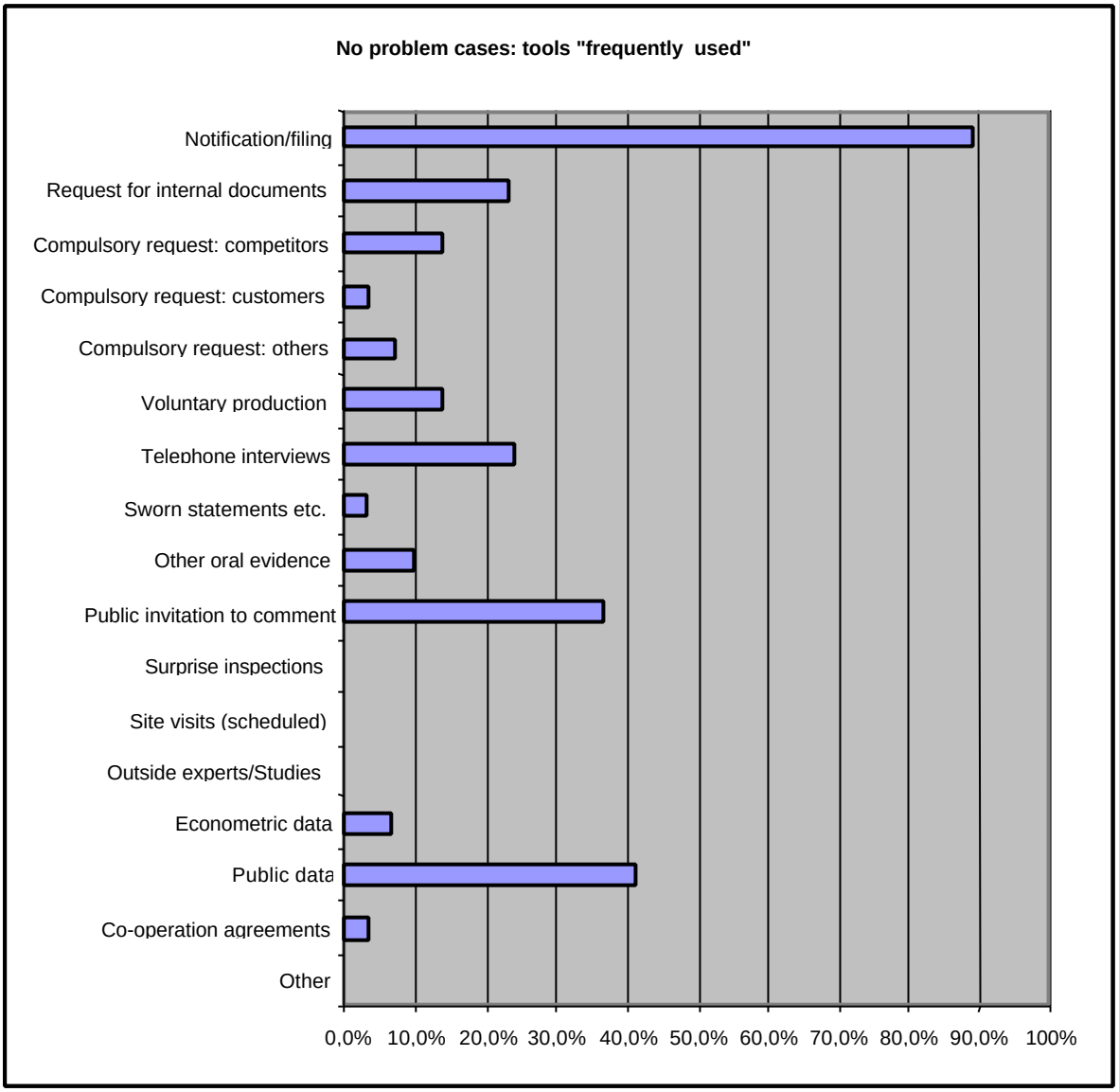
    1) surprise inspections,
    2) outside studies/econometrics and
    3) sworn statements and other formal oral evidence.

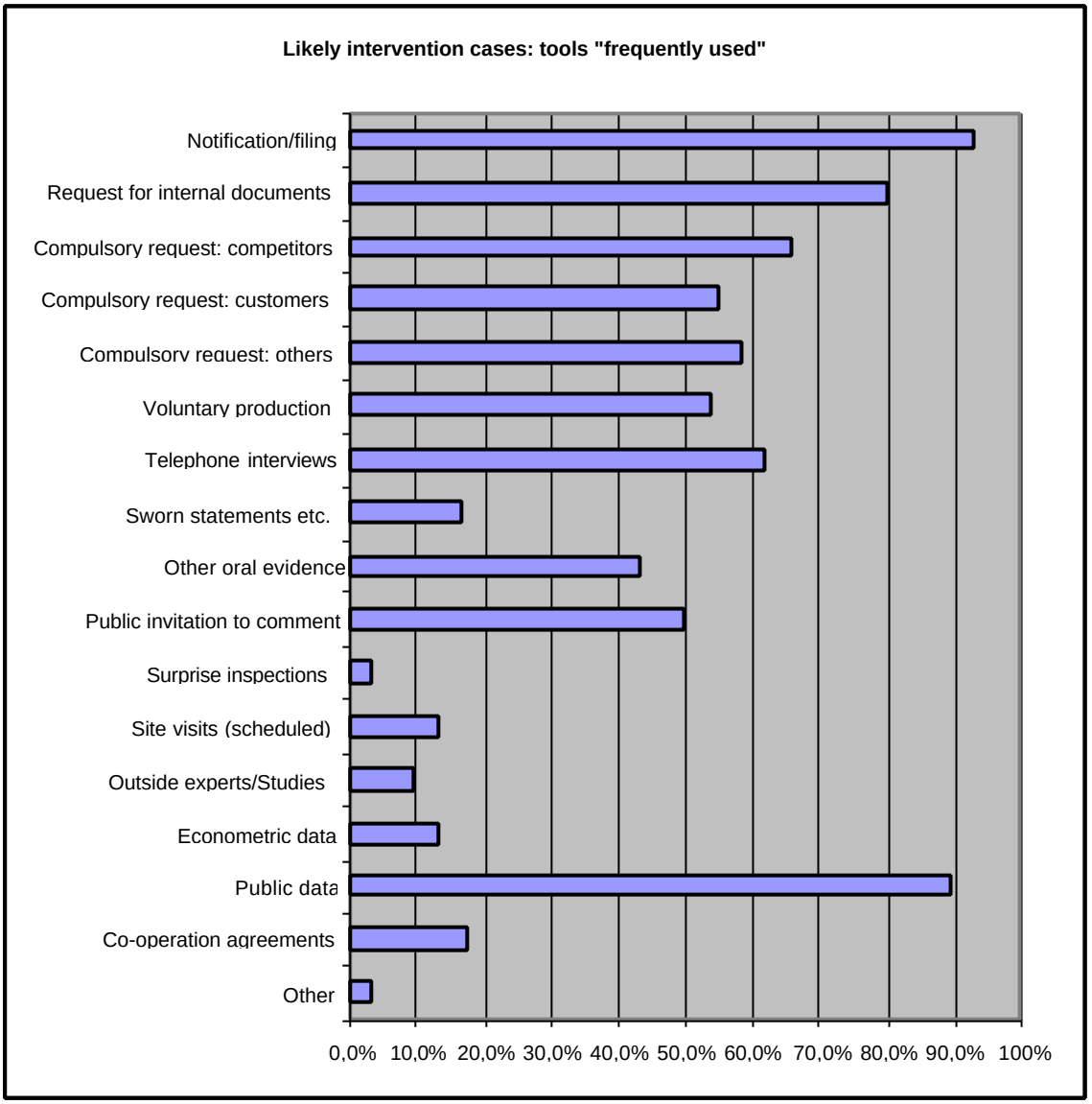
22. For likely intervention cases, the most common tools are

    1) notifications/filings,
    2) public data and
    3) requests for information addressed to the parties
    4) requests for information addressed to competitors

23. Tools where many agencies indicated that they never use them in likely intervention cases are surprise inspections, sworn statements and public invitations to comment.

24. The following charts give a complete overview on all tools and their frequency of use. The bar represents the percentage of agencies that indicated that they "frequently use" the specific tool.


No problem cases: tools "frequently used"
Notification/filing
Request for internal documents
Compulsory request: competitors
Compulsory request: customers
Compulsory request: others
Voluntary production
Telephone interviews
Sworn statements etc.
Other oral evidence
Public invitation to comment
Surprise inspections
Site visits (scheduled)
Outside experts/Studies
Econometric data
Public data
Co-operation agreements
Other
0,0% 10,0% 20,0% 30,0% 40,0% 50,0% 60,0% 70,0% 80,0% 90,0% 100%



25. Two observations seem to be relevant here. First, in both "no problem" and "likely intervention" case scenarios, agencies seem to use to a large extent information obtained from the parties and public sources as a starting point for their investigation. This shows that it is essential to fully exploit these sources by carefully defining the information to be provided etc., and to provide mechanisms to ensure the reliability of this information.

26. Second, for the bulk of investigative tools, the frequency of use increases with mergers that present more competitive concerns. This applies in particular to requests for information addressed to customers and other addressees, and sworn statements.

27. It can also be observed from the replies that there are tools which are available to a large proportion of agencies, but which are very rarely used in practice, even in likely intervention cases. They are: notifications, public invitations to comment, surprise inspections. Requests for information addressed to customers and other addressees and sworn statements are also available to a relatively large number of

agencies, but are very rarely used in non-problem cases. However, the frequency of their use significantly increases in problematic cases.

28. Surprise inspections are available to ¾ of all agencies, but are never used by almost all agencies in no problem cases, and are never used by about ¾ of the agencies even in likely intervention cases. Two agencies noted this tool is time-consuming and burdensome and is rather seen as an enforcement measure in case of non-compliance with notification rules and requests for information. One of the agencies noted surprise inspections are not frequently used as they are better suited for use in conduct cases.

29. Another such example are co-operation agreements with foreign agencies, although it has to be considered that only a proportion of cases reviewed by an agency might have impacts in other countries. However, although more than ¾ of agencies refer to the availability of this tool, half of those never use it in easy cases. A quarter never use it in likely intervention cases, and another quarter uses it only rarely in these cases. Agencies indicated timing and confidentiality issues as the main obstacles for a wider use of this instrument. In addition, domestic market particularities are seen as limiting the investigative value of information obtained in exchanges of views with other agencies. Consequently, this tool is predominately used between agencies of geographic proximity and those embedded in a wider network, such as the European Competition Authorities network. Although there are natural limits to this tool as mentioned above, it appears that its potential has not been fully exploited in practice.

30. Another finding supported by agencies' replies is the link between a specific type of merger review regime, and the use of certain investigation instruments. As an example, it could be observed that all agencies which operate in a system where ultimately a court decides on any intervention, use sworn statements and other formal oral evidence with a significantly higher frequency. This indicates that at least in likely intervention cases any discussion on specific tools, their mode and frequency of application cannot be decoupled from the overall procedural background in each jurisdiction.

3. Agencies' comments on individual tools (q. 5, 7, 8, 11)

31. Agencies were asked to explain briefly how these instruments are used, and to indicate their advantages and disadvantages based on their experience.

32. It is clear from the responses that similar tools work differently in different countries, not just because of differences in legal background and tradition, but also because market participants are more active and/or have a different level of understanding of merger review/competition law in some countries than in others. The latter was explicitly expressed in questions on compulsory written requests for information addressed to competitors, customers or others, voluntary production of information and documents, public invitation to comment but can also be an issue in relation to voluntary/non voluntary notifications, public data and sometimes even in different forms of oral evidence.

a) Notification/filing

No problem case				Likely intervention case			
0	1	2	3	0	1	2	3
0,0%	10,7%	0,0%	89,3%	3,6%	0,0%	3,6%	92,9%

[This table shows the percentage of responding agencies indicating that the tool is never used (=0), rarely used (=1), sometimes used (=2) or frequently used (=3)]

33. Nine respondents emphasised that the notification (or "filing") is an extremely useful tool because it is the first and most detailed source of information available at an early stage of the proceeding. It helps determine the nature and potential competitive threats as well as screen out those cases which plainly raise no competition concerns. Five respondents emphasised that some information given in their notification is subjective and thus must be treated carefully. One of the countries noted that the most important problem they have is how to define the level of information that can meet the needs of the investigation of mergers which raise very different levels of competitive concerns, so as not to unnecessarily make a process too long and costly. A respondent, where a non-compulsory system of notification is in place, noted that one consequence of the voluntary system is that the amount of information provided at the time of merger is variable, parties can use the flexibility inherent in the system to provide brief details of cases which plainly raise no competition concerns. Whereas if the case is complex it is considered in the best interest of the parties to provide full information at the outset, because it speeds up the handling of the case.

b) Compulsory requests for internal documents of the merging parties

No problem case				Likely intervention case			
0	1	2	3	0	1	2	3
20,0%	43,3%	13,3%	23,3%	10,0%	6,7%	3,3%	80,0%

34. Agencies who reported using this tool frequently numbered 24, out of 28 agencies who have this tool at their disposal. Out of nine comments received on this tool, five of them show that agencies use this tool as an additional source of information if the notification documents are not complete. Agencies use it to require additional documents, more detailed and specific information of the kind which is already required in the notification or to obtain further detailed information. One agency commented that the tool is thus not time-consuming and two agencies noted it is ideal for verifying facts and figures and for obtaining confidential data.

35. However, this investigation tool works completely differently in other jurisdictions. There, the parties have to submit a detailed set of specified documents and business records. Parties have to produce all business records in the last couple of years (but the time period varies depending on the investigation) that relate to the critical issues in the investigation. Often staff calls for production

of hundreds of boxes of documents. Agencies expressed the view that such documents and business records often produce far more candid and probative evidence on key questions than parties would otherwise provide. The disadvantage reported to be linked with such an approach is that it is time-consuming and it requires a lot of staff to exploit the documents produced.

36. Agencies indicated that the main advantage of this investigation tool is to get a first hand view on the issues that have not been filtered by the merging parties, third parties or others, which is perceived as one of the disadvantages of data requests addressed to third parties. It also was considered useful in economies with lesser knowledge or understanding of competition law. Respondents also stressed the evidential value of internal documents when used in court.

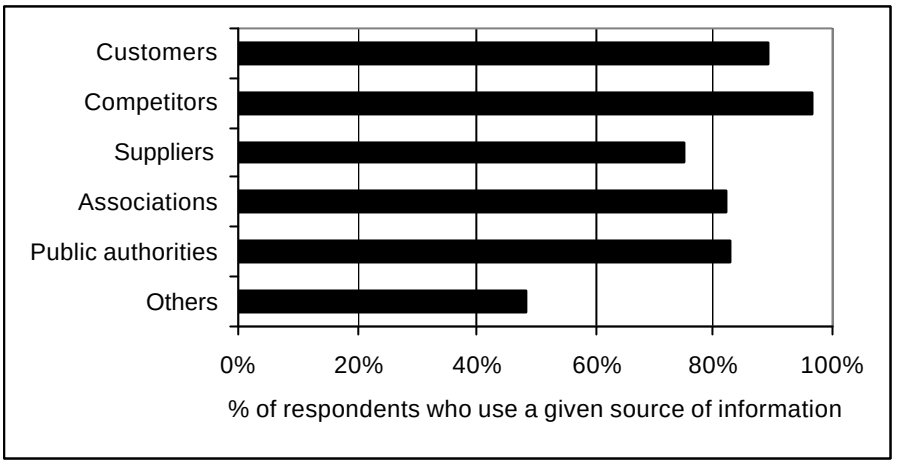
c) Compulsory written requests for information, addressed to competitors, customers or others

	No problem case				Likely intervention case			
	0	1	2	3	0	1	2	3
Compet.	31,0%	37,9%	17,2%	13,8%	10,3%	3,4%	20,7%	65,5%
Custom.	37,9%	41,4%	17,2%	3,4%	10,3%	17,2%	17,2%	55,2%
Others	31,0%	34,5%	27,6%	6,9%	10,3%	6,9%	24,1%	58,6%

37. Most respondents claimed that information requests to third parties are an extremely important tool, and three of them said that it is the most important. This tool is used to gather first-hand information about the market and to verify information provided by the parties. It is most often used in the likely intervention cases, these being the most complex. Four respondents raised the problem of bias in responses provided by third parties. One respondent suggested that this drawback could be addressed to some extent by ensuring to choose a representative sample. Another agency considered that this tool is not very useful, because the competitors and customers in their country do not have a full grasp of competition law. Another agency said they try not to put an unnecessary burden on the potential addressees, and request information only if the request is essential, proportionate and reasonable.

38. Requests for information are almost equally addressed to competitors, customers, suppliers and different kinds of associations and public authorities, all these sources being used by more than three quarters of the respondents (see figure below). The two most used sources are competitors and customers.

Use of third parties as source of information



39. Contact details for the addressees of such requests are mainly obtained from the merging parties themselves, although other sources are also used, such as databases or publications available to the agency.

d) Voluntary production of information and documents

No problem case				Likely intervention case			
0	1	2	3	0	1	2	3
10,7%	50,0%	25,0%	14,3%	3,6%	17,9%	25,0%	53,6%

40. This tool is used particularly often in more complex cases and much more rarely in no problem cases. Replies indicate that many agencies referred to information that is volunteered, rather than specific requests for the voluntary production of information. Most countries who described its use said it is a good source of information, that provides data which otherwise would not be considered. However, agencies also raised the problem that due to the voluntary character, the scope and depth of the information provided can be limited.

e) Telephone interviews

No problem case				Likely intervention case			
0	1	2	3	0	1	2	3
20,7%	20,7%	34,5%	24,1%	13,8%	17,2%	6,9%	62,1%

41. Agencies use telephone interviews at various stages of the proceedings (very often at all stages) and always find it very useful for different reasons: to verify claims, to get background information, to gather a lot of information in a short time, to identify persons who can provide evidence, to afford (third) parties a less formal occasion to discuss views in which they may thus be less hesitant to respond

openly and to help them understand exactly what the agency is looking for and to follow up on very specific issues. One of the agencies noted that it can be time-consuming and frustrating trying to get in touch with the right people; this is why they ask the notifying parties to provide contact details for their largest competitors and customers. The disadvantage of telephone interviews raised by seven respondents is their probative value. Two agencies noted they resolve this by obtaining statements under oath later in the procedure. Another two agencies require proper documentation in the form of agreed minutes if such interviews are to be used as evidence. One of the agencies mentioned that respondents are less well prepared in telephone interviews than in face to face interviews and sometimes unwilling to give information.

f) Sworn statements, depositions, affidavits

No problem case				Likely intervention case			
0	1	2	3	0	1	2	3
70,0%	20,0%	6,7%	3,3%	43,3%	30,0%	10,0%	16,7%

42. The most important advantage of this tool is its probative value. They are used more often in likely intervention cases than in no problem cases. However, it should be noted that three out of the five countries who use it very often in the likely intervention cases have a system whereby a merger can only be prohibited by a court. In 4 out of the 5 countries who use it very often, testimony under oath is a regular part of their evidence system. In contrast, two agencies indicated that affidavits are not foreseen at all in their legal system.

g) Other forms of oral evidence

No problem case				Likely intervention case			
0	1	2	3	0	1	2	3
63,3%	20,0%	6,7%	10,0%	26,7%	6,7%	23,3%	43,3%

43. Eight agencies expressly stressed they use meetings and personal interviews in their investigations. One of the agencies noted that its willingness to meet the parties and openly discuss issues is often cited as one of the most positive features of its regime. It resolves misunderstandings, clarifies matters and it is useful in order to check information, assumptions and theories. An advantage of face to face contact over telephone interviews is also their probative weight. One of the agencies noted that interviews never take place in the agency's offices. This is said to create a more positive effect on the interviewee. Another agency mentioned it relies heavily on interviews with complainants. But one agency remarked that third parties often do not wish certain of their candid statements to appear in the file, even in the form of confidential minutes.

44. The selection of persons to be interviewed is based on a wide range of considerations. Sometimes third parties want to be heard, or the information gathered through the written responses is not sufficient or is contradictory. It can be said that most agencies use oral evidence on a case by case basis and only four agencies use this tool as a standard procedure.

45. The most common way of introducing oral statements into the procedure is by means of a written document signed by the witness or by means of affidavit. The other two more frequent outcomes are (i) statements that are recorded by officials only, without the signature of the witness, and are taken into account in the overall analysis and (ii) they are not introduced into the procedure at all.

h) Public invitation to comment published on web site, in official journal etc.

No problem case				Likely intervention case			
0	1	2	3	0	1	2	3
43,3%	13,3%	6,7%	36,7%	33,3%	10,0%	6,7%	50,0%

46. Five out of seven respondents who made comments on this tool said it very rarely produces any useful information, but three emphasised the advantage of making publicly known that a merger and its review are under way. In this way, the information reaches many people and it gives the interested parties an opportunity to contact the agency.

i) Surprise inspections

No problem case				Likely intervention case			
0	1	2	3	0	1	2	3
96,7%	3,3%	0,0%	0,0%	70,0%	23,3%	3,3%	3,3%

47. As mentioned above, a considerable number of agencies have this tool available (23 out of 31), but only very few actually take advantage of it. Only one agency uses it frequently in likely intervention cases and only one sometimes in likely intervention cases. In no problem cases it is virtually never used by any agency. Two agencies see it as a very harsh method, and one of the agencies remarked it is too time-consuming.

j) Site visits –scheduled

No problem case				Likely intervention case			
0	1	2	3	0	1	2	3
66,7%	30,0%	3,3%	0,0%	20,0%	33,3%	33,3%	13,3%

48. Scheduled site visits are used primarily in complex cases and very rarely in no problem cases. Five out of seven respondents who made comments on this investigation tool said it gives a very good insight into how the industry in general and a particular company operate. One agency said it is particularly useful when technical questions are an issue.

k) Outside experts and studies

No problem case				Likely intervention case			
0	1	2	3	0	1	2	3
80,0%	16,7%	3,3%	0,0%	16,7%	43,3%	30,0%	10,0%

49. Outside expertise is much more widely used in likely intervention cases, particularly if there is a specific complex issue to complement the knowledge and assessment capabilities of the agency. One respondent noted that outside experts have very little understanding of merger review so constant monitoring from the side of the agency is needed. A disadvantage of using outside experts or studies raised by three agencies is that it is time-consuming. One agency noted this disadvantage can to some extent be remedied with sound forward planning. Another disadvantage noted by one agency is the cost of this tool. Five agencies, however, claimed that the results are often very useful and one agency remarked it is a useful tool because it gives an independent view.

l) Public data

No problem case				Likely intervention case			
0	1	2	3	0	1	2	3
0,0%	20,7%	37,9%	41,4%	0,0%	0,0%	10,3%	89,7%

50. Respondents use public sources regardless of the complexity of the case and particularly often in likely intervention cases (90% of the agencies), and more than any other investigation tool beside the notification/filing. Many agencies use these sources to improve their understanding of the industry, for general information, but not for specific data. Almost all who made comments cautioned that it can be unreliable or biased. Two agencies remarked that they therefore sometimes counter-check and complete these information with formal questions to a representative set of market participants. The tool is considered very useful in systems without compulsory notification to discover the existence of a merger.

m) Econometric data

No problem case				Likely intervention case			
0	1	2	3	0	1	2	3
73,3%	20,0%	0,0%	6,7%	10,0%	40,0%	36,7%	13,3%

51. Econometric data is used in very complex cases. One of the agencies noted it never uses it because the cases they review are not so demanding. Four agencies noted they would like to use it more often, but named time constraints and lack of sufficient data as principle obstacles. One agency felt that this is an indispensable tool.

4. Specific information technology tools (q 13)

52. Most common are database and economics software and access to a law database. Database software is used to manage the documents received and produced in a merger investigation, such as Summation, Concordance and JFS Litigator's Notebook. In the category economics software products Mathematica, e-views and SAS were named. Law databases named included OLIS, Judit and JUSTIS.

5. Investigation of remedy proposals (q 10)

53. Agencies were asked to indicate whether they conduct a specific investigation in cases where parties offer remedies to the competition problems identified, in order to assess the suitability of these remedy proposals.

54. Almost ¾ of agencies conduct a distinct investigation to assess remedies proposed by the parties. However, one agency seems to limit this investigation to internal sources of information rather than involve other market participants. Otherwise, there is no significant difference in the type of tools used and their frequency in this specific investigation as compared to the investigation of the merger itself .

6. Investigative powers in merger review unrelated to specific merger cases (q 14)

55. In 16 countries there are no investigative powers under the prevailing merger review regime which are unrelated to a specific case. In 13 jurisdictions such an investigation is possible. In one country, such an investigation can be made, at the request of the minister for the economy or the Competition Council, but mainly if a merger has not been notified or implemented incorrectly. Such investigations are undertaken by another agency for reasons to improve antitrust policies and also

monitor and follow up market practices. In two out of the 13 agencies that answered in the positive, such investigations can be undertaken but the authority does not have any powers to force market participants to answer.

IV. Enforcement powers with regard to providing information (q 15, 16)

56. All agencies except one have enforcement powers. Whereas in one jurisdiction these powers are to do a search and seizure operation, in all other jurisdictions a system of fines and, in some instances, of criminal law proceedings has been put in place. However, in some jurisdictions fines can only be imposed on firms which did not notify and that merged without prior authorisation, notified too late or did not follow agreed commitments.

57. In all those jurisdictions which have a system of imposing fines, fines are imposed for incorrect, misleading or late information. In some jurisdictions, such a behaviour is generally or in addition to civil law subject to criminal law prosecution. For instance, in one jurisdiction it is a criminal offence to intentionally withhold, misrepresent, conceal, destroy, alter or falsify any documentary material, answers to written interrogations and oral testimony. In the different jurisdictions the possible sentence ranges from 3 months to 5 years imprisonment.

58. Fines for failure to notify or to provide information are calculated once for the breach as such and then on a daily basis until compliance. A distinction is made between private persons and companies in some countries. The highest fine is to be found in one jurisdiction where failure to notify can be subject to a fine of the equivalent of 650.000 €. The highest daily fines amount to an equivalent of 25.000 €.

59. The number of cases in which such fines were imposed range from 0 to 24 in 1999, from 0 to 42 in 2000 and from 0 to 44 in 2001. It has to be noted that a large proportion of these cases relate to fines for the failure to notify or late notification.

V. Protection of business secrets (q. 19, 20)

60. With regard to the protection of business secrets, the vast majority of the respondents have specific regimes that regulate the access to this kind of information. Usually business secrets are not disclosed without a waiver from the parties, but in ¼ of the regimes this information can be disclosed before the court.

61. Normally business secrets can be used as evidence and are introduced in the procedure by means of confidential /non confidential versions of the different documents gathered or produced. Only in a very limited number of agencies are business secrets not used as evidence save in specific circumstances.

62. Regarding the protection of third parties' identities, it is difficult to draw a conclusion with respect to whether specific provisions or the general provisions for the protection of business secrets are applied. However, ¾ of the respondents have confirmed that a third parties' identities may be protected in practice, and only in specific circumstances are they disclosed.

VI. Informing parties and third parties about the results of the investigation (q. 17, 18)

63. The enquiry has shown that there are usually contacts between the agency and the merging parties during the investigation in different ways (meetings, hearings, at the end of each stage in the procedure, etc.). These contacts take place mainly when the operation is likely to give rise to competition concerns, in order the give the parties the opportunity to give their views on the different issues or to discuss possible remedies. These kinds of interchange of information take place in three quarters of agencies. In the other agencies the parties are merely informed by means of a decision at the end of the procedure.

64. However, the principle of access by the merging parties to the evidence gathered during the investigation has been confirmed by nearly all the respondents, although with different restrictions.

65. A first group of agencies grant access to evidence at any time or at specific moments during the procedure, such as the period before a hearing or when the investigation changes from one level of intensity to another. Other agencies apply general provisions of their national legislation on public access to documents. A third group grants the access only if the decision is contested and it goes before the court.

66. Third parties are informed of the results of the investigations only by one third of the authorities who replied to the enquiry. Normally this information is given to them when statements of objections are issued or hearings are held. Only 40% of the respondents give any access to gathered evidence to third parties.

VII. Background information

1. Merger review regimes and caseload (q. 21, 22)

67. Three main types of merger review regimes can be defined:

a) One administrative agency investigates and makes the decision and there is judicial review if the decision is contested.

b) One administrative agency investigates, another one makes the decision and there is judicial review if the decision is contested.

c) An agency investigates, the court decides and the process remains within the judicial system.

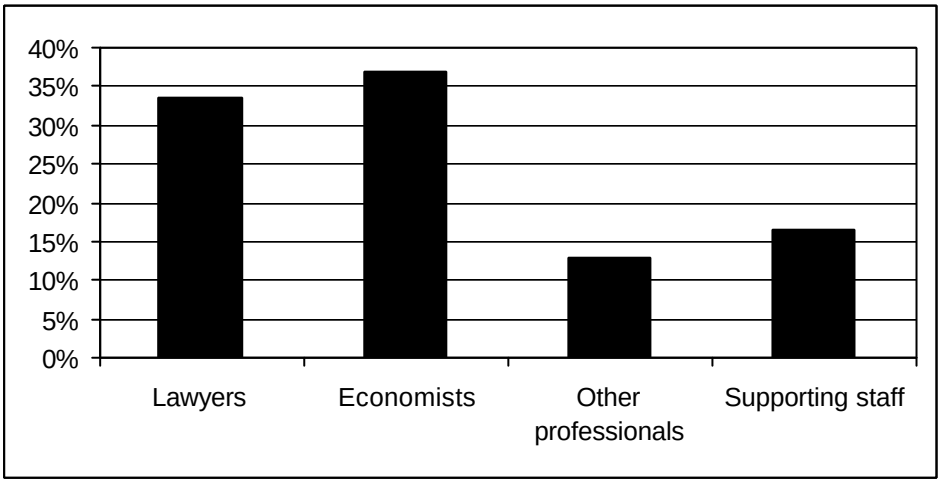
68. The majority of agencies who responded to the enquiry belong to either type a) or type b) mentioned above, with only a few agencies belonging to type c).

69. In 2001 the total number of cases in the 28 agencies who replied to this question was 7.933. In average there were 283 cases per agency, ranging from 0 to 2.417.

2. Staff qualification and role of economists (q. 9, 12, 23)

70. With respect to the different types of qualifications, lawyers and economists account in average for 70% of the staff working in the agencies. The other 30% is formed by other professionals or supporting staff.

Qualifications of staff



71. Very few merger review enforcement agencies employ specialised staff other than economists and lawyers. Two agencies have specialised statisticians, two others employ accountants, and one agency has some corporate finance specialists.

72. In the vast majority of jurisdictions economists and lawyers work together on cases as part of a single case team. In some countries, there is a separate economists branch, which can help in difficult cases, where econometrics are required, or which are likely intervention cases. This separate branch takes either the form of a chief economist or a Competition Policy Bureau or Policy and Research division.

73. In some countries both economists and lawyers work on the same case but either with different tasks or in parallel. In two agencies there are separate units which

do a parallel investigation. In other countries there is a clear separation of tasks. In two agencies economists do fact finding/draft questionnaires and undertake economic analysis, whereas lawyers liase with parties and draft the documents produced.

74. There are two countries where economists are not usually used at all in merger investigations.

ANNEX 1

ICN – MERGER WORKING GROUP

INVESTIGATIVE TECHNIQUES SUBGROUP

Questionnaire to ICN Members

on Investigative Techniques in Merger Review Procedures

Note: In case you supplied some of the information requested in this questionnaire in the framework of other initiatives, you are welcome to answer by attaching a copy of the respective submission. For ease of processing the replies, it would however be helpful if you could transpose the relevant information into your reply to this questionnaire.

Investigation practice

1. Please describe different levels of intensity of merger investigation which exist in your jurisdiction and/or practice (e.g. purely internal review of a filing in case of mandatory filing, informal external information gathering, use of formal instruments to require (additional) information from parties, formal instruments addressed to third parties). Please define these levels according to the depth of your investigation in practice rather than to formal steps in your procedure (such as Phase 2 / second request).

2. Please provide a breakdown of the cases reviewed by your agency in the year 2001 which reached the different levels of intensity identified above:

Level of intensity	**Proportion of total number of cases (approximate %)**
Level 1 (please specify)	
Level 2	
Level 3	
…	

3. Does your law provide for a formalised confidential guidance procedure, by which the merging parties can seek preliminary guidance on the likely assessment of a proposed merger by the authority? ❒Yes ❒No.

If so, please indicate on what information this guidance is based and whether and to what extent you undertake any investigation.

Investigation tools

4. Please identify in the following list the investigation tools that are at your disposal in Merger Review procedures. Please amend the list if necessary.

   Please also indicate the frequency you use the investigation tools listed in the following table in your review practice. Please use the following pattern:
   3 = frequently used
   2 = sometimes used
   1 = rarely used
   0 = never used.

   Please distinguish between "no-problem" cases and cases where the agency expects to intervene, e.g. by the imposition of conditions or a prohibition (these two bold categories have been chosen to get a clear picture of the possible variations in the investigation tools used in different types of cases. It is clear that there may be cases in between for which an intermediate tool set may be used).

Investigation Tool		**Available (Y/N)**	**Frequency of use (0-3)**	
			No problem case	**Likely intervention case**
Notification /filing				
Compulsory requests for internal documents of the merging parties (e.g. the "Second request" in the US system)				
Compulsory written requests for information, addressed to	Competitors			
	Customers			
	Others (specify)			
Voluntary production of information and documents				
Telephone interviews				

Sworn statements, depositions, affidavits			
Other forms of oral evidence (please specify)			
Public invitation to comment (published on web site, in official journal etc.)			
Surprise inspections			
Site visits (scheduled)			
Outside experts / Studies commissioned by your agency			
Econometric data			
Public data (newspaper articles, industry/investment reports)			
Co-operation agreements with foreign agencies			
Other (please specify)			

5. For each of the tools you use, please explain briefly how these instruments are used, and indicate their advantages and disadvantages based on your experience. Please refer to recent examples if available.

   Please also describe the importance of each tool for your substantial analysis and the findings and assessment in your final decision/conclusions (e.g., informal telephone enquiries might be used systematically to get a general background of the transaction, but the general information obtained through these enquiries might not be directly used as evidence in the final decision).

6. Are there any investigation tools which are currently not foreseen in your legal framework, but which you would consider desirable? If so, please indicate those tools and explain why.

7. In case you use requests for information addressed to third parties, please indicate

   a) to what kinds of third parties you submit such requests (customers, competitors, consumer associations, government departments, etc.)

   b) how you select the addressees of such requests.

8. In case you use oral evidence in your procedures, please describe

   a) how you decide who to question orally and

b) how this evidence is documented and introduced into your procedure.

9. Do you use dedicated, specialised staff for some specific investigation tools?
❒Yes ❒No.

   Please explain if applicable.

10. In cases where the parties offer to remedy competition concerns identified during your procedure, do you conduct a specific investigation with regard to the assessment of the suitability of the remedies? ❒Yes ❒No.

    If so, please briefly describe this investigation and the investigation tools used (if you use several tools, please rank them according to question 4).

11. To what extent do you use economic and econometric data and models in your investigation, and how are they introduced into your procedure?

12. In what way are economists integrated into your investigation process (case team member, separate unit, external consultants/experts, etc.), and in what way do they participate in/contribute to the fact finding in merger cases?

13. Please identify any specific information technology tool you use for the compilation and processing of information gathered in your investigation (apart from the usual office applications like MSWord etc.), and briefly describe its functioning.

14. Do you have investigative powers in merger review which are unrelated to specific cases, e.g. sector related investigations? ❒Yes ❒No.

    Please specify if applicable

Procedural issues

15. Please describe your enforcement powers (e.g. fines or other sanctions) with regard to failure to comply (or improper compliance) with obligations to provide information.

16. Please indicate in how many cases in the years 1999 to 2001 you made use of these powers, and describe the circumstances in which these powers are typically employed.

Year	**Number of enforcement cases**
2001	
2000	
1999	

17. To what extent, at what stages and under what procedure are the merging parties

    a) informed of the results of your investigation?

b) given access to the evidence gathered?

18. Are interested third parties

    a) informed of the results of your investigation at a certain stage of your procedure (apart from the publication of the final decision and/or a press release)? ❒Yes ❒No.

    b) given access to the evidence gathered? ❒Yes ❒No.

    If so, please explain to what extent, at what stage and under what procedure this is done.

19. Please explain your regime as regards the protection of business secrets contained in the information gathered during your investigation. Please also explain whether and how information that constitutes business secrets can be used as evidence.

20. Please describe any specific provisions with regard to the protection of third party complainants and their identity (if applicable).

Background questions

21. Please give a brief description of your Merger Review regime, and refer in particular to the general procedural and institutional system (e.g. who investigates, who decides, judicial review, etc). Please indicate also whether your procedure provides for different procedural stages, e.g. initial and extended review.

22. Please state the total number of mergers ("mergers" is meant to include "concentrations" or any other term that refers to transactions that are subject to your country's merger review law) that were notified to your agency in the year 2001. If your country does not provide for merger notification, or if notification is voluntary, state the total number of mergers that your agency reviewed in any fashion.

Number of cases reviewed:	

23. Please indicate the number of staff in your agency dedicated to merger review procedures, broken down by lawyers, economists, other professionals, and supporting staff.

Category	**Percentage (%)**
Lawyers	
Economists	
Other professionals (please specify)	
Supporting staff	

ANNEX 2

AGENCIES THAT REPLIED TO THE QUESTIONNAIRE

1.	Argentina
2.	Australia
3.	Belgium
4.	Brazil
5.	Canada
6.	Czech Republic
7.	Denmark
8.	EU
9.	Finland
10.	France
11.	Greece
12.	Hungary
13.	Israel
14.	Japan
15.	Korea
16.	Malta[3]
17.	Mexico
18.	New Zealand
19.	Pakistan
20.	Peru
21.	Russia
22.	Slovakia
23.	Slovenia
24.	South Africa
25.	Sri Lanka
26.	Sweden
27.	Switzerland
28.	The Netherlands
29.	United Kingdom
30.	USA
31.	Zambia

[3] Replies were provided to some questions only.