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MARKET STUDIES

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FOREWARD

This document comprises proceedings in the original languages of a Roundtable on Market Studies, which was held by the Competition Committee in June 2008.

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

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

PRÉFACE

Ce document rassemble la documentation dans la langue d’origine dans laquelle elle a été soumise, relative à une table ronde sur les études de marché, qui a eu lieu en juin 2008 dans le cadre du Comité de la Concurrence.

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

Cette compilation fait partie de la série intitulée « Les tables rondes sur la politique de la concurrence ».

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable and the delegates' submissions, several key points emerge.

- (1) *Market studies are a wide-spread component of the work portfolios of competition agencies.*

Nearly every competition agency conducts market studies even though not all of the agencies mean the same thing by "market." There are some countries, however, with a particularly long and rich tradition of conducting market studies. In the US, market studies were initiated at the beginning of the 20th century and, in Japan, market studies go as far back as the late 1940s. The United Kingdom has spent considerable time and effort reviewing and analyzing its considerable experience in initiating and conducting markets studies as well as in carrying through with the recommendations of such studies.

- (2) *Market studies serve two primary purposes. The first is as a prelude or precursor to litigation. The second is as a spearhead or foundation for competition advocacy.*

The use of market studies is quite varied. Some countries use them primarily for litigation. Others use them primarily for competition advocacy. Market studies can constitute a lead-in to litigation when anticompetitive behavior is suspected in a sector but the competition authorities do not exactly know the nature and source of the competition problem. In this circumstance, market studies help to identify the possible competitive problems. Alternatively, market studies can constitute a lead-in for competition advocacy. This is particularly the case when there is no suspicion of violation of antitrust laws, but yet it does not appear that the market is really functioning well for consumers. The causes often turn out to be public restrictions on competition or inefficient market equilibria. In such cases, market studies may lead to proposals to deregulate, reform market institutions, or improve information dissemination to consumers or suppliers.

- (3) *Market studies are a good way to develop the link between consumer policy and competition policy.*

In a number of countries, market studies are used both for competition and for consumer policy and these two uses are often intertwined in the market studies. Particularly in nations with separate consumer protection and competition agencies, integrating the two closely related mission areas can be a challenge. Market studies can be an excellent vehicle for such integration because market studies can readily accommodate a wider perspective than a competition agency would be allowed to take in litigation. From this broader perspective, recommendations for activities either in the consumer protection area could be made.

For nations with a combined consumer protection and competition agency, market studies are a natural vehicle to highlight the synergies from combined jurisdiction over both policy areas.

- (4) *Market studies are most productive when focused on the prospects for change rather than simply on the importance of the problem.*

Market studies are a very flexible tool which can accommodate a number of objectives, but few competition agencies have sufficient resources to pursue all potentially meritorious market studies. Resource constraints face every competition agency, at least part of the time. The presence of resource constraints appropriately leads to consideration of the costs and benefits of different market studies as well as the costs and benefits of market studies compared to other activities of competition agencies. Experience suggests that limiting market studies to big, obvious problems may not be the optimal strategy for competition agencies. If the probability of making a positive difference by studying a major problem is negligible, competition agencies can improve the cost/benefit ratio of market studies program by shifting to studies with a greater probability of success --- even if the magnitude of competitive problem or inefficiency is not as large. In so doing, the agency can improve its reputation and this may increase its probability of success in studying and remedying the largest problems at a later point in time. In practical terms, this means that targeting of market studies is most productive when it focuses on the prospects for change rather than simply on the importance of the problem.

- (5) *Some market studies serve an important function for society by refuting claims of anticompetitive conduct when, for example, prices rise as a result of supply disruptions and not because of anticompetitive conduct. Absent such refutation, governments may be inclined to apply anticompetitive restrictions on competition that will harm consumers and degrade future market responses to supply or demand shocks.*

Competition agencies in several countries have been called upon to assess whether price increases for key commodities such as gasoline or natural gas reflect market forces responding to supply or demand shocks versus anticompetitive conduct by suppliers. Market studies in these circumstances can have an important impact on policy discussions by averting government intervention if markets are functioning efficiently or by narrowing government interventions to specific competitive problems and targeted, effective remedies if anticompetitive behavior is at fault. In such matters, market studies can have a prophylactic effect that avoids government restrictions on competition and associated harm to consumers.

- (6) *Market studies involve a wide variety of practices and institutional environments from very formal and exacting hypothesis testing with advanced quantitative methods to quite informal inquiries about the existence of specific business practices.*

In some countries, a major proportion of the selection of market studies is determined by the legislature or the national executive. In others, the competition agency has nearly total discretion in selecting market studies. Competition agencies generally prefer the latter, but agencies have a duty to conduct requested market studies and doing such studies may present a major opportunity to gain credibility and support from the legislature or the executive.

In some countries, market studies can use the powers of investigation of the antitrust authority to obtain data and other information. In other countries, the competition agency can only employ voluntary gathering of data. Competition agencies with such investigative powers report that they use them sparingly, primarily to obtain critical data that cannot be obtained by other means. Competition agencies without such powers often seek them, but with mixed success. Opposition is often based on concerns that competition agencies will use such power for “fishing expeditions.”

In some nations, consultation with stakeholders is commonplace, yet market studies in other countries are carried out without apparent consultation involving stakeholders. Experience indicates that stakeholder involvement can help identify pertinent questions and information sources early in the development of market studies. Such involvement can also help to avoid glaring errors or misinterpretations of evidence near the completion of market studies. The risks of stakeholder involvement include delays, higher costs, and distorted answers to information requests or demands.

Some market studies are a bit superficial, but provide enough information to get a general idea of the conditions affecting market performance. In contrast, other studies involve elaborate processes, sometimes involving the legislature, in which the competition authority follows a very strict procedural regime and employs sophisticated quantitative analysis on elaborate data sets. There are trade offs between thoroughness, promptness, and costs that the competition agency must weigh.

In some nations, market studies are almost entirely carried out by staff of the competition agency while, in others, consultants are regularly retained to conduct market studies or elements of market studies for the competition agency. Use of staff to conduct market studies helps to retain the training benefits and specific knowledge for the agency. Consultants can be useful when the agency lacks specific expertise, the subject of the study is an activity of the competition agency, the consultants are less subject to political pressure by market participants or the consultants have great industry-specific expertise or credibility that will enhance the reception of the market study by decision makers.

- (7) *At some point, it may be worthwhile, to consider attempting identifying best practices in conducting market studies to improve the general effectiveness of this aspect of the work of competition agencies.*

Developing a list of best practices for conducting market studies of different types could benefit the effectiveness of studies generally as well as improve the reputations of competition agencies, assist with the training of staff, and increase the cooperation of respondents to the competition agency's information requests. Regarding the latter, businesses recognize that when market studies are too superficial, unwarranted and costly recommendations are more likely to result. Hence, simply minimizing costs to businesses of responding to information requests and demands will not necessarily benefit these businesses on balance.

It could be relatively simple for competition agencies to agree on good practices and to identify approaches that work less well regarding transparency, formalizing the process of conducting market studies, setting timelines and sticking to them, and involving market participants. The resulting improved understanding of the information requirements for sound market studies could improve cooperation between agencies and the businesses that are involved. More discussion would be needed if the OECD or other organizations proceeded to develop best practice guidelines, but the discussion at the roundtable revealed that there are some approaches that are more useful than others, including restraint in the use of formal investigative powers to minimize costs.

- (8) *The effects of market studies range from dramatic and substantial to inconsequential or even adverse.*

The outcomes from market studies can be very different. These differences may stem from several sources. For example, the different outcomes may have to do with the fact that the methodologies were quite different or that circumstances changed between the time the study began and the time that it was released. In a few instances, market studies which have been so compelling that they galvanized proponents of the status quo enough to delay reforms. In contrast, some market studies have been very influential in promoting major regulatory changes or legislative reforms that benefit competition and consumers.

- (9) *Focused management once a market study is completed improves the likelihood of enhancing consumer welfare and economic efficiency.*

While market studies can be very powerful tools for change, success often requires focused management once the market study or sector study has been completed. In particular, considerable work is required to effectively promote the results and recommendations. Preparation for marketing the results and recommendations of market studies can be part of the process of selecting, designing and conducting market studies as well as releasing them.

- (10) *Where anticompetitive practices or inefficiencies are substantive, deeply ingrained and supported by beneficiaries, the final society-wide benefits of market studies spotlighting these practices and inefficiencies may take many years to be realized.*

Follow through for market studies may be a very long process --- sometimes it takes up to 20 years to see the most significant results, but that should not discourage competition agencies from undertaking focused follow through to make the best possible use of market studies.

SYNTHÈSE

Il ressort plusieurs points essentiels des débats qui se sont déroulés lors de la table ronde ainsi que des contributions des délégués.

- 1) *Les études de marché figurent en bonne place parmi les activités des organismes chargés de la concurrence.*

Quasiment tous les organismes chargés de la concurrence mènent des études de marché, même si tous n'accordent pas la même signification au « marché ». Certains pays ont néanmoins une tradition particulièrement longue et riche dans ce domaine : aux États-Unis, des études de marché sont apparues dès le début du XXe siècle et, au Japon, elles remontent à la fin des années 1940. Le Royaume-Uni consacre beaucoup de temps et d'efforts à l'examen et à l'analyse de sa grande expérience des études de marché ainsi qu'au suivi des recommandations de ces études.

- 2) *Les études de marché ont deux objectifs principaux, le premier est d'être un prélude ou un précurseur à une action en justice, le second d'ouvrir la voie ou de servir de base à la défense des principes de la concurrence.*

Les études de marché sont utilisées de bien des manières. Certains pays y ont recours essentiellement dans le cadre d'actions en justice, d'autres pour défendre les principes de la concurrence. Elles peuvent constituer une première étape vers une action en justice lorsqu'un comportement anticoncurrentiel est suspecté mais que les autorités de la concurrence ne connaissent pas précisément la nature ni la source du problème. Dans ce cas, une étude de marché contribue à mettre en évidence les problèmes de concurrence éventuels. Les études de marché peuvent aussi contribuer à la défense de la concurrence. C'est notamment le cas lorsqu'il n'y a pas de suspicion de violation de la législation antitrust mais que le marché ne semble pas fonctionner correctement pour les consommateurs. Les causes sont souvent des restrictions publiques à la concurrence ou un équilibre inefficace des marchés. Les études de marché peuvent alors déboucher sur des propositions visant à déréglementer, à réformer les instances responsables des marchés ou à améliorer la diffusion de l'information auprès des consommateurs ou des fournisseurs.

- 3) *Les études de marché constituent un bon moyen de consolider les liens entre la politique à l'égard des consommateurs et la politique de la concurrence*

Un certain nombre de pays utilisent des études de marché pour la politique à l'égard des consommateurs comme pour la politique de la concurrence, et ces deux aspects sont souvent associés dans les études. Il peut être difficile, notamment dans les pays où les organismes de protection des consommateurs et de la concurrence sont séparés, de réunir ces deux missions pourtant étroitement liées. Les études de marché peuvent être un excellent moyen de les rapprocher, dans la mesure où elles permettent facilement d'adopter une perspective plus large que ce qu'un organisme chargé de la concurrence serait autorisé à faire dans le cadre d'une action en justice. Grâce à cela, l'organisme chargé de la concurrence peut formuler des recommandations concernant des activités qui relèvent de sa compétence ou de celle de l'agence de protection des consommateurs, et il n'est pas contraint de rechercher des solutions difficiles à

mettre en œuvre sous sa propre autorité alors qu'elles pourraient être obtenues plus efficacement par d'autres moyens.

Dans les pays qui disposent d'un organisme chargé à la fois de la protection des consommateurs et de la concurrence, les études de marché constituent un outil logique pour souligner les synergies tirées du cumul des compétences dans ces deux domaines d'action.

- 4) *Les études de marché sont particulièrement utiles lorsque sont privilégiées les perspectives d'évolution et pas uniquement l'importance du problème.*

Les études de marché sont un instrument très souple qui peut répondre à plusieurs objectifs, mais peu sont les organismes chargés de la concurrence à disposer des ressources suffisantes pour mener toutes les études de marché potentiellement intéressantes. Tous ces organismes sont confrontés à des restrictions budgétaires, du moins sur certaines périodes, ce qui les conduit à étudier les coûts et les avantages de différentes études de marché ainsi que par rapport à d'autres activités. L'expérience semble indiquer que limiter les études de marché à des problèmes importants et évidents ne constitue pas la meilleure stratégie pour ces organismes. Si la probabilité est mince d'apporter une contribution positive en étudiant un problème important, les organismes chargés de la concurrence peuvent améliorer le rapport coût/avantages de leurs programmes d'études de marché en menant des études ayant une plus grande probabilité de réussite – même si l'ampleur du problème ou du manque d'efficacité en termes de concurrence n'est pas aussi grande. L'organisme peut ainsi rehausser sa réputation, ce qui peut rehausser à terme la probabilité de mener à bien des études sur les problèmes les plus sérieux et d'y remédier. Concrètement, cela signifie qu'il est plus productif de cibler les études de marché en fonction des perspectives d'évolution que de s'attacher uniquement à l'importance du problème.

- 5) *Certaines études de marché remplissent une fonction sociale importante en apportant un démenti à des allégations de comportement anticoncurrentiel lorsque, par exemple, les prix augmentent à la suite de ruptures d'approvisionnement et non à cause d'un comportement anticoncurrentiel. Si ces allégations ne sont pas réfutées, les pouvoirs publics peuvent être enclins à appliquer des restrictions à la concurrence qui nuiront aux consommateurs et affaibliront la réactivité future du marché aux chocs du côté de l'offre ou de la demande.*

Les organismes chargés de la concurrence de plusieurs pays ont été appelés à déterminer si les hausses des prix de produits de base essentiels tels que le pétrole ou le gaz naturel reflétaient l'évolution du marché face à des chocs du côté de l'offre ou de la demande, ou si elles étaient le résultat d'un comportement anticoncurrentiel des fournisseurs. Dans ces circonstances, les études de marché peuvent avoir une incidence profonde sur les débats d'orientation en évitant que les autorités n'interviennent si les marchés fonctionnent correctement ou en limitant leur intervention à des problèmes spécifiques et à des mesures ciblées et efficaces si un comportement anticoncurrentiel est en cause. Sur ces questions, les études de marché peuvent avoir un effet prophylactique permettant d'éviter les restrictions publiques à la concurrence et les préjudices qui en résultent pour les consommateurs.

- 6) *Les études de marché englobent un large éventail de pratiques et de cadres institutionnels, certaines sont très formelles et s'appuient sur des méthodes quantitatives sophistiquées pour vérifier les hypothèses, d'autres s'apparentent à des enquêtes relativement informelles sur l'existence de pratiques commerciales particulières.*

Dans certains pays, le choix des études de marché est largement déterminé par le pouvoir législatif ou l'exécutif national, dans d'autres, l'organisme chargé de la concurrence décide

pratiquement seul des études à mener. Les organismes chargés de la concurrence préfèrent généralement la seconde formule, mais ils ont le devoir de mener les études de marché demandées et cela peut être une bonne occasion de gagner en crédibilité et d'obtenir le soutien du pouvoir législatif ou exécutif.

Les études de marché peuvent, dans certains pays, bénéficier des pouvoirs d'enquête de l'organisme chargé de la concurrence pour obtenir des données ou d'autres informations, alors que dans d'autres, cet organisme ne peut s'appuyer que sur des collectes de données facultatives. Les organismes qui possèdent ces pouvoirs d'enquête signalent qu'ils les utilisent avec parcimonie, essentiellement pour obtenir des données cruciales qui ne peuvent pas être obtenues par d'autres moyens. Les organismes qui n'ont pas ces pouvoirs cherchent souvent à les obtenir, avec plus ou moins de réussite. Les oppositions reposent souvent sur la crainte que ces pouvoirs ne soient utilisés en vue d'exercer un contrôle indirect de la situation financière.

Les consultations avec les parties prenantes peuvent être courantes dans certains pays, mais dans d'autres, les études de marché sont menées sans qu'il y ait apparemment consultation avec les parties concernées. L'expérience montre que l'implication des parties prenantes peut aider à définir des questions et sources d'information pertinentes aux premiers stades de l'étude de marché. Leur participation peut également permettre d'éviter des erreurs flagrantes ou de mauvaises interprétations des données avant la fin de l'étude de marché. En revanche, elle risque d'entraîner des retards, des coûts plus élevés et des réponses déformées aux demandes de renseignements.

Certaines études de marché sont un peu superficielles, mais elles fournissent suffisamment d'informations pour obtenir un tableau d'ensemble des éléments qui pèsent sur le fonctionnement du marché. Au contraire, d'autres études supposent des processus élaborés, impliquant parfois le pouvoir législatif, dans lesquels l'organisme chargé de la concurrence suit une procédure très stricte et emploie des analyses quantitatives sophistiquées sur des ensembles de données complexes. L'organisme doit trouver le juste équilibre entre exhaustivité, rapidité et coûts.

Il peut arriver dans certains pays que les études de marché soient entièrement réalisées par le personnel de l'organisme chargé de la concurrence, alors que dans d'autres, on fait régulièrement appel à des consultants pour mener tout ou partie des études de marché. Le recours au personnel pour réaliser les études contribue à valoriser la formation et le savoir spécifique de l'organisme. Cependant, des consultants peuvent être utiles lorsque l'organisme manque de compétence dans un domaine particulier ou lorsque l'étude porte sur l'une de ses activités, auquel cas les consultants sont moins soumis à la pression politique des acteurs du marché, ou bien ils possèdent une grande expertise ou jouissent d'une grande crédibilité dans un domaine précis, ce qui rendra les dirigeants plus réceptifs à l'étude effectuée.

- 7) *Il peut être utile de recenser les meilleures méthodes de réalisation des études de marché afin d'améliorer l'efficacité de cet aspect du travail des organismes chargés de la concurrence.*

L'élaboration d'une liste de méthodes exemplaires pour la réalisation de différents types d'étude de marché pourrait rehausser l'efficacité générale des études et améliorer la réputation des organismes chargés de la concurrence, faciliter la formation du personnel et rendre plus coopératives les entités soumises à des demandes de renseignement. Concernant ce dernier point, les entreprises reconnaissent que lorsque les études de marché sont trop superficielles, les recommandations qui en résultent risquent davantage d'être injustifiées et coûteuses. Par conséquent, se contenter de limiter les coûts qu'entraîne, pour les entreprises, le fait de répondre

aux demandes de renseignements ne sera pas nécessairement avantageux pour elles au bout du compte.

Il pourrait être relativement simple pour les organismes chargés de la concurrence de convenir de méthodes efficaces et de recenser les approches qui fonctionnent moins bien en termes de transparence, de formaliser le processus de réalisation des études de marché, de fixer des délais et de s'y conformer, tout en faisant participer les acteurs des marchés concernés. Il en résulterait une meilleure compréhension des besoins d'information pour réaliser des études de marché solides, ce qui pourrait favoriser la coopération entre les organismes et les entreprises concernées. De nouvelles discussions seront nécessaires si l'OCDE ou d'autres organisations souhaitent élaborer des lignes directrices sur des méthodes efficaces, mais les débats de la table ronde ont d'ors-et-déjà montré que certaines démarches sont plus utiles que d'autres, notamment le fait de limiter les pouvoirs d'enquête officiels afin de réduire les coûts.

- 8) *Les retombées des études de marché peuvent être aussi bien considérables que notables ou négligeables, voire préjudiciables.*

Les études de marché peuvent avoir des résultats très divers, et ce, pour plusieurs raisons. Ainsi, des résultats différents peuvent s'expliquer par des méthodes différentes ou parce que la situation a évolué entre le moment où l'étude a été réalisée et sa parution. Il arrive parfois qu'une étude de marché soit si convaincante qu'elle entraîne une mobilisation suffisamment forte des partisans du statu quo pour retarder les réformes. À l'inverse, certaines études de marché ont eu une influence très profonde sur de grands changements de la réglementation ou sur des réformes législatives qui ont bénéficié à la concurrence et aux consommateurs.

- 9) *Une fois l'étude de marché terminée, une gestion bien ciblée renforce la possibilité d'améliorer le bien-être des consommateurs et l'efficacité économique.*

Si les études de marché peuvent constituer des vecteurs de changement très puissants, leur réussite dépend souvent d'une gestion bien ciblée une fois que l'étude de marché ou sectorielle a été effectuée. En particulier, de gros efforts doivent être déployés pour promouvoir efficacement les résultats et les recommandations. La stratégie de présentation des résultats et des recommandations des études de marché peut faire partie du processus de sélection, de conception et de réalisation des études de marché ainsi que de leur diffusion.

- 10) *Lorsque les pratiques anticoncurrentielles ou les problèmes sont importants, profondément enracinés et soutenus par ceux qui en bénéficient, les avantages ultimes, pour l'ensemble de la société, des études de marché qui révèlent ces pratiques et ces problèmes peuvent mettre des années à se concrétiser.*

La suite donnée aux études de marché peut représenter un très long processus – il peut parfois s'écouler vingt ans avant de voir apparaître les premiers résultats notables, mais cela ne doit pas décourager les organismes chargés de la concurrence d'entreprendre des actions de suivi ciblées afin d'exploiter au mieux les études de marché réalisées.

CANADA

1. General Background on Market Studies at the Competition Bureau

One of the important roles of the Competition Bureau (“Bureau”) is to advocate in favour of market forces to federal and provincial regulators. In recent years, the Bureau has focused its advocacy efforts on areas where it believes there exists the risk of significant and unnecessary impediments to competition in priority areas, such as the professions and telecommunications. The Bureau has also been an active advocate for greater reliance on market forces in some parts of the health sector, such as the purchase of generic drugs.

The Bureau conducts two types of studies. The first type, known as “studies to assess the state of competition in an industry” or “industry studies” takes a broad look at a market or sector to assess the overall state of competition there including whether structural or other limitations are impacting overall performance. They are typically undertaken in response to unusual market events. Examples of this type of broad industry study include Bureau examinations of markets for the sale of gasoline in Canada (following hurricane Katrina)¹ and of cattle and beef pricing (during the BSE crisis in Canada)². The issue of whether the Bureau or another agency, such as the Canadian International Trade Tribunal, should conduct such studies as well as whether that agency should have access to formal powers to do so, has been the subject of extensive consultation and debate in Canada since at least 2001³.

The Bureau conducts the second type of study, known as “market studies”, as part of its legislated mandate to intervene before government tribunals and other decision-makers to advocate in favour of market forces. This was the impetus for the Bureau’s recent work in the areas of generic drug pricing (*Generic Drug Pricing Study*)⁴ and five self-regulated professions (*Study on Self-Regulated Professions*)⁵. By conducting advocacy-based market studies, the Bureau seeks to identify regulatory restrictions that unnecessarily hamper or distort competition, while also highlighting regulatory instruments or practices that may promote the potential benefits from competition. The results of these advocacy-based market studies form the basis for formal and informal interventions before regulatory agencies and other decision-makers. They are a useful complement to competition enforcement as they allow the Bureau to deepen its knowledge of a sector and give market participants advance notice of how the Bureau views their sector.

¹ See <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00215e.html>) and <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00213e.html>

² See <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01311e.html>). This matter was also examined under the conspiracy and abuse of dominance provisions of the Act.

³ A suggestion for a new market study power emanated from a Member of Parliament, the Hon. Dan McTeague, in the Fall of 2001, during Committee review of Bill C-23, *An Act to amend the Competition Act and the Competition Tribunal Act*. Mr. McTeague proposed a motion to allow the Commissioner, with the approval of the Minister of Industry, to ask the Canadian International Trade Tribunal (“CITT”), to inquire into the state of competition in any sector of the Canadian economy

⁴ See <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02495e.html>

⁵ See ([http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwaj/Professions%20study%20final%20E.pdf/\\$FILE/Professions%20study%20final%20E.pdf](http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwaj/Professions%20study%20final%20E.pdf/$FILE/Professions%20study%20final%20E.pdf))

For the purposes of this paper, the terms “industry study” and “market study” will be used to refer to the two distinct types of studies conducted by the Bureau as they are defined above.

2. Competition Bureau Market Studies to Date

2.1 *The Generic Drug Pricing Study*⁶

Before embarking on its study of generic drug pricing, the Bureau was aware retail prices of generic drugs were high in relation to those of other developed countries. The Bureau initiated the *Generic Drug Pricing Study* to look into the possible causes for these high prices with the goal of determining whether provincial regulators could change provincial regulatory regimes to benefit from competition. In Phase 1 of the study completed in October 2007, the Bureau conducted a detailed examination of each level of the Canadian generic drug sector, starting from the acquisition of ingredients for manufacturing generics and proceeding through their production, approval process, distribution and wholesaling, dispensing and reimbursement or payment by public and private insurance plans, and persons paying out of pocket. To perform the study, the Bureau acquired and analysed data, retained outside experts and conducted interviews with participants and interested parties at all levels of the sector. Before finalization, a draft of the report was circulated to over 100 sector participants and interested parties for fact-checking purposes.

The final report, following completion of Phase 1 of the study, found that more than ten generic drug manufacturers were competing for shelf space in Canadian pharmacies by offering rebates of up to 40 percent of the retail price of generics. However, in many provinces, the benefits of this competition were not passed on to provincial drug plans, consumers or insurance companies. A key-contributing factor to this finding is the design of public drug plans under which give pharmacies limited incentive to pass rebates on to consumers.

The Bureau is currently working on Phase 2 of the *Generic Drug Pricing Study*. Scheduled for completion in October 2008, this phase of the study will make concrete recommendations to regulators on ways to design provincial drug programs to benefit from competition among generic manufacturers.

2.2 *Self-Regulated Professions: Balancing Competition and Regulation*⁷

The market study on the self-regulated professions in Canada built on the Bureau’s considerable experience examining professions from enforcement and advocacy perspectives. This market study focused on five professions in particular: accountants, lawyers, optometrists, pharmacists and real-estate agents. These groups were selected in light of the Bureau’s knowledge of these professions, the significant volumes of commerce generated by them and because they are all consumer-facing.

Coincidentally, the OECD’s report *Going for Growth 2007*⁸, indicated that Canada is among the countries with the heaviest regulatory regime for the professions. In its report, the OECD identified lessening regulation in the professions as one of the five keys to improving prosperity in Canada. Further, a 2006 report by the Conference Board of Canada⁹ found that Canadian professions rate in the bottom fifth

⁶ *The Generic Drug Sector Study* is available on the Competition Bureau’s Website at: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02495e.html>

⁷ *Self-Regulated Professions: Balancing Competition and Regulation* is available on the Competition Bureau’s Website at: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02523e.html>

⁸ *Going for Growth 2007*, available on the OECD Website at: http://www.oecd.org/document/45/0,3343,en_2649_38086509_1_1_1_1.00.html

⁹ 2006 Report by the Conference Board of Canada, available on the Conference Board of Canada Website at: <http://www.conferenceboard.ca/documents.asp?mnext=1886>

on their relative labour productivity and that Canadian professionals are only about half as productive and efficient as their counterparts in the United States.

The results of the study, released in December 2007, draw significantly from the OECD's *Competition Assessment Toolkit* and are designed to assist regulators to develop laws and policies that will maximise consumer welfare through competition while meeting policy objectives. The Bureau also hopes that the study will contribute to the discussion on how best to regulate the five professions studied, and others, in an effective way that achieves the benefits of both regulation and competition.

The study found that the rules that limit advertising, set prices for services and restrict who can offer some professional services may go beyond legitimate consumer protection. Rather than protecting consumers, these rules can lead to higher prices, limit choice of service providers, and restrict access to important consumer information. The study identified numerous examples of rules that regulators should consider revising or removing to promote greater competition, to better serve consumers and to enhance productivity. The Bureau's findings can be transferred to other professions, as it is reasonable to expect similar types of regulation to exist in this type of environment.

2.3 The Dentistry Profession

On March 7th, 2008, the Bureau launched a market study on another profession, namely, dentistry in Canada¹⁰. Using a methodology similar to that used in its *Study on Self-Regulated Professions*, the Bureau hopes to identify regulatory restrictions that may hamper competition for the provision of dental services. The study also aims to highlight regulatory instruments or practices that may promote more effective competition and can serve as a standard for other professions.

3. Important Questions Relating to Market Studies

3.1 Approach

- *What criteria do you use to select appropriate markets to study?*

When selecting appropriate markets to study, as part of its mandate to advocate in favour of market forces, the Bureau applies the same criteria it uses to assess all advocacy opportunities. These are:

1. *Does a ready forum to present information exist?*
2. *Can the Bureau bring its unique perspective to bear on this issue in a useful way?*
3. *Will our advocacy efforts have clear benefits for Canadians?*
4. *Will we be able to gauge or measure any effects our advocacy efforts may have*

- *How do you go about the process of gathering data and other information for the study?*

The Bureau has no formal powers under the *Competition Act* to compel the supply of information for the purpose of conducting either industry studies or advocacy-based market studies. Rather, it must rely on publicly and voluntarily provided information. Information and material provided on a confidential basis are afforded protections provided under the *Competition Act*. The Commissioner may also hire outside

¹⁰ <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02598e.html>

experts, or “temporary, technical and special assistants,” to assist the Commissioner with particular matters arising under the Act.¹¹

The nature of the information gathering process depends on the particularities and scope of the market study. This may involve interviews, questionnaires and data requests with or to market participants and interested parties; the acquisition of data from data companies; and the research of publicly available information, such as academic articles, industry association material, sector investment or financial analyses, newspaper and magazine articles, company annual or quarterly reports, government or other relevant reports, hearings, reviews or statements.

For the Bureau’s study on generic drugs, all of these forms of information gathering were used. In addition, to ensure the accuracy of information, the Bureau prepared a draft version of the factual underpinnings of the study that was made widely available to interested parties for fact checking.

- *Does your agency have the authority to compel market participants to provide data for market studies? If so, how frequently and effectively is this power used? If not, how do your studies deal with information gaps?*

The Bureau currently does not have the authority to compel market participants to provide data for industry studies or for its advocacy work. The Bureau attempts to obtain data from private sources or will hire experts who may have better access to information.

On October 27, 2005, the Government of Canada introduced amendments to a government bill then before Parliament that would have provided the Bureau with the formal powers to conduct studies to assess the state of competition in an industry. The bill died on the order paper when an election was called that same year.

- *What are the advantages and disadvantages of using empirical evidence in market studies? What about anecdotal evidence?*

Good empirical data is highly desired wherever it is feasible to obtain. This data can assist at both an analytical level, in diagnosing a problem and, just as crucially, in describing the impact of a problem and building consensus about how to fix it. However, scarcity of verifiable empirical data and evidence and reluctance of parties to provide such information, particularly in the absence of formal powers, frequently necessitates the use of qualitative information.

- *Is it a good idea to seek the involvement of market participants (sellers, customers, and any other stakeholders), or is it better to conduct the study without them? What are the pros and cons of each approach?*

As for all of the Bureau’s work, transparency is a high priority. We aim to be as open in our dealings with stakeholders as the law permits. The Bureau’s experience is that it is essential to involve market participants, as it is only by talking and dealing directly with these parties that markets can be understood. Industry studies have typically involved extensive consultation and involvement of stakeholders

¹¹ Section 25 states: “All officers, clerks and employees required for carrying on this Act shall be appointed in accordance with the Public Service Employment Act, except that the Commissioner may, with the approval of the Governor in Council, employ such temporary, technical and special assistants as may be required to meet the special conditions that may arise in carrying out this Act.”

With respect to market studies, the Bureau sent copies of the factual underpinnings of the *Generic Drug Pricing Study* and the study on self-regulated professions to market participants for fact checking before publishing its recommendations. This kind of transparency both ensured that the results of these studies were factually correct but also that they were highly credible, which in turn boosted their impact.

In addition, the Bureau welcomes suggestions from stakeholders on subjects for future market studies.

- *In general, how much transparency is appropriate when conducting market studies?*

Unlike investigations, the Bureau publicly announces its intentions to conduct particular industry and market studies and their results are always made public. However, in order to create an environment in which companies and individuals feel safe providing confidential information, such information must be afforded appropriate protections against public disclosure. For example, to ensure that commercially sensitive information is not inadvertently communicated, the Bureau allows affected parties to review the factual underpinnings of market studies shortly before publication in order to provide them with an opportunity to identify any confidential information that, in their opinion, should be removed (and any factual errors that, in their opinion, should be corrected). While consideration is given to the comments of the parties prior to the publication, the Bureau makes the final determination regarding the content of that document¹².

For the Bureau's *Study on Self-Regulated Professions*, extensive research was conducted by soliciting input from provincial and territorial regulators through a voluntary questionnaire and by reviewing existing restrictions (as found in legislation, regulations, policies, codes of conduct and other instruments), conducting independent research and holding follow-up consultations on the findings. This follow-up was conducted as a fact-checking exercise with the professionals involved, which also provided the opportunity for professionals to explain the rationale for various regulations.

In using the questionnaire and the subsequent consultations, the Bureau made every effort to ensure transparency and accuracy. While mindful that restrictions are not always implemented the same way as they are written in regulation, the Bureau worked with the available information. Although the Bureau relied heavily on the information it received from the questionnaires and consultations, the views and recommendations contained throughout the report are the Bureau's own.

To complement its own extensive expertise in the area of competition economics, the Bureau also sought the assistance and advice of expert economists to analyse the potential anti-competitive and efficiency effects of regulations regulators may impose.

In the case of the *Generic Drug Pricing Study*, as noted, a draft report was distributed to sector participants to provide them with an opportunity to correct any informational errors. The final report was made publicly available and was widely reported on in the press. The Bureau has also publicly announced the work that it is doing for the second phase of its study.

- *Do the market studies done by your competition authority have distinctive features in comparison to those done in other jurisdictions? If so, what are those features?*

As described above, the Bureau conducts two types of market studies. The first type, known as "studies into the state of competition in a market" or "industry" studies assess the overall state of competition and whether structural or other limitations are impacting overall performance. Examples of

¹² See *Communication of Confidential Information Under the Competition Act* at: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01277e.html>.

this type of broad industry study include the examinations of markets for the sale of gasoline in Canada and the Bureau's examination of cattle and beef pricing during the BSE crisis in Canada.

The second type of study, known as "market studies", is unique in that it forms part of the Bureau's legislated mandate under the *Competition Act* to intervene before government tribunals and other decision makers to advocate in favour of market forces. The Bureau's work in the areas of generic drug pricing and examination of five self-regulated professions are both examples of this type of advocacy-based market study and both form the basis for formal and informal interventions before regulatory agencies and other decision-makers.

- *How do you go about setting timetables and milestones for completing market studies?*

Setting timetables and milestones for completing market and industry studies is done on a case-by-case basis, taking into account the complexity of the issues, the amount of work involved, available resources, etc. Having basic organisational techniques, such as setting goals, timelines, and performance measurements at the outset, is imperative.

- *What human and financial resources (approximately) have you devoted to market studies (including those for which consultants have been hired)? Have the results been worth the resources spent? Please explain why or why not.*

For the *Study on Self-Regulated Professions*, the Bureau spent approximately four full-time person years and approximately CDN \$224,000. The study has already achieved one of its principle objectives of shining a spotlight on an area that has long been ignored to the detriment of consumers and the economy. Since the study was released, the Bureau has received numerous invitations to speak to professionals regarding the study's findings. Several professional groups have openly expressed their acceptance of the study's recommendations and are working towards eliminating some restrictions.

The *Generic Drug Pricing Study* involved a small core team working on planning, initiating, performing related analysis and drafting the study over one year and multiple teams working intensively over a three-month period examining different elements of the sector, with input from counsel and sector experts. Resources devoted to the study totalled CDN \$117,000 and about three full-time person years in terms of hours worked.

- *Should competition agencies conduct market studies themselves or should the work be contracted out? What are the advantages and disadvantages of each approach? (e.g., are there any concerns about credibility or objectivity?)*

To date, the Bureau has conducted work on both industry and market studies internally, although it has hired outside economic experts and professional editors to assist in both cases. Advantages of doing substantive work in-house include the attainment of new knowledge and information; control over work and direction; and the ability for the competition agency to rely on its reputation in the marketplace to obtain information.

3.2 Relationship between Enforcement and Market Studies

- *What complementarities exist between enforcement and market studies?*

Advocacy-base market studies complement the Bureau's enforcement work in a number of significant ways. First, they allow the Bureau to develop expertise in particular sectors, making it easier to assess merger and enforcement issues if they arise. Market studies also give market participants contacts within

the Bureau, which may result in case leads or facilitate future interactions with the Bureau. Finally, market studies also give market participants advance notice of how the Bureau views their sector, which can be helpful in developing a complaint and anticipating the Bureau's reaction to a particular merger or other proposal.

- *What best practices should be followed when a market study turns up evidence of a competition offence?*

The Bureau does not use industry or market studies as a means to obtain evidence for enforcement. Nor has the Bureau inadvertently come across evidence of anti-competitive activity that raises issues under the provisions of the *Competition Act* during the course of either a broad industry study or a market study.

If the nature of the market problem is most appropriately considered under one of the enforcement provisions, the Bureau will deal with the issue as an enforcement matter and will not commence a market study with respect to the same matter. This situation does not arise as market studies are focused on market or industry-wide conditions or practices and on advocating the benefits of competition to regulators. Market studies and industry studies are not meant to address the anti-competitive activities of specific firms or individuals, which are best addressed by the enforcement provisions of the *Competition Act*.

- *What are the pros and cons of having formal powers to conduct market studies?*

Although the Bureau does not have formal powers to conduct market studies, it envisions that such powers could be highly beneficial in certain circumstances. For example, in cases where parties are reluctant to provide information voluntarily for fear of reprisals or key information is known to be available but is not being provided voluntarily.

Greater access to information and data is a clear benefit of having formal powers to conduct market studies. A lack of access to data was a problem that the Bureau encountered while conducting its *Study on Self-Regulated Professions*. This difficulty in retrieving data made it hard for the Bureau to be definitive as to the actual impact of particular restrictions. Therefore, in cases where key information is confidential and difficult to access, the Bureau's impact assessment is more theoretical.

- *What conditions or requirements, if any, should be met before authorisation to use those powers is granted? How extensive should the powers themselves be?*

On October 27, 2005, the Government of Canada introduced amendments to Bill C-19, including an amendment that would have provided the Bureau with the power to "assess the state of competition" in an industry using formal powers. The text of the proposed amendment includes a number of requirements, which would have to have been met before such industry studies could be carried out and formal powers used.

Under this proposal, the Bureau would have been able to use formal subpoena powers to compel evidence or the production of information. However, the Bureau would not have had the power to conduct searches of premises. The proposed powers to carry out industry studies would not have involved hearings before the Tribunal or the courts, which can significantly prolong matters. Finally, the proposal would have required that terms of reference be published in the *Canada Gazette*, giving public notice and explicitly limiting the scope of each industry study. These features were designed to limit the length and cost of market studies.

Under the proposed provision, the existing protections against self-incrimination would have applied to individuals compelled to give information during the conduct of industry studies. Any individuals subject to the exercise of a formal power would have attracted the protection of subsection 11(3) of the Act, which stipulates that the testimony given by an individual pursuant to a section 11 order shall not be used against that individual in subsequent criminal proceedings.¹³ In addition, other applicable Canadian legislation would have provided individuals with protection against self-incrimination, including subsection 5(2) of the *Canada Evidence Act*,¹⁴ and sections 7, 11(c) and 13 of the *Canadian Charter of Rights and Freedoms*.¹⁵

Finally, although the proposed amendment did not deal specifically with criteria for selecting industries or sectors for study, these would have been addressed in Competition Bureau guidelines. For instance, guidelines would have outlined the criteria that might have been used to initiate a study and could include considerations, such as whether the benefits were likely to exceed the costs, whether the Bureau was the most appropriate body to undertake the study, whether the Bureau's competition perspective would be useful, whether the study would be likely to yield useful recommendations, the significance of the market or industry to the economy, and the degree to which there existed or appeared to exist significant market problems or failures.

3.3 *Strategies for Using Market Studies*

- *What is the connection, if any, between your industry studies and your agency's competition advocacy program?*

Market studies are an element of the Bureau's advocacy work. They inform that work and the recommendations contained in them are used to publicly advocate in favour of market forces as part of the Bureau's legislated competition advocacy role.

¹³ Subsection 11(3) states: "No person shall be excused from complying with an order under subsection (1) or (2) on the ground that the testimony, record or other thing or return required of the person may tend to criminate the person or subject him to any proceeding or penalty, but no testimony given by an individual pursuant to an order made under paragraph (1)(a), or return made by an individual pursuant to an order made under paragraph (1)(c), shall be used or received against that individual in any criminal proceedings thereafter instituted against him, other than a prosecution under section 132 or 136 of the *Criminal Code*."

¹⁴ Subsection 5(2) states: "Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence."

¹⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 7 states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Subsection 11(c) states: "Any person charged with an offence has the right [...] (c) not to be compelled to be a witness in proceedings against that person in respect of the offence". Section 13 states: "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

- *Are market studies useful instruments? What purposes do they serve?*

Market studies can play a valuable role in informing the Bureau's competition advocacy work under the *Competition Act*. They provide a means to make targeted recommendations to government regulators and law-makers about ways to rely on market forces and at the same time obtain the benefits of competition.

- *For example, are they used to carry out investigations without having to do so formally? Is that a good practice?*

The Bureau does not use industry or market studies to conduct investigations.

Do some of your market studies stem from legislative requirements or executive orders as opposed to the agency's own initiative? How does this affect the development, timing, resources used and impact of the market studies conducted by the agency? Are any of the studies conducted jointly with other agencies and how do such arrangements impact the studies?

None of the Bureau's market or industry studies have stemmed from legislative requirements or administrative orders.

- *Has your agency faced any authorisation and funding penalties from the legislature or executive as the result of conducting market studies? What have been the short-term and long-term consequences, if any?*

The Bureau has not faced any authorisation or funding penalties from the legislature or executive as a result of conducting market or industry studies.

- *Another possible use for market studies is to wield them as a tool for effecting regulatory and legislative reform. Have you found them to be effective for that purpose? Why or why not?*

Recommendations that the Bureau makes as a result of a market study are non-binding and not enforceable. However, such recommendations will be made public and, by turning attention to these issues, may serve as a catalyst for change. Since they are designed to inform or provide a vehicle for the Bureau's advocacy work before regulators or lawmakers, market studies are particularly useful in this regard.

For example, Phase 1 of the *Generic Drug Pricing Study* attracted significant attention to the high mark-ups that pharmacies are making on generic drugs in Canada and promoted interest by provincial regulators in policy changes that would transfer more of the benefits of competition to provincial plans and indirectly to taxpayers.

The launch of the Bureau's *Study on Self-Regulated Professions* was the first step in a longer advocacy initiative. The Bureau sent a letter to all of the self-regulated bodies of the professions studied and to all of the provincial ministries responsible for their oversight:

- Restating that the Bureau plans to assess, in two years time, to what extent efforts have been deployed to implement the Bureau's recommendations and what progress has been made, if any.
- Asking them how they plan to address the anti-competitive restrictions found in the study. If the professions still believe that these restrictions are the minimum necessary in order to meet a

legitimate public policy goal, the Bureau would be interested in knowing what evidence backs this position.

- Inviting them to meet with the Bureau to discuss its findings or other related issues.

The Bureau plans to meet with all of the national associations of the professional groups studied to reiterate its message (with provincial regulators linked via teleconference). Moreover, the Bureau will meet with other groups that were not part of the study but wish to discuss how they can improve their regulation. The Bureau expects the study to bring about regulatory change to the self-regulated professions and some groups have already expressed to the Bureau that they will be making changes to their regulations.

In addition, the *Study on Self-Regulated Professions* had led us to focus on serious concerns about one profession regulating the activities of another, partially competing profession. For this reason, we will be watching with great interest the experience in Ontario where the Law Society of Upper Canada is regulating paralegals. We would be concerned for example if any standards or conditions are applied, which would become barriers to the provision of legitimate paralegal services in Ontario. The provincial government's two- and five-year reviews of the rules and bylaws governing independent paralegals will provide a useful venue for us to voice these concerns.

In a similar intervention, the Bureau supported moves in two provinces, Nova Scotia and New Brunswick, to free dental hygienists from regulation by dentists. We also supported decisions in two other provinces, Alberta and Ontario, to allow dental hygienists to perform at least part of their jobs without the permission or supervision of a dentist. In Ontario, Alberta and Nova Scotia, legislation was amended subsequent to our input. As a result, more than 1,500 dental hygienists in Ontario have become certified and do not require the authority of a dentist to work, providing consumers with more choice.

- *Does your agency maintain systematic records of the impacts of market studies on subsequent public policy, cases, or competition advocacy? If so, how does this material inform the selection of subsequent market studies?*

The Bureau's experience in tracking the impacts of its work is relatively recent. While all industry and market study proposals must include performance measures by which their impact can be measured, the tracking of these is in its infancy.

CZECH REPUBLIC

1. Approach

1.1 Introduction

In its application the Office for the Protection of Competition (hereinafter referred to as the “Office”) works with the term “sector inquiry” practice rather than with the term “market study”. The institute of sector inquiry generally serves for investigation of situations where there is a suspected market failure but at the same time it is not advisable to initiate investigation of individual undertakings. The European Competition Network (hereinafter referred to as the “ECN”) members have agreed on the sector inquiry definition. According to this definition, sector inquiry means an inquiry into a particular sector of the economy or into a particular type of agreements across various sectors conducted by an ECN member, who suspects that there are indications of market distortions which cannot be assigned to specific undertakings. This definition seems to be sufficiently fitting for a brief characteristic of inquiries previously made by the Office.

Partial analyses have been carried out as part of individual administrative proceedings in the area of antitrust and merger control. In comparison with sector inquiries, these analyses take a narrower view and usually focus on handling specific issues associated with the relevant case. In the following text, the Office will abstract from these specific analyses.

1.2 *The criteria to select appropriate markets to study*

Many heterogeneous factors play a role in the decision-making into which markets sector inquiries will be conducted. The factors that the Office usually considers in selecting the sector of the economy for sector inquiry include: level of concentration, market structure and size of market share of individual undertakings, level of vertical integration, demands on financial, technological or administrative requirements of building new market capacities, existence of market rigidities or other market anomalies. In the decision-making as to which sector of economy will be subject to a deeper inquiry, the Office decides according to its application practice, specifically based on knowledge about undertakings and consumers.

1.3 *Process of gathering data and other information for the study*

The Office in the sector inquiry does not *a priori* prefer one specific data gathering method. For the sector inquiries performed by the Office in recent years, data were typically gathered in the form of questionnaire forms. In addition, the Office frequently uses for sector inquiry processing publicly available resources such as various statistics or market studies. The Office always keeps an open option to have a supporting market study (analysis) from external sources.

1.4 *Sources of data and ways of gathering*

In sector inquiries, the Office definitely prefers empirical data to other types of data. Before starting the sector inquiry, the Office primarily draws from publicly available data and from its own application practice. During the inquiry itself, the data are acquired in a purely official way on the basis of written

requests for information addressed to individual market participants or public institutions. Other ways of gathering data are seen by the Office as problematic in terms of credibility of the entire sector inquiry.

1.5 *Involvement of market participants*

During their everyday activities, market participants get a broad spectrum of experience and knowledge that not only relate to their own and other market entities' behaviour, but also to the functioning of the market as such. If possible, the Office employs market participants' knowledge to the maximum possible extent in sector inquiries. If sector inquiry does not have a link to the market participants, there would be a risk that the acquired data and their interpretation do not correspond to the real market situation.

There is a separate question: when acquiring data from market participants, should directly addressed or anonymous answers be chosen? If directly addressed form is chosen, individual respondents may, especially on markets with small degree of competition, in some cases intentionally provide distorted facts about market conditions for fear of potential sanctions from stronger competitors or their suppliers or customers. Neither is the anonymous form of data acquisition free from the risk of bias. It is the anonymity that may be the reason for giving overestimated or underestimated data regardless of the cause (either negligently or with the intent of obscuring the image of the situation and market). With respect to the above mentioned facts, the Office carefully considers which data acquisition method to choose in each specific case.

1.6 *Transparency*

During sector inquiry realisation and/or presentation, the Office tries, like in other areas, to keep maximum level of transparency. When requiring information, the respondents are informed for what purpose and on what legal basis the information is requested. The Office endeavours to publish the inquiry conclusions to the maximum extent possible. Only confidential information and third party business secret are excluded.

1.7 *Setting timetables and milestones*

The Office usually sets a sector inquiry timetable with expected time of finalisation of the inquiry. Individual survey phases are usually scheduled without fixed milestones. With regard to the fact that most sector inquiry data are acquired from market participants, various delays may occur. In such cases, the Office prefers completeness of the data acquired to keeping the originally set timetable.

1.8 *Human and financial resources*

In the previous sector inquiries, the Office relied primarily on its own human and financial resources. The reason for this approach is the relatively problematic transfer of some powers entrusted by law to the Office officials on the one hand, and the character of gathered information that is often confidential on the other hand. In preferring our own human resources, a significant role is played, apart from the high cost of studies made by external providers, by the frequently dubious outcome of such sector inquiries. An indisputable advantage of sector inquiries carried out by the Office's own resources is the fact that the people responsible for the conduct of the study may coordinate the inquiry procedure directly with the ECN members or competition authorities of other EU member states. Among others, this possibility of coordination and data sharing provides the member state's competition authority with the option of getting more comprehensive data and their mutual comparison. In spite of that, it can be generally admitted that there are cases where it is more efficient to award a sector inquiry to third parties.

The question whether the expended resources (human and financial) correspond to the benefits of the sector inquiry cannot be answered with certainty due to the limited number of sector inquiries previously conducted by the Office. It is to say in general that in exercising the vested powers, the Office tries to proceed so that the outcome of a specific activity exceeds the cost of it. Sector inquiries are no exception.

1.9 *Does your agency have the authority to compel market participants to provide data for market studies? Is so, how frequently and effectively is this power used? If not, how do your studies deal with information gaps?*

The legal basis for sector inquiries is presently regulated by Article 1, paragraph 1 of the Act on the Powers of the Office for Competition Protection and by Article 20, paragraph 1, letter a) of Competition Act. According to the former provision, the Office is the central state administration body to support and protect competition against unlawful restriction. According to the latter provision, the Office, in addition to other powers, supervises whether and in what way the undertakings fulfil the obligations arising for them from the Competition Act or from decisions based thereon. The Office derives its power to perform sector inquiries from these provisions. As part of the planned Competition Act amendment, the Office proposes to have the power to carry out sector inquiries explicitly incorporated in the law, which should symbolically enhance the importance of this activity.

In performing the supervision pursuant to Article 20, paragraph 1, letter a) of Competition Act, which also includes sector inquiries, the Office has very similar powers to those vested for administrative proceedings. So the Office may require that the undertakings provide information and materials available to them that are necessary for sector inquiry. If the information is not provided, the Office may also impose a sanction. However, coercive procedural powers outside the administrative proceedings are applied by the Office cautiously, in accordance with the principle of proportionality. Therefore, repeated requests for information have been sent in practice, inclusive of the instruction about possible sanction; procedural fine for failure to provide information has not been imposed in sector inquiry yet. As regards information gaps, the acquired information can be extrapolated to the entire market in some cases.

1.10 *Do some of your market studies stem from legislative requirements or executive orders as opposed to the agency's own initiative? How does this affect the development, timing, resources used and impact of the market studies conducted by the agency? Are any of the studies conducted jointly with other agencies and how do such arrangements impact the studies?*

Sector inquiries carried out by the Office have been entirely the Office's own initiative so far. According to the present law, the Office is not obliged to perform such surveys. Neither are the inquiries performed by request or order of the Parliament, Government or other state agency. We are confident that this situation facilitates sector inquiry scheduling as well as allocation of human and material resources for those inquiries.

The Office cooperates with the Czech Telecommunication Office (national sector regulator of electronic communication) on its relevant market analyses designed for *ex ante* regulation purposes. This takes the form of Office's comments to proposals of analysis. So far, this cooperation worked at such a good level that potential differing views of the CTO and of the Office on specific market definition or competition situation evaluation were avoided.

1.11 *What is the connection, if any, between your industry studies and your agency's competition advocacy program?*

Refer to Chapter II.

1.12 *Has your agency faced any authorisation or funding penalties from the legislature or executive as the result of conducting market studies? What have been the short-term and long-term consequences, if any?*

Sector inquiries previously performed by the Office had none of the consequences mentioned above.

1.13 *Does your agency maintain systematic records of the impacts of market studies on subsequent public policy, cases, or competition advocacy? If so, how does this material inform the selection of subsequent market studies?*

No such monitoring has been carried out with respect to sector inquiries conducted in the past. However, this monitoring could become part of the planned Methodology of competition studies (see below).

2. Relationship between enforcement and market studies

The primary goal of sector inquiries made by the Office is not to acquire knowledge that leads to formal action against market participants. The goal of these inquiries should be to acquire such information that would lead to a closer identification of market distortions and defects. Therefore, it is not possible to predict with certainty what specific steps the Office will take after sector inquiry. The procedure always directly depends on the character of the facts found. If indices about law infringements are found, the Office tries to prevent the competition law infringements in the future. According to the character of the behaviour, either administrative proceeding or competition advocacy (in less serious cases) is applied. In such cases, the Office strives for remedying the detrimental situation through commitments made by the market participants. The outcome of the sector inquiry may also be a publicly available list of pro-competition recommendations that entities entering into competition in the relevant sector should respect. The outcome of the sector inquiry may also be identification of competition barriers given by inappropriate legal regulation. If this is the case, the Office directs recommendations to change the relevant legislation or regulatory measure to the competent legislative or regulatory body. Alternatively, the Office may enforce changes as part of the “comment procedure” in which the Office participates and that relates to government legislative and non-legislative proposals. If the Office finds out that there is no competition problem in the given sector of the economy, the inquiry can be terminated without the Office taking any measures.

Whatever the result of the sector inquiry, the outcome is a final report summarising both the inquiry method, data collection, and the results including measures taken or recommended. The report is published. This happened for example in the sector inquiry into the beer production and distribution industry; a very detailed report is planned for the ongoing inquiry into the motor vehicle distribution and service sector.

As regards conditions that should be met so that the Office can employ its authority to conduct sector inquiries, these are not specified in detail. It is to state in general that the Office takes every effort to avoid abuse of the powers vested. This is also why sector inquiries are made in the first place in industries where competition is weakened or seriously threatened.

3. Strategies for using market studies

Sector inquiries can hardly be substituted in the Office’s application practice. Results of these inquiries are a basis for market failure remedy and prevention. It is the Office’s effort in sector inquiries not to overburden market participants, and proceed in accordance with the law. Any other procedure such as an informal inquiry, could not only seriously compromise credibility of the data acquired but also trust in the Office itself.

4. Realised and current market studies

4.1 Beer

Contracts by which breweries bind restaurant operators to minimum or exclusive beer purchase may pose a fundamental problem from the competition point of view. The Czech Office for the Protection of Competition has been tackling it continually since the second half of the 1990s, and apart from completing several administrative proceedings, the Office monitors this market carefully.

The so called “on-trade channel” analysis conducted in 2006 (beer sale in catering establishments) has shown that in 2005 the amount of beer supplied to Czech catering establishments was 8,521,000 hl, of which not more than about 2,563,000 hl were bound by agreements on exclusive, minimum or specific beer amounts. The maximum bundled amount is therefore about 30% of the total amount of beer supplied to the reviewed market. The inquiry proved that compared with the previous periods, the volume of bundled beer supply decreased, and establishments bound by minimum purchase may purchase beer from other breweries on a regular basis, too. Purely exclusive purchase agreements were only found in three breweries with less than 1% market share. Such agreements, although regarded as a soft-core cartel, are tolerated provided they are concluded with an undertaking with a less than 30% market share and if they do not exceed five years duration (they are covered by the Block Exemption). Agreements made by players with a greater share need individual assessment (pursuant to Article 3, paragraph 4 of Act on the Protection of Competition).

Cumulative foreclosure effects may occur in the market, if more than 30% of the market is covered by vertical agreements, but 50% market coverage by these agreements would be really problematic from the competition policy point of view.

The inquiry has shown that current market bundling in the Czech Republic is close to this limit, and the Office therefore keeps monitoring this area. This is not only the case of monitoring the dominant undertaking Plzeňský Prazdroj (SAB Miller) operations, but the Office also monitors other breweries with agreements for high volumes of minimum purchases, whose market shares are not negligible.

During the inquiry into the contracts of breweries with catering establishment operators, the Office has found out that some of these undertakings conclude prohibited agreements with their customers. Specifically, this refers to the contractual provision that prevents customers from exporting beer abroad. Subsequently, the Office informed the producers involved that such provisions infringe the national as well as the Community competition law. As the breweries were willing to cooperate after this warning, the Office decided not to initiate administrative proceeding and handle the case by means of competition advocacy. Deadlines to modify the contracts were agreed to make them complying with the competition law. The Office continuously checks whether the corrective measures have been taken to the full extent.

4.2 Motor vehicles

Motor vehicle distribution and service industry is one of the areas of extraordinary importance for the European consumer. The specific motor vehicle distribution and service issue is regulated within the European Union by the Commission Regulation (EC) No. 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (hereinafter referred to as the “Regulation”).

The Regulation applies to contracts for purchase and sale of new motor vehicles, vertical agreements on purchase and sale of spare parts for motor vehicles, and vertical agreements on purchase and sale of motor vehicle service, repair and maintenance. The Regulation has come into force in the Czech Republic on 1 May 2004; the rules provided in it have become applicable to cases without the Community element

since 1 October 2005. Before 1 October 2005, the competition law issue for the motor vehicle sector was regulated by the Office's Decree No. 31/2003 Coll. on allowing general exemption from the ban on agreements distorting competition pursuant to Article 3, paragraph 1 of Act on the Protection of Competition for certain types of vertical agreements on motor vehicle distribution and service.

For the period of validity of both regulations to protect competition in the specific motor vehicle sector, the Office handled dozens of complaints related to the motor vehicle sector. In the second half of 2006, the Office was informed by the European Commission of the results of a study titled Developments in car retailing and after-sales markets under Regulation No 1400/2002, produced for the European Commission by London Economics.

The inquiry into the motor vehicle distribution and service sector itself was performed from June to October 2007. The inquiry involved addressing practically all authorised motor dealers and service providers operating in the Czech Republic. Questionnaires were chosen as the most adequate data gathering method. The inquiry involved sending 867 questionnaires with 65 questions to the respondents. Feedback was received from more than 500 addressed entities.

At present, a comprehensive analysis of data gathered is being prepared along with the work on the final report (hereinafter referred to as the "Report"). The Report is supposed to be finished in June 2008 and it is anticipated that except for confidential information and third party business secret, the Report will be published. Also the European Commission should be acquainted with the Report contents.

5. Look into the future: Methodology of competition environment studies in relevant markets

5.1 Introduction

The Office currently prepares its own market inquiry and competition environment assessment methodology (hereinafter referred to as the "Methodology"). The aim of the Methodology is to find out the state of competition environment in the relevant market. The Methodology should be universal and applicable to any market. Theoretical literature, experience of foreign competition authorities and experience of the Office are being considered in preparing the Methodology, taking local conditions into account.

The Draft Methodology currently envisages four basic steps:

- Data gathering from the sources mentioned above,
- Calculation of empirical indicators,
- Interpretation of results, and
- General competition environment assessment.

In addition, the Methodology should also include market prioritisation procedure, a sort of brief "pre-analysis" that should detect markets with potential competition problems, and apply the Methodology to such market subsequently.

5.2 *Data gathering*

As regards data gathering, the Office envisages to use primary and secondary data sources.

Primary sources can be classified at several levels:

1. *Sector level* - includes data relating to the entire market rather than individual undertakings. They are therefore aggregate data.
 - Public resources:
 - General: Czech Statistical Office, Eurostat, stock exchange statistics
 - Sector-oriented: individual ministries responsible for the relevant sector; state-established/controlled organisations
 - Private resources - general: typically databases with paid access to data.
 - Sector resources: databases of sector association/union members.

Another primary cross-category data source are studies and surveys carried out by specialised companies such as AC Nielsen, GfK, and Stem/Mark. Such studies may also be performed on a non-commercial basis by the public administration, or as a combination of both.

2. *Corporate level* – This directly involves data about individual companies operating on the market, and information applicable to the entire market can be derived from the aggregate data. The financial statements, i.e. the standardised balance and the profit & loss account usually serve as the source of corporate data. Depending on the data gathering method, they can be divided into passive and active data.

Passive data represent offers of entities offering corporate data extracted from accounting reports. They are frequently closely connected to the sector level, and therefore they represent a supplement, a more detailed view.

Active data are data actively retrieved by the Office from accounting reports. They can be acquired from the Collection of Documents in the Trade Register, Internet sites, or by direct addressing or by combining the above methods.

Sources of data directly processed for the Office purposes are designated as *secondary*. They are modified to the customer's needs; if prepared by specialised firms, they may contain the provider's "know-how" and analytical approach apart from the data themselves.

The Office is aware of the fact that the primary private source of data is widely used in foreign countries, which means that paid access to commercial databases is used. Many foreign databases contain very extensive data sources, and indicators that can be directly used for sector inquiries can be found there. However, such databases do not cover the Czech Republic, and databases **with that big exploitation rate do not currently exist in the Czech Republic**. Use of secondary source, i.e. "tailor-made" **market analysis using external specialised analytical firm**, comes into question for extensive sector inquiries, or on lower-transparency markets.

With regard to the low number of quality sources available, the corporate level, i.e. data gathering from individual entities, and their aggregation to acquire data applicable to the entire market will be the

main way of gathering data. Of course, this method can be applied best on markets with a low number of undertakings and on undertakings subject to notification duty. Small undertakings usually do not inform about their business results. However, if sufficient amount of information is gathered about “larger” companies, this information can be extrapolated to the entire market to a certain extent.

5.3 *Empirical indicators*

There are numerous empirical indicators in the theoretical literature to assess competitive market environment being the subject-matter of the Methodology. Many of them is unsuitable for practical use, though, mainly due to the need for detailed data that are very poorly accessible, and moreover, comparable with difficulty because of inconclusive compatibility of data gathering methods. Results of many indicators suffer from interpretation uncertainty, and their benefit for the market analysis is limited.

Therefore, the aim was to select such empirical indicators that can be considered sufficiently representative to describe market situation, indicators based on data that can be relatively easily found, and indicators whose results do not suffer from interpretation uncertainty.

Empirical indicators for market inquiry will probably be **divided into three groups** (main, accessory and supplementary indicators). The group of the main indicators should be the gist of the analysis.

The main empirical indicators typically include: market concentration (C4, HHI), market barriers (company movement on the market – FFF, entry-related capital expenditure to annual revenues ratio, advertising to revenue ratio), productivity (labour productivity development), sector profitability (ROCE minus cost of capital), and number of complaints received by the Office.

Individual indicators from the above groups are calculated, and each of them leads to a certain value that is weighted depending on relative importance. They can be further refined based on the experience in Methodology application in practice.

It is advisable to specify the market assessment based on main indicators with accessory and supplementary indicators.

Accessory indicators include indicators further specifying an analysis built on the main indicators. There are no recommended values for these factors in the technical literature, according to which they could be assessed as such because they are usually typical of each market. Benchmarking – comparison with foreign markets – is generally used for these indicators. This group includes the cost of switching to another supplier (switching costs), R&D expense to total revenue ratio, imports to market volume ratio, market volume, etc.

Supplementary indicators (qualitative indicators) are used to specify and supplement the market analysis. This involves for example business operation on multiple markets (horizontal, conglomerate), vertical integration, existence of free capacities, existence of the *bidding market*, market volume growth, and existence of *maverick-type* undertaking.

It is to emphasise again that the text above is a brief summary of the Draft Methodology reflecting the present state of the Office’s considerations. The final Methodology may undergo significant changes as a result of subsequent internal and external debates. If the OECD is interested, the Office can inform the OECD about the final version of the Methodology.

FRANCE

Introduction

La capacité pour les autorités de la concurrence à mener des enquêtes sectorielles, études de marché et études thématiques, ainsi qu'à conduire une évaluation concurrentielle des réglementations existantes ou envisagées, est un outil efficace au service des consommateurs, qu'il s'agisse d'études complémentaires des affaires instruites par le Conseil de la concurrence ou indépendantes du contentieux.

Les études de marché menées par les autorités de la concurrence permettent de mieux appréhender le fonctionnement de certains secteurs spécifiques, sans nécessairement avoir à les investiguer formellement. Les enquêtes sectorielles permettent quant à elle de mener des investigations à grande échelle et peuvent contribuer à la détection de pratiques anticoncurrentielles. L'évaluation d'impact permet pour sa part d'attirer l'attention des autorités publiques sur les effets concurrentiels des réglementations existantes ou des projets de réforme, sur la base d'une sollicitation du Gouvernement ou de manière spontanée, selon les cas.

Le recours à ces différents instruments pose certaines questions. Quels sont les avantages et inconvénients à conduire ce type d'études, comparativement à l'instruction de cas individuels ? Dans quelle mesure faut-il opter pour une approche formelle (enquête sectorielle) ou non (étude de marché) ? En fonction de quels paramètres déterminer la stratégie permettant d'obtenir les meilleurs résultats ? Quelle méthode choisir (externalisation ou traitement interne) ?

Le Conseil de la concurrence a récemment lancé trois études : deux études thématiques et une étude de marché qui devraient aboutir autour de l'été 2008. Nous répondrons donc aux questions posées par l'OCDE en nous appuyant sur la pratique du Conseil de la concurrence en la matière, et en distinguant d'une part, les questions relatives à l'opportunité de ces études, et d'autre part, les questions se rapportant à la méthodologie retenue.

1. Opportunité

1.1 *Complémentarité avec le contentieux*

La finalité de l'étude de marché et de l'enquête sectorielle peut être de nourrir ou d'appuyer le contentieux traité par les autorités de la concurrence. Ces études et enquêtes sont en effet complémentaires du contentieux : leur objectif est d'analyser de façon globale et systématique la situation concurrentielle de certains secteurs et, le cas échéant, d'identifier des préoccupations de concurrence ou des indices de pratiques anticoncurrentielles susceptibles de déboucher sur l'ouverture de cas. En aval, il peut aussi s'agir d'élargir une investigation formelle. Lorsqu'une enquête ou une plainte fait naître des préoccupations relatives à tout un secteur, cet outil permet en outre de contribuer à l'examen d'ensemble de ces problèmes. Cependant, l'objectif de ces études n'est en aucun cas de se substituer aux investigations menées au cas par cas.

L'étude de marché lancée par le Conseil à propos du secteur du traitement des déchets en France vise ainsi à replacer plusieurs affaires en cours d'investigation dans leur contexte. Son objectif est de

déterminer l'existence éventuelle de pratiques à risque du point de vue de la concurrence, au delà des cas dont le Conseil est déjà saisi, et susceptibles d'être examinées de plus près.

Les études thématiques et de marché peuvent enfin permettre de hiérarchiser les interventions des autorités en fonction de leur priorité. L'étude sur le traitement des déchets s'inscrit dans les priorités du Conseil, qui englobent aussi les marchés récemment libéralisés, les nouveaux marchés, le secteur des produits pharmaceutiques, la santé et l'énergie.

1.2 Expertise à la disposition du Gouvernement

L'évaluation concurrentielle des réglementations permet d'analyser les effets sur la concurrence de réglementations existantes ou de réformes à l'étude. Cet instrument peut aider le Gouvernement à arbitrer entre diverses modalités de réforme, au vu de leur impact respectif sur la concurrence. Cette évaluation peut être faite à sa demande ou résulter d'une initiative de l'autorité de la concurrence.

Comme l'atteste le projet de recommandation de l'OCDE, la nécessité d'évaluer les réglementations publiques fait consensus. L'OCDE préconise en effet une intensification des analyses d'impact, sur le modèle des bonnes pratiques déjà mises en œuvre ou à l'étude dans certains États membres tels que le Royaume-Uni, le Portugal ou encore l'Espagne. La pratique plus systématique des études d'impact est un élément clef de garantie de la qualité du processus réglementaire et de prise en compte du bien-être du consommateur dans celui-ci.

En France, les avis du Conseil de la concurrence sont susceptibles de jouer ce rôle, dans le cas de textes déjà en vigueur ou encore à l'état de projet. Certains avis ont d'ailleurs suscité l'évolution de réglementations dans un sens intégrant davantage la concurrence. Dans une perspective d'« *advocacy* », et compte tenu de la crédibilité scientifique associée aux travaux menés par l'autorité spécialisée en matière de concurrence, ces études contribuent à expliquer l'intérêt des réformes et à diffuser la culture de la concurrence dans l'administration et auprès des acteurs publics et privés (collectivités territoriales, associations représentatives etc.). Lorsqu'ils interviennent en amont plutôt qu'en aval, les avis du Conseil peuvent permettre d'éviter des processus de réforme *a posteriori* des réglementations.

Par exemple, la réglementation relative à l'équipement commercial a fait l'objet d'une évaluation concurrentielle par le Conseil de la concurrence¹, qui a mis en lumière l'existence de barrières à l'entrée dans le secteur de la distribution et l'impact négatif d'une telle réglementation pour les consommateurs, sans que cette réglementation soit parvenue à protéger le petit commerce de proximité, conduisant à illustrer l'intérêt de la réforme proposée par le projet de loi de modernisation de l'économie.

1.3 « Guidance » pour les acteurs économiques

Les analyses et prises de positions générales des autorités de la concurrence (avis, enquêtes, études) permettent par ailleurs de diffuser de la « *guidance* » pour les opérateurs économiques.

Les enquêtes sectorielles peuvent ainsi aider à identifier dans un secteur certains comportements soulevant des difficultés au regard de la concurrence, sans que les acteurs en aient nécessairement conscience. Il s'agit pour les autorités de la concurrence de ne pas se limiter aux affaires dont elles sont saisies et aux problématiques survenues dans les cas d'espèces. Grâce à la publication de ces études, les entreprises pourraient faire évoluer leur action dans un sens plus conforme aux attentes des autorités de la concurrence, avant que des investigations formelles interviennent.

¹ Avis n° 7-A-12 du 11 octobre 2007, <http://www.conseil-concurrence.fr/pdf/avis/07a12.pdf>.

Cet outil fait donc partie intégrante des outils des autorités de la concurrence, au même titre que la possibilité d'accepter des engagements ou d'octroyer des mesures conservatoires.

Dans l'hypothèse où les enquêtes sectorielles ne déboucheraient sur aucun cas et où aucune préoccupation de concurrence ne serait identifiée, ces études, quand elles sont rendues publiques, fournissent en tout état de cause un guide : les acteurs du marché sont en mesure de mieux comprendre ce qui est permis et ce qui est interdit.

Les études thématiques sont aussi une source abondante de « *guidance* ». Dans ce cadre, le Conseil de la concurrence a lancé par exemple une étude thématique consacrée aux programmes de conformité. Il s'agit de mieux appréhender les caractéristiques de ces programmes, encore peu développés en droit français de la concurrence par rapport à ce qui est le cas dans les pays anglo-saxons ou dans d'autres branches du droit (marchés financiers), et d'examiner l'intérêt de les développer dans les moyennes et grandes entreprises françaises, que cette perspective intéresse. Cette étude permettra aussi de réfléchir à l'efficacité de ces dispositifs pour prévenir les comportements anticoncurrentiels, et d'émettre, si besoin est, des recommandations sur leur utilisation en lien avec la politique de la concurrence. Cette étude servira à identifier les points clefs de réussite de ces programmes et les facteurs d'échec, sans bien sûr normaliser cet outil, dont la souplesse et la flexibilité sont une garantie d'efficacité.

Enfin, ces études permettent de renforcer l'expertise des autorités de la concurrence, notamment sur des sujets transversaux. Par exemple, le Conseil de la concurrence a lancé une étude dédiée à l'évaluation des effets des pratiques anticoncurrentielles qui lui permettra de faire le point sur les méthodologies disponibles et de développer, au besoin, de meilleures pratiques en la matière. Plus précisément, cette étude vise à étudier la faisabilité de la construction d'outils pratiques permettant d'estimer le dommage infligé au consommateur dans des cas simples et en fonction d'un nombre limité de paramètres.

2. Méthodologie

2.1 Cadre d'action

En ce qui concerne les études de marché et les études sectorielles, le Conseil de la concurrence a la capacité formelle de mener à bien ces travaux en interne, grâce aux services transversaux qu'il a récemment mis en place (service juridique, service économique).

En matière d'évaluation de l'impact concurrentiel des réglementations, le Conseil peut d'ores et déjà rendre des avis, mais ses compétences devraient être renforcées dans le cadre de la réforme de l'Autorité de la concurrence prévue par le projet de loi de modernisation de l'économie, actuellement en discussion au Parlement. Le rapport rendu par la Commission pour la libération de la croissance française (rapport Attali)² avait en effet proposé de permettre à l'Autorité de la concurrence de rendre de sa propre initiative de tels avis. Cette proposition est reprise par l'article 23 du projet de loi de modernisation de l'économie.

La concertation et la coopération avec les autres institutions et acteurs économiques sont indispensables. Le Conseil de la concurrence fait partie du réseau européen de concurrence (REC) mis en place par le règlement n° 1/2003³, ce qui lui permet de coopérer et d'échanger des idées avec les autres autorités du réseau. Les forums tels que l'ECA, l'ICN et l'OCDE contribuent aussi à leur manière, à l'échange d'expériences et à l'établissement de meilleures pratiques. Mais il est aussi essentiel de

² <http://lesrapports.ladocumentationfrancaise.fr/BRP/084000041/0000.pdf>

³ Règlement (CE) n° 1/2003 du Conseil de l'Union européenne du 16 décembre 2002 relatif à la mise en œuvre des règles de concurrence prévues aux articles 81 et 82 du traité CE, Journal officiel n° L 001 du 04/01/2003 p. 0001 – 0025.

développer par ailleurs la coopération avec les autorités de régulation sectorielles. Par exemple, dans le cadre des études de marché, il pourrait être intéressant de mutualiser les ressources et le « *know how* » avec d'autres détenteurs d'expertise de marché (CRE, ARCEP).

Cependant, il est clair que de tels outils ne sont utiles que si les autorités auxquelles on les confie disposent des moyens humains et budgétaires nécessaires à leur mise en œuvre. Ainsi, l'étude de marché menée en interne par la *Competition Commission* au Royaume-Uni sur le sujet suivant : « *the supply of groceries in the UK market investigation* » a mobilisé plus d'une dizaine de personnes à plein temps sur plusieurs mois⁴, pour un résultat utile, puisqu'elle a permis de mettre en lumière des difficultés concurrentielles.

2.2 *Études de marché, enquêtes sectorielles et études thématiques*

Le Conseil a lancé trois études: l'une relative au secteur du traitement des déchets, l'autre portant sur les programmes « *compliance* » et la troisième sur les effets des pratiques anticoncurrentielles. A chaque fois, le Conseil a choisi l'externalisation, n'ayant pas les moyens humains de les mener entièrement lui-même. Cette externalisation est encadrée et un suivi régulier a été mis en place. La méthodologie employée consiste à établir une lettre de cadrage précisant les objectifs assignés à l'étude et à mettre en place un comité de pilotage réunissant l'autorité de la concurrence et les acteurs intéressés. Des rapports intermédiaires sont évalués à intervalle régulier.

L'étude thématique relative aux programmes de « *compliance* » est réalisée par le cabinet *Europe Economics*, sous la direction d'un comité de pilotage présidé par un membre du Conseil et comprenant des personnalités extérieures représentatives des acteurs intéressés (avocats, juristes d'entreprise etc.), ainsi que des représentants du Conseil. La méthodologie sélectionnée dans cette étude consiste à effectuer une revue de la littérature sur le sujet, à mener des entretiens avec des experts, à analyser des données et à entreprendre des études de cas de programmes de conformité. 250 entreprises ont été interrogées et les réponses sont en cours de traitement. Cette étude empirique s'articule aussi avec une analyse du cadre réglementaire. Elle conclura en tant que de besoin sur des recommandations concrètes. Le rapport analyse les types de programmes mis en place dans les entreprises, l'incitation des entreprises à les développer et les caractéristiques des programmes les plus efficaces. Cette étude se fait en coopération avec les entreprises et l'outil comparatif est utilisé (comparaison entre pays, entre droits etc.).

L'étude relative aux effets économiques des pratiques anticoncurrentielles est réalisée par le cabinet *LECG*. La lettre de cadrage précise que l'étude se doit d'exposer les différentes méthodes permettant d'estimer empiriquement les effets des pratiques anticoncurrentielles et qu'elle doit comprendre une revue critique de la littérature économique. Le cabinet est invité à examiner de manière approfondie plusieurs cas tirés de la pratique décisionnelle du Conseil qui ont été choisis en concertation avec le Chef économiste du Conseil. L'étude expliquera, pour chacun de ces cas, comment les méthodologies pertinentes pourraient être mises en œuvre concrètement avec les données disponibles et, le cas échéant, quelles données supplémentaires seraient à recueillir pour pouvoir mener à bien l'évaluation des dommages.

L'étude de marché relative au secteur de traitement des déchets est réalisée par le par le cabinet *BIPE*. La lettre de cadrage souligne l'importance assignée au rapport en ce qui concerne la compréhension globale de l'organisation des différentes filières de collecte et de recyclage des déchets, hors ordures ménagères, dont certaines sont en cours de constitution. Cette étude vise à examiner la structure et le fonctionnement des différents marchés concernés. Elle procède à des comparaisons internationales détaillées. L'objectif était de procéder à un « *screening* » du secteur afin de parvenir à de premières

⁴ Pour plus d'informations, cf. <http://www.competition-commission.org.uk/inquiries/ref2006/grocery/index.htm>

conclusions sur sa situation concurrentielle. Les résultats obtenus sont nécessairement différents de ceux qui auraient été atteints en choisissant la voie alternative de l'enquête sectorielle permettant de recourir aux pouvoirs d'enquête. Cette voie plus lourde aurait été empruntée si le Conseil avait d'ores et déjà eu des soupçons de pratiques anticoncurrentielles à grande échelle ou avait été destinataire de plaintes en nombre. Les justifications du recours à l'un ou l'autre de ces instruments sont donc *a priori* différentes.

2.3 *Avis sur des questions de concurrence*

Pour reprendre l'exemple de la législation relative à l'équipement commercial, son examen a été mené par le Conseil lui-même pour une raison tenant à notre système juridique, qui permet au Gouvernement de demander formellement au Conseil de la concurrence son avis sur des textes ou des questions de concurrence. Les collectivités territoriales, organisations professionnelles et syndicales, organisations de consommateurs agréées etc. peuvent aussi demander un avis au Conseil sur ces mêmes questions⁵. Le ministre de l'économie qui avait saisi le Conseil, a précisé ce qu'il attendait et quelles étaient les raisons de sa demande.

La saisine du ministre a fait suite à une mise en demeure puis à un avis motivé adressés par la Commission européenne aux autorités françaises mettant en cause certaines dispositions de la loi de décembre 1973 d'orientation du commerce et de l'artisanat («loi Royer») telle que modifiée par la loi de juillet 1996 relative au développement et à la promotion du commerce et de l'artisanat («loi Raffarin»). Le Gouvernement avait mis en place une commission de modernisation de l'urbanisme commercial. Cette commission présidée par le ministre des PME et de l'artisanat, M. Renaud Dutreil, et associant parlementaires, élus locaux, et représentants des professions concernées, a formulé des propositions visant à réformer cette législation.

Le Conseil de la concurrence a été invité par le ministre de l'économie à formuler une analyse de ces propositions de réforme. Le ministre a souhaité un éclairage sur le bilan de la réglementation actuelle au regard de l'équilibre entre les différentes formes de commerce, des conséquences sur la concentration dans le secteur de la distribution et de sa pertinence au regard de la prévention de la constitution de positions dominantes locales. De plus, le Gouvernement a sollicité l'avis du Conseil sur les évolutions possibles pour permettre une amélioration de la concurrence au plan local.

Cette analyse s'est faite dans un esprit de concertation et de nombreux acteurs ont été auditionnés par le Conseil sur le fondement de l'article L. 463-7, alinéa 2⁶, du code de commerce. Les représentants de l'association des centres distributeurs E. Leclerc, de la Fédération du commerce et de la distribution, de la Fédération de la consommation, du logement et du cadre de vie et de la Confédération générale de l'alimentation de détail ont été entendus lors de la séance du Conseil présentant cet avis. Elle s'est aussi appuyée sur les travaux de la Commission Dutreil, ce qui a permis une meilleure collecte de données et un recoupement efficace des informations.

3. Conclusion

De la pratique actuelle du Conseil de la concurrence, il ressort que les études de marché externalisées sont un bon moyen d'améliorer la connaissance du fonctionnement d'un secteur économique donné sous le contrôle de l'autorité de concurrence. Les enquêtes sectorielles et de marché menées en interne peuvent quant à elles constituer un complément utile à l'activité contentieuse. Cependant, ces études sont coûteuses et requièrent de mobiliser des moyens conséquents. Il peut donc être nécessaire d'arbitrer entre les deux selon l'objectif visé. Dans le cas où le Conseil reçoit beaucoup de plaintes et/ou est conduit à s'interroger

5 Article L462-1 code de commerce

6 Article L463-7 code de commerce

sur l'existence de pratiques préoccupantes à grande échelle, l'enquête sectorielle, menée en interne, sera préférée à l'étude de marché externalisée.

Les études thématiques constituent un outil pertinent pour faire évoluer la pratique des autorités de concurrence et/ou donner des indications aux acteurs économiques. Cela permet de développer la « *guidance* » dans un souci pédagogique, et de renforcer l'« *advocacy* » en matière de concurrence sur un thème donné. Pour ces études, l'externalisation, si elle bien encadrée, peut être satisfaisante.

Les évaluations concurrentielles de réglementations ou de projets de réforme par les autorités de concurrence peuvent constituer un outil important d'aide au Gouvernement car elles peuvent faciliter l'adoption de mesures cohérentes avec la concurrence, la croissance et le pouvoir d'achat. Elles doivent être menées en interne puisque l'évaluation de l'impact concurrentiel est une des compétences reconnue de l'autorité de la concurrence. En outre, au vu de l'expérience du Conseil dans ce domaine, il apparaît crucial de d'associer l'expertise des acteurs du marché concerné.

On voit l'avantage comparé de la procédure consultative par rapport aux enquêtes sectorielles : s'en tenant à une analyse abstraite, ces avis ne préjugent nullement de l'examen pouvant être mené dans tel ou tel cas d'espèce⁷, ils sont préparés en coopération avec l'ensemble des parties intéressées et permet de parfaire l'information de l'autorité, sans qu'il soit nécessaire, *a priori*, de recourir aux pouvoirs d'enquête prévu par le code de commerce⁸.

⁷ Ces avis ne constituent pas de pré-jugements, comme l'a confirmé la jurisprudence nationale, cf. arrêt du 24 juin 2003 Conseil supérieur de l'ordre des géomètres-expert de la cour d'appel de Paris

⁸ Article L450-1 code de commerce

HUNGARY

This submission gives a brief overview of what sector inquiries are under the Hungarian Competition Act (Competition Act), and how they work. After an introduction it deals separately with its conceptual and structural aspects and with aspects related to the process, finally it deals with issues listed in the secretariat's letter of inviting submission but not covered in the first two parts.

In Hungary, sector inquiries, carried out by the Hungarian Competition Authority (Gazdasági Versenyhivatal (GVH)) correspond to the term "market studies" used by the Secretariat's request for submission. Basically, GVH sector inquiries are a copy of their similarly called EU counterpart. Beyond sector inquiries, there are two other opportunities to get information on various industries without engaging into an individual law enforcement proceeding. These are "market overviews" and information gathering for the purposes of providing information with international organisations such as the OECD on a voluntary basis.¹ The current Hungarian legal thinking on information gathering holds that public authorities like the GVH may freely rely on public information, but any information request from enterprises, even voluntary type, require statutory empowerment.

Sector inquiries have been possible in Hungary since the 2000 amendment of the Competition Act. Over the years, the GVH launched five sector inquiries regarding mobile telecoms (2001-2002), mortgage loans (2004-2005), electricity (2004-2006), bank switching (2007-ongoing) and electronic media (2007-ongoing). Experience gained in the first couple of sector inquiries resulted in refinement of the Competition Act provisions regulating GVH sector inquiries.

1. Concept and structure

The idea behind sector inquiries is to investigate a whole industry (or part of that industry) in order to understand the reasons behind a perceived problem in market operation which might indicate that competition is distorted. In the end of the process, the GVH prepares a report, explaining those reasons and reaching conclusion whether further action (i.e. law enforcement and/or regulatory intervention) is needed.

GVH sector inquiries are formal proceedings under the Competition Act, different from individual law enforcement procedures in many respects. Triggering events can be anything that indicates problems with market operation like strange price movements, or other phenomena seem to be counterintuitive and unexplained assuming proper – usually competitive – market functioning. In other words, the GVH recognises that "something is wrong" or might be wrong with competition, but it does not have a solid idea about it, it does not really understand it (or if it has general hypotheses it is not yet in the position to substantiate them), to the extent that would be satisfactory for intervention. These problems are different,

¹ In case of "market overviews" the GVH itself, or by commissioning a research firm, overviews the market, its development with special focus on the conditions of competition. "Market overviews" are not formal procedures, and therefore can rely only on publicly available information and data. These exercises do not require statutory authorisation of the GVH or investigative powers, but GVH experience with pure "market overviews" are not very encouraging in terms of quality and usefulness so far. A provision of the Hungarian Competition Act also makes possible for the GVH to gather information from enterprises on a voluntary basis, if this is necessary to fulfil information request of international organisations. This provision has been hardly exercised so far.

most importantly less specific both in terms of behaviour and enterprises involved, than problems triggering individual law enforcement proceedings (like merger cases or cases on various agreements (including cartels) and abuse of dominant position), where a theory of harm, a clear behaviour/suspicion, and potential wrongdoers are identified before the proceeding is launched.

Beyond the proper nature of the problem, a certain magnitude and importance of it is also required. There are many not fully understood “market mysteries” around a competition authority still not deserving a resource and time intensive closer scrutiny. There are no objective criteria set either in the Competition Act or in the GVH practice what constitute a beyond-the-threshold-scale problem, nevertheless factors like size of the industry, public attention, potential welfare effects, could be mentioned. In this context EU or broader international interest and similar activity (or experience from it) can play a significant, though never dominant role. Several GVH sector inquiries had a parallel EU counterpart, or other sort of non-occasional international activity in the same subject (like roundtables of the OECD Competition Committee or its working parties). In some cases these may contribute to the initiation, the design or the analytical approach of the GVH sector inquiry in various ways, or can represent a pure, nevertheless useful and encouraging co-incidence in other cases.

For example in the case of the electricity sector inquiry the triggering problem was the low switching rate (from the public service segment to the free market) and a subsequent trend of switching back (from the free market segment to the public service) of industrial customers after the first stage of the gradual market opening process came into force. The EU energy sector inquiry did not have any direct impact on the GVH sector inquiry in any respect, the two exercises reinforced each other nevertheless. It was not clear why customers do not move when in principle they could. In the bank switching sector inquiry it was the presumable difficulty (and low rate) to react to price changes in existing credit relationships for consumers, and apparent lack of comparable information on terms and conditions to make an informed consumer choice on current account switching that made the GVH to start an inquiry. In addition, it became clear that the issue is taken seriously by other competition agencies worldwide, and there were examples of well-considered interventions in switching between current accounts in several jurisdictions. The EC banking sector inquiry (started in 2005) also covered switching and it played a role to develop and maintain GVH interest in the topic, as well as the OECD CC roundtable on switching (held in 2006).

After the case handlers and the GVH management identified a problem potentially triggering a sector inquiry (for which the information can come either from previous law enforcement experience, or from market developments themselves), an inquiry team is established, a concept memo is formulated and a working plan is set up. They describe the outline of the sector inquiry dealing both with substantive and operational aspects, such as identifying the initial problem, hypothetical explanations, methods to be used, stages of the inquiry, expected duration, various outsourcing issues.

The sector inquiry’s final product is a report (not a decision), which includes statements, including proposals (not remedies). In this respect, GVH sector inquiries themselves do not have any “practical” consequences. Nevertheless, the results of a sector inquiry, depending on its findings, can be either initiating individual law enforcement or competition (or other) advocacy or both.² Law enforcement (individual procedure(s), technically separate from the sector inquiry) is initiated when the sector inquiry reveals information about a probable competition law infringement during the sector inquiry. This happened in the case of the electricity sector inquiry, after which the GVH launched several individual

² In principle it is also possible that a sector inquiry has no any further consequences, because the initially perceived “problem” by the end is understood as a normal market phenomenon. Another theoretical option is that a market failure identified but no (plausible or cost effective) interventions of any kind seem to be available. Finally, in theory it is possible that the phenomenon is not understood to the extent where either individual cases or advocacy proposals could emerge.

cases dealing with probably anticompetitive loyalty schemes applied by regional electricity utility. (These cases are still pending.)

More typical is a competition advocacy result, especially proposals aiming at the removal, introduction or modification of regulations. On the one hand, competition advocacy proposals are elaborated and included in the conclusions section of the report, on the other hand, they often have an after-life as they are presented repeatedly by the GVH in its competition advocacy activities, sometimes after refinement or further elaboration. Thus sector inquiries may yield specific competition advocacy proposals as well as more general competition advocacy activity directions. Advocacy results were the main products both of the electricity sector inquiry, and the mortgage loans sector inquiry.

It is important to note that advocacy in the mortgage sector inquiry was not pure competition advocacy, but the report's proposals were mainly about consumer protection measures aiming at improving the conditions of a better informed consumer choice. GVH experiences with sector inquiries in the financial sector suggest that both from a technical and a substantive point of view, sector inquiries are fairly appropriate means to deal with areas where there is a strong overlap between competition and consumer policies, provided that the authority, like the GVH has expertise in both policy fields.³

Sometimes the GVH anticipates, or even communicates what types of main consequences of a planned sector inquiry are expected to emerge, but they cannot be predicted for sure. In the electricity sector inquiry, the GVH primarily expected competition advocacy proposals. This was basically correct, individual law enforcement procedures were also needed to start nevertheless.

2. Process

The decision to launch a sector inquiry is that of the president of the GVH (unlike individual law enforcement procedures, which are approved by the vice-president).⁴ Ideally, at the same time, firms involved in the information gathering (and therefore parties to the proceeding) receive an information request (including data request). In practice, information request sometimes goes somewhat later for technical reasons. Usually the GVH also holds one (or a few) meeting with the firms requested to provide information, to explain the purposes and the background of the particular sector inquiry (including the concept and the legal background, but also introducing team members, and communicating its main stages and time frame), and to reach a common understanding on the information request. Fine-tuning of the information request as a consequence is also possible.

The sector inquiry is done by a team consisted of officials coming from various units of the GVH. The GVH does not have a dedicated unit for sector inquiries or market studies. Core participants of the team are case handlers of the unit to which the sector belongs anyway (in other words they would deal with individual law enforcement cases as well as competition advocacy in that area). Officials (including economists) from general units are often, and members of the Competition Council are occasionally part of the team. GVH sector inquiries are both resource and time intensive exercises – they reach the scale of some of the really big GVH cases or even go beyond.

So far, GVH sector inquiries usually (but not always) involved outsourcing. It is never about the whole project, and the final report is always prepared by the GVH. Outsourcing covers mainly sub parts of the sector inquiry, concentrating on issues where analysis requires technical skills or capacity (primarily

³ See also Financial Sector Inquiries – A Hungarian Example Illustrating Some Overlaps Between Competition and Consumer Policies (7th Meeting of the Global Forum on Competition, 22 February 2008, Room Document No. 2, Session IV) (<http://www.oecd.org/dataoecd/32/42/40136225.pdf>)

⁴ In theory, parties to the proceeding can challenge this decision before court.

industry knowledge and empirical work). Nevertheless, in certain cases these issues can lay in the heart of the inquiry. Therefore while technically supplementary, outsourcing can play an extremely important role also from a substantive point of view in the sector inquiry.

In the mobile telecoms sector inquiry empirical work (a statistical analysis using price correlation methodology) on mobile/fix substitution was outsourced. In the bank switching sector inquiry surveys on switching habits of the population and SMEs (based on questionnaires), and part of an econometric analysis on the impact of switching were outsourced. On the other hand, in the electricity sector inquiry no outsourcing was done at all.

In sector inquiries the GVH basically can rely on all of its information gathering powers that are available in individual law enforcement cases, including access to confidential information and imposition of fines in case of denial. However, dawn-raids – available in cartel and abuse and dominant position cases – cannot be used in sector inquiries. In practice, information gathering is arranged with the parties, and it is an iterative process. On the one hand, obviously, neither the parties, nor the GVH want the information disproportionately burdensome, on the other hand, the GVH clearly wants to make well-based statements in the end of the sector inquiry. The nature of the sector inquiry and the attitude of the GVH imply that normally it is less a unilateral imposition on the parties than in individual law enforcement cases. Even so, there are exceptions: in the electricity sector inquiry, despite an arrangement phase and flexibility, certain parties had to be encouraged to co-operate by procedural fines. In the GVH's experience, in this respect industrial culture is an important factor.

GVH sector inquiries do not have a specific statutory deadline – the Competition Act requires the GVH to conclude them within “reasonable time”. Nevertheless, a timeframe and a deadline is part of the working plan. Missing this self-imposed deadline does not have any legal effect, but it is public, therefore unexpected delays without explanation may not improve the reputation of the GVH. To avoid this, sometimes it is useful to review and possibly modify the working plan (as well as to communicate this to the parties as well as to the general public). So far the GVH was not always able to keep initially set deadlines. Delays were sometimes substantial. The typical reasons were: delays in information gathering (late responses by the parties); more complex than expected cases (and their analysis); team members, doing multitasking, needed to concentrate on more urgent tasks (such as a merger case).

Sector inquiry reports (their public version – not containing confidential information) must be published by the GVH. They are finalised in the last stage of the inquiry in an iterative and interactive process. It is a statutory requirement to publish the draft version in order to attract comments, to give 30 days for those comments to be made, and the GVH is expected to make reasonable modifications before publishing the final version. Before the final version is prepared, the GVH may hold a hearing for market participants involved in the sector inquiry (a term of the Competition Act that refers a potentially wider group than parties to the proceeding) to discuss their comments and possible changes in the report. A summary of the comments and of the hearing must be published together with the final report. In addition, market participants involved to the procedure may ask the GVH to publish their substantive comments to the draft report together with the final report.

Beyond this, in practice, both the draft version and the final version (and the comments) can be found at the website of the GVH, and the draft version is also circulated among those who are expected to be interested (e.g. government agencies, and other stakeholders). The GVH usually also holds an oral consultation (that might be supported by written materials) on the draft version with experts and academics at the issue who were not involved in the sector inquiry. These consultations and the hearing are usually multilateral (not one-by-one) exercises. So far, in no case such comments and consultations implied major substantive changes in sector inquiry reports, especially in their conclusions.

3. Remaining questions of the secretariat

3.1 Approach

- *What criteria do you use to select appropriate markets to study?*

See paragraphs 5-7.

- *How do you go about the process of gathering data and other information for the study?*

See paragraphs 13 and 17.

- *What are the advantages and disadvantages of using empirical evidence in market studies? What about anecdotal evidence?*

The usual attitude of the GVH is to try to get as much empirical evidence in sector inquiries as possible within the scope of time and resources. The reason is that empirical evidence is often regarded to be more “objective”, to get them can be time and resource intensive nevertheless. Empirical evidence does not necessarily imply econometric analysis on hard data in sector inquiries. Surveys are sometimes easier to conduct and relatively informative – even if they may reflect opinions rather than facts, and therefore should be taken cautiously.

- *Is it a good idea to seek the involvement of market participants (sellers, customers, and any other stakeholders), or is it better to conduct the study without them? What are the pros and cons of each approach?*

Stakeholders can participate in the sector inquiry draft report consultation process, some of them might be proactively involved by the GVH in that process. In the sector inquiry process they might be involved as an information provider (as a member of a survey sample, or as a party to the procedure who is obliged to co-operate in information gathering). Paradoxically, our experience in the electricity sector inquiry was not too good in implying buyers in the information gathering process – they were more reluctant to give answers than electricity firms. So far the GVH have never tried to co-operate with business stakeholders (other than information providers) before the report consultation stage. The GVH tried however in several times with good results is to contact industry experts or regulatory agencies familiar with the industry in question for a better design of a planned sector inquiry. Regulatory agencies can even play a role during the sector inquiry, certain information and analytical results can be shared and discussed with them, sometimes with a very productive outcome. They also can be a valuable source of information and data.

- *In general, how much transparency is appropriate when conducting market studies?*

The GVH wants to provide maximum transparency regarding the general framework of sector inquiries. This is so because in our experience businesses easily confuse sector inquiries with normal law enforcement proceedings (see also answer to question 2.3) that may cause reluctance and distrust towards the sector inquiry in question and may harm the information gathering process. The fact that a given sector inquiry has started is public (and press released), as well as the results of sector inquiries (reports, draft reports and comments to the draft report), providing maximum transparency in this respect too. The information gathered in the course of a sector inquiry is basically treated in the same way as it would be gathered in the course of a normal law enforcement procedure – e.g. strict rules on confidentiality equally apply.

The best practice in our opinion probably is the same. At least, the Hungarian situation is satisfactory in this respect.

- *Do the market studies done by your competition authority (or authorities) have distinctive features in comparison to those done in other jurisdictions? If so, what are those features?*

We might be in the position to answer this question not before, but after the roundtable discussion.

- *How do you go about setting timetables and milestones for completing market studies?*

See paragraphs 8, 19 and 20.

- *What human and financial resources (approximately) have you devoted to market studies (including those for which consultants have been hired)? Have the results been worth the resources spent? Please explain why or why not.*

See paragraph 14.

- *Should competition agencies conduct market studies themselves or should the work be contracted out? What are the advantages and disadvantages of each approach? (E.g., are there any concerns about credibility or objectivity?)*

See paragraph 15.

3.2 Relationship between Enforcement and Market Studies

- *What complementarities exist between enforcement and market studies?*

GVH sector inquiries are initiated on the basis of a less specified problem, they deal with more general issues than normal law enforcement (see paragraphs 5-6). In addition, unlike normal law enforcement, they can hardly solve any problem directly (see paragraphs 9-12). Therefore in Hungary there are clear complementarities between the two in terms of subject, approach and results.

- *What best practices should be followed when a market study turns up evidence of a competition offence?*

The GVH does not have too much room to manoeuvre in this respect. If a sector inquiry reveals evidences of a competition offence, the question in Hungary is not if but when. Normally, the GVH would wait until the sector inquiry ends (the report is published), partly for practical reasons (such as resource allocation), partly because the proper interpretation of those evidences is assumed normally to require the sector inquiry to pass its course. Nevertheless, there might be cases where the principle of no time to waste applies (such as a hardcore cartel where destruction of evidence is a danger). It is also worth to be mentioned that under the Competition Act evidences gathered through a sector inquiry can be used in a subsequent individual law enforcement proceeding.

- *What are the pros and cons of having formal powers to conduct market studies?*

In Hungary without formal powers, to conduct a sector inquiry, or any sort of market study exercise in the meaning of this roundtable discussion, probably would be impossible legally (See also paragraph 2). Formal powers therefore are useful. One drawback is however that strong powers on information gathering

and the fact the GHV sector inquiries are formal procedures often cause misunderstandings among parties, who tend to confuse sector inquiries with normal law enforcement.

- *What conditions or requirements, if any, should be met before authorisation to use those powers is granted? How extensive should the powers themselves be?*

For conditions and requirements see paragraphs 5-6 – the same powers can be used in all sector inquiries. (We believe that the Hungarian situation is satisfactory in this respect.) Formal powers have to be strong (equally strong as in normal law enforcement) regarding information gathering, some powers regarding remedies can be also very useful.

3.3 Strategies for Using Market Studies

- *Are market studies useful instruments? What purposes do they serve?*

Yes, sector inquiries are certainly useful, in case of absence the GVH certainly would miss them. For the purposes see paragraphs 5 and 9-10.

- *For example, are they used to carry out investigations without having to do so formally? Is that a good practice?*

The practice raised by the question probably cannot be regarded as a best practice. In any case, it would be impossible in Hungary. Under the Competition Act sector inquiries cannot be used to substitute for individual cases, since they are different in many ways. Moreover GVH sector inquiries are formal proceedings in the Hungarian regime. (See also paragraph 5.)

- *Another possible use for market studies is to wield them as a tool for effecting regulatory and legislative reform. Have you found them to be effective for that purpose? Why or why not?*

GVH sector inquiries are clearly important means in a competition advocacy context. They often produce very good basis and strong arguments for competition advocacy proposals or for advocating in order to facilitate free and informed consumer choice that may sound more convincing, or more solidly underpinned than usual ones.

IRELAND

Overview

The Irish Competition Authority is organised along functional lines, as opposed to sectors, and market studies are undertaken by the Advocacy Division in furtherance of the Competition Authority's statutory function to "*study and analyse any practice or method of competition affecting the supply and distribution of goods or the provision of services or any other matter relating to competition*".¹

The main *purpose* of market studies is to

- identify restrictions on competition in a market that stem from laws, regulation or administrative practices of the State;
- to evaluate any consumer or other public policy benefits claimed to exist from any such restrictions; and
- to consider whether the restrictions are effective in and proportionate to achieving such benefits;

with a view to advocating that Government and its agencies remove any unnecessary distortions of competition. Market studies may also contain recommendations to non-governmental organisations or lead to enforcement action where potential breaches of the Competition Act 2002 are identified.

The Irish Competition Authority has been undertaking market studies since 1997, with increasing frequency, improving quality of analysis, and greater success in effecting reform in Ireland.

A market study is an important part of the armoury of Advocacy tools available to the Competition Authority in advocating pro-competition reform, but by no means the only part. Among the other Advocacy functions of the Authority are –

- to advise the Government, and individual Ministers, concerning the implications for competition in markets for goods and services of proposed legislation (including any secondary legislation);
- to advise public authorities generally on issues concerning competition which may arise in the performance of their functions;
- to identify and comment on constraints imposed by any enactment or administrative practice on the operation of competition in the economy;

¹ Section 30(1)(a) of the Competition Act 2002.

- to carry on such activities as it considers appropriate so as to inform the public about issues concerning competition.²

As regards the first of these, it is at least as beneficial to devote resources to preventing the *flow* of anti-competitive regulation from occurring in the first place, as it is to trying to reform the *stock* of such regulation already in place.

Use of the second approach indented above often obtains a pro-competition result without recourse to a full market study (e.g. to solve regulatory issues arising at a local level, responding to public consultation by statutory regulators).

1. Approach to Market Studies

1.1 Criteria for selection

Initially markets for study were selected on the basis of four criteria:

- percentage of GDP;
- importance to the wider economy;
- extent of regulation; and,
- past experience of anti-competitive activity or concerns about regulations limiting competition.

This led to studies of banking, insurance, and professional services (lawyers, architects, engineers, dentists, opticians, doctors, veterinarians).³ The criteria proved to be rather blunt however, as the studies took too long to complete due to their large scale. The Competition Authority has thus developed a new methodology for selecting studies based on a centralised “market monitoring” function which will harness information from all Divisions and produce “scoping papers” suggesting suitable, focused, studies of two sizes: “detailed-look” and “quick-look”.

Market studies increasingly tend to focus nowadays on markets where there is significant direct Government or other statutory regulation, and where there may be scope to enhance competition in the market by removing regulation which may be restricting (or even preventing) competition.

1.2 Legislative requirement or own-initiative?

While most market studies are carried out on the Competition Authority’s own initiative, the Minister for Enterprise, Trade and Employment may also, under the Competition Act, section 30(2), request the Authority to carry out a market study and submit a report to him/her.⁴

Any such request clearly affects the Authority’s strategic priorities, and may tie up very limited resources in a project not of the Authority’s choosing. For example, the Authority was asked in 2006 to

² Section 30(1), Competition Act 2002.

³ Other market studies involved liquor licensing, private health insurance, bus & rail passenger transport, mobile telecommunications and casual trading.

⁴ This was the origin of the Authority’s Studies on Casual Trading and Mobile Telecommunications, respectively.

submit a report on private health insurance in Ireland. Such a project was not part of the Authority's Business Plan; the diversion of time, effort and resource required meant that the Authority's own-initiative market study of competition in dental services was delayed for over a year.

In the Competition Authority's view, joint studies with other agencies are not advisable or best practice. First, joint output may affect public perception of the Authority as an independent agency. Second, joint work runs the risk of delay and difficulty, given the different priorities (and indeed mandates) of different agencies. Practical difficulties may also arise from the involvement of two separate bodies (and their respective Boards) in the analysis and recommendations, and in finally signing off the project.

1.3 Funding penalties arising from market studies?

The Competition Authority is not aware of having incurred "*authorisation or funding penalties*" by the legislature or executive, arising from its market studies. That is not to say that the Authority's recommendations for reform have been universally welcomed in Government circles. The record of implementation by Government Departments of Authority recommendations is a mixed one and, naturally, such recommendations have been more welcomed in some quarters than others. But the view of the Authority is that, as time passes, and the more the Authority engages in all strands of competition advocacy, the more receptivity it experiences in Government Departments and other bodies in general.

1.4 Gathering data and other information

Desk research and meeting relevant organisations are the first tools used to gather data and information about a market. Desk research includes:

- reviewing reports on the sector;
- contacting the Central Statistics Office of Ireland and the relevant organisations for data;
- trawling relevant websites and industry publications;
- trawling the Authority's database of queries and complaints from consumers and undertakings;
- tracking media articles and other public debate;
- reviewing academic literature on the market;
- tracking discussion of markets in the Oireachtas (the National Parliament);
- reviewing any enforcement cases in the market; and,
- reviewing any similar reports by other National Competition Authorities.

Relevant organisations include Government Departments, State regulators, business representative bodies (e.g. Law Society, Insurance Federation), consumer organisations and other user groups.

The Competition Authority also tries to contact individual persons or companies who may have relevant information on, or a different perspective of, the market – for example industry experts, current players in the market, potential entrants to the market, players in related markets.

Finally, a public consultation is undertaken on the preliminary analysis to ensure that the Authority has an accurate picture of the market and how competition works in it. This often brings out new sources of information.

In some studies, but not all, the Authority has obtained data from individual players in the market, or from unusual sources such as the Courts Service.

1.5 Evidence

Empirical evidence can be a very powerful tool, particularly when it comes to advocating reform, as it can give an idea of the scale of the competition problem identified. It is important not to overplay such evidence and that it is robust.

Anecdotal evidence can also be useful, but only where it is corroborated by a wide variety of stakeholders, or by the underlying empirical evidence.

Evidence of other countries' experience of implementing change can be very useful in predicting the outcomes of potential recommendations. Where change has directly benefitted consumers in such countries, this can be a very powerful tool for advocating pro-competition reform.

1.6 Involving market participants

It is difficult to imagine conducting a proper market study without the involvement of market participants. For example, market operators have sometimes been able to show that a potential recommendation would not be workable, or that an important element of the market dynamic is missing from, or is not taken full account of in, the Authority's analysis. There is also more potential for market participants to "buy-in" to recommendations where it is clear that their views have been fully considered. As a corollary, it is more difficult for participants to refute recommendations where there has already been a degree of public debate on the issues concerned. It must, of course, always be clear that market studies are not negotiation processes, and that the Competition Authority will always come to its own independent conclusions. On the downside, involving market participants can lead to studies taking longer to conclude, but this risk is worth taking, and can be contained by proper project management approaches.

The Competition Authority has found it particularly useful to engage the responsible Government Department, Agency or statutory regulator as early as possible in the project, since it is to that quarter that many of the Authority's recommendations will ultimately be aimed.

1.7 Transparency

The Competition Authority has occasionally made the mistakes of:

- consulting too early on studies – e.g. what markets within the banking sector should be studied – and thus making the report process overly long; and
- consulting market participants at too late a stage regarding preliminary analysis.

It is best if the Authority has done the desk research and decided the scope of the market study before engaging market participants. The Competition Authority's new methodology will require a "closed consultation" of market participants and industry experts before announcing the study and a public consultation.

The Authority’s policy on transparency is that, in principle, all submissions from interested parties are published on the Authority’s Website, except where genuine issues of confidentiality arise. Transparency is also helped by the policy of publishing a preliminary analysis, to facilitate a public dialogue, before proceeding to final analysis and recommendations.

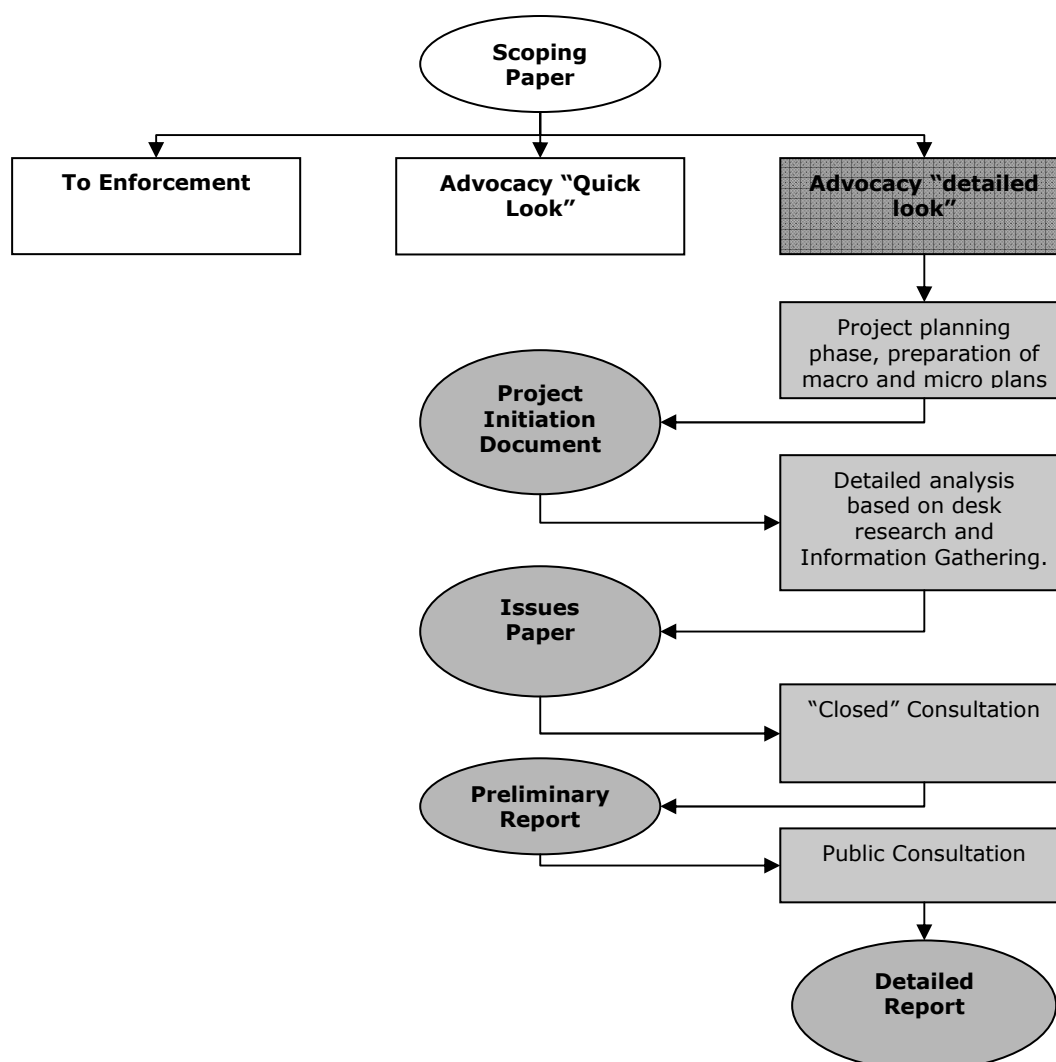
1.8 Distinctive features of market studies in Ireland

The Competition Authority does not know the answer to this question – the current Roundtable will undoubtedly help to make this clear!

1.9 Timetables and milestones

Timetables are set in accordance with normal project management techniques.

The milestones for any future “detailed look” studies will be as set out below:



1.10 Resources devoted to market studies

The Advocacy Division has a Director, a Manager, between 2 and 6 economists, and the aid of a legal adviser. Up to 25% of these resources are devoted fully to market studies at any given time. As to the actual cost, the Banking Study, based on fees paid to external consultants and staff salaries, was estimated to have cost €330,000.

Other studies would have cost considerably less, particularly those completed by the Authority's own staff without involving external consultants.

1.11 Contracting out market studies

Market studies are best conducted by the agency itself. This avoids concerns about powers to seek information and about the language used in the report to convey the recommendations to a wide audience and key decision makers. It is also easier to manage one team rather than two.

In the past, consultants have been used to provide the analysis, when Authority staffing levels were much lower than they are today. Nowadays, external consultants are used only for specific inputs e.g. econometrics and statistics. External consultants can be very useful for contracting out discrete parts of a study, e.g. market research, data analysis, international review.

2. Relationship between Enforcement and Market Studies

2.1 Complementarities

In the Competition Authority's view, enforcement of competition law on its own is not effective. On the other hand, competition advocacy (including market studies) on its own does not work either. Both tools are essential to a competition regime, and complement each other neatly.

Sometimes an enforcement investigation will reveal no breach of the law but suggest that the underlying regulation of the market concerned may be making the market less competitive than it could be. This can help identify suitable markets for study. For example, following an investigation of a local waste collection market, the Competition Authority found no abuse of dominance, but did conclude that a regulatory solution to the competition "problem" should be implemented by the Government Department concerned.

Similarly, a market study may reveal market behaviour which is potentially in breach of competition law. The information accumulated in the course of the market study would equip those responsible for enforcement with valuable information and intelligence. In addition, market definitions and information provided by market studies can contribute to merger decisions and enforcement work.

At a deeper level, the enforcement efforts of a competition agency may lead to business representative bodies seeking either protection under sectoral legislation or, of even more concern, exemption from the basic competition laws altogether. If this occurs, a competition agency with an experienced advocacy team is well-placed to counter such efforts by, *inter alia*, publicly articulating the case for competition (and the case against a retreat to sectoral or general protectionism).

Overall, restrictive laws and regulations can have similar effects to cartels and abuses of dominance. Advocating in favour of pro-competitive reforms and as a counter to lobbying by vested interests seeking such laws and regulations is, in the Competition Authority's view, as essential a function of a modern competition agency as an effective enforcement regime.

In this context, it is certainly worth spending resources on market studies in addition to other elements of the Authority's advocacy programme.

2.2 Formal powers

The Competition Authority has the statutory function to “study and analyse any practice or method of competition affecting the supply and distribution of goods or the provision of services or any other matter relating to competition”.⁵

Having a statutory mandate to conduct market studies is extremely useful as it effectively answers any complaints about the Authority straying beyond its remit.

While the Competition Authority has the power to compel the provision of information or data for market studies, this is not often used, as most of those asked for data will generally provide it willingly. It is, nonetheless, a very useful power to have in reserve. It can be particularly useful for obtaining information which might be classified by the provider as confidential or a business secret.

3. Strategies for Using Market Studies

3.1 Are market studies useful instruments?

The usefulness of market studies is at least threefold:

- they provide insights into the way that markets work, and specific markets in particular;
- robust analysis by an independent agency, acting in the public interest, may shine a light on market circumstances, regulation and behaviour which may not previously have been the subject of such detailed analysis;
- where a market is not working well for consumers, recommendations may be made to market participants, or to bodies that represent them, on ways which may be open to them to change their behaviour. For example, an organisation representing the main Irish banks implemented Authority recommendations that the rules for entry to its clearing house system should be opened up;
- where State or other statutory regulation is hindering competition, Authority recommendations in market studies can be directed to the responsible Government Departments and other public regulatory bodies that such regulation should be overhauled or removed.

3.2 Are studies effective for effecting regulatory and legislative reform?

The answer to this depends on the yardstick used for success. The effectiveness of market studies as a tool for reform depends on many factors, including the collective policy of the Government of the day, the receptiveness of individual Government Departments to change, the strength and organisation of any entities who may wish to resist change and retain the *status quo*, the extent of consumer and other pressure for change, and so on. These dynamics will naturally vary from sector to sector, and from time to time, depending on individual and collective economic circumstances.

⁵ Section 30(1)(a) of the Competition Act 2002.

A competition agency cannot realistically expect a 100% success rate in the implementation of its recommendations. However, while a number of its own recommendations for reform remain unaddressed, the Competition Authority considers that it has had considerable success overall in effecting regulatory and legislative reform based on the analysis in its market studies. Moreover, the receptiveness of Government and industry to change tends to grow as the Authority produces more and better studies. Critically, success depends on following up recommendations, and not leaving reports “on the shelf”.

The Table below summarises the current status of recommendations made by the Irish Competition Authority as a result of market studies since 2002. It shows the number of recommendations aimed at different types decision makers and, within those categories, how many have actually been implemented, or are being addressed, and how many have not been implemented or do not require any action at this time.

	Ministers and Departments	Other Regulatory Bodies	Others	Total
Recommendations directed to	56	60	43	159
Recommendations implemented	7	27	21	55
Recommendations being progressed	14	21	7	42
Recommendations that have not been implemented	30	10	13	53
(number of these that require a certain amount of time to implement – e.g. primary legislation needed)	(13)			(13)
Recommendations not currently requiring action	5	2	2	9

Market studies also have intangible benefits. If they are drawn up properly, and presented professionally, skilfully and (most importantly) accessibly, they both stimulate public debate on the issue at hand and get people talking about competition issues in general.

The Irish Competition Authority has no power to force the implementation of its recommendations, and must rely on the basic strength of its analysis and arguments for change in order to bring reform about. In some countries, Governments have made commitments that they will, at the least, produce a formal reasoned response to the recommendations of its competition agency. The (Irish) Competition Act 2002 is currently being reviewed, and the Competition Authority, in its submission to this review, set out the arguments for and against giving its recommendations more formal “teeth” in this way. The ultimate decision on this will be one for Government policy-makers to take.

3.3 *Recording impacts and following-up*

The Competition Authority attaches great importance to following up its recommendations with those in Government and elsewhere to whom those recommendations are addressed. It does this primarily by staying in regular contact with those responsible for particular recommendations, and practising its nagging skills in the process, but also by giving presentations, making submissions to public consultation processes, and engaging actively with the media. The Authority also regularly produces tabular statements as to the

progress made in the implementation of recommendations overall – for example in its Annual Report, in a recent submission to Government on reform of the Competition Act 2002 etc.⁶

4. Conclusion

Carrying out market studies and – more importantly, continually following them up afterwards until the necessary reforms are implemented – requires not just excellent skills, teamwork and analysis, but also a high level of individual and corporate optimism and resilience on the part of the competition agency and its staff. In the Irish Competition Authority's view, however, they are well worth the effort expended on them.

From carrying out a number of market studies over the past 10 years, the Competition Authority has learned a number of lessons. These are summarised below –

4.1 *Get the process right*

- keep tight control of scope from the start;
- and a realistic timeframe;
- teamwork is essential;
- so are internal checks/questioning/debating;
- public consultation is good – but don't overdo it.

4.2 *No one single analytical process leads to reform*

- government Departments will do their own analysis;
- external consultants can be involved, and Government-appointed bodies, Review Groups, Regulators etc.
- competition Authority's own analysis;
- external analysts will also have a view – OECD, academics, media etc.

4.3 *Change is gradual and incremental – no big bang*

4.4 *Reform sometimes comes from unexpected sources*

- For example, court decisions overturning

⁶ See 2007 Annual Report at <http://www.tca.ie/NewsPublications/AnnualReports/AnnualReports.aspx>, and Submission S/07/008 at <http://www.tca.ie/NewsPublications/AnnualReports/AnnualReports.aspx>.

4.5 *There's a lot more to reform than just getting the basic analysis right*

- political economy is just as important as good analysis, well-written;
- so is expertise in media relations;
- and awareness of the power of public opinion;
- and the power of pressure groups.

4.6 *Follow-up is crucial*

4.7 *Small teams can get big results – but only if they*

- establish a good reputation;
- are agile, expert, flexible and streetwise;
- know how Government policy-making works.

ITALY

1. Introduction

The Italian antitrust law allows the Authority to undertake sector enquiries in order to gain a better understanding of the functioning of certain markets or sectors when *the development of trade, the evolution of prices or other circumstances suggest that competition may be impeded, restricted or distorted*. These enquiries consent the identification of unjustified restrictions originating from regulation or from anti-competitive behaviour and, in general, allow a better understanding of industry behaviour. The information acquired with market studies can serve as a background for enforcement or advocacy interventions. In this respect, market studies are not a substitute, but a complement to both enforcement and advocacy.

The procedures and powers of the Authority are outlined in regulation n. 217/98 stating that, in the course of a sector enquiry *“the offices may request the disclosure of information or documents, and may order inspections, expert testimony, statistical and economic analyses, or consult experts”*. Both the opening and the closing of sector enquiries receive the same form of publicity given to investigations (publication in the Antitrust Bulletin and in the Authority’s website). In regulated sectors the enquiries have been sometimes conducted in co-operation with the sector regulator.

Since its establishment in 1990, the Italian Competition Authority has concluded 31 sector enquiries, particularly concentrating on recently liberalised sectors (in recent years the Authority conducted sector enquiries in the energy, telecommunication and air transport markets). Other enquiries have dealt with markets where competition was not working effectively. In all these markets the enquiries have helped to understand the nature of the problems, whether coming from regulatory restrictions, inefficiencies or anticompetitive behaviour and to identify a course of action. In a number of occasions the Government followed the suggestions of the Authority.

2. Sector enquiries

2.1 Insurance market

After motor vehicle insurance was liberalized by Directive 92/49/EEC, the Italian Authority addressed the general competition problems of the motor vehicle insurance market¹ in a sector enquiry concluded in April 2003. The enquiry showed that after liberalization prices significantly increased, market shares remained stable and entry was quite limited. The Authority suggested the introduction of greater incentives for cost control and greater opportunities for demand side competition. In particular, the Authority suggested the introduction of a direct settlement system (where customers could be compensated directly by their own insurance companies) as a way to increase competition, encourage companies to compete for service quality and increase the incentives for consumers to switch.

¹ Italian Competition Authority, Sector enquiry n.19 into the motor-vehicle insurance sector in Bulletin n. 16-17/2003.

In September 2005 a new insurance code was adopted in Italy, revising all the legislation in the field and simplifying the legislative framework applicable to the private insurance sector. One of the most important innovations of the insurance code was indeed the introduction of compulsory direct settlement.

2.2 *Electricity and natural gas*

A sector enquiry was conducted in the energy sector, in co-operation with the sector regulator, into the degree of liberalization of the electricity and natural gas markets². Both enquiries served as a background for suggestions of measures aimed at enhancing competition.

For the electricity market the enquiry provided an updated picture of the domestic electricity industry. In particular, it emerged that ENEL was the leading operator in terms of its stock of net operational generating capacity, taking into account the characteristics and geographical location of its power plants. From an analysis of the structure of demand according to geographical location and type of plant, it emerged that the forced sale of generation companies, which was required by the sector liberalization legislation, was insufficient to create an effective competitive structure. The sector enquiry suggested some measures in order to enhance competition, such as proprietary separation of the transmission grid so as to introduce the right incentives for strengthening the interconnections with neighbouring countries and the construction of new generation facilities by ENEL competitors.

In natural gas the investigation confirmed the dominant position of ENI. The analysis suggested measures aimed at achieving greater competition, both upstream for the supply of natural gas and downstream for its sale to final customers. The enquiry stressed the importance of the construction of new supply infrastructures, making it possible an increase and diversification of supply sources. The Authorities called for the proprietary separation of the gas pipeline, both domestic and international. They further urged the definition of rules for opening a centralized market for the exchange of natural gas, which would be integrated with other European markets, to encourage two way flows of gas between Italy and Europe and the creation of a Mediterranean gas hub able to compete with North-European hubs. Finally, the Authorities suggested the release by the dominant operator of sufficient quantities of gas for an appropriate number of years at condition close to supply cost and without restrictions on final customers to be served.

2.3 *Airfares for passenger transport*

In April 2005, the Authority concluded a sector enquiry into passenger airfares³. The enquiry showed that, irrespective of liberalization, a number of obstacles to access on a number of domestic routes prevented the entry of competitors. Take-off and landing rights had been assigned to long-established carriers and, as a result, because of the absence of a secondary market, the entry of new operators on coordinated airports had been made very difficult. In fact new entry was confined to a small number of routes, limiting profitability and the development of alternative networks. The Authority identified several possible ways to promote the development of competition in the sector, such as developing a secondary market for takeoff and landing times, but at the same time obliging incumbent carriers to sell their unused slots to competitors. Furthermore the Authority suggested to enhance the transparency of airfares, so as to safeguard the importance of prices in guiding consumer choices and their role as a competitive instrument between airlines.

² Italian Competition Authority, Sector enquiry n. 22 State of the liberalisation of the electricity and natural gas markets. The part of the enquiry into the natural gas market was closed in June 2004 (Bulletin n. 25/2004), that on the electricity market in February 2005 (Bulletin n. 6/2005).

³ Italian Competition Authority, IC 24, Airfares for passenger transport, Bulletin n. 17/2005.

2.4 *Costs of banking services*

In February 2007 the Authority concluded a sector enquiry into fees paid by customers for banking services⁴. The enquiry revealed numerous structural and behavioural elements that helped explain the widespread inertia in consumer-bank relationships. First, the investigation showed that information is provided to customers in a very opaque way. Moreover, many banks charged customers for discontinuing several banking and financial services, such as fees for closing current or securities accounts or early mortgage repayments. In addition because of delays on the part of the original bank, switching customers risked that service be discontinued. Finally, the survey revealed the relatively high level of recourse to binding agreements consisting in making the sale of one service subject to the sale of another, without granting the possibility of acquiring them separately. At the end of the investigation, the Authority formulated several suggestions to increase demand side competition. To achieve greater transparency and make it easier to compare costs, the Authority suggested that banks supply information leaflets enabling current account holders to be informed on the type of services offered and their cost item by item. In order to reduce obstacles to client mobility, the Authority proposed the development of switching packs: maintaining current account services with the old bank for the time it takes to switch to a new bank, avoiding duplications of cost for account holders, the setting of a maximum time limit for switching, the elimination of all unjustifiable links between current account and other services, including for example, loans, savings, securities and finally, the development of account number portability.

A number of important developments took place both in the course of the enquiry. First of all, as soon as the Authority publicly announced the opening of the enquiry, a number of banks decided voluntarily to eliminate their closing charges. Furthermore a few months later the Government issued a decree (the Bersani decree of June 2006) where it outlawed closing charges and it imposed on banks to renegotiate mortgages for free (no switching costs on mortgage renegotiations). Finally, after the Bersani decree had been approved by Parliament, the Italian banking association issued a commentary to law where it suggested to banks a very restrictive interpretation of the regulatory provisions of the decree (according to the association the eliminated closing charges affected only checking accounts and not security accounts). The Authority intervened by blocking the commentary that, origination from a decision by an association of firms, constituted a restrictive agreement in violation of article 81 of the EC Treaty⁵.

2.5 *Professional services*

In 1997 the Italian Competition Authority carried out an extensive sector enquiry into liberal professions, aimed at providing a general framework of analysis and at identifying regulatory restrictions of competition calling for possible legislative interventions⁶. The enquiry, covering a large number of professions⁷, focused on conditions of entry, as well as on regulation of conduct and of business structure. Apart from the various, specific suggestions for action contained in the investigation, the Authority stated that regulation of liberal professions should be enacted or maintained only when significant market failures make it indispensable and it should not exceed what is strictly required to cure the identified market imperfection⁸. In August 2006, important changes regarding liberal professions were introduced by the so

⁴ Italian Competition Authority, IC 32, Costs of banking services for customers, Bulletin n. 3/2007.

⁵ Italian Competition Authority, I675 ABI – Unilateral modification of contractual conditions, decision n. 17046, Bulletin n. 26/2007.

⁶ Italian Competition Authority, IC15, Enquiry into professional associations, Bulletin n. 42/1997.

⁷ The enquiry concerned legal professions, accounting professions, health professions (doctors and pharmacists) and technical professions (architects and engineers) partnerships.

⁸ Italian Competition Authority advocacy report n. AS316. Liberalisation of Professional Services., of 16 November 2005.

called liberalisation package, enacted by the law of 4 August 2006, n. 248 that amended several pre-existing provisions, introducing pro-competitive changes in different sectors⁹. In particular, article 2 eliminated minimum tariff requirements and advertising restrictions for professional services. Professionals are allowed to decide freely the level of their fees, and to link such fees to the outcome of their service (contingency fees). Professionals are now free to advertise (their specific qualifications and specializations, and the characteristics and the price of their services). They are also allowed to establish multidisciplinary firms providing an array of professional services. Professional associations were required by the reform to amend their codes of conduct by the end of January 2007, in order to comply with the new provisions. In January 2007 the Authority opened a general enquiry in order to analyse the changes in self regulation and to assess whether all restrictions on competition had been eliminated from the ethical codes¹⁰. The enquiry is still ongoing.

2.6 Wholesale distribution of food products

In June 2007 the Authority concluded an extensive sector enquiry into food product distribution in order to ascertain the effect on prices of the structure and organization of the sector distribution chain¹¹. The enquiry identified several inefficiencies in the distribution process, such as a very fragmented structure at the production level, the existence of several “micro” markets, a long distribution chain, elements that, although not immediately connected to specific anticompetitive behaviour, determined high prices to final consumers. The Authority suggested improvements in the organization of the distribution chain (such as a reform in the organization of wholesale markets) that might eliminate some of the inefficiencies.

3. Conclusions

Sector enquiries have been an important area of intervention, and proved to be quite effective in acquiring information on an industry or a sector. They have helped in better focusing future action by the Authority, both in enforcement and in advocacy. The suggestions that originated from sector enquiries were followed by the Government in a number of occasions.

⁹ Law of 4 August 2006, n. 248 .Urgent Provisions regarding economic and social development, the control and rationalisation of public expenditure, interventions in the fields of public revenue and repression of tax evasion.

¹⁰ Italian Competition Authority, IC 34, Sectoral enquiry on professional associations, in Bulletin n. 2/2007.

¹¹ Italian Competition Authority, Wholesale food products distribution, in Bulletin n. 22/2007.

JAPAN

1. Fact-finding surveys by the JFTC

The JFTC has been conducting “fact-finding surveys” almost every year since 1947 when the Antimonopoly Act (“AMA”) was enacted. Surveys by the JFTC have been conducted with the aim of achieving insight into specific markets, industries, trade practices and other issues in accordance with the different needs of competition policy at different times. These surveys differ from the JFTC investigations into individual acts in violation of the AMA. Fact-finding surveys carried out by the JFTC since FY 1997 are listed in the Annex. Such surveys number 31 at the end of FY 2007.

To achieve the purposes of the AMA, the JFTC shall take charge of matters relating to regulation on private monopolisation, unreasonable restraints of trade and unfair trade practices, as well as pertaining to monopolistic situations and other issues (Article 27-2 of the AMA). Fact-finding surveys are necessary for the JFTC to fulfil those missions. For this reason, the JFTC has been naturally considered to possess the authority to conduct such surveys under the Japanese legal system.

In answering the questions raised by the OECD, we would like to introduce in the following paper (i) the JFTC’s fact-finding survey approach, (ii) the relationship between fact-finding surveys and law enforcement, and (iii) uses of fact-finding surveys, together with actual examples.

2. Fact-finding survey approach

2.1 *Selection of survey targets*

The JFTC selects for its fact-finding surveys new trade fields, and existing trade fields where competitive environments notably change and where unreasonable trade practices have been identified. The following transaction fields are examples:

- New trade fields created as a result of advances in IT, including e-commerce and digital contents; for example, “Fact-finding Survey of B2C E-Commerce such as Electronic Shopping Malls” (published in December 2006).
- Trade fields where deregulation has taken place; for example, “Survey of Trade Practices between Financial Institutions and Enterprises” (published in July 2001 and June 2006).
- Trade fields relating to intellectual property; for example, survey of the animation industry (currently underway).

2.2 *Collection of data and information*

The JFTC gathers data and information by conducting interviews and questionnaires targeting business operators, trade associations and consumers, and by researching literature etc.

■ **Fact-finding Survey of B2C E-Commerce such as Electronic Shopping Malls (published in December 2006)**

<Survey targets>

- (i) Electronic shopping mall operators and tenants: 362 questionnaire respondents and 24 interviewees
- (ii) Consumers (Consumer Monitors and E-commerce Researchers¹): 1,173 questionnaire respondents

<Survey items; for example, questionnaire items for electronic shopping mall tenants>

- (i) Corporate profile
- (ii) Motives and triggers for starting consumer e-commerce services
- (iii) Advantages and disadvantages of consumer e-commerce services
- (iv) Provision of consumer e-commerce services (store-opening method, etc.)
- (v) Outline of consumer e-commerce services (merchandise suppliers, etc.)
- (vi) Relationship with consumers in consumer e-commerce services (complaints from consumers, etc.)
- (vii) Agreements on establishments of stores in electronic shopping malls (agreements on opening stores with electronic shopping mall operators, etc.)
- (viii) Challenges in operations of online stores (needed improvements in trade practices in the future, etc.)
- (ix) Challenges, problems, points for improvement, etc. in consumer e-commerce services in general

■ **Survey of Trade Practices between Financial Institutions and Enterprises (published in June 2006)**

<Survey Targets>

financial institutions, borrower enterprises, etc: 2,684 questionnaire respondents and 25 interviewees

<Survey Items; for example, questionnaire items for borrower enterprises>

- (i) Corporate profile
- (ii) Financial institutions with which questionnaire respondents have business relationships and reasons for selecting these financial institutions
- (iii) Whether to be invested in by those financial institutions
- (iv) Whether it is difficult to reject various requests from those financial institutions
- (v) Whether to be requested by financial institutions to purchase financial commodities or services from these financial institutions, after applying or receiving investment to or from these financial institutions
- (vi) Whether to be requested by financial institutions to purchase commodities or services from the affiliate companies of these financial institutions or companies with which these financial institutions have close business relationships, after applying or receiving investment to or from these financial institutions
- (vii) Whether to be requested by financial institutions to start business with or to change business partners to the affiliate companies of these financial institutions or companies with which these financial institutions have close business relationships, after applying or receiving investment to or from these financial institutions
- (viii) Whether to be requested by financial institutions not to have business with companies which compete with the affiliate companies of these financial institutions or companies with which these financial institutions have close business relationships, after applying or receiving investment to or from these financial institutions
- (ix) Whether they have confronted new problems since 2001 when receiving investment from financial institutions.

¹ The JFTC entrusts 1,100 consumers nationwide, as “Consumer Monitors,” with the tasks of replying to its questionnaires, collecting advertisements, etc. The JFTC also asks 80 consumers out of these Consumer Monitors, as “E-commerce Researchers,” to monitor and report on Internet advertising representations.

2.3 *Use of empirical evidence*

Generally speaking, no analysis based on econometrics is performed in the course of fact-finding surveys conducted by the JFTC. Such analysis, if conducted, is likely to enable a quantitative and persuasive analysis of survey findings. However, additional human resources are necessary for collecting data and building models required for econometric analysis.

2.4 *Interviews and questionnaires targeting business operators other than survey targets*

In addition to direct survey targets, the JFTC often interviews their business partners and any other stakeholders, and sends questionnaires to them in some cases. These steps allow the JFTC to gain an overall understanding of trade fields subject to its survey. However, obtaining cooperation from such third parties may require additional efforts.

2.5 *Transparency*

The JFTC publishes final survey results and makes an effort to ensure transparency.

2.6 *Set of timetables for surveys*

Survey periods vary depending on the trade fields surveyed. However, periods are normally set within a general range of six months to one year, based on the number of surveyed business operators and other factors.

2.7 *Human and financial resources devoted to market studies and results*

At present, the Trade Practices Research Office under the Trade Practices Department mainly takes charge of fact-finding surveys at the JFTC. The Office has 9 regular staff members (as of FY 2007). It has a survey-related budget of 4.7 million yen (as of FY 2007). In addition, other divisions and offices at the JFTC conduct fact-finding surveys from the perspective of other acts under the jurisdiction of the JFTC other than the AMA, study regulated fields from the viewpoint of promoting regulatory reforms, and undertake research to grasp the state of economic concentration in major industries.

The JFTC performs an ex-post assessment of its policies implemented in accordance with the Government Policy Evaluations Act (Law No. 86 of 2001). With regard to fact-finding surveys, the JFTC performed an ex-post assessment of fact-finding surveys on gasoline distribution and home electric appliance distribution, both of which were conducted in 2004. The assessment was conducted in 2005 to verify whether the expected effects actually resulted from these fact-finding surveys.

2.8 *Outsourcing*

For example, the JFTC outsources the aggregation of questionnaire results to external business operators. This allows the JFTC to assign its own staff to substantive survey operations.

2.9 *Features of fact-finding surveys by the JFTC in comparison to those done in other jurisdictions*

We have no details of market studies conducted by competition authorities in other jurisdictions. However, as previously noted, the JFTC has conducted fact-finding surveys for more than 60 years. We think that the number of surveys executed by the JFTC is fairly large.

3. Relationship with law enforcement

3.1 Complementary relationship between investigations on individual violations and fact-finding surveys

Fact-finding surveys aim to prevent violations against the AMA, and to maintain and promote fair and free competition, by arbitrarily surveying actual business activities in an entire industry from the perspective of competition policy, and by showing the AMA perspectives on trade practices that may be in conflict with competition policy. As such, generally speaking, fact-finding surveys have no direct complementary relationship with investigations on violating acts.

However, fact-finding surveys can have certain links with investigations on violating acts in some cases. For example, the JFTC published the results of fact-finding surveys on trade practices between financial institutions and enterprises in July 2001, and presented an AMA perspective on the “abuse of dominant bargaining position”² which financial institutions have over borrower business operators and on other trade practices. However, in an AMA violation case, for which a recommendation decision was issued in December 2005, acts carried out by a major city bank against borrower business operators were judged to constitute an abuse of dominant bargaining position. This led to concerns over the existence of similar acts in transactions between other financial institutions and borrower business operators. Consequently, the JFTC conducted the fact-finding survey again, considering much information on individual violations was not reported. The JFTC published the results of the second survey in June 2006.

3.2 JFTC’s practice when fact-finding surveys turn up problems on competition policy

The JFTC surveys actual business activities from the perspective of competition policy. In case the JFTC finds out in surveys that trade practices may pose problems for competition policy, the JFTC points out the concern, encourages the parties to voluntarily improve such practices, and publishes its survey findings.

² Such an act falls under unfair trade practices prohibited by the AMA.

■ **Fact-finding Survey of B2C E-Commerce such as Electronic Shopping Malls (published in December 2006)**

Based on the survey findings, the JFTC showed its AMA perspectives on transactions between electronic shopping mall operators and mall tenants including the following points; (i) restrictions on business activities including sending direct mails, (ii) the unilateral change of commission rate, (iii) the imposition of excessive funds for reward systems, and (iv) the obligatory use of a card transaction service offered by electronic mall operators. In addition, the JFTC pointed out that such acts by mall operators might pose problems with the AMA.

The JFTC also requested electronic shopping mall operators to improve consumer e-commerce services overall, including to inspect trade practices and to review anti-competitive practices, based on its survey findings.

■ **Survey of Trade Practices between Financial Institutions and Enterprises (published in June 2006)**

As a result of the survey, the following facts were identified regarding transactions between financial institutions and enterprises:

- Approximately 30% of borrower enterprises felt it “difficult to reject” the requests from financial institutions in connection with financing.
- Regarding the ratio of borrower enterprises that accepted financial institutions’ requests against their will, the ratio rose in certain survey categories while the ratio generally declined in comparison to a similar survey in July 2001.
- Approximately 60% of borrower enterprises that accepted the requests against their will did so out of fear that rejecting the requests might “make loans difficult to obtain the next time.”
- More than 20% of surveyed financial institutions didn’t recognise the previous survey, etc. In addition, more than 40% had made no effort though they knew the previous survey.

Based on the survey findings, the JFTC explained the purpose of the survey report to trade associations for banks, and requested these organisations to report on their efforts implemented based on the survey report. In response to the request, the bank associations sent the survey report to its members, sponsored seminars for presidents, equivalent senior executives and officials in charge of compliance at banks, and reported these activities to the JFTC.

3.3 *Exercise of legal power in fact-finding surveys*

Article 40 of the AMA stipulates that “The Fair Trade Commission may, if necessary for the performance of its duties, order public offices, juridical persons formed by special laws and regulations, entrepreneurs or organisations of entrepreneurs, or their personnel to appear before the Fair Trade Commission, or require them to submit necessary reports, information or materials.” With this provision, the AMA sets out a power over general surveys, separate from investigations on individual acts of violation. Paragraph 1 of Article 94-2 of the AMA provides that “Any person who, in violation of measures pursuant to the provisions of Article 40, has failed to appear or to submit a report, information, or materials, or submitted a false report, information, or materials...shall be punished by a fine of not more than two hundred thousand yen.”

The exercise of power under Article 40 of the AMA offers the advantage of access to information that can’t be supplied on a voluntary basis. However, whether to exercise this power in fact-finding surveys should be carefully decided since the power is binding based on the penal provision.

In general, the JFTC conducts fact-finding surveys today by obtaining voluntary cooperation from survey targets. We are confronting no particular problem in survey activities

4. Application Methods

4.1 *Purpose of fact-finding surveys*

Fact-finding surveys aim to prevent violations against the AMA and to maintain and to promote fair and free competition by arbitrarily surveying actual business activities in an entire industry from the perspective of competition policy, and by showing the AMA perspectives on trade practices that may be in conflict with competition policy.

4.2 *Relationship with regulatory reforms*

Besides the “fact-finding surveys” conducted for the purpose stated above, the JFTC undertakes studies on regulated fields for the purpose of promoting regulatory reforms. These studies enable us to clarify the effects of regulations on competition. They also allow us to recommend the abolishment and review of existing regulations so as to prevent their adverse effects on competition, and to propose desirable regulations in the view of further promoting competition in the markets.

For example, the JFTC published a report titled “Issues Concerning Electricity Market and Competition Policy” (in June 2006) after conducting a comprehensive set of interviews and questionnaires targeting relevant business operators and customers. This report made a recommendation to consider introducing a new scheme that aims to sustain a stable electric power system as well as taking into account the needs for the promotion of competition.

ANNEX: LIST OF THE JFTC FACT-FINDING SURVEYS SINCE FY 1997

	<i>Survey title</i>	Published
1	<i>Fact-finding Survey on Distribution, Trade Practices and Other Aspects of Contact Lenses</i>	Jun 25, 1997
2	<i>Fact-finding Survey on Distribution, Trade Practices and Other Aspects of Medical Devices</i>	Aug 4, 1997
3	<i>Survey on Low Bidding Prices in Recent Open Tenders Offered by Local Public Entities and the Like</i>	Mar 11, 1998
4	<i>“Survey on Changes in the Distribution Structure and Responses of Business Operators” (reported by the Distribution Issue Study Group): Business Activities of Processed Food and Everyday Sundries Wholesalers</i>	Mar 19, 1998
5	<i>Fact-finding Survey on Business Activities of Wholesalers and Others</i>	Mar 19, 1998
6	<i>Fact-finding Survey on Advertising Restrictions, Store Opening Restrictions and Other Aspects of Pharmacies and Drugstores</i>	Jun 19, 1998
7	<i>Fact-finding Survey on Advertising Restrictions and Other Aspects of Professions (Judicial Scriveners and Administrative Scriveners)</i>	Sep 18, 1998
8	<i>Fact-finding Survey on Price Lists Produced by Construction Industry Associations</i>	Mar 19, 1999
9	<i>Fact-finding Survey Report on Distribution of Flat Glass</i>	May 20, 1999
10	<i>Fact-finding Survey on Trade Practices and Other Aspects in Liquefied Petroleum Gas Sales</i>	Jun 23, 1999
11	<i>Fact-finding Survey on Automobile Maintenance Services and Others</i>	Apr 27, 2000
12	<i>Fact-finding Survey on Changes in the Distribution Structure and Use of Information Technology: Focusing on Business-to-Business Transactions of Consumer Goods</i>	Jun 28, 2000
13	<i>Survey on Prices Stated in “Sekisan Shiryo,” “Kensetsu Bukka” and the Like Prepared by Organisations Related to the Construction Industry</i>	Sep 8, 2000
14	<i>Survey on Low Price Sales of Information Systems Procured by Public Offices and the Like</i>	Jan 31, 2001
15	<i>Survey Report on Trade Practices between Financial Institutions and Enterprises: Results of the Questionnaire Conducted from the Perspective of Unfair Trade Practices against Borrower Enterprises</i>	Jul 4, 2001
16	<i>Survey of Competition Conditions and Other Aspects in the Domestic Passenger Airline Business Field</i>	Jul 11, 2001
17	<i>Survey Report on Competition in Service Fields to Which Nursing-care Insurance Is Applied</i>	Mar 13, 2002
18	<i>Fact-finding Survey Report on the Representations of Hot Springs</i>	Jul 31, 2003
19	<i>Survey of Competition Conditions Surrounding the Management and Maintenance of Apartment Buildings: For Realising Fair and Free Transactions</i>	Oct 24, 2003
20	<i>Fact-finding Survey of Subcontracting in Four Business Categories Including Software Production, and the Details of the Amended Subcontract Act: For the Smooth Enforcement of the Amended Subcontract Act</i>	Feb 13, 2004
21	<i>Fact-finding Survey Report on Gasoline Distribution</i>	Sep 22, 2004
22	<i>Fact-finding Survey Report on Home Electric Appliance Distribution: Challenges for Realising Appropriate Transactions</i>	Sep 24, 2004
23	<i>Fact-finding Survey of Funeral Service Transactions</i>	Jul 20, 2005
24	<i>Follow-up Survey of Gasoline Distribution</i>	Sep 29, 2005
25	<i>Follow-Up Survey of Home Electric Appliance Distribution</i>	Sep 29, 2005
26	<i>Fact-finding Survey of Transactions in the Advertising Industry</i>	Nov 8, 2005
27	<i>Fact-finding Survey of Medical Equipment Distribution</i>	Dec 27, 2005
28	<i>Survey of Trade Practices between Financial Institutions and Enterprises</i>	Jun 21, 2006
29	<i>Fact-finding Survey of Ethical Drug Distribution</i>	Sep 27, 2006
30	<i>Fact-finding Survey of B2C E-Commerce such as Electric Shopping Malls</i>	Dec 27, 2006
31	<i>Fact-finding Survey Report on Textbook Distribution</i>	Aug 3, 2007

KOREA

1. Introduction

The Korea Fair Trade Commission implemented the Clean Market Project between 2001 and 2005 in an effort to comprehensively address anticompetitive practices and regulations in specific industries. Market studies were conducted as a preliminary step for implementing the Project.

The KFTC first selected industries for which to implement the Project based on certain criteria. Next, the KFTC conducted market studies on the selected industries using various channels such as document survey, expert opinion and comments from trade associations to find out whether anticompetitive practices or regulations exist there.

Based on the outcome of market studies, the KFTC launched self-initiated investigation into enterprises whose acts were suspected to have violated competition law and imposed corrective orders or surcharges on them in case it decided that their conducts were illegal. In addition, when the KFTC found during the self-initiated investigation that certain regulations had been restraining competition in the concerned market, it recommended the regulatory authorities to abolish or improve such anticompetitive regulations.

2. Approach

2.1 *What criteria do you use to select appropriate markets to study?*

The KFTC considers the following 3 criteria to select 10~12 markets on an annual basis for a comprehensive study:

- markets where anticompetitive practices and regulations are prevalent and thus promoting competition is needed;
- markets where consumer complaints are frequently filed;
- markets where monopolistic & oligopolistic structure is held firmly in place.

For instance, in 2001, the KFTC selected private education (private education institution, school uniform manufacturing and distribution), IT (telecommunications, broadband Internet), medicines & pharmaceuticals, and construction (cement, concrete) sectors for market studies. That's because the KFTC recognised that among all sectors which take account for a large share of the national economy and is closely related to people's daily lives, these sectors are where legal violations and consumer complaints most frequently arise.

Sectors for Market Studies

Year	Sectors
2001	Telecommunications, broadband Internet, medical service, medicines, wedding & funeral services, concrete, newspapers, broadcasting, school uniform
2002	Gas, credit card, nonlife insurance, TV shopping channels, real estate agency, house management
2003	Power generation, banking, instalment finance, online shopping malls, residential-commercial building construction, advertising, certificate-based professions
2004	Broadcasting, finance, construction, ports & harbours, real property sales, private education, energy, medicines & pharmaceuticals, real estate, construction materials, textile
2005	Finance, construction, ports & harbours, real property sales, private education, energy, medicines & pharmaceuticals, real estate, construction materials, textile, alcohol

2.2 *How do you go about the process of gathering data and other information for the study?*

The KFTC collects data and other information for market studies from the following channels. First, there is data in the public domain. It includes written documents such as mining and manufacturing industry survey by the Korea National Statistical Office and trade statistics by the Korea Customs Service, corporate reports, data available at online homepages, news reports by the media and market analysis data by public organisations. Next, there is classified data obtained from other government organisations and regulatory authorities or data produced over the course of the complaint-filing or case-handling process within the KFTC. Lastly, there is data obtained from surveys or meetings for discussion with experts, enterprises or trade associations of related industries, consumers or consumer organisations.

2.3 *Do the market studies done by your competition authority (or authorities) have distinctive features in comparison to those done in other jurisdictions? If so, what are those features?*

The KFTC's market studies function as a preliminary step for implementing major policies such as the Clean Market Project. In other words, our market studies are distinctive in that they have never been done separately from major policy implementation.

As mentioned earlier, based on the market study outcome, the KFTC launched self-initiated investigation into enterprises whose acts were suspected to have violated competition law. The KFTC imposed corrective measures regarding uncovered illegal acts, while it recommended the regulatory authorities to abolish or amend the detected anticompetitive regulations.

Meanwhile, the KFTC assigned market studies to each of its Bureaus according to sectors and industries without establishing a dedicated unit. Under these circumstances, when a Bureau with investigation power detected competition offenses in the studied sector or industry, it carried out self-initiated investigation along with the market study. And in many cases, such market studies directly triggered case investigations.

Corrective measures and regulatory improvement through self-initiated investigations triggered by market studies are as follows.

Sector	Result
Private education	Correction of price cartel and joint purchase obstruction by school uniform manufacturer and distributors
IT	Amendment of unfair subcontract between mobile service providers and their sales agencies
Medicine & Pharmaceuticals	Correction of resale price maintenance by pharmaceutical companies and drug wholesalers, correction of pharmaceutical companies' acts to provide financial assistance to hospitals
Energy	Correction of cartel by LPG importers, correction of abuse of superior bargaining position in power generation sector
Finance	Correction of cartel and unfair subcontracts by credit card and nonlife insurance companies
Distribution	Correction of unreasonable advertising and abuse of superior bargaining position by TV home shopping enterprises
Certificate-based profession	Correction of fee cartel by trade associations for certificate-based professions including judicial scrivener, certified public accountant and architect

For example, in the school uniform manufacturing and distribution sector, corrective measures and regulatory improvement have fundamentally changed sales and purchase patterns, leading to substantial achievement of price decrease. More specifically, the KFTC cracked down on price cartels in school uniform manufacturing and distribution market and improved regulations to promote school uniform joint purchase such as drawing up guideline preventing obstruction of school uniform joint purchase. These efforts are said to have led to 40% reduction in school uniform price.

2.4 *What human and financial resources (approximately) have you devoted to market studies (including those for which consultants have been hired)? Have the results been worth the resources spent? Please explain why or why not.*

As market studies served as a preliminary step for implementing the Clean Market Project, each Bureau of the KFTC conducted them along with its unique task, without extra input of human or financial resources.

Market studies have made a great contribution to the KFTC's implementation of the Clean Market Project, by enabling the KFTC to better understand industrial features and obtain information including whether there are anticompetitive regulations or practices distinctive in the concerned industry. However, as market studies were additional task for each Bureau of the KFTC, there were operational problems such as increased workload.

3. Relationship between Enforcement and Market Studies

3.1 *What complementarities exist between enforcement and market studies?*

As considerable part of the KFTC's law enforcement is initiated by individual complaints, it is difficult to expect systematic and comprehensive law enforcement for a certain industry or sector. The Clean Market Project mentioned earlier is the part of the KFTC's effort to depart from case-by-case piecemeal approach and instead, seek an industry-based comprehensive approach so as to raise efficiency of competition law enforcement. In this regard, market studies as preliminary step for the Project contributed to the KFTC's efforts to understand sectoral and industrial features and accumulate related information, thereby complementing law enforcement activities that would otherwise have become piecemeal and one-off events

Comparison between individual law enforcement and Clean Market Project

Category	Individual law enforcement	Clean Market Project
Implementation direction	Correction-oriented enforcement regarding individual legal violation	Comprehensive law enforcement system through sectoral regulation overhaul and correction measures
Recognition method	Ex-post recognition through complaints or self-initiated investigation regarding individual cases	Ex-anti recognition through market studies, expert opinion, overseas cases and consumer counselling
Investigation method	Enterprise-based investigation	Market/industry-based investigation
Inspection objects	Enterprises suspected of violating law	Related enterprises and trade associations, consumers and consumer organisations, related regulations and statutes
Case-handling method	Correction of individual illegal acts	Comprehensive and fundamental improvement from correction of illegal acts to regulatory improvement
Duration period	short	Long (1 year in minimum)

3.2 *What best practices should be followed when a market study turns up evidence of a competition offense?*

As mentioned earlier, as a result of market studies, in case the KFTC decided that there is competition offense to correct, it conducted self-initiated investigation into the suspected enterprises, imposing corrective measures including surcharges on individual offenses.

4. Strategies for Using Market Studies

4.1 *Are market studies useful instruments? What purposes do that serve?*

Considering that anticompetitive regulations and anticompetitive practices by enterprises are the biggest impediment to a well-functioning market, it is hard to expect effective market improvement if only one of the two issues is tackled.

Market studies have served as useful instruments for implementing the Clean Market Project which dealt with the above two issues effectively by offering extensive and overall information including the level of competition, anticompetitive regulations or practices and opinions of market participants regarding selected industry or sector.

In addition, market studies were useful in inducing voluntary compliance with competition law from enterprises. While some competition offenses are intentional, many offenses are committed due to low awareness of competition law. In fact, through the process of collecting comments from enterprises and trade associations as part of market studies, their awareness of competition law has been raised, leading to prevention of competition offenses.

4.2 *Another possible use for market studies is to wield them as a tool for effecting regulatory and legislative reform. Have you found them to be effective for that purpose? Why or why not?*

Market studies are effective in enhancing efficiency of regulatory reform. Anticompetitive regulations or practices are barely revealed and addressed through individual law enforcement. This recognition has made competition authorities commit considerable resources to conduct market studies, regularly or if needs arise, on certain industries or markets.

For its part, the KFTC recommends regulatory authorities to improve anticompetitive regulations or practices detected by market studies and subsequent self-initiated investigations. Certainly, the regulatory authorities have no legal obligation to follow such recommendations. But the KFTC often induces indirectly them to do so by wielding self-initiated investigations into related enterprises or corrective measures on them in parallel with recommendations.

MEXICO

This contribution discusses Mexico's Federal Competition Commission's (CFC or Commission) experience with undertaking market studies and implementing their recommendations. We have based our comments on the five most recent market studies, all of them concerned with regulated sectors: technological convergence (2005) and content provision in telecommunications (2006), competition in the provision of individual retirement accounts (2006), retail banking services (2007), competition in airport services (2007), and the latest market study dealing with regulation in foreign trade, published in May 2008. This document is divided into four sections: the first defines what the Competition Commission regards as a market study, the second outlines the general purpose in undertaking these studies, the third section is a summary of successful implementation strategies that the CFC has used, and last is a description of the five opinions mentioned here and their implementation to date.

1. Scope of market investigations

Although market studies are issued as non compulsory "opinions" by the chairman of the Commission, they have a distinct purpose and a more detailed level of analysis than "regular opinions", which are also issued by the chairman but generated on a regular basis by the Planning and International Affairs Unit of the Commission. "Regular opinions" are drafted in response to legislative proposals or drafts of executive acts that are considered to have an effect, either positive or negative, on the process of competition.

In contrast, market studies are in-depth opinions which contain detailed analyses of competition conditions in specific goods or services markets and which elaborate on a particular industry's structure and its regulation. They include a set of recommendations aimed at the Executive (regulator or Ministry in charge), the legislative branch (possible changes in legislation that could be enacted either by the Chamber of Deputies or the Senate) and observations on the industry's structure and behaviour. General observations are sometimes added with the aim of improving competition conditions in that industry, and may also include a diagnosis of existing problems which could lead to the opening of investigations and result in subsequent enforcement actions. However, the CFC's experience has mostly been the opposite: while pursuing enforcement actions it has become aware of more pervasive competition problems in a particular market. These problems are not always limited to conduct by particular economic agents, but arise from an anticompetitive regulatory framework, and market characteristics conducive to anticompetitive behaviour (e.g. informational asymmetries, high barriers to entry, etc.). These observations prompt a market study which delves into the market or industry in greater detail and which may be conducted in parallel to enforcement actions with the aim of making proposals to improve the structural conditions of markets.

2. Purpose and use of market investigations

Over the past four years the Commission has increased its use of these in-depth opinions to promote more rapid change in competition conditions. Among the purposes of these studies are:

- To better understand the structure and functioning of complex markets (e.g. telecommunication services or retail banking services).
- To help clarify whether inefficient markets result from anticompetitive behaviour that requires enforcement actions or from regulation that raises barriers to entry, exit or expansion, or from imperfect information that limits market growth and participation, i.e. where concerns exist that a given market is not working well for consumers, but where it is not clear if changes in regulation affecting competition or consumer rights is an appropriate response at the moment or whether enforcement action is needed.
- To set an agenda or establish a work plan to find a solution to regulatory problems that affect competition, and which may underlie recurring complaints of anticompetitive behaviour in a given market.
- When competition problems exist but these problems are not contained in the behaviours described in the Federal Law of Economic Competition (LFCE), i.e. when any feature, or combination of features, of a market prevents, restricts or distorts competition.

3. Implementation

The CFC has found that success in implementing recommendations derived from market studies depends on a strategy that tackles four different fronts:

- Designing a communications strategy working with media to create awareness among the general public in order to start a debate about the issues identified in the market study.
- Building awareness among market participants and consumers through outreach and advocacy efforts, either before (e.g. through public fora) or after the study is published.
- Coordinating with other regulators to first identify and then possibly resolve the problems uncovered in the market study. Initial coordination involves collaboration to gather information and possibly obtain technical assistance from the sectoral regulator, to better understand the functioning of the market.
- Lobbying with the executive and legislative branches. At times lobbying efforts occur prior to the publication of the market study, particularly when there is collaboration with sectoral regulators in the information gathering stage. Mostly, however, lobbying efforts occur once the study has been made public and are aimed at convincing regulators and law makers about the need to push for reforms. These reforms do not necessarily require the competition agency's direct intervention either through enforcement actions or by issuing binding opinions.

While these represent the central elements that the Commission has focused on when pushing for the implementation of its recommendations, other elements that have contributed to successful implementations include:

- Ensuring that the analyses contained in these studies are technically sound and that recommendations are also based on the technical elements contained in the study.
- Isolating political issues from public discussion of CFC's proposals.
- Fostering transparency about the subject matter being analysed and demonstrating openness to hear opinions from all interested parties. In the recently issued foreign trade opinion the Commission organised a discussion forum as part of its stock-taking exercise.
- Building a reputation for independent decision-making. This has meant that to date, the CFC elaborates all of its opinions "in-house". This situation is changing as the Commission is experimenting with partial outsourcing of its market studies. The Toolkit project, which is being implemented in conjunction with the OECD, is an exercise that the Commission is currently using to semi-outsource the analysis of the industry and sectoral regulation to academic experts in the field with the CFC as overseer. As has always happened, technical recommendations in this project and in future opinions or market studies on competition issues remain with the competition authority.
- Building momentum to push for rapid change.

4. Recent studies

There are 5 recent studies that we briefly discuss in this section. All were written by the CFC over the past 3 years with the final opinions sent to the Senators and Congressmen heading the specialised committees dealing with each subject (e.g. telecommunications, competitiveness, economy), the Ministers in charge of policy making and, in some cases oversight, of these sectors (e.g. Finance, Economy, Transport and Communications) as well as sectoral regulators.

4.1 *Telecommunications: convergence (October 31st, 2005) and contents (November 28th, 2006)*

In its opinion on convergence of telecommunications services (voice, data and video) the CFC identified the potential for future competition in the provision of these services regardless of current infrastructure ownership. It considered that the different players in these markets should be able to compete in the supply of these services and that regulation should foster technically feasible convergence, provided the following conditions were met: (1) non-discriminatory and efficient interconnection and interoperability, (2) number portability for local service areas, (3) separate accounting for the provision of different services to avoid cross subsidies, (4) auction of frequencies and the supply of broadband through power line communications in non-discriminatory conditions and at prices equal to long run marginal costs of the facility used, (5) requiring the CFC's opinion in cases where the same economic agent has cross ownership of infrastructure.

The CFC's opinion regarding content provision included the following recommendations: (1) to ensure neutral and consistent regulation in terms of access to content, (2) to allocate radio electric spectrum in an efficient manner, including the allocation of an additional open TV channel, (3) to guarantee access to open TV content (*must offer*) and to open TV content to transmission media (*must carry*), and (4) to promote the development of independent producers in open TV channels.

Both of these opinions were used as the basis for legal amendments to the laws of telecommunications and of radio and television. They have also been used as the basis for administrative procedures aimed at allowing number portability and interconnections and interoperability that will enable the provision of triple play services. Once these opinions were published, the CFC conducted meetings with each of the

recipients of the opinions (ministers, regulators, congress members) and made public statements about its position to explain the effects of its recommendations. Also, in line with the CFC's opinions, the Commission has recently approved mergers between TV content providers and cable operators aimed at consolidating their presence in a "converged" market; in those cases the Commission has made its approval conditional on the parties agreeing *must offer* and *must carry* provisions.

4.2 Pensions (November 22nd, 2006)

This was the Commission's first experience in working collaboratively with the sectoral regulator to obtain detailed information on the pension funds system. The collaboration was limited to information exchanges and technical assistance, as the opinion was not jointly issued and represented the position of the Commission alone. Key to this opinion was finding an appropriate moment to make it public as it coincided with a change in government and the CFC wanted to ensure that its analysis should not be politicised. The opinion contributed to give momentum to the discussion of a legal amendment to the pension funds system, introduced by the new legislature.

Among the recommendations included in the CFC's opinion on pension funds administration were the following: (1) to separate the administration of individual accounts from the advisory services offered by Afores (pension fund administrators) to increase value for individuals; (2) to allow for greater flexibility in the pension investment scheme; and (3) to create a mechanism that protects the savings of uninvolved individuals, namely the transitional generation which has a guaranteed pension by law.

4.3 Retail banking services (April 24th, 2007, CFC Retail Banking Services Opinion)

The CFC's main considerations in this market were: the lack of access to banking services for a large portion of the population; an oligopolistic structure particularly in those services where non-bank intermediaries were underrepresented; a high degree of product differentiation, scant price competition, and high barriers to entry; lower operative costs mostly reflected in higher returns, but not reflected in better conditions for consumers; difficulty in switching among service providers in spite of price and service differentials; and a lack of price transparency. The CFC concluded its opinion with a set of public policy recommendations aimed at promoting competition principles in retail banking markets. Among these recommendations were: (1) increasing transparency to facilitate comparisons between banking products, making it legally binding for banks to offer a basic, standardised, comparable service, together with its own individual services, and strengthening regulatory powers aimed at protecting and promoting consumer rights; (2) facilitating the switching banking of accounts among different banks, (3) reducing minimum capital requirements to international levels, (4) ensuring non discriminatory access for market participants in retail payment systems, (5) strengthening criteria used to determine the need for price regulation when there is a lack of competition conditions, and (6) strengthening the autonomy of sectoral regulators, in particular the bank overseer and the commission in charge of protecting the rights of financial services consumers.

The Commission engaged in technical discussion and information gathering with the central bank, sectoral regulators that report to the ministry of finance, as well as individual banks. When its opinion was made public the Commission called a press conference. Once the opinion was issued, the implementation process was similar to that of telecommunications, where the CFC actively pursued meetings with Ministers, congressional members, regulators and economic agents to explain its opinion and its positive effects on competition. In contrast with the pension system opinion, regulators who collaborated with their expertise and information were able to foresee the objectives of the opinion and pushed for changes in legislation while the opinion was still being drafted. In essence, this meant that most of the opinion's recommendations were implemented very quickly.

4.4 *Airports (October 1st, 2007, CFC Airports Opinion)*

After analysing the effects of regulatory changes introduced in 1998 and aimed at allowing private investments in airport services, the Commission issued 8 recommendations: (1) introduce economic efficiency criteria among the principles for tariff regulation for new concessions, through changes in the law and by requiring an opinion from the Commission; (2) include commercial income (income derived from economic activities that are not directly related to airport services) among the income considered within the principles for tariff regulation for new concession-holders; (3) establish an independent sectoral regulator and increase the transparency of airport regulation, particularly the review of its five-year program; (4) promote greater efficiency in the mechanism that assigns take-off and landing slots, which currently favour incumbents - for example, by assigning these slots through public auctions; (5) promote greater competition between airports, by establishing as a condition that the CFC grants a favourable opinion to participants in auctions for public concessions for airport management, and by reducing public participation in airport management; (6) eliminate the exclusivity of ASA, the government's airport services company, in the provision of fuel in Mexican airports, while allowing access to key infrastructure that should enable the participation of other economic agents in the provision of this input; (7) eliminate entry restrictions for taxi cab services to and from airports; (8) closely oversee vertical relations between airports and airlines to avoid competition problems.

The reaction to the opinion by the Ministry of Transport and Communications, who is also the sectoral regulator (through a General Directorate within the Ministry), has not been positive. The opinion highlighted the importance of creating an independent regulator, separate from the Ministry, and of eliminating the exclusivity of a government-owned enterprise, controlled by the Ministry, in providing gasoline to all airports in the country; these recommendations may not be readily accepted by the Ministry. In contrast, public opinion and, in particular, new market entrants (e.g. Low Cost Carriers or LCCs), have generally favoured the CFC's opinion.

In promoting its opinion, the CFC noted that it was part of its larger efforts to generate benefits for consumers through its merger review process which promoted entry of LCCs and prohibited the concentration between the two major incumbents in the market, Mexicana y Aeromexico (2006), over the position of the Minister of Transport and Communications. The CFC emphasised the final objective of these recommendations was to enhance the benefits that consumers were already experiencing from its previous efforts, namely lower prices and more destinations for air transport users. Also, the Commission emphasised the importance of lowering fuel costs for airlines, and noted that its recommendation sought to allow more service providers in the supply of fuel, which would likely have a positive impact in this respect.

4.5 *Foreign trade (May 19th, 2008)*

In its most recent opinion on regulation in foreign trade, the Commission issued the following recommendations: (1) to unilaterally eliminate tariffs unless an argument could be made that social welfare is increased by maintaining a particular tariff, as well as decreasing the number of tariff lines to discourage tariff dispersion; (2) to simplify customs procedures and introduce regulatory improvement measures to the customs law; (3) to reduce entry barriers in the provision of customs services by eliminating exclusivity in the provision of customs services and auctioning merchandise handling services through a competitive process, and by allowing for the creation of new organizations in charge of verifying compliance of foreign merchandise with domestic standards; (4) to strengthen infrastructure to facilitate foreign trade; and (5) to strengthen the institutional framework that regulates foreign trade, for example by allowing the existing interministerial commission in charge of foreign trade oversight to issue binding opinions and to include in this commission the consumer protection agency.

This opinion is the CFC's first experience in consulting private and public through open fora. The Commission held one forum in its offices and invited private parties that participate in foreign trade procedures, such as customs agents and trade chambers and associations, the Ministry of Economy, and the Ministry of Finance. During the forum, each party presented its opinion on the regulatory framework and practices as well as their proposals for improvement. The CFC took this information into consideration when elaborating its independent opinion. As it did before, the Commission sent its opinion to the Ministries involved, congressional committee heads and called a press conference.

4.6 *Final considerations*

Market studies represent a useful tool for competition advocacy. In the CFC's experience, they have been an important instrument that has helped influence the policy making process and, in some cases, has been decisive in pushing for reform. In addition, the accompanying communication strategy triggered by publishing of the market study serves to position competition principles at the centre of public discussion.

Furthermore, market studies have served as a complement of enforcement activities, with the aim of solving competition problems by modifying public policies and the regulatory framework, in order to achieve market structures more favourable to competition.

NETHERLANDS

1. Introduction

This paper describes the experience of the NMa using market studies as a tool for competition law enforcement and for exercising its regulatory tasks. First, the paper discusses the usefulness of market studies (2). Second, the paper explains the aims pursued by market studies (3.). This is followed by describing some practical aspects for conducting market studies (4.). Fourth, the experiences of the NMa in using market scans in the energy and financial market sectors are illustrated (5.). All this is rounded up by some concluding remarks (6.).

2. Market studies as a tool

Market studies are important for the enforcement of competition law and the regulatory tasks of the NMa. The studies carried out by the NMa may generate results that increase insight into possible infringements of the Competition Act and other acts that the NMa enforces. If a particular market study provides evidence of a cartel or abuse of a dominant position, the market study may be used as a starting point for further investigation. When this is the case, the NMa first collects additional relevant market information from different sources. With all the information gathered a research team draws up a market/risk matrix and a proposal for the investigation. When the infringement is sufficiently concrete the research team starts the formal investigation.

The NMa has formal powers to conduct market studies. The advantage of this is that market participants must provide information that is necessary to conduct a good market research. When using its power, the NMa takes into account the administrative burden on market participants as well as the proportionality of the information requests to the issue at hand. Until this moment, no formal complaints have been received with respect to the use of formal powers for market studies.

Although market studies in the energy and transportation sector are primarily focused on regulation of the market, e.g. infrastructure bottlenecks, competition issues are also focused upon. As a result, the work is mainly done by the staff of the Office of Energy Regulation (as of June 2008 called the “Energiekamer”) and the Office of Transport Regulation (“Vervoerkamer”) which are part of the NMa, but in close cooperation with colleagues from the Competition Department. In some cases, results of energy studies have been used in antitrust cases as well as in merger cases. The total capacity spent on the energy studies is approximately 2-4 staff per year.

3. The aims of market studies

Market studies serve different purposes. They are useful instruments to identify and address potential competition issues and market failures. Market studies are aimed at identifying and eliminating structures and practices that restrict competition. The insight obtained through the market studies will also provide support in the agency’s assessment of concentrations and can be used as an alternative instrument of enforcement.

In brief, the main objectives of market studies are:

- To contribute setting the priorities for specific investigations in a sector. Market studies carried out by the NMa generate results that increase insight into possible infringements of the Competition Act. Based on a market study the NMa may determine that further investigation is necessary. And, as indicated above, this may lead to a formal investigation.
- To increase awareness of the standards contained in the Competition Act and the importance of compliance by structurally monitoring a sector and the publication of insights and analysis. This results in an autonomous enforcement effect.
- To support the assessment of concentrations.
- To identify market failures. Based on a market study, the NMa may adopt a preliminary view that the market does not function properly.
- To provide guidance to policymakers (advocacy). Not all restraints on competition can be attributed to infringements of the Competition Act. Sometimes they are caused by other factors, such as sector-specific legislation and regulations. The NMa reports these insights to ministries and other authorities and in this way the studies provide starting points for policy recommendations.
- To mobilise or deepen knowledge in specific areas so as to increase the NMa's pro-active operations;
- To have a tool to press for regulatory and legislative reform. For example, both the Office of Energy Regulation and the Office of Transport Regulation use market studies to provide an insight into the development of the market and to obtain an early indication of any bottlenecks that impede further development. Based on these monitors policy recommendations on necessary improvements in the operation of market forces will be formulated.
- To select relevant subjects for the NMa Agenda of the coming two calendar years. The NMa wants to concentrate its enforcement and regulating activities on those infringements that cause important negative economic effects or negatively influence the functioning of the markets.

3. Conducting market studies

The NMa uses a wide range of sources to identify sectors of the economy in which market studies may prove valuable. Those sources include:

- Information businesses are obliged to provide by law. These obligations exist with regard to electricity and gas markets and transportation;
- Information received in the course of enforcing the Competition Act, including the assessment of mergers and acquisitions;
- Complaints and leads received from market participants;
- Signals from market participants;
- Public information sources;

- Interviews.

Based upon the information obtained from the sources mentioned above, the NMa selects those sectors of the economy in which it wants to conduct further study. This selection is based on the following criteria:

- Value for investigation programmes;
- Tactic prioritisation;
- Contribution to the agency's knowledge base.

If information is needed in the course of enforcement activities or the assessment of mergers and acquisitions, market studies will always be conducted. Also in case of a statutory duty to monitor markets no selection will take place.

After the NMa has selected the most promising research projects, it uses a number of different approaches to collect information. Desk top researchers obtain information from public sources. The NMa will also conduct interviews, meetings, and telephone surveys, or send questionnaires to appropriate stakeholders in order to gain a full understanding of the functioning of the particular market and shed light on competition issues raised. When questionnaires are sent, usually there will be a limited response period. Adherence to this timetable is highly desirable if the study is to be completed on time. In all cases, stakeholders are encouraged to participate by providing information and share their views. This participation contributes to reliable conclusions.

Whether or not it is useful to seek the involvement of market participants depends on the goal of the market study. If the study is to enhance knowledge or to supervise a particular market then involvement is useful, because market participants can provide factual information and their view of the market. On the other hand, if the market study is conducted in the course of enforcement activities, then it might be counterproductive as market participants might be tempted to destroy evidence of possible infringements of competition rules.

As is clear from the above, the NMa uses both empirical evidence and anecdotal evidence in its market studies. The advantage of using empirical evidence is that it gives factual information of the situation in a particular market. The disadvantage is that empirical evidence is often difficult to obtain because such information is usually confidential. Anecdotal evidence may provide additional views of a market. Such information contributes to an impression, however, it does not provide strong evidence. Therefore, a formal investigation cannot be started on anecdotal evidence only.

The NMa sets timetables and milestones depending on the purpose of the market study and the expected time it takes to conduct a study. Depending on the span of the research project, usually two or three persons are part time engaged in a research project for a few months. It should be noted that it is difficult to assess how much resources should be allocated to market studies. Particularly in the financial sector, where infringements are very hard to detect, contribution to the knowledge base and deterrence may be as important as the generation of leads for formal investigations.

Not all the market research is carried out by the NMa itself. The NMa may outsource specific research, or parts of it, to external consultants who will be selected by a procurement process. The NMa may decide to outsource because it does not have the knowledge or the capacity to conduct the research itself. It may also outsource because the NMa itself is subject of a research. This was the case in a market

study into entry barriers for suppliers to the retail market for energy.¹ In selecting potential bidders, the NMa takes various selection criteria into account. Among these are: the knowledge of the external consultants, the proposed approach of the bidder, costs, references, and potential conflict of interests. Moreover the NMa will ensure that the bidders are able to handle commercial confidential information in accordance with provisions of confidentiality.

Monitoring work normally is carried out by NMa staff. Nevertheless, sometimes external consultants are hired because internal capacity is not sufficient to meet deadlines or to satisfy internal quality standards on specific themes. In general, the NMa believes that monitoring activities should be carried out by internal employees as it belongs to the key activities of the agency.

The main advantage of outsourcing research projects is that the NMa can make use of the expertise of the external consultant. Moreover, it saves internal capacity. The disadvantages are the out of pocket costs and the time consuming supervision of the external research team in order to get the appropriate results. However, in the case of the survey of the Railway market, which is a relatively small market, the Office of Transport Regulation of the NMa prefers not to outsource the research since (personal) contacts with market participants are very relevant for a regulator. These contacts can be used in other research projects and give a better insight into current developments and issues in the market.

Whether the NMa publishes a report on its findings depends on the purpose of the market study. Results will be published if, for example, the purpose of the market study is to increase awareness of standards contained in the Competition Act and the importance of compliance with the law. As such, these studies raise interest in the competition issues and may lead to further signals of infringements. They may equally well prevent infringements from occurring. On the other hand, market studies that generate results that increase insight into possible infringements will not be published, for obvious reasons.

5. Experiences

Before 2003, the NMa performed market studies in various sectors of the economy on an *ad hoc* basis, e.g. to support its assessment of mergers and acquisitions and in order to increase insight into possible infringements of the Competition Act. However, since 2003, the NMa is performing market studies on a structural, institutionalised basis, in particular regarding the financial, energy and transport sectors. The Financial Sector Monitor team has published several annual volumes as well as carried out individual market scans. Also the Office of Energy Regulation and the Office of Transport Regulation monitor developments within the energy and transportation markets respectively on a permanent basis.

In the following the energy and financial market studies are discussed as prime examples of the NMa's experience in using this tool.

¹ A perceived potential entry barrier was the supply licence for energy that companies need to supply energy to retail consumers. The NMa is responsible for granting these supply licences.

5.1 Energy

On the basis of the Electricity Act and the Gas Act, the Office of Energy Regulation promotes competition in the energy markets, monitors these markets and reports its findings to the Minister of Economic Affairs annually.² As a consequence the NMa annually publishes market studies on the wholesale electricity and gas market and on the retail energy markets. These market studies serve three goals:

- To inform businesses by distributing useful information which is not generated by the market, for instance on the availability of infrastructure;
- Deterrence, as market parties (having dominant positions) receive signals that the NMa is closely monitoring their behaviour and results;
- Advocacy, as policy options are explored to improve competition or the liquidity of energy markets.

Within the energy sector the NMa uses various data sources to assess the functioning of the market. For instance, electricity producers are required to submit hourly data on production and available capacity, while Transmission System Operators are obliged to provide hourly data on the availability and use of transport infrastructure. In addition to this formal data request, the NMa conducts several surveys, such as a survey among traders and shippers to find out their experiences with the liquidity of the market. The NMa also conducts an annual survey among Dutch retail energy consumers regarding their perception of the energy markets. Complaints and questions submitted by consumers and companies to *ConsuWijzer* or *Bedrijvenloket*³ are another valuable source of information about possible shortcomings in (energy) markets. Finally, public as well as commercial data sources, like Platts and Bloomberg, are used to obtain data on prices.

Market parties are involved in the energy market studies of the NMa. They not only submit the data requested by the NMa, but also participate in discussions on the analysis of these data. For instance, a draft version of the Energy Market Monitor is discussed in a consultative group which includes representatives of producers, traders and interest organisations. The final report, however, is not discussed with market parties in order to stress the sole responsibility of the NMa.

The market studies in the energy sector have been effective means to develop new regulatory standards. For instance, in recent studies on the wholesale gas market, the NMa pointed at severe bottlenecks in the infrastructure used for conversion of gas quality. As a result of the market study the NMa has imposed new standards for the allocation of this infrastructure. This will likely lead to more competition on the Dutch market for low-quality gas in the near future. In addition, in order to reduce the dominant position of established parties in the Dutch gas market, the NMa has strongly advocated the development of a liquid market place called the TTF. The regular market studies have underlined the high level of concentration in the Dutch electricity market. This has led the NMa to promote the integration of energy markets in the North-Western European region with foreign regulators. Published studies conducted by the Office of Energy Regulation may also influence policy making. A sharp rise in metering tariffs for energy consumers signalled by the Office of Energy Regulation in one of its market study reports, for example, led to a call by Dutch Parliament to curb metering tariffs. This subsequently led to new regulatory measures.

² Section 5(3) of the Electricity Act of 1998.

³ *ConsuWijzer* and *Bedrijvenloket* are easily accessible entry points to the NMa for consumers and businesses that wish to submit questions and complaints about markets or specific market participants.

In a separate market study in 2007, the NMa investigated the origin and spending of profits of network operators over the period 2001–2007. The study demonstrated the necessity of regulation of network activities by energy firms. The main conclusion was that regulation of network operators by the NMa has generated total savings of € 1.9 billion on consumers' bills. However, the investigation also revealed that the regulatory framework could have been even more effective. In 2004 and 2005, the energy companies made a total of € 4 393 million more profit than the NMa considered to be reasonable. Although these profits were made within the existing legal framework, the NMa has decided to tighten the regulatory framework to prevent major differences between reasonable and realised profits. Therefore, in the summer of 2007, the NMa has published strict new draft regulatory methods for the period 2008–2010.

5.2 *Financial sector*

The Financial Sector Monitor (FSM) aims to signal and outline competition risks in the financial sector.

The following objectives of the FSM 2006 can be identified:

- Publishing has an autonomous enforcement effect;
- Guidance for the sector;
- Advocacy vis-à-vis fellow competition authorities and policymakers;
- Contribute to prioritisation in forensic research;
- To provide useful information for merger assessment;
- Convey the NMa's overall vision on the sector;
- To facilitate the NMa's dialogue with parties in the financial sector.

On a general level the FSM also facilitates dialogue between the NMa and various interested parties active in financial services. First of all, these include parties that are subject to competition enforcement within the meaning of the Competition Act. Banks, insurers, investment companies and pension funds are the main players in the financial sector. The Monitor also contributes to coordinating policy and performance within the 'enforcement triangle' in the financial sector. Generally speaking, the triangle comprises:

Prudential supervision with a view to stability (De Nederlandsche Bank [DNB]; the Dutch central bank) supervision of conduct with a view to transparency and market integration (Financial Markets Authority [AFM]) market supervision with a view to competition (Netherlands Competition Authority [NMa]). Such supervision may concern market structure as well as market conduct. Careful coordination among the three enforcement and regulatory authorities stimulates the interest for each of these supervision objectives and contributes to a properly functioning of the financial sector.

The FSM research in 2006 assessed the level of competition on the market for debit card contracts on the basis of indicators of both the behaviour of parties and the market outcomes. In relation to behaviour, the searching and switching behaviour of retailers was considered. The respondents in this research (purchasers of debit card contracts) originate from various branches of industry (automobile/repairs, food retail, non-food retail and the hospitality industry). Although this group is broader than the retail trade, the group is referred to in this chapter as retailers. The data for this research were collected through telephone

surveys, questionnaires, and data provided by banks. The study revealed that approximately 12% of retailers with a single contract reconsidered their contract this year and considered switching to a different bank. Ultimately more than 5% of the retailers entered into a contract with a different bank. Compared to a previous research, the switch rate had increased slightly (from 3% in 2004 to 5% in 2006). The most important reasons for switching are lower debit card tariffs and a better relationship between the customer and the bank. Product bundling with other products and services formed less of a barrier for retailers who consider switching to a different bank compared to the findings of the research in 2005. However, in contrast to retailers, the banks have not yet been actively involved in acquiring new customers. On balance, no major shifts occurred in the number of debit card contracts per bank.

Moreover, the market study revealed that the average tariffs of debit card contracts which banks charged retailers fell compared to 2005. This fall is a direct consequence of the one eurocent discount in the Payment Services Covenant. Even if this discount is excluded, the total tariffs of debit card contracts slightly fell. This fall is mainly the result of the fall in the tariffs of single contracts.

6. Concluding remark

The experience of the NMa with market studies is positive.

In the areas in which the NMa is obliged to monitor certain sectors, market studies proved to be a very useful and effective tool in developing market knowledge. This in turn has allowed the NMa to improve its enforcement and supervisory efforts. Market studies demonstrated also to be highly useful for advocacy and guidance purposes as well as creating general awareness of competition rules.

Finally, market studies play a role in detecting potential competition law infringements. Accordingly, the NMa would support a closer cooperation between NCAs by linking up market studies performed by other NCAs and the European Commission in order to obtain a better understanding of markets on the European level.

NORWAY

1. Legal framework

The Norwegian Competition Authority (NCA) enforces the Norwegian Competition Act of 2004¹. The primary tools of the Act is section 10 and 11 (equivalent to Article 53 and 54 of the EEA Agreement and Article 81 and 82 of the EC Treaty) and merger control under section 16 (similar to Article 57 in the EEA Agreement). Additionally, the Authority occasionally uses its ability granted in section 9 to point out anti-competitive effects of public measures and proposals. The same section also grants the NCA the authority to effectuate measures to increase market transparency. If it is deemed necessary to promote competition in specific markets, the NCA can also use its ability granted in section 14 to intervene against terms, agreements or actions that constrain or may constrain competition contrary to the objectives of the Norwegian Competition Act.

2. Use and purpose of market studies

The NCA uses market studies in situations where concerns exist that a given market is not working well for consumers, but where competition enforcement action according to section 10 or 11 not appear to be an appropriate response at the moment.

A market study can lead to:

- enforcement action according to section 10 or 11 if appropriate,
- recommendations for changes to laws or regulations or effectuation of measures for enhanced market transparency according to section 9,
- an intervention according to section 14, or
- advocacy or awareness campaigns.

In addition, market studies are used to build competence; to give economists and lawyers, i.e. case handlers in the respective market sections of the Authority, an in depth knowledge of priority markets.

The recommendations contained in a market study, provided reasons for concern can be raised, will be based on the specificities of the market and its regulations, a thorough competition economics analysis and understanding of competitive potential and constraints of the market. In addition (if relevant), the recommendations will be based on best practice and experience from other countries comparable to Norway on key factors.

1

http://www.konkurransetilsynet.no/portal/page?_pageid=235,471152&_dad=portal&_schema=PORTAL&_menuid=13066

The NCA will argue that having a reasoned opinion on how to achieve more efficient competition in a market characterized by competitive concerns is particularly important for a small open economy like Norway, which is particularly vulnerable to such distortions.

So far, the NCA has not evaluated the impact of conducted market studies *ex post* on a systematic basis. However, and as elaborated somewhat more below, the NCA will have a strengthened focus on *ex post* (impact) market studies in the future.

3. Selection of market studies

The market studies conducted can be classified in different ways. One way is to distinguish between:

- in-house market studies;
- commissioned market studies;
- market studies in cooperation between the Nordic countries.

The selection between in-house or commissioned market studies involves weighing different considerations against each other, in addition to the budgetary issue. On the one hand, in-house market studies give the competition authority more control over the result and conclusions. On the other hand, more care will have to be taken when the study deals with politically controversial issues or politically touchy markets. Commissioned market studies from independent research institutions leave less control over the final result and its conclusions, but the recommendations coming out of the study will not have to take the political environment into consideration. The impact of the study and its conclusions may also be more significant. The Nordic market studies are based on consensus, which means that issues with conflicting views often are toned down. However, the Nordic market studies give the opportunity to develop convergence in policy views and analytical approach.

Market studies can also be characterized as *ex ante* or *ex post*. *Ex ante* market studies will be used to learn more about a specific market, identify potential competitive concerns and, if so, discuss and suggest remedies.

Ex post market studies will be used to study a market after intervention, and to evaluate the impact of a particular intervention. The NCA's use of *ex post* market studies will be presented in a separate section below.

The criteria used to select appropriate markets to study, differ between these categories. With respect to the last category, i.e. market studies being conducted and resulting from joint effort between the Nordic countries, the actual market is decided by the director generals of the respective Nordic competition authorities at the annual meeting of the Nordic competition authorities. Following that, a working group is appointed being responsible for the study with additional resources from the respective authorities if necessary. Results from the study are normally finalized and presented at the next annual meeting.

With respect to in-house or commissioned market studies, these will in some cases be initiated by the Ministry of Government Administration and Reform by its annual letter of priority to the NCA. At the beginning of each year the Ministry of Government Administration and Reform states the government's priorities in the competition field in a letter to the Competition Authority. Here, certain sectors of the economy and areas of the law will be specifically mentioned. The sectors and areas mentioned will be prioritized by the authority.

Following the letter from the ministry, the leader group of the authority discusses necessary measures, including the initiation of in-house or commissioned market studies. The NCA can also decide to initiate in-house or commissioned market studies on its own initiative. This decision will be based on the same criteria, i.e. markets which give rise to particular competitive concerns.

However, even if the NCA in some senses act as a directorate of the Ministry, the conclusions and recommendations of an in-house market study will be based on the competition law and economics knowledge and expertise of the NCA, working independently from the Ministry. This independency is broadly perceived as very important, and the NCA has never experienced or faced any authorization or funding penalties from the legislature or executive as the result of conducting market studies.

4. Data for market studies

According to section 24 of the Norwegian Competition Act, "Duty to provide information and examination", anyone must provide the competition authorities with the information these authorities require to perform their responsibilities under the Act or to meet Norway's obligations under agreements with foreign states or international organizations. Such information may be required in written or oral form within a specified time limit from individual undertakings or groups of undertakings. It can be noted that the competition authorities are entitled to require any type of information and access to sources of such information for examination on the same conditions.

However, even if the authorities according to the law are entitled to require information as part of conducting market studies, the authority will have to be considerate, so that the request for information is perceived as reasonable and well founded, and not represents an unreasonable burden nor goes further than necessary.

The authority to request information under section 24 is used regularly, but not often. It has i.a. been used in connection with the NCAs studies of the effects of liberalized book pricing (see below), where book dealers (chains) provided data files with point of sale data on book sales. This information was supplemented with meetings with representatives from the book chains.

In addition to information obtained based on section 24, information from other sources will have to be used to fill the picture. Here various approaches are applied, depending on the type of analysis and the extent and type of information needed. Typical information sources are:

- internet;
- sector authorities;
- meetings with key informants like branch organisations, etc.

5. Overview over actual market studies

Some of the main market studies and findings from the last three years in these three categories are described in the following.

5.1 *In-house market studies*

The principal priorities for advocacy during **2005** were:

- retail sales;
- food;
- civil aviation;
- domestic transportation; and
- equal terms of competition for public and private companies in general.

An example of a market study of the food market was presented in a report made by the Competition Authority on the *competitive effects of slotting allowances* used in the Norwegian grocery market. It found that such payments may foreclose small suppliers from the market. Listing payments encompass a whole spectrum of discounts, bonuses and up-front payments, which the suppliers pay in order to obtain favourable placement in the shelves of the retail chains. Following this report, several measures were implemented by the Competition Authority to promote competition between retail chains and prevent suppliers and chains from being foreclosed from the market. One of the measures was that the retail chains are obliged to notify their annual agreements with some of the dominant suppliers. This includes 25 suppliers and lasts to January 2010.

The Competition Authority also produced the following market study reports during 2005:

- *Competition concerns related to recycling in Norway*: Analysis of governmental regulations and competition within the recycling markets;
- *Listing payments*: Analysis of the competitive effect of listing payments in the Norwegian grocery market;
- *Liberal professions – more competition?*: Analysis of law and regulations affecting competition in the “Liberal professions”;
- *The intermediary’s role and influence on competition*: Analysis of the Intermediary’s role in the insurance, travel and media markets;
- *Competition in the diary sector*: Analysis of competition and what measures should be recommended to increase competition in this sector.

The sectors and markets given priority for **2006** were:

- civil aviation;
- food retail sale;
- transport;
- insurance; and

- electricity.

In addition to two commissioned reports mentioned specifically below, the Competition Authority produced the following market study report during 2006:

- *Casualty insurance*: The report describes the Norwegian insurance market. The market is characterized by a few large companies. It is concluded that an Internet portal for comparison of conditions and prices may increase customer mobility and strengthen competition.

In **2007**, the Competition Authority gave particular priority to:

- civil aviation;
- domestic transportation;
- software;
- groceries;
- electricity; and
- finance.

This year, the Norwegian Competition Authority produced a comprehensive study on *competition issues relating to the Norwegian software markets*. The software markets differ from traditional markets because of economies of scale and network effects. These features imply that one firm may become dominant in the market and furthermore that software developers compete for the market instead of competing within the market.

The software markets are therefore seen as dynamic and driven by rapid technological change and large investments in research and development, where the interaction between competition and incentives to innovate is of great importance. Thus, the competition authorities have to balance the effects of incentives to innovate and realization of economies of scale and network effects against the effects of higher competition within the markets. This balancing between static and dynamic considerations must be done on a case by case basis.

Ensuring interoperability between products from different software developers could decrease the competition worries in the software markets. Opening dominant software systems in a way that allows products from competitors in adjacent markets to become interoperable would increase competition in these markets. This was an important issue in the Microsoft-EU case and the Microsoft-US case. The competition authorities were worried that a dominant producer in one market could leverage its market power into adjacent markets and harm the competition in these markets. Open systems may also make it easier for new platforms to evolve from adjacent markets and become competitors to the dominant producer in the main market.

However, and as pointed out in the study, it is not only the competition authorities that could ensure competition in the software markets. Both central and local authorities may play an active role making sure that public information is published using open formats. The Norwegian government's recent decision that information from central authorities published on the internet should be in the formats HTML, PDF or ODF is an example of such an initiative supported in the conclusions of this market study.

5.2 *Commissioned market studies*

2005:

- *On equal conditions?:* Analysis of competition between public and private companies.
- *Competition in the dairy sector – status and proposed measures:* This report, prepared by Econ Analyse, studies competition in the Norwegian dairy sector, and based on the analysis presents proposals for measures that can enhance competition.

2006:

- *Ownership relations and cooperation in the Norwegian power market:* A report by Institute for Research in Economics and Business Administration. This study establishes an updated data set that documents the status with respect to distribution of ownership of generation capacity, and it identifies the main forms of cooperation and information exchange among the power generation companies in Norway. The examination shows an extensive cross-ownership and other forms of cooperation between producers in the Norwegian power market. This situation reduces the competition in the market.
- *Market definition in the transport sector:* A report by Asplan Viak and Frischsenteret. The report is a study on market definition in the transport sector. A key question is whether bus transportation is in the same relevant market as other means of transport, for example sea transport and air transport.

2007:

- *Competition in the broadcasting markets:* This report, prepared by three professors at the Norwegian School of Economics and Business Administration, focuses on competition issues in the Norwegian broadcasting markets. Particular attention is given to exclusive dealing and competition between different platforms for distribution of TV signals.

5.3 *Market studies in cooperation between the Nordic countries*

2005: The Nordic cooperative project “From farm to table” played a key part in the Competition Authority’s monitoring of food retailing. Retail food prices showed to be significantly higher in the Nordic countries than in the rest of Europe. Price levels in Norway were about 25 percent higher than in Denmark and Sweden and it showed that it was less competition in this market than in other European countries. The Competition Authority has in particular looked into the food-processing market which is strictly limited, and suppliers that possess market power may consider it advantageous to tie-in retailers to make it more difficult for competitors to get access to the market.

2006: The Authority took part in the compilation of the report “Competition in Nordic Retail Banking” together with its counterparts in the other Nordic countries. The report describes the financial sector in the Nordic countries, and concludes that the sector has certain characteristics with a high concentration in the market and few newcomers. This can be an indicator of weak competition. Furthermore, the report concludes that customer mobility in the Nordic banking market is relatively low. This leads to less competition. The report recommends measures that will reduce the drawbacks for customers of switching banks. The drawbacks largely consist of the fees associated with switching, practical issues of getting new payment cards, informing all relevant parties of the new account number and, for many, the loss of a confidential relationship with the customer advisor at the previous bank.

Partially based on this report, the Ministry for Finance asked a committee to evaluate measures and schemes that can help reduce the inconvenience associated with switching banks and increasing competition in the sector.

2007: In September 2007, the Nordic competition authorities presented a new report on the functioning of the Nordic electricity market: "Capacity for competition – Investing for an Efficient Nordic Electricity Market". The report concludes that the Nordic electricity market functions well, but there is room for improvement. The Nordic competition authorities call attention to several competition challenges, among these we find owner concentration, cross-ownership and the transmission capacity among the Nordic countries. It is pointed out that ownership concentration in the Nordic power market is still high, and is aggravated by widespread cross-ownership and joint ownership of generating plants. The report express support for the reduction in the extent of cross-ownership and joint ownership and point out that, in Sweden, the extent of joint ownership of hydropower plants has been reduced.

In the report, it is also stressed that in order for the power market to function satisfactorily, the transmission capacity among the Nordic countries needs to be strengthened. The Nordic system operators have agreed to five major projects that are supported by the Nordic competition authorities. In addition, the system operators should work to improve the effective utilisation of the capacity.

In addition to this, it can also be noted that the Nordic competition authorities are engaged in on-going cooperation with respect to the power market. This implies, among other things, that the authorities consult each other when they examine important cases related to that market, and that they exchange information on major competition problems.

Moreover, EFTA's Surveillance Authority, the ESA, has investigated the conditions for competition in the electricity markets in the EFTA countries, which include Norway, Iceland and Liechtenstein. However, the report focuses mostly on the energy market in Norway. The investigation was carried out in parallel with an analogous examination of the energy sector in the EU countries. The report concludes that competition in the wholesale market for electric power functions relatively well in Norway. Integration with markets in other countries, transparency and liquidity in the market are relatively good. Nonetheless, the ESA points out that the high market concentration, such as the increasing market share of Statkraft, may restrict competition.

6. Ex post market studies

Ex post market studies are used by the NCA to study a market *after* a specific intervention, and to evaluate the impact of this particular intervention. The intervention can be a specific enforcement action according to section 10, 11 or 16, changes in framework conditions following the NCA's recommendations for changes to laws or regulations, effectuation of measures for enhanced market transparency according to section 9, an intervention according to section 14, or advocacy or awareness campaigns.

Some examples of ex post market studies are the following (both from 2006):

- *Competition and Welfare – The Norwegian Experience*: This is a book commissioned by the Norwegian Competition Authority where invited leading academics and professionals describe the impact of competition in seven Norwegian industries: electricity, pharmacy, telecommunications, airlines, cement, groceries and radio.
- *Effects of liberalized book pricing*: A report prepared by the Norwegian Competition Authority presenting evidence that the sales of literature had increased significantly, the prices had decreased and the number of titles also increased following the new agreement for the Norwegian

book sector. The new agreement entered into force on 1 May 2005 following an intervention by the NCA after the enactment of the Norwegian Competition Act of 2004. The background for the intervention was that according to the new act, the kind of RPM contained in the old book agreement between publishers and distributors was deemed to be illegal according to section 10 in the new act. A new and updated analysis of the effects of liberalized book pricing is currently under presentation.

In this regard, it can be mentioned that in 2007, the Norwegian Ministry of Government Administration and Reform commissioned Copenhagen Economics (CE) to prepare two reports; the first focusing on competition indicators and methods that can be used to report the results of the Norwegian Competition Authority, and to visualize the effects of competition policy, whereas the second report focused on how to envisage the economic effects of the Competition Authority's interventions and enforcement. The Norwegian Ministry of Government Administration and Reform asked in its assignment letter for 2008 the NCA to specifically do ex post assessments of the impact of at least one decision relating to abuse, one decision relating to illegal price cooperation and one merger case. Consequently, the NCA's focus on ex post market studies will be strengthened in the future.

7. Future activities

In addition to the strengthened focus on ex post market studies, the NCA has recently initiated a comprehensive project with the working title "Competition in Norway" inspired by similar initiatives in Sweden and Denmark. The final report is planned to contain market studies on the:

- diary sector,
- finance market,
- groceries market,
- pharmacies,
- TV-markets and
- electricity market.

Each market study will contain a description of the market, the main competitive concerns in addition to recommended measures to improve competition in the actual market.

POLAND

1. Approach

Conducting market studies is one of the tasks of the President of the OCCP in accordance with Article 31 of the act of 16 February 2007 on competition and consumer protection.

Market study, including the analysis of the level of its concentration and market behaviours of individual enterprises, is an essential part of the majority of antitrust proceedings conducted by the President of the OCCP. Gathering and verifying evidence and making correct decisions in cases concerning restrictive practices and concentrations most often requires market studies to be undertaken. However, the legislator considered the actions described above as insufficient for the full competition protection in the economy and obliged the President of the OCCP to conduct „studies of the state of economy and behaviours of enterprises” not necessarily linked to any current or contemplated antitrust proceedings.

The competition studies conducted by the OCCP therefore have two main aims, which determine their course, choice of the research tools and the amount and scope of received information. These aims include:

- gathering evidence for the conducted proceedings,
- gathering information on the concentration processes and competition in an industry, which allow to assess the functioning of individual markets and the existence of possible threats to competition.

These two aims condition the character of the studies conducted by units of the OCCP, which are symbolically defined as type A and type B studies.

Type A studies have a narrower character. Usually they concern a number of precisely defined problems, which are a subject of a proceeding. These problems are identified in the stage preceding the study, that is gathering of the initial evidence. The gathered material enables usually to formulate proper research hypotheses, whose verification should lead to the final decision whether restrictive practices, requiring an intervention of the competition authority occurred in the analysed market. This group includes not only studies conducted during antitrust proceedings, but also those carried out within explanatory proceedings.

The study itself often has a character of analysing individual enterprises or their groups rather than analysing the whole market, i.e. a unit conducting a study concentrates on a detailed research of the market activity of enterprises, analysing the whole range of methods of competition and other activities characteristic for their behaviours, which have an indirect or direct effect on competitors.

Studies conducted for the needs of proceedings most often are not aimed at studying the market structure and the entire conditions and economic processes taking place there in such a broad scope as it is happening in studies whose subject is mainly the diagnosis of the state of competition. As a result of that, such studies to a large extent must be based on external materials including broader market data.

Studies conducted in connection with specific proceedings, on account of their short-term character, narrow timeframes resulting from procedures accompanying the proceeding and orientation on verification of hypotheses formulated beforehand, rarely provide conclusions reaching far beyond the frames of the proceeding. Such studies usually are not a source of material which can become a basis for subsequent proceedings leading to the elimination of harmful phenomena not directly connected with the subject of the proceeding within which they are conducted.

Type B studies, that is studies not directly connected with antitrust proceedings, have a significantly broader character. These are studies that enable to determine the market position of enterprises, to identify the forces shaping the competition in this sector, the level of its concentration, as well as the competitive behaviours of key enterprises. Materials, collected mainly for cognitive reasons, give significantly broader possibilities in terms of the further analysis and later usage of its results.

- ***What criteria do you use to select appropriate markets to study?***

On account of the size of the Polish market and the limited funds at the OCCP's disposal, the planned studies are selected in a well thought-out and regular way. For this reason, every year the Office prepares an official document including the planned competition studies (type B). The suggestions of studies together with their justification are submitted by individual units, next they are accepted by the President of the OCCP. Analyses to be conducted are selected according to the following three criteria:

Regulatory criteria

Markets where the competition is subject to a partial regulation, which results from the existence of natural monopoly or services of a general character. It should be mentioned here that the act of 16 July 2004 – Telecommunications law (Journal of Laws 04 item 171 No. 1800 with amendments) obliges the President of the OCCP to issue opinions concerning the maintaining of competition conditions in tenders announced by the President of the Office of Electronic Communications for the reservation of frequencies, as well as other issues, such as decisions concerning the competition on the market. For this reason, the President of the OCCP must have information on the competition on the market.

Structural criteria

Oligopolistic markets, where there are phenomena suggesting the possibility of mutual coordination of actions by the largest enterprises or with a possibility of continuing the concentration processes, also those resulting from mergers taking place abroad.

Market criteria

Markets connected with a significant number of complaints coming to the units of the Office, both complaints concerning competition law infringements, as well as complaints for non-observance of consumer rights. An important reason to conduct a study can also be a decision of a competition authority of another country, finding that certain enterprises used restrictive market practices. This in particular concerns a situation when such enterprises or their subsidiaries conduct an activity on the same markets in Poland.

- ***How do you go about the process of gathering data and other information for the study?***

Market studies are conducted within an explanatory proceeding on the basis of Article 48 of the act on competition and consumer protection. In the conducted study two kinds of information are used. The first kind is information gathered from secondary sources, i.e. from the statistical office publications, decisions

of the European Commission and other competition authorities, the press or from databases available on the Internet.

The other method of collecting data is gathering it directly from enterprises. In accordance with Article 50 of the above mentioned act enterprises are obliged to provide any necessary information at the request of the President of the Office.

Article 106 of the act says that the President of the Office may impose a fine on an enterprise, by way of a decision, in the amount constituting an equivalent of up to 50,000,000 euros, if such enterprise does not provide information requested by the President of the Office on the basis of the above mentioned Article 50, even if it was not a deliberate action, or provides untrue or misleading information. Such sanctions are used very rarely, but the sheer possibility of imposing them is a very important tool disciplining the enterprises.

Gathering primary data has most often a form of a letter with questions or a request to provide specific data or a postal survey (a questionnaire with questions is enclosed to the letter). More rarely data is gathered by way of formal or informal interviews with enterprises. This method, however, is a supplementary one.

- ***What are the advantages and disadvantages of using empirical evidence in market studies? What about anecdotal evidence?***

Empirical data gathered by the competition authority include only information important from the perspective of competition protection, or from the perspective of its assessment. Data from secondary sources, in particular from available market reports, is usually poorly adapted to the needs of the antitrust practice. It is aggregated in a way that often makes it difficult to relate it to relevant markets, or makes it impossible to define those markets. The empirical data make it possible to conduct a thorough analysis. Apart from that, while conducting its own study, the competition authority has a full knowledge on the representativeness of the gathered data and their possible defects.

The disadvantage of conducting in-house studies is the need of engaging specialised employees and the long time spent on gathering, organising and analysing the data. The process of finding and purchasing necessary data from external entities is usually much shorter.

A frequent problem in gathering data for market studies conducted by the competition authority is the reluctant reaction of enterprises. On the one hand they often fear that their company secrets may leak outside the competition authority, on the other hand (especially large entities) fear that their market behaviour may turn out to infringe the competition protection act.

The competition authority sometimes uses „anecdotal evidence”, but it usually has a secondary and supplementary character. It is used to describe the character or method of functioning of the market rather than to present the key problems or to prove theses concerning the level of competition on the market.

- ***Is it a good idea to seek the involvement of market participants (sellers, customers, and any other stakeholders), or is it better to conduct the study without them? What are pros and cons of each approach?***

Within the conducted study the President of the Office gathers information concerning the market from its various participants, including first of all organisations and associations of enterprises, as well as distributors. Gathering data from such different entities enables looking at the market from a wider perspective (not only from the point of view of manufacturers, but also from the point of view of their

distributors). Sometimes it happens that distributors use contacts with the Office to inform it about what in their opinion is an illegal behaviour of a manufacturer. Therefore, in case of some studies (in particular the ones aimed at establishing whether there occurred illegal actions of enterprises) the Office starts a study from questions directed to distributors or clients (on the B2B market). A certain disadvantage of questions directed to distributors is the laconic answers given by them. Nevertheless, in the opinion of the OCCP, questioning entities other than those active in the relevant market on the supply side, i.e. distributors or clients, enables looking at the market from a broader perspective and drawing more conclusions concerning the competition in a given market.

A certain inconvenience of this method of market study is the fact that enterprises often report problems or facts which after a deeper analysis turn out to be irrelevant or harmless for the competition. There is also a possibility of using the competition authority for conducting a current competition fight between enterprises.

- ***In general, how much transparency is appropriate when conducting market studies?***

The basic problem encountered when we initiate a study is the access to data. An ideal situation would be to conduct an analysis without notifying the market participants about it. The Office's experiences show that in case of the majority of sectors a proper analysis cannot be conducted only on the basis of secondary sources (generally available reports, databases or publications of the statistical office). Usually this is insufficient data (in particular there is no data concerning the specific entrepreneurs, e.g. their market shares, prices etc.). Therefore, while conducting a study, the Office questions all market participants, i.e. manufacturers, distributors.

The main advantage of gathering information from enterprises is the possibility of receiving reliable data, which will enable conducting thorough analyses. In the majority of cases this is the only possibility of receiving this data, on account of the fact that such information is not available on the market (it constitutes the trade secret of those entities). A certain disadvantage of such a method of data gathering, however, is the necessity of informing the enterprises on initiating a proceeding, which in case of establishing whether there was a conspiracy in the market eliminates the element of surprise in case of an inspection.

During the study enterprises are not informed of the exact research aims, the subject and the geographical scope of the study. The information given to them is the „title” of the proceeding within which the study is conducted (the enterprise may then know whether this is gathering evidence in an antitrust proceeding, or an analysis of the state of competition) and, of course, the detailed list of questions.

Enterprises are not entitled to inspect the materials (also their own materials) gathered during a market study which does not take place during an antitrust proceeding. Reports from some studies, after removing confidential data, are published on the Office's website.

- ***Do the market studies done by your competition authority (or authorities) have distinctive features in comparison to those done in other jurisdictions? If so, what are those features?***

The Polish competition authority has never made detailed comparisons in this respect. It seems that market studies conducted by each competition authority have a different form. This springs, first of all, from the detailed provisions of law, the organisational culture and the method of functioning of the economy.

The presentations of competition authorities on international forums, as well as conversations with their representatives show that the most frequent differences are associated with:

- the possibility of gathering information, some authorities may request information only during antitrust proceedings and do not have separate laws regulating market studies, as it is the case with the Polish competition authority,
- organisation of studies, many authorities do not have specialised organisational units conducting current studies, they are conducted by working groups or units dealing with the regular antitrust activity (case-handling),
- the scope and depth of studies, some authorities, such as Competition Commission in the United Kingdom, conduct very broad studies with the use of external specialists and the whole research team, while in the Polish authority studies are conducted internally and usually they are carried out by one person or a two-man team.

The above-mentioned differences noted by the Polish competition authority, however, can be spurious and can result from a poor knowledge of the specificity of the research activity of individual authorities.

- ***How do you go about setting timetables and milestones for completing market studies?***

At the beginning of each year the OCCP prepares a document entitled „Plan of competition studies”. (see section I, question 1) This document consists of two parts. The first part includes guidelines concerning the methodology of conducting competition studies by the Office's units. The second part comprises the description of all competition studies planned for a given year, carried out by units conducting such studies.

The plan does not indicate detailed dates of starting and finishing studies. This results first of all from the fact that very often the units conducting studies must undertake unplanned studies, as current needs may require. In such a situation the planned studies are postponed, sometimes even for the next year.

The calendar of individual studies is established while they are in progress. In case of the Department of Market Analyses, which conducts the majority of the broadest studies, the initial calendar of a study, as well as its detailed research aims are established at the meeting of the director of the department, the head of the Market Studies Division and the person (persons) conducting the study. These meetings are repeated before subsequent stages of the study, during the meetings the current timetable of studies is established, as well as decisions are made on the modification or extension of its detailed research aims.

The model course of a study is described in the methodological part of the „Plan of competition studies”. According to this document, the studies conducted by the President of the OCCP are divided into a number of stages. The first stage is the preparation of the study. The reliability of the study preparation to a large extent determines its further course and the quality of its results. In this stage, market signals are organised and analysed, whose existence suggests that the Office should start analysing a given sector. Next the aims of the study are established. In subsequent stages of the study information concerning the analysed market is gathered, which is then verified and supplemented.

After finishing the verification and supplementation of data, the persons conducting the studies set about making the final analysis, in which elements of economic, financial and statistical analysis can be used. The two first types of analyses are used mainly in relation to individual market participants, and the third type to the research of the analysed population as a whole. In the last stage of the study its results are transformed into a report or a memo.

- ***What human and financial resources (approximately) have you devoted to market studies (including those for which consultants have been hired)? Have the results been worth the resources spent? Please explain why or why not?***

Market studies at the Office are conducted by individual departments of the Head Office and by branch offices (the OCCP consists of the Head Office and 9 regional branch offices). Type A studies are conducted in the first place by the enforcement departments of the Head Office (Department of Competition Protection and Department of Concentration Control) and the branch offices. Type B studies are conducted mainly by the department which was specially established for this purpose (Department of Market Analyses)¹. From 6 to 7 people deal with these studies at this department. Annually the Office's units conduct a several dozen market studies in total, however, the majority of them are type A studies.

In our opinion conducting market studies is very useful from the perspective of the competition authority's work. The analysis of raw data from enterprises, not burdened with a subjective approach of external research units, enables observing phenomena unnoticed before, which suggest possible threats to competition. Having extensive data concerning the competition on a certain market and behaviours of enterprises shaping it enables observing the development trends and a possible anticipation of processes which can take place in the future. With such knowledge the Office is able to react faster to irregularities appearing in the future. It is also worth mentioning that the mere fact of conducting this type of actions by the Office has a positive effect on its image, showing that the competition authority actively seeks problems on the market, without waiting passively for signals from enterprises. It should also be stressed that the information gathered during market studies have become the basis for initiating antitrust proceedings in relation to specific enterprises.

- ***Should competition agencies conduct market studies themselves or should the work be contracted out? What are the advantages and disadvantages of each approach? (E.g., are there any concerns about credibility or objectivity?)***

Market studies are conducted by employees of the competition authority. The Office does not contract external companies to conduct such studies. However, it happens (very rarely though) that some elements of studies are performed by market research agencies. In particular these are studies aimed at finding the opinion of consumers on a specific issue (the Office cannot conduct this kind of studies on its own due to lack of access to respondent databases and to specialised pollsters).

Sometimes during studies partial analyses are ordered at external entities, consultations with specialists in the field are conducted (e.g. representatives of scientific institutions) or existing reports concerning a given sector are purchased. However, these are rare situations. They are aimed at:

- gaining specialist knowledge (most often with respect to the production process) concerning a given sector, e.g. analysis of the market of fireproof materials for the industry,
- cutting the time necessary to conduct a study by avoiding gathering large amounts of data which are available in the desired format, e.g. data concerning prices in the construction materials sector,

¹ The Department of Market Analyses was created in February 2002. At present it consists of two divisions: Division of Market Studies, which is responsible for conducting the broadest and most complicated market studies and the Division of Economic Analyses, whose functions are similar to the functions of the team of the Chief Competition Economist at DG Comp of the European Commission.

- confrontation of the gathered data and conclusions drawn with opinions of external specialists, e.g. analysis of banking services.

Nevertheless, as it has already been mentioned, these are rare cases. The majority of study works are performed by the Office employees. Such form of gathering information results from experiences of the competition authority. It should be mentioned that the analysis of some phenomena requires sometimes very exact data, often constituting the trade secret of a given enterprise. This type of data can be gathered only within a proceeding conducted by the Office. External research companies do not have such possibilities.

Gathering information from enterprises is associated with some problems. The main problem is the enterprises' reluctance in providing in-depth answers. (It has already been mentioned.) This causes the necessity of obtaining supplementary information, which extends the timeframe of the conducted study.

As it has already been mentioned above, the OCCP rarely uses external research companies on account of the poor adaptation of their research tools to the OCCP's needs. The subject of antitrust is specific and still not very popular in Poland. Research companies, among others consulting companies, very often are not familiar with the legal and economic principles of the competition law. Therefore it often happens that the results of contracted studies are hardly useful or too superficial. Moreover, they are always more expensive than in-house analyses.

As it was suggested in the question, sometimes the results of studies are included as evidence in antitrust cases. Then charges of the accused enterprises appear. Most often they do not question the reliability of the study, but the choice of the methodology. In case of studies prepared by the Office itself, it is easier to take a stance on those charges, because the authority has the full knowledge concerning the course of the study and has the whole source material. The persons conducting the study can also be engaged in the judicial proceeding. In case of research companies such situations are often troublesome and cause organisational problems, sometimes also financial ones, if the issues of the possibility of additional usage of studies and the questions resulting from it were not sufficiently regulated in the contract.

2. Relationship between Enforcement and Market Studies

- *What complementarities exist between enforcement and market studies?*

The information gathered during market studies is used by the enforcement units in their work. The studies conducted by the competition authority have usually three main aims:

- gathering information in order to conduct the analysis of competition (among others analysis of the level of concentration, market structure, intensity of competition),
- gathering information whether market behaviours of enterprises acting on the analysed markets may infringe the competition law, or whether they are a result of normal market interactions,
- gathering information in order to define the relevant market (product and geographical market).

The information gathered during studies is used by the enforcement units, among others, to assess the market position of enterprises or to define the relevant market. Often it happens that the evidence gathered during studies is the basis to initiate antitrust proceedings against some entities.

The aim of some studies conducted by the Market Analyses Department is developing a position concerning the definition of the relevant market, in the product perspective or in the geographical perspective. Recently a study of the railway transport of goods was conducted, which, among others, was to answer the question whether car and railway transport of goods are sufficiently substitutive to count them as the same market. In 2006 a study of the coal market was conducted, which was to determine its geographical scope.

During survey studies always general questions are asked concerning the methods of competing in the market. These questions have often provoked entrepreneurs to inform the competition authority on irregularities which in their opinion take place in the market. Part of this information was then verified in detail in separate explanatory proceedings. Some were next the subject of antitrust proceedings. For example, at present there is a proceeding concerning imposing unfair trading conditions on contractors by an enterprise with a dominant position in the domestic market of table salt. The information concerning the actions of this entity was described by its contractors in study surveys.

- ***What best practices should be followed when a market study turns up evidence of a competition offence?***

In case of the Polish competition authority, such evidence is submitted to the units responsible for pursuing anti-competitive practices (Department of Competition Protection or the relevant branch office). These units make a decision whether the evidence is significant enough to initiate an antitrust proceeding, or whether a detailed explanatory proceeding concerning only this issue still needs to be conducted. Sometimes the enforcement units request a more detailed market study concerning exclusively the problems in question.

The Market Analyses Department informs the enforcement units about the discovered irregularities, either right after being informed about them (in situations when the fact of infringing the act is unambiguous) or after finishing it, at the same time submitting the study report (when the situation is ambiguous, and the problem has, for example, a systematic character, i.e. when it relates to the majority of entities in the market or is a long-term practice that so far has not been considered in the context of the antitrust provisions, on account of the ambiguous assessment of its effects).

- ***What are the pros and cons of having formal powers to conduct market studies?***

In our opinion one of the basic advantages of having powers to conduct market studies is the possibility of receiving data from the enterprises. Thanks to this the analyses conducted by the Office are more reliable, and more conclusions can be drawn on their basis. Apart from that, the authority is able to gather very detailed information, which is not available in another way, and which very often determines the assessment of the state of competition in the market.

The negative side of the broad powers of the President of the OCCP is the criticism expressed by entrepreneurs which appears during some studies. It has a form of formal protests of associations of entrepreneurs, and in extreme cases also of complaints sent to the representatives of the government or the parliament.

The entrepreneurs' complaints are usually connected with, in their opinion, the too large scope of data requested by the competition authority. Enterprises complain about the additional unpaid work that their employees must perform while collecting the data, they also fear disclosing their company secrets.

There were also situations, when the problems created by enterprises during the study were aimed at making it impossible for the authority to gather information on the irregularities existing in the market.

Additional difficulties with which the competition authority must deal during the study and after finishing it is providing a proper protection for company secrets included in the collected source material. This is particularly problematic when the President of the OCCP decides to publish the study report.

- ***What conditions or requirements, if any, should be met before authorisation to use those powers is granted? How extensive should the powers themselves be?***

Conducting market research is one of the tasks of the President of the OCCP in accordance with Article 31 of the act of 16 February 2007 on competition and consumer protection. (More in section I)

The decision on initiating a study is made by the director of the unit conducting the study, who has a valid authorisation of the President of the OCCP to make such decisions. They are responsible for the course of the study and its results.

The powers of the Polish competition authority are very broad. They seem sufficient. Judging from the results of the conducted studies they do not seem too broad.

3. Strategies for using Market Studies

- ***Are market studies useful instruments? What purpose do they serve?***

Market studies are an essential element of the functioning of the competition authority. Without the knowledge gathered with their use it is very difficult to conduct an active competition policy.

The studies conducted by the competition authority are used mainly to the realisation of three main aims:

- gathering information in order to conduct the analysis of competition (among others analysis of the degree of concentration, market structure, intensiveness of competition),
- gathering information whether market behaviours of enterprises acting on the analysed markets may infringe competition law, or whether they are a result of normal market interactions,
- gathering information in order to define the relevant market (product and geographical market).

More information in section II, question 1.

- ***For example, are they used to carry out investigations without having to do so formally? Is that a good practice?***

According to the Polish law, materials gathered by the competition authority during a market study, which formally is a special form of an explanatory proceeding, can be included in the evidence in an antitrust proceeding. The antitrust authority issues a proper decision concerning this and informs the interested enterprises about this fact.

During studies the enterprises are informed that the information provided by them, which describe the actual state, must be true and must be submitted in a form that makes it possible to treat them as evidence.

In an antitrust proceeding the competition authority can demand the same information and perform the same actions as during the market study, therefore there is no practical or formal reason for carrying out informal market studies.

- ***Another possible use for market studies is to wield them as a tool for effecting regulatory and legislative reform. Have you found them to be effective for that purpose? Why or why not?***

One of the tasks of the President of the OCCP is the participation in the so called inter-department consultations. All legal acts and other government documents that are the subject of the Council of Ministers' sessions are sent to the competition authority for an opinion. Thanks to that the President of the OCCP may submit proposals of changes or critical comments to the documents. The competition authority has often undertaken such actions in order to eliminate the anti-competitive provisions in drafts of legal acts or other documents having an effect on the country's economy.

Moreover, the President of the OCCP himself prepares drafts of some legal acts, and sometimes provides a substantive support for other governmental institutions creating such acts.

Own market studies are one of the possibilities of gathering knowledge and information on the market, which enable an active participation in the processes described above.

SPAIN

1. Introduction: The new Spanish Competition Authority

On September 1, 2007 the new Competition Act (Act 15/2007 of July 3¹) entered into force. This new Act substitutes the previous of 1989, which until then had suffered only relatively minor changes, and includes important novelties in the Spanish Competition System. Just to mention some of them, the two previous competition authorities, the *Servicio de Defensa de la Competencia* (SDC), dependent on the Ministry of Economy and Finance and in charge of investigations, and the *Tribunal de Defensa de la Competencia* (TDC), independent and in charge of resolutions, merged into one only independent institution, the *Comisión Nacional de la Competencia* (CNC); a leniency program was introduced; the CNC was given competence to fully decide on merger control, although the Government retains a residual competence here; and its advocacy functions were reinforced, including the power to challenge anti-competitive acts of public administrations before the Courts. After an extended period of public consultation, the Regulation developing the Act was passed on February 22, 2008.

2. Selection criteria

When it comes to decide which market studies to conduct, the CNC Council takes the following factors into consideration:

The information available: Information gathered in the course of the investigation of cases, be they enforcement or merger cases, which indicate that the market may not be working well for reasons different from specific anticompetitive behaviour of operators; information transmitted by different stakeholders: businesses, consumers, trade associations, etc.

- The relative importance of the market or sector regarding national productivity and economic growth.
- The harm inflicted on consumers due to the lack of competition.
- Prioritisation established in the CNC's Strategic Plan².

How do you go about the process of gathering data and other information for the study?

The type of information to be collected is likely to vary according to the nature of the concerns which have given rise to the study.

¹ The Competition Act is available in English at <http://www.cncompetencia.es/PDFs/legislacion/47ing.pdf>. See also press release at <http://www.cncompetencia.es/PDFs/novedades/34ing.pdf>.

² The CNC's Launch Plan for 2008 and 2009 is available in English at <http://www.cncompetencia.es/PDFs/Novedades/LaunchPlan.pdf>.

In a preliminary review we use public and easily available information provided by company reports and websites, the press, previous studies of the CNC, data gathered during investigations, reports by regulators and government official reports, international studies and academic papers.

Should we decide to go on with the study after examining all these pieces of information, we gather further information through questionnaires and focussed interviews to market operators.

What are the advantages and disadvantages of using empirical evidence in market studies? What about anecdotal evidence?

Using anecdotal evidence bears little costs but is less trustworthy and could lead to significant errors. Empirical evidence should be gathered if we are to produce a good quality market study with reliable conclusions.

Is it a good idea to seek the involvement of market participants (sellers, customers, and any other stakeholders), or is it better to conduct the study without them? What are the pros and cons of each approach?

The different views of market participants can be very useful when it comes to get a thorough understanding of the market, but their involvement may increase the cost of the study.

In general, how much transparency is appropriate when conducting market studies?

Transparency is essential when the authority wants to encourage firms to take voluntary action, or when it wants to make specific recommendations to the government or to regulators, or to promote competition culture.

Do the market studies done by your competition authority (or authorities) have distinctive features in comparison to those done in other jurisdictions? If so, what are those features?

Regarding methodologies for conducting the studies we do not find such kind of significant distinctive features. However, Competition Act 15/2007 incorporates a new instrument, not so common in other jurisdictions, which strengthens the capacity of the CNC to influence regulatory design or to promote changes in existing regulation whenever this regulation brings about competition concerns. In particular, the CNC is legally authorised to bring actions before the competent jurisdiction against administrative acts and regulations from which obstacles to the maintenance of effective competition in the markets are derived³. This means that regulatory recommendations contained in market studies could be followed by further and more drastic actions. Thus, this new instrument gives the CNC's opinions and calls for action more strength than ever.

How do you go about setting timetables and milestones for completing market studies?

Up to now we have not set nor followed rigid timetables for completion of studies, but we are now committed to set genuine work plans and timetables for studies to come.

³ See article 12.3 of Competition Act 15/2007.

What human and financial resources (approximately) have you devoted to market studies (including those for which consultants have been hired)? Have the results been worth the resources spent? Please explain why or why not.

The TDC devoted only around four people to market studies and did not hire any external consultants. The reason for this is that Competition Act 16/1989 stated that the competition authority's main goal should be that of enforcement.

On the contrary, Competition Act 15/2007⁴ expressly mentions that the CNC is responsible, not only for the consistent enforcement of the Act, but also for the promotion of competition in all sectors of the economy and throughout the entire national territory.

As a result of the legally reinforced advocacy role of the CNC, a new Advocacy Division has been created. This Division includes three units, each taking care of Relations with Public Administrations, Competition Research and International Affairs, and more staff has been incorporated to advocacy functions.

Should competition agencies conduct market studies themselves or should they be contracted out? What are the advantages of each approach? E.g. are there any concerns about credibility or objectivity?

So far we have not contracted out any market study and we do not expect to do so, at least in the near future. All we may consider for the moment is to contract external help to gather or process data or to launch and record questionnaires.

What complementarities exist between enforcement and market studies? What best practices should be followed when a market study turns up evidence of a competition offence?

Where we conclude that the distortion of free competition is due to specific conducts that are prohibited by Competition Act 15/2007 or by the EU Treaty, a market study may result in the formal initiation of proceedings *ex officio*. Should this be the case, and as soon as the suspected anticompetitive practices are identified, the Advocacy Division, in charge of market studies, would communicate with the Investigation Division.

A market study may also advise the initiation of proceedings in order to activate the CNC's power to challenge certain regulations and administrative acts before the Courts, as mentioned before.

What are the pros and cons of having formal powers to conduct market studies?

We find there an important advantage in terms of legitimation: no person could deny collaboration with the CNC since the Act expressly establishes, on the one hand, the authority's power to initiate a market study and, on the other hand, the obligation to collaborate with and to inform the CNC⁵.

What conditions or requirements, if any, should be met before authorisation to use the powers is granted? How extensive should the powers themselves be?

No external authorisation needs to be obtained in order to initiate and conduct any market study, not even from the government or the courts. Only a decision of the CNC Council is needed.

⁴ See articles 12.3, 25 and 26 of Competition Act 15/2007.

⁵ See article 39 of Competition Act 15/2007.

Are market studies useful instruments? What purposes do they serve?

Market studies can be more appropriate than pure enforcement activities where competition problems identified are not due to specific anticompetitive behaviours of operators and affect the whole of the industry. Through market studies we can detect market flaws and evaluate regulations that may be unjustifiably distorting competition, i.e. by establishing unnecessary entry barriers.

For example, are they used to carry out investigations without having to do so formally? Is that a good practice?

Market studies cannot substitute investigation proceedings in Spain. When it comes to enforcement actions, formal proceedings established by law, which guarantee the parties' rights for defence, need to be followed strictly.

Another possible use for market studies is to wield them as a tool for affecting regulatory and legislative reform. Have you found them to be effective for that purpose? Why or why not?

We have already referred to the value of market studies as a tool for affecting regulatory and legislative reform.

The reports issued by the TDC in the 90s⁶ insisted in the beneficial effects of introducing competition in the markets, laid down the general criteria that the liberalisation process should follow, and made some sector-specific recommendations. These reports, although non-binding, were quite successful and advised the Government's liberalisation actions at the time.

After Act 15/2007, CNC's reports and studies continue to be non-binding, but their conclusions and recommendations have been strengthened through article 12.3.

Does your agency have the authority to compel market participants to provide data for market studies? If so, how frequently and effectively is this power used? If not, how do your studies deal with information gaps?

As mentioned before, all persons are compelled to collaborate with the CNC whenever requested by it (article 39 of Act 15/2007).

So that there is no doubt that this obligation applies not only to investigation proceedings in the frame of enforcement activities but also to market studies and other advocacy functions of the Authority, article 10 of Competition Regulation⁷ states that the CNC may request data or pieces of information from economic operators about the situation in a market and that all natural or legal persons and the bodies and organisations of any Public Administration are subject to the obligation to collaborate with the CNC and to provide, at its request and in due time, any kind of information at their disposal which may be necessary in order for the CNC to carry out its function of promoting effective competition in the markets.

In the event that this request is not satisfied, or the party gives false, incomplete or misleading information, the fine imposed by the CNC could reach up to 1% of the infringing company's turnover (or between 100.000 and 500.000 €). Also coercive fines up to 12.000 € a day have been foreseen.

⁶ *Politic remedies to improve free competition in the services sectors and stop damages caused by monopolies* (1993). *Competition in Spain: Evaluation and new proposals* (1995). Both available at <http://www.cncompetencia.es/index.asp?m=15&p=12>

⁷ Available at http://www.cncompetencia.es/PDFs/doc/P_997.pdf

Do some of your market studies stem from legislative requirements or executive orders as opposed to the agency's own initiative? How does this affect the development, timing, resources used and impact of the market studies conducted by the agency? Are any of the studies conducted jointly with other agencies and how do such arrangements impact the studies?

The 90's reports mentioned before were the result of a request of the Spanish Government, but more recent studies have stem from the authority's own initiative.

What is the connection, if any, between your industry studies and your agency's competition advocacy program?

We consider our market reports and studies to be at the heart of our advocacy program. That is why the Unit for Competition Research lies within the Advocacy Division. In case the question is referring to communication policy and building of competition culture, we should say that our reports and studies are issued to the ones called for action, if any recommendation for action is made, and that they are all public and are available at the CNC's website.

Has your agency faced any authorisation or funding penalties from the legislature or executive as the result of conducting market studies? What have been the short-term and long-term consequences, if any?

No.

Does your agency maintain systematic records of the impacts of market studies on subsequent public policy, cases, or competition advocacy? If so, how does this material inform the selection of subsequent market studies?

We do not carry out systematic evaluations of the impact of our market studies. But we do follow up, regularly, the implementation of our final recommendations. Where these recommendations are not implemented and competition problems subsist, we could make further recommendations or even explore the possibility to activate article 12.3 of Competition Act.

Our Strategic Plan for 2008-2009 states that the CNC will "lay the groundwork for carrying out *ex post* evaluations of the work of the CNC, identifying possible quantitative and qualitative indicators for monitoring performance in its different areas of action [including advocacy work], and analysing effective techniques and methodologies for the degree of success to be adequately gauged".

UNITED KINGDOM

Introduction

The United Kingdom's Office of Fair Trading (OFT) and Competition Commission (CC) (collectively, "UK agencies") dedicate a significant portion of their resources to market studies-type work.

For the OFT, "market studies" are examinations of the way a market is working, and are one of many tools at OFT's disposal to address competition or consumer protection problems, alongside enforcement and advocacy activities. They were introduced by the OFT as a means of identifying and addressing all aspects of market failure, from competition issues to consumer detriment and the effect of government regulations. As well as looking at particular economic markets, the studies may also relate to practices across a range of goods and services, e.g., doorstep selling; the term 'market studies' is therefore not limited to markets in the economic sense. The OFT performs market studies pursuant to the UK competition law (section 5 of the Enterprise Act 2002). There is a range of possible outcomes of a study including, inter alia, a decision that intervention is not appropriate on the evidence available, making recommendations to the Government or regulators, investigation or enforcement actions, or a market investigation reference ("MIRs") to the Competition Commission. In the latter case, the OFT refers markets to the CC for a detailed investigation.

MIRs require the CC to perform an in-depth competition analysis for the purpose of identifying whether a particular market is not working well and also for the purpose of remedying competition problems in those markets. The CC identifies features of the market that adversely affect competition, which can be structural or due to the conduct of the market participants or customers. A key feature of the CC's market investigations is the power to set binding remedies where these are thought necessary to address market features that prevent restrict or distort competition.

Neither market studies nor MIRs involve the application of the Chapter I or Chapter II prohibitions¹ contained in the Competition Act 1998 or Article 81 or Article 82 prohibitions of the EC Treaty². Market studies and MIRs also are not investigations to determine whether any of those prohibitions have been infringed. Where the OFT had reasonable grounds for suspecting an infringement of those prohibitions, instead of launching a market study or making an MIR to the CC, it would consider whether to commence a formal investigation into the alleged infringement. It would have regard to its obligations, under Article 3 regulation 1/2003/EC to apply Articles 81 and 82 to relevant agreements and abusive conduct.

This submission provides a summary of representative market studies and market investigations, as well as detailed information on the processes the UK agencies use to determine, conduct, and evaluate market studies and market investigations.

¹ The Competition Act 1998 establishes two prohibitions. The Chapter I prohibition prohibits agreements between undertakings having an effect on trade in the UK that prevent, restrict or distort competition, while the Chapter II prohibition prohibits abuse by an undertaking of a dominant position in a market in the UK.

² The EC Modernisation Regulation, Regulation 1/2003 empowers, and in some cases, requires the OFT to apply Article 81 or Article 82 EC Treaty to anti-competitive agreements or conduct having an effect on trade between EC Member States.

This submission is organised as follows: Part 1 considers market studies. In section 1 we consider the types of OFT market studies, by reference to outcomes, purpose, differences from other tools, and key features. In section 2, we offer an explanation of the specific procedures the OFT uses to conduct market studies; and in section 3 we provide a brief summary of how the OFT measures outcomes of market studies. Part 2 provides a description of the CC's market investigations, with particular reference to analysis and evidence gathering.

PART 1 MARKET STUDIES

1. What is a market study?

The OFT has conducted market studies for many years, although this paper focuses on experience within the last five years, since the entry into force of the Enterprise Act 2002, the current legislation under which the OFT conducts market studies.³ In 2002, the UK government committed⁴ to respond to recommendations made in market studies, to determine whether it accepts them, and what actions it will take to address them, within 90 days of publication of the study. Attached at **Annexe 1** is a list of the 31 market studies the OFT has conducted since 2002, their sources, outcomes, key findings and duration. A number of these studies are referred to in this paper to illustrate particular points.

In 2004, the OFT published guidance on its approach to conducting market studies.⁵ This guidance will be updated to reflect current practice, but nevertheless provides useful commentary on some of the issues examined here.

In the UK, there is no statutory definition of a market study. Studies are conducted under the OFT's general power to obtain information and conduct research, in section 5 of the Enterprise Act. The OFT therefore has considerable flexibility in defining market studies, in selecting markets for study, and in its approach to conducting market studies.

The OFT has defined market studies by reference to their purpose, their outcomes and their differences from other tools available to it as an independent competition and consumer authority. They can also be defined by reference to key features that make them a useful and flexible tool for the analysis of markets. Each is considered below.

1.1 Purpose of market studies

Market studies are examinations of the way a market is working. Studies enable the OFT to take an overview of the regulatory and economic drivers in a market, and of any patterns of consumer or business behaviour.

An important function of market studies is to enable the OFT to better understand market dynamics where there have been complaints that the market is not working well, but there is not a clear case for immediate enforcement action, and/or the OFT wants to understand more about the likely effects of any enforcement action that it chooses to take. For example:

³ Even before that date, however, section 2 of the Fair Trading Act 1973 empowered the OFT to review commercial activities in the UK and to prepare reports on practices that could adversely affect the interests of consumers in the UK.

⁴ Paragraph 4.15 White paper: "A World Class Competition Regime", 30 July 2001, <http://www.archive.official-documents.co.uk/document/cm52/5233/523301.htm>

⁵ http://www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft519.pdf

- **the medicines distribution** market study⁶ was launched following complaints about actual and proposed changes to medicines distribution arrangements. Key reasons for conducting a study rather than immediately launching a competition enforcement investigation included:
 - that the competition implications of the changes were not yet clear;
 - that a market study would facilitate market-wide consideration of these changes in the context of the sector's regulations;
 - that a market study could look at the effects on the whole market rather than focusing on a single set of arrangements by two market players;

The study concluded by making recommendations to government rather than launching competition enforcement action. The OFT recommended that changes should be made to the government's Pharmaceutical Price Regulation Scheme (PPRS)⁷ to ensure that NHS medicines costs do not increase as a result of the changes in distribution. It also recommended that the government consider legislating to provide for minimum service standards, if it was concerned that these would reduce under the new distribution arrangements. The government response accepted the OFT's recommendations for alterations to the PPRS, and said that it would keep service standards under review.⁸

- the **private dentistry** market study⁹ was triggered by a super-complaint¹⁰ that highlighted six problem areas (encompassing both competition and consumer concerns): a lack of price transparency; a failure of competition; little impact from new entrants to the market to trigger increased competition; the absence of a complaints system; a reduction in competition because of problems with access to NHS dentistry; and a failure to comply with professional guidance. The study recommended a mixture of competition and consumer-focused remedies: improving consumer information through better self regulation and reducing restrictions on the supply of dentistry services; that each practice should have a complaints procedure; and that, in line with NHS procedures, an independent complaints procedure should be established to examine complaints that cannot be resolved at practice level. All of the recommendations were taken on board by the government in an action plan that it published in response to the study,¹¹ and were, eventually, implemented;
- the OFT launched a market study on **personal current account banking**¹² that provides the context for a parallel investigation under consumer protection legislation into the fairness of the level and application of unauthorised overdraft charges. This study was launched in part to allow

⁶ http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/medicines

⁷ The PPRS is the method by which the UK Government seeks to control the prices of branded prescription medicines. The scheme comprises two main components: profit controls that apply to all the branded products sold by a company to the NHS, and price controls that allow companies freedom to set the initial price of new active substances but restrict subsequent increases to the NHS list price. Additionally there are one-off price cuts that are periodically agreed at the time of the scheme's renegotiation.

⁸ <http://www.berr.gov.uk/files/file45998.pdf>

⁹ http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/dentistry

¹⁰ See paragraph 18 below.

¹¹ <http://www.berr.gov.uk/files/file25886.pdf>

¹² http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/personal/PCA's-UK/

the OFT to take into consideration the potentially distortive effects that enforcement action may have if it forced down charges in one area but the banks simply compensated by increasing charges elsewhere.

Market studies have been used by the OFT to particularly good effect to examine markets where government regulation or policy may be restricting competition, and to make recommendations to government for legislative or policy change so as to free up competition. Examples include:

- the **public subsidies** market study,¹³ considered the effects on competition of public subsidies given to private business. Phase 2 of this work developed recommendations for improving the design of public subsidies through changes to state aid rules, guidance to subsidy providers in the UK and improved data collection on subsidies. The study was highly influential in two respects. It produced:
 - a practical framework by which UK government departments and agencies can identify the costs and benefits of a proposed subsidy, including its potential impact on competition – published in January 2007. In March 2007 the UK Treasury incorporated this into its government guidance on public subsidies (known as the Green Book);¹⁴
 - proposals to the European Commission for reforming state aid controls to avoid distorting competition. These have been cited in a number of EC papers and appear to be reflected in the Commission's state aid framework for R&D and risk capital for SMEs;
- The **PPRS** market study,¹⁵ which built on the OFT's experience of cases under the Competition Act 1998, in which predatory pricing and price discrimination in the pharmaceuticals sector were found to have been facilitated by the PPRS. The aim of the study was to assess whether the PPRS is the most effective means of securing value for money for the National Health Service (NHS), whilst offering appropriate incentives for pharmaceutical companies to invest in new and useful drugs for the future. The OFT:
 - identified a number of drugs where prices were significantly out of line with patient benefit, including treatments for cholesterol, blood pressure and stomach acid
 - recommended that the current 'profit cap and price cut' scheme should be replaced with a patient-focussed value based pricing scheme in which the prices the NHS pays for medicines reflect the therapeutic benefits they bring to patients. This would enable the NHS to obtain greater value for money from its existing drug spend

The interim government response, published in August 2007,¹⁶ broadly welcomed the report and stated that government would undertake a continuing programme of detailed analysis of the OFT

¹³ http://www.oft.gov.uk/advice_and_resources/resource_base/market-studies/subsidies

¹⁴ http://www.hm-treasury.gov.uk/economic_data_and_tools/greenbook/data_greenbook_detguidance.cfm#competition

¹⁵ http://www.oft.gov.uk/advice_and_resources/resource_base/market-studies/price-regulation

¹⁶ <http://www.berr.gov.uk/files/file40756.pdf>

report's proposals, discuss this analysis with the industry, and make further proposals as part of the current PPRS re-negotiation.¹⁷

Market studies may be a more effective route to address the exercise of market power that restricts or distorts competition where this is facilitated by regulation and/or where market power is held by public sector bodies. An example is:

- the **property searches** market study,¹⁸ which was launched in response to complaints made by private search companies about access to information held by local authorities, and by a single central electronic search provider. The study made a number of recommendations, aimed at opening up access to private search companies to the raw property information held by local authorities, and allowing more players to provide electronic searches. Virtually all of the recommendations were accepted by the government and the body responsible for regulating the electronic search hub.¹⁹

The commitment by government, referred to at paragraph 4, to respond to recommendations in market studies, is particularly helpful in relation to market studies which propose legislative or policy change – although it should of course be noted that there is no commitment to accept the OFT's recommendations.

1.2 *Outcomes of market studies*

There are various potential outcomes of market studies conducted by the OFT. They can result in:

- enforcement action under competition or consumer protection powers. Examples include: **debt consolidation**,²⁰ where the study findings informed OFT's enforcement of the Consumer Credit Act; and **care homes**²¹ and **ticket agents**²² where, following the study, the OFT took enforcement action under the Unfair Terms in Consumer Contracts Regulations 1999 to address unfair contract terms;
- a market investigation reference to the Competition Commission. Examples include: **airports**,²³ where the OFT referred the supply of airport services by BAA to the Competition Commission; **payment protection insurance**,²⁴ and **groceries**;²⁵
- recommendations to industry stakeholders to change their conduct. Examples include: **care homes** and **ticket agents**;

¹⁷ The PPRS market study was also discussed in the 24 May 2007 UK submission to the OECD Working Party No. 3 on Co-operation and Enforcement on Public Procurement – the Role of Competition Authorities in Promoting Competition.

¹⁸ http://www.of.gov.uk/advice_and_resources/resource_base/market-studies/property-searches

¹⁹ <http://www.berr.gov.uk/files/file25861.pdf>

²⁰ http://www.of.gov.uk/advice_and_resources/resource_base/market-studies/debt-consolidation

²¹ http://www.of.gov.uk/advice_and_resources/resource_base/market-studies/care-homes

²² http://www.of.gov.uk/advice_and_resources/resource_base/market-studies/ticket-agents

²³ http://www.of.gov.uk/advice_and_resources/resource_base/market-studies/airports

²⁴ http://www.of.gov.uk/advice_and_resources/resource_base/market-studies/payment

²⁵ http://www.of.gov.uk/advice_and_resources/resource_base/references/grocery

- recommendations to government to change the law or regulatory framework. Examples include: **estate agents**,²⁶ **medicines distribution**, and **PPRS**;
- a consumer education campaign. Examples include: **internet shopping**²⁷ and **doorstep selling**;²⁸
- a clean bill of health. There is one example: the OFT's market study on **The Financial Services and Markets Act 2000**.

1.3 *Market studies distinguished from other action*

There are several other tools or functions within the UK regime that may resemble market studies, but that are worth distinguishing.

First, a market study is not a market investigation reference. A market investigation reference is a formal statutory investigation by the Competition Commission of a market that has been referred to it by the OFT on the basis that one or more features in the market prevent, restrict, or distort competition.

Market investigation references can result from market studies, and are most likely to be made where, for example, the OFT considers that mandatory behavioural or structural remedies are needed to address inappropriate exercise of market power that is not suitable to address as a Chapter 2 violation. Market investigations are used in particular to address serious but potential remediable barriers to entry and restrictions on rivalry in oligopolistic or monopolised markets.

Second, a market study is not a super-complaint response. Under section 11 of the Enterprise Act 2002, certain designated consumer bodies have the power to make what is called a 'super-complaint' to the OFT complaining that a feature or combination of features in a market seems to be significantly harming the interests of consumers. This formal route for collective complaint is unique to the UK regime. When the OFT receives a super-complaint, it must, by law, consider the complaint and publish a reasoned response within 90 days setting out what action, if any, it will take. One of the possible outcomes of a super-complaint could be a market study – if the complaint has highlighted issues that the OFT considers merit examination in more depth.

Third, a market study is not a competition advocacy report to guide other government departments (OGDs). Although such an advocacy initiative is one of the possible outcomes of a market study, the majority of OFT's advocacy efforts do not coincide with market study. Within its Office of the Chief Economist the OFT has a small group that is responsible for competition advocacy to OGDs. This group liaises with OGDs on the competition effects of forthcoming legislation in the form of impact assessments and on competition principles applicable to government policy more generally. From time to time the advocacy group will publish a report or guidance advocating the consideration of competition principles in arenas of public sector activity. Recent examples include *'More competition, less waste'* a guide to competition principles as they apply in the waste procurement sector and *'Making competition work for you: A guide for public sector procurers of construction'*. These reports can be distinguished from market studies because:

²⁶ http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/estate-agents

²⁷ http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/internet

²⁸ http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/doorstep-selling

- they are practical guides for Government about how to apply competition principles;
- they do not involve surveys of industry players, and collection of evidence – but simply set out the OFT's view of how competition can be made to work more effectively in public sector markets;
- because of their more specialist nature they are more likely to be outsourced to economic consultancies;
- they may be joint publications with other government departments;
- they do not trigger any obligation on the part of the government departments to whom they are addressed.

1.4 Key features of market studies

OFT considers that market studies have a number of unique benefits that make them a very flexible and cost effective tool:

- they enable the OFT to identify and address the root causes of market failure;
- they are an effective way of tackling regulatory and other government restrictions on competition;
- they allow for a simultaneous examination of competition and consumer protection issues.

1.4.1 Going to the root of the problem

Market studies enable the OFT to identify and tackle the root causes of market failure across a whole market. Where there is a clear case for enforcement action against individual companies, that is the preferable course of action – indeed there would be dangers in not doing so. The risk of destruction of evidence of clear breaches of competition law means it remains important for OFT to act, and act decisively, to bring hard core cartel activity and other serious competition breaches to an end.

The OFT has not conducted market studies in circumstances when there is a clear case for competition enforcement action. It has, however, used market studies to gain a deeper understanding of the root causes of competition or consumer protection failures in markets and to decide how those root causes can best be addressed – whether by enforcement action or some other means. Where there is no clear case for enforcement action, market studies can be a much more targeted and cost effective tool than trying to fit market failures within the framework of the competition prohibitions against abuse of dominance or anti-competitive agreements or within the framework of consumer protection regulation. Examples include **medicines distribution**, discussed above, and **ticket agents**.

1.4.2 *Tackling regulatory restrictions*

Market studies can be the best way to tackle regulation that restricts competition. They enable the OFT to become an expert on the way a market functions and to spot regulation that is restricting or chilling competition, and to recommend that government should remove it. Examples include not only the **PPRS** and **public subsidies** market studies discussed above, but also the **taxi and PHV**²⁹ market study.

The **commercial use of public information** market study is another good example of the power of market studies to address policy and regulatory restrictions on competition. In this case, the OFT found that public sector information holders often were the only source of raw data that could be vital for businesses wanting to make value-added products. The way that these information holders charged for access to this data, and the conditions on which access was given were restricting competition. The OFT recommended that public sector information holders should:

- make as much public sector information available as possible for commercial use;
- ensure that businesses have access to public sector information at the earliest point that it is useful to them;
- provide access to information where the public sector information holder is the only supplier on an equal basis to all businesses and the public sector body itself; and
- use proportionate cost-related pricing and account separately for their monopoly activities and their value added activities.

The UK government accepted most of the OFT's recommendations and, after further work, committed to looking more closely at public sector information held by trading funds (a particular kind of public sector body) to distinguish more clearly what is required by government for public tasks, ensuring this information is made available as widely as possible for use in actual and potential downstream markets. It also committed to a pricing policy based on the principle that information collected for public purposes will be made available at a price that balances the need for access while ensuring customers pay a fair contribution to the cost of collecting this information in the long-term³⁰.

1.4.3 *Joining consumer and competition policy*

The OFT believes that in well-functioning markets strong, confident consumers, in possession of clear and accurate information about products and services, drive competition on price choice and quality, by choosing the goods and services that best meet their needs. Consumer protection law enforcement may be needed to ensure that consumers are getting accurate information and that businesses are not engaging in misleading or unfair trade practices. Competition law enforcement is needed to ensure that undertakings in a dominant position do not restrict market entry and expansion by, for example, margin squeezing and to ensure that agreements between businesses do not restrict competition.

As an agency with both competition enforcement and consumer protection powers, market studies enable OFT to understand the problems in a market more fully before deciding whether to take enforcement action under either its competition or its consumer powers, or whether voluntary action on the part of business, or changes to laws or policy will better address market problems. Studies where the OFT has considered both competition and consumer protection issues include: **PCA banking** and **ticket agents**.

²⁹ http://www.of.gov.uk/advice_and_resources/resource_base/market-studies/taxis

³⁰ <http://www.berr.gov.uk/bbf/competition/market-studies/public-information/page39978.html>

Although market studies are a particularly useful tool in regimes, such as that in the UK, where competition policy and consumer protection are the responsibility of a single agency, as a number of the examples cited in this paper illustrate, many of their benefits can be derived from agencies responsible only for competition enforcement.

3. Process of market studies

Based on lessons learned from previous experience, the OFT follows a specific process in conducting market studies: selection; prioritisation; pre-launch; launch; data collection; data analysis; informal consultation on provisional findings and outcomes; publication of findings; government response and follow-up. Throughout the life of the study, the OFT project manages risks, stakeholder engagement, and impact estimation by means of specific plans. This section tracks through these phases.

3.1 Selection

The first phase is to identify markets to study, drawing on intelligence from a number of sources, including:

- complaints from businesses, consumers, and other stakeholders;
- proactive consultation with stakeholders;
- super-complaints from consumer bodies;
- government requests; and
- own initiative concerns, in particular about markets and regulation.

To support this R&D function, OFT has a Horizon Scanning team, responsible for, inter alia, selecting a number of high quality project proposals to evaluate for study.

Under this part of its mission, the Horizon Scanning team provides leads gathered from stakeholders and OFT staff. These can be cross-checked against, for example, analysis of productivity growth data based on standard industry classification codes. Leads are collected into a database and subjected to an initial fact-based filter to refine the possible areas of study. Further development of theories of harm and very initial thinking about remedies for each idea further narrows the list.

Tools for gathering leads include:

- an internal intranet-based 'Ideas Lab'. This gathers ideas and electronic discussion from OFT staff members;
- an OFT Project Ideas Group. This group meets bi-monthly and provides support to R&D functions within the OFT by bringing together people and intelligence from across the organisation, and coordinating resource to investigate embryonic ideas;
- the Consumer Direct database. Consumer Direct is a government-funded telephone and online service offering information and advice on consumer issues, operated by the OFT in partnership with local government Trading Standards Services. Consumer Direct holds a database of complaints received from consumers. OFT monitors trends across sectors in order to inform its market study selection process.

The output of the selection phase is a short paper for each idea setting out the market, the theory of harm, and very initial ideas on remedies. These papers are passed on to project-based teams to be considered for proposals for studies.

3.2 *Prioritisation*

The initial paper is then formally considered against the OFT's prioritisation principles. The purpose of prioritisation is to ensure that OFT's finite resources are used to produce the greatest benefits for consumers. The principles are:

- **Impact**
 - What is the likely direct or indirect impact on consumers?
 - What are the wider economic benefits?
- **Strategic significance**
 - Does the work tie in with the OFT's strategy and objectives?
 - Is the OFT best placed to act?
 - How would the balance of the OFT's portfolio be affected?
- **Risks**
 - What is the likelihood of a successful outcome?
- **Resources**
 - What are the resource implications of doing the work?³¹

Applying these principles, a senior level decision is taken on whether to prioritise a market study idea for action or not. Decisions are taken during the OFT's annual planning process, and on an as-needed basis during the year in respect of new work that arises, e.g. from a super-complaint.

3.3 *Pre-launch*

Having decided to prioritise a particular study for action, staff are selected to work on the project. Market studies commonly involve a team of around six or seven full time staff, including necessary legal and economic input from among OFT's legal and economic staff. Occasionally, where issues are very theoretical, OFT will outsource an entire study to economic consultants. An example is the review of the competition effects of the Financial Services and Markets Act 2000, conducted on OFT's behalf by Oxera.³² In most cases, however, the study is run by an in-house team, with recourse to external contractors to:

³¹ Further details at http://www.offt.gov.uk/shared_offt/consultations/oft953con.pdf

³² http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/fsma

- provide resource needed e.g. to conduct surveys;
- provide particular specialist expertise e.g. using an accounting firm to examine the accounts of industry players.

Pre-launch work includes:

- further consideration of the scope of the project – including whether the market works differently in Scotland and Northern Ireland, developing a question tree that works up the theory of harm setting out the issues to which answers are sought, what work needs to be undertaken to answer them and the interconnections between them;
- impact estimation – considering how likely impact will be estimated and building in processes to do so from the outset;
- risk assessment – developing an analysis of the risks affecting the study and ways to mitigate them;
- stakeholder assessment – mapping stakeholders and developing a stakeholder management strategy;
- making a recommendation on governance and quality assurance structures. For a market study this will usually include a team supported by a team leader, a project director and a senior responsible officer, supported by a consultative steering committee;
- preparing a project plan showing time, effort, activities, resources, workstream organisation and communications. A high level plan setting out key milestones for the project is also prepared at this point.

The pre-launch work is conducted within the OFT's Effective Project Delivery Framework, described in Box 1.

Prior to launch, the OFT Board approves the decision to conduct the study.

Box 1. Effective Project Delivery (EPD)

The OFT's EPD Framework is a set of project management principles, processes, and tools, aimed at improving OFT's ability to deliver high quality and timely outputs, recognising that well run projects can maximise high impact outcomes in the market. It is based on the disciplines of project-centred management, adapted to the public service objectives of the OFT and the nature of its projects.

Applying consistent procedures helps ensure that each project produces a successful outcome through a consistent approach and understanding. It helps to reduce and manage project risk and to increase the visibility of projects throughout the organisation. The EPD Framework is an important support for a flexible project-centred approach to the OFT's working practices and facilitates staff mobility and professional development. The key aspects of the EPD Framework are as follows:

- Common approach for all types of projects
- Robust scoping and planning
- Clear roles and responsibilities for people managing and delivering projects
- Clear roles for Steering Committees to provide advice to projects
- Categorisation of projects into 3 governance levels reflecting their significance,
- A structured project lifecycle with clear project phases designed for OFT projects
- Systematic approach to quality assurance, based on right first time principles
- A system for monitoring project progress, for transparency and accountability

In addition there are on-going processes integral to effective project delivery including:

- Risk Assessment, Monitoring, and Mitigation
- Project Reporting through the OFT Project Reporting Assistant (OPRA)
- Stakeholder Management
- Resource Management

In summary, the Framework is a mix of:

- A defined project lifecycle
- Requirements of how projects should be delivered
- Advice based on the good practice
- Tools to support project-centered management

3.4 *Launch*

At launch the OFT publishes a press notice, usually accompanied by a scoping document setting out the scope of what the OFT intends to study, any questions it is considering, its reasons for deciding to conduct a market study, an invitation to make submissions, and contact details.

3.5 *Data collection*

Next, the study proceeds to the data collection phase. During this phase the questions or hypotheses are tested by means of stakeholder questionnaires and meetings. Quantitative surveys of both consumers and business will often be conducted, as will “mystery shopping” (unidentified shoppers). Questions are devised by the market study team, including in-house statisticians, and the data collection and preliminary analysis is usually outsourced to market research contractors. Contractors’ work needs careful management and testing, conducted by the market study team, in particular by the statisticians. In addition to customised surveys, the study team sometimes adds questions to large omnibus surveys conducted on a weekly basis by organisations like MORI (a market research agency). Teams have also used qualitative research, including focus groups run by outside contractors, and case studies. The OFT’s experience suggests case studies are best conducted in-house by market study teams, who will have a clear idea of what material is relevant and be best positioned to deal with stakeholders according to the stakeholder management strategy. The OFT tends to prefer empirical over anecdotal evidence – but often adds anecdotal comments into its market study reports to promote a better understanding for readers.

The OFT needs to gain a good understanding of the legal and regulatory framework, and of how the market is functioning in economic terms. OFT tends to use in-house lawyers and economists to advise on these issues.

The OFT does not have the power to force undertakings to provide information for the purposes of a market study. It has powers to collect information, but there is no penalty for non-compliance.³³ In practice, this lack of powers to compel generally has not been a problem. Many businesses want the OFT to understand their perspective – whether motivated by self-interest or otherwise – such that they will readily answer questions and consider and present their views.

3.6 *Data analysis*

Study teams analyse the results and use the evidence they have gathered to describe the consumer or competition issues in the market. Based on provisional findings, the study team determines which tool would be most appropriate to address them (e.g., enforcement action, MIR), and what an appropriate 3remedy would be. The team then engages in an informal consultation on these proposals with key stakeholders – usually from industry and government.

³³ On occasion, the OFT has found it is useful to have the back up of the power in section 174 Enterprise Act 2002 to require information. This power is available only after the OFT considers that it should make a market investigation reference (“MIR”) (MIRs are explained more fully in Part 2). It has been used infrequently (only in relation to the groceries market investigation reference) but it remains an important power to hold in reserve.

The OFT has discussed with other competition agencies that have formal powers whether they consider these to be a useful adjunct, and if so, how much they have used them. Some of these discussions suggest that use of formal powers can cause delay because companies and their advisers become much more concerned about the possible uses to which the information could be put and the need to protect the rights of the defence. The OFT is interested to read other member countries’ submissions on this issue.

The OFT does not have any examples of a market study turning up evidence of a competition infringement or of a hard core cartel offence. In part this may be because it has selected for study markets where enforcement action is not the best route.³⁴ However, the lack of coercive information gathering powers for market studies also could be an explanation.

The OFT has experience, in relation to **PCA Banking**, of conducting a market study in parallel with a test case on issues relating to consumer enforcement. In this case, the timing of publication of the findings of the market study has been driven by the timing of the outcomes of the test case. The OFT has delayed publication of the market study report until after the test case judgment.

3.7 Informal consultation

In terms of transparency, the OFT believes that a lower level of transparency is needed than in enforcement cases or cases where the OFT is considering making a market investigation reference to the CC³⁵. The consequences of any outcomes are less onerous for businesses and others who may be affected, and in many cases there will be further opportunities to make points in relation to policy or legislative change at a later consultation point.

Nevertheless, if the outcome is recommendations to government or to industry, a key phase of the study process is testing potential recommendations with stakeholders. Their involvement is needed to test the study team's analysis and to seek buy-in whenever possible to any recommendations that come out of the study. The OFT has learnt to its cost how important this is in one or two less successful market studies. The clearest example is the **pharmacies** market study,³⁶ where the OFT's recommendations to lift regulatory entry barriers were the subject of adverse comment in the press and elsewhere with regard to their potential effect on consumers and were not implemented in full in England and Wales, and not implemented at all in Scotland.

Prior to publication study teams present their findings and recommendations to the OFT Board for approval.

3.8 Publication

The final report and recommendations are carefully drafted, reviewed by lawyers and economists, and published. On publication, the study team provides a detailed press briefing because the OFT sees public opinion as one of the key drivers of change, and experience suggests that press reports can make or break a study. Careful press handling, therefore, is critical. Where appropriate, the study team also engages support from key stakeholders, for example consumer bodies.

3.9 Government response and follow-up

Study teams plan for continued support of the study's recommendations during the 90 day period when government is considering and responding to the recommendations. OFT presents its findings to the government departments responsible for implementing any recommended changes and participates in the interdepartmental committee set up to consider and respond to the recommendations.

³⁴ In some cases where this type of evidence was found, particularly where there might be a criminal cartel offence, the OFT may consider putting the market study on hold while the competition infringement was investigated.

³⁵ When there is a statutory obligation under section 169 Enterprise Act 2002 to consult parties who may be affected.

³⁶ http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/pharmacies

In some cases, follow-up is needed even after the end of the 90 day period, to feed in comments, or continue to advocate for change, as the government implements recommendations. Where this is necessary, the market study team itself may carry out the follow up for a planned period, or follow-up may be handed over to another part of the OFT, such as the advocacy team.

3.10 Project management

Good project management is critical to delivery of a successful market study. Project plans, risk and stakeholder management plans, and impact estimation plans are revised and updated throughout the life of the study. Progress against milestones is monitored and reported on, on a monthly basis.

Each team has a team leader, a project director and a senior responsible officer. Responsibility and accountability for delivery of parts of the study is agreed amongst these team members at the outset. Risk and quality is monitored by means of a specially selected steering committee for each study. The job of the steering committee is not to take decisions but to offer high level advice to the project director, team leader and senior responsible officer.

Resource demands for market studies can be intensive – but generally studies can be finished in a shorter timescale than most competition investigations. This is particularly so if account is taken of the resource cost of appeals of enforcement cases.

In making decisions related to market studies and market investigation references, the OFT has more discretion than with any other of its competition and consumer powers, which require the agency to meet higher evidentiary standards before proceeding. This ability to exercise wide discretion is appropriately balanced by governance rules that require Board and/or CEO approval for initiation, findings, or references to the CC (the latter reserved to the Board).

4. Measuring outcomes of market studies

The OFT has recently conducted a retrospective internal review of the outcomes of its market studies. Using basic indicators of success (e.g., ‘some or all recommendations implemented, or report influential’), the OFT’s finding was that two thirds of its market studies had been successful.

Looking forward, the OFT has embedded in current and future market studies a system of impact estimation to measure the impact of its studies so as to help demonstrate value for money.³⁷ Teams estimate the likely impact by setting out and regularly revising a plan that outlines what they think the impact of the study will be, why they think it will have this impact, and how the impact will be measured. Plans typically include:

- an impact chain – this is a diagram drawing causal connections between OFT’s actions and final impacts e.g. consumer detriment reduced, vulnerable consumers protected
- identification of key success indicators – elements of the impact chain, changes in which are indicative that the OFT’s actions are leading towards the anticipated final impact
- an initial estimate of impact expressed in terms of monetised consumer savings where possible
- an action plan setting out what needs to be monitored and when.

³⁷ We reported that we were planning to do this in the May 2007 UK paper submitted to the OECD roundtable on Evaluation of the Actions and Resources of Competition Authorities.

After project completion, teams use the impact estimation plan to provide an estimate of direct financial benefits to consumers coming out of the study by monitoring the key success indicators. In its annual reports, the OFT publishes estimates of consumer savings from those completed market studies whose recommendations were implemented in the year.

The OFT runs a more in-depth evaluation programme that includes evaluation of past market studies.³⁸ In evaluating market studies, the OFT follows its published evaluation strategy for market studies³⁹. This details that OFT will evaluate at least one market study a year, selecting studies that satisfy at least one of the following criteria:

- a high chance for reading across/transferring lessons on ongoing and future market studies;
- the study recommended innovative solutions, whose impact the OFT is keen to assess;
- the estimated consumer detriment is particularly large or serious and it is likely to have high impact;
- the study was very costly to the OFT and/or to industry;
- the study was of a particularly topical/controversial issue, or led to an important OFT long-term commitment.

The key objectives of the evaluation programme are to improve understanding of how effective OFT is in delivering its objectives, and to provide learning points that inform the prioritisation of work and the choice of intervention methods. Evidence gathered from the evaluation programme will inform:

- the choice of what markets to study – helping OFT to focus on those markets where it is likely to make the most impact;
- methods to maximise the impact of each study;
- whether further action could be taken in the markets the OFT has already investigated.

Recent evaluations of market studies include the Car Warranties Evaluation and the Evaluation of the 2003 Taxis Market Study. The OFT reported on the Car Warranties Evaluation in the May 2007 UK OECD submission⁴⁰ and on the Taxis Evaluation in the October 2007 OECD submission.⁴¹ From both evaluations, the OFT was able to draw lessons about maximising the positive impact of studies. With the former we found that changing the rules of the market makes little difference unless market participants are informed. In the latter we learnt that benefits in the taxi market could have been increased if OFT had recommended not only that quantity controls on taxi licences be lifted, but also that regulated fares be brought closer to market clearing levels.

The Secretariat asks whether OFT has ever faced any authorisation or funding penalties from the legislature or the executive as a result of conducting market studies. The answer is that to date the OFT

³⁸ Described in the May 2007 UK paper submitted to the OECD, *ibid*.

³⁹ Evaluation strategy for market studies, September 2006, OFT 862.

⁴⁰ *Op cit*. May 2007.

⁴¹ Working Party No. 2 on Competition and Regulation, UK submission of 5 October 2007 on the OFT's evaluation of the taxis market study: Taxi Services Regulation and Competition.

has not faced such difficulties. The UK government asked the OFT to advise ‘where laws and regulations create barriers to entry and competition, or channel markets in a particular direction, thereby holding back innovation and progress’⁴². The OFT investigates these issues and provides this advice by way of market studies. At the same time the government also gave its commitment to respond to any recommendations coming out of OFT’s market studies within 90 days⁴³. This indicates a commitment on the part of the UK government to the use of market studies, in particular as a means of tackling restrictions on competition arising from regulation.

PART 2 MARKET INVESTIGATIONS

1. Market Investigations by the Competition Commission (CC)

As described in the introduction, the CC carries out market investigations under the Enterprise Act 2002 (the Act) following references from the OFT or sectoral regulators with competition powers or, exceptionally, from Ministers. Such investigations involve in-depth competition analysis for the purpose of identifying whether a particular market is not working well and also for the purpose of remedying competition problems in those markets.

The market investigation regime gives the CC a remit that is broader than that of Articles 81 and 82 EC competition law, or the UK Competition Act 1998 equivalent. The CC identifies features of the market that adversely affect competition, which can be structural or can be the conduct of the market participants or customers. This analysis specifically focuses on competition issues, while allowing some scope for the CC to take into account other issues when determining appropriate remedies and their purpose is to promote competition for the benefit of consumers, efficient business and the economy generally. The regime not only gives the CC power to take decisions but requires it to determine appropriate remedies. Remedial action may either be taken by the CC itself or the CC may recommend that others take action. (For information about the competition test and powers of remedy, see *Statutory Framework* below).

In contrast to the market studies conducted by the OFT and many other agencies, the CC’s investigations are conducted within a statutory framework which requires the CC to reach a formal decision within a maximum time frame of two years and gives the CC powers to require information. The framework also requires the CC to publish Rules of Procedure for such investigations.

A high degree of transparency is built into the CC’s processes thus ensuring that all those with an interest are able to comment and that issues are well aired. Although the investigation is into competition issues, non-competition issues are often raised by market participants or observers. The transparency of the process has the added advantage of enabling the competition analysis to be seen in the context of wider issues, and, to some extent it helps contribute to the discussion of issues of public concern and the advocacy of competition principles.

Annex II attached identifies the market investigations on which the CC has published a Final Report to date⁴⁴ and summarises the CC’s decisions, both on the competition analysis and the remedies (and responsibility for those remedies).

⁴² The government first announced this wish in its February 2001 White Paper "Opportunity for All in a World of Change." It repeated the request in the July 2001 White Paper "A World Class Competition Regime", op. cit.

⁴³ Paragraph 4.15 July 2001 White Paper "A World Class Competition Regime", op. cit.

⁴⁴ These reports and the non-confidential material submitted to the CC can be found at the CC’s website: <https://www.competition-commission.org.uk>.

The remainder of this part of the paper covers the following:

- Statutory Framework;
- Procedural aspects;
- The terms of reference and scope of CC's investigation;
- Analysis;
- Evidence Gathering and Assessment;
- Involvement of Market Participants and Others;
- Transparency;
- Resources;
- Unique features of Market Investigations.

2. Statutory Framework

The CC's competition analysis is made with reference to a number of statutory questions. The first of these is whether there are features of the market that prevent, restrict or distort competition. 'Features' can be structural aspects of the market referred to or conduct of either the market participants or customers. If the CC does conclude that there are such features, there is an adverse effect on competition (AEC) and the CC must consider a number of statutory questions relating to remedial action, namely whether it should take remedial action and/or should recommend that remedial action be taken by others. The CC has a duty to implement remedies that comprehensively address the AEC (and any detrimental effects on customers) found and which are reasonable. When deciding upon appropriate action, it may take into account customer benefits resulting from the features, modifying its chosen remedial action to preserve such benefits if it considered it appropriate to do so.⁴⁵

As explained in the introduction, the CC is required to complete the investigation within a maximum period of 2 years although this period does not apply for the implementation of any remedies. The CC is also required to publish Rules of Procedure and Guidance on how it will apply the competition test and decide remedies.⁴⁶ The Rules require the CC to publish an administrative timetable, Provisional Findings and Notice of Proposed Remedies. The Act requires the CC to consult those likely to be adversely affected on its proposed decisions on the competition assessment and remedies.

3. Procedural Aspects

The diagram below identifies the four distinct stages of the investigation and the key publications leading up to the publication of the CC's Final Report: (1) Information Gathering and Analysis—a Statement of Issues is published during this period and the CC's Emerging Thinking is published at the end of the period; (2) Analysis and Report writing leading to the CC's provisional findings on the competition

⁴⁵ These are defined as lower prices, higher quality, greater choice and greater innovation.

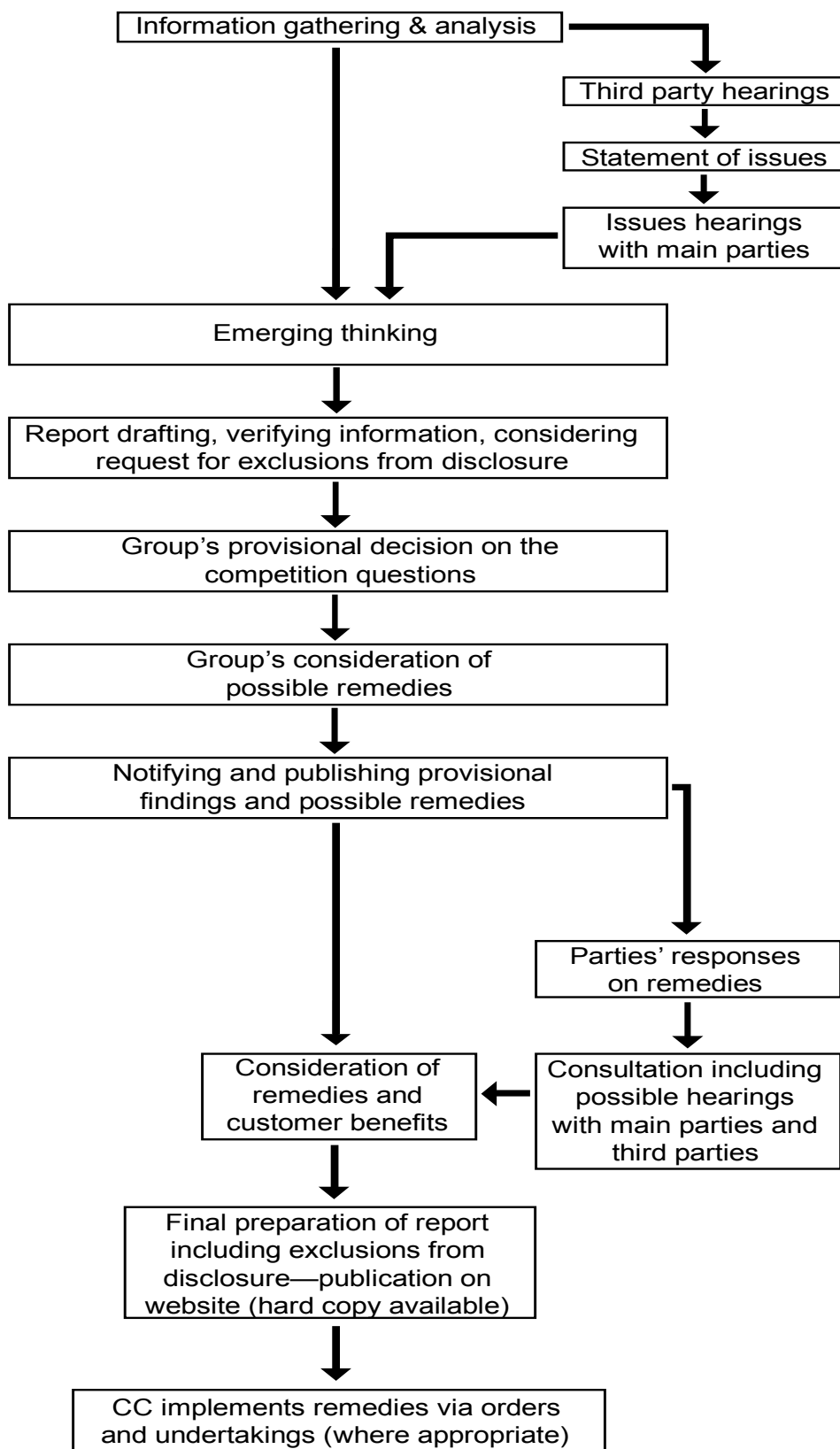
⁴⁶ These publications, CC1 and CC3 respectively, can be found on the CC's website.

test and consideration of remedies; (3) Public Consultation on the CC's Provisional Findings and Notice of Possible Remedies; and (4) publication of the Final Report.

The Issues Statement identifies the issues on which the CC intends to focus and is based upon the theories of harm. Emerging Thinking is published one third to half way through the investigation setting out the CC's initial views and Provisional Findings set out the CC's proposed decision on its competition analysis. If the CC determines that there is a competition issue to be addressed, the CC will also publish a Notice of possible remedies and subsequently, having taken into account evidence from the market participants and other interested parties, a paper setting out its proposed decision on remedies.⁴⁷ Comments on all these publications are invited from the market participants and others.

⁴⁷ For example, see Groceries web-page: Notice of Possible Remedies and Provisional decision on remedies.

Typical shape of a market investigation



Following the publication of the Final Report the CC proceeds to implement the remedies it has selected. It may do so either by making an Order, or by accepting Undertakings from the relevant firms.⁴⁸ The nature of market investigations means that the CC is more likely to implement remedies by way of Order rather than seeking the agreement of all the market participants both for practical reasons and because the use of Orders enables the measures put in place to have an element of future proofing (for example, in *Domestic LPG* the Order will apply to all suppliers of bulk LPG for domestic use in the UK rather than named suppliers). Any remedies implemented must follow the decision set out by the CC in its Final Report unless there has been a change of circumstance or there is another special reason that means the decision in the Final Report is no longer appropriate.

Before putting in place the Order or Undertakings, the CC must consult publicly. In any event, the measures are quite often complex and detailed so that the CC involves the parties who will be the subject of them to ensure that they are fit for purpose and sometimes also discusses the proposals with other interested parties.

Once in place, the remedies are enforceable by either the CC or by the OFT although the OFT has the responsibility of monitoring compliance with such measures. The OFT keeps the measures under review and if it considers that the market has changed so that revision of the measures is appropriate, it will bring this to the CC's attention. This can lead to the release, in whole or part of the remedies.

4. The Terms of Reference and Scope of CC's Investigation

The body making the reference will set out its reasons for doing so, identifying key issues from the referrer's perspective. The statutory maximum period of two years, whilst not short, does mean that the CC has to decide upon the issues that it will explore and how it will dedicate its resources. Other factors affecting the scope (breadth and depth) of the inquiry are the number of market participants, the stakeholders with interest in the market and the high level of transparency of the CC's processes—see *Transparency*. The CC is not restricted to exploring those issues raised by the referring body though these are often the key areas of the investigation.

While the terms of reference will affect the CC's functions when reaching its conclusions on the competition analysis and will limit the exercise by the CC of its powers of remedy, the CC is not constrained by the terms of reference when exercising its information gathering powers. The CC can and often does request information on the margins or outside the terms of reference in order to increase its understanding of the referral market. For example, in *Home Credit*, the CC sought information relevant to other types of credit and in *Northern Irish Personal Banking* the CC sought information on other products and other markets. Though it is important to plan the scope and timetable of the investigation at the beginning, it has also proved important to be able to adapt as the CC's understanding of the market develops or there are developments in the market. This has, in a number of instances, involved allocating resources to additional issues (see *Resources* below). In *Northern Irish Personal Banking* for example, possible issues of coordination based on evidence of parallel pricing were raised at the time of the reference. However, the CC found that any parallel pricing that might have taken place in the past, and which was the subject of the super-complaint received by the OFT preceding the reference, had broken down. The emphasis of the investigation's focus therefore moved towards understanding the different PCA charging structures, looking in particular at overdraft charges.

⁴⁸ The Enterprise Act identifies the types of measures that may be included in the Order. The scope of undertakings is unlimited, subject to the CC securing a party's agreement.

5. Analysis

As explained, the UK market investigation regime allows wide-ranging investigation of markets referred to the CC. Although the first completed market investigation reported only in 2006, the CC has already investigated a wide variety of theories of harm in its market investigations.

Theories of harm investigated (in some cases upheld, in others cleared and in some currently under investigation) have included:

- Restrictions on switching (*Store cards, Domestic LPG*);
- Tacit collusion (Northern Irish Personal Banking);
- Inadequate provision of information to consumers (*Store cards, Home Credit, Northern Irish Personal Banking*);
- Detriments arising from local market power (*Groceries, BAA Airports*);
- Detriments to consumers arising from retailer buyer power (*Groceries*);
- Entry-deterring brand proliferation (*CDAS*).

In these investigations structural issues and consumer unwillingness or inability to switch have contributed to the market under investigation not working well. The market investigation regime does not seek to judge the conduct of market participants against pre-defined prohibitions nor to attach blame to anyone. Indeed the CC would expect a firm facing a downward-sloping demand curve to price at the profit-maximising point. Thus, while profitability analysis has been used to assess whether firms have market power the results of such analysis is not intended to indicate any fault on the part of the firms concerned (and any remedies would aim to improve the functioning of the market in the future, rather than punish the firms supplying that market for past behaviour).⁴⁹ There are many reasons why firms might have market power—why the demand elasticity they face at competitive prices might be low. Technical analysis is closely focused on identifying conditions where there is such a low elasticity. The point, however, is to change them.

6. Evidence – Gathering and Assessment

The CC relies on various types of evidence including:

- Desk top research—published documents and reports;
- Responses to questionnaires (often containing a large volume of detailed data);
- Written and oral submissions from the market participants and other interested parties;
- Parties' files and original correspondence;
- Surveys (commissioned by the CC or by others).

⁴⁹ CC3 notes that profits persistently and substantially greater than the cost of capital may be an indicator of competition problems, rather than identifying any concept of profits or prices being 'excessive'.

There is no formal ‘hierarchy of evidence’. In particular, the CC keeps a careful balance between what economic analysis indicates about the parties’ incentives and likely behaviour and what can be proven from analysis of data, documents, correspondence and emails. The analysis aims to be forward-looking, recent outcomes not necessarily being indicative of market outcomes in the future. The CC’s approach is always to consider all the evidence ‘in the round’ in forming expectations rather than to favour some evidence in preference to any other.

At the beginning of the investigation, the CC seeks to understand the industry and likely competition issues. This will include considering the referring body’s reasons for making the reference (which must be published) and collecting from that body evidence it holds. The early work by the CC also involves desk top research and discussion with the parties of key issues for the industry. Often the CC will obtain a historical background of the industry and will conduct ‘site visits’ visiting many of the key market participants as well as inviting them to give evidence and make written submissions. With this general information, the CC will identify theories of harm which will be developed as the investigation progresses. Through this initial information gathering, the CC can also begin to understand the data and other information that might be available from the parties to the investigation and (in consultation with those parties) begin to develop detailed information requests.

At an early stage of the investigation the CC requires market participants (usually all main parties but sometimes others) to complete financial and economics questionnaires and its in-depth analysis will be based on these responses. Consumer bodies and trade associations can on occasion be useful sources of information, particularly if the market is one with a significant number of small or medium sized participants. The CC can often successfully gather evidence and communicate to these participants through a trade association, thus increasing efficiency of the investigation.

The CC explores issues raised by the responses and background research, generally through hearings with individual firms having published a statement of issues prior to the hearings with the main parties so that they are aware of the issues then being considered. The CC also seeks comments on its published documents (see *Procedural Aspects* above). The dialogue between the CC and the parties continues throughout the investigation, the CC requesting additional data and clarification of points and the parties responding to the CCs’ work, whether Emerging Thinking or one of the several papers it makes available during the process indicating the CC’s approach to particular issues (for example, market definition, price discrimination)—see *Transparency* below. Generally the CC will meet the significant market participants for formal (transcribed private) hearings on two occasions prior to publication of provisional findings but there are often several working level meetings with the parties also.

The CC makes considerable use of surveys. The CC has undertaken a wide variety of surveys: quantitative and qualitative (e.g. focus groups), telephone on-line or face-to-face and techniques such as conjoint analysis. These can be surveys of end-customers, suppliers and also of market participants. The last of these might be used as a way of obtaining the views of a large number of small market participants (small firms, for example). Interested parties are also invited to submit surveys they have commissioned and consider relevant, although more credence is placed on surveys conducted before it became generally known that the market was to be investigated. Surveys can examine a wide variety of questions, although it is important not to assume that simply because a question can be posed, the answer will necessarily be accurate or meaningful. For example, hypothetical monopolist questions for market definition will often simply be too abstract from the perspective of a consumer, but it might be possible at least to find out what the nearest substitutes to a given product are perceived to be (or the main features of the product that the consumer considers important). Thus, survey work will rarely be determinative for market definition, but might provide valuable evidence to be taken with other evidence; and the same is true for other questions that might be asked.

Recently, the CC has begun to use surveys in the remedy design phase of its investigations to trial possible remedies. In the recent *Northern Irish Personal Banking* investigation, for example, surveys were used to gain a better understanding of customers' awareness of information about current account services, in order to identify information deficits that could usefully be addressed with remedies. The CC is thinking further about whether there is scope for greater use of surveys in relation to customer-facing (and perhaps particularly information-based) remedies in the future, for example through the use of focus-groups to test reactions to particular information delivered in particular forms.

The CC recognises the importance of drawing a distinction between fact and opinion. While the CC receives and fully considers evidence that is opinion based, it focuses upon evidence by making requests for data and for contemporaneous documents. In *Groceries* the CC received evidence from both perspectives, some of it contradictory and anecdotal. Part-way through the investigation, the CC sought all written exchanges between two grocery retailers and its suppliers over a 6 week period in order to gain perspective on the relationship between these retailers and suppliers - the CC received approximately 180,000 emails in total. The retailers sought to explain matters observed by the CC, but this did not detract from the results of the document survey. The results were informative, and the information could not have been obtained in another way. In *Payment Protection Insurance (PPI)* (ongoing) the CC requested all relevant internal documents relating to the development of a short-term income protection policy, to evaluate the extent of a party's activity in PPI products against the claims by the party that it no longer sold such products but instead provided a different offering to its customers. The analysis was very important in understanding whether or not the new product was within the scope of the CC's investigation.

In general, the CC secures the information by request though the existence of the statutory powers is undoubtedly helpful in securing compliance with such requests.⁵⁰ Recently the CC has made increasing use of its statutory powers when parties have shown reluctance to provide the information. They have also been used to ensure that documents were not destroyed (it is a criminal offence to destroy relevant documents) and as a means of ensuring that the responses are complete and not edited for the party's purpose.

7. Involvement of Market Participants and Others

As mentioned already, the CC's investigations involve receipt of evidence and views from market participants and also other interested parties, such as consumer bodies, regulatory or public authorities, suppliers and academics. All have the opportunity to provide views on the issues and analysis of the CC. As explained below—*see Transparency*—a considerable amount of the evidence submitted to the CC is placed, in non-confidential format, on the CC's website, thus enabling parties to understand and comment on the evidence of others. This level of transparency not only ensures that the parties' rights of defence are respected but also enables interested parties to understand the reasons for the CC's decisions, even if they may not deliver the outcome that they want. The CC considers that such transparency improves the quality of its analysis and contributes to the standing of market investigations and advocacy.

For example, in *Home Credit*, the CC received contributions from 50 home credit providers and 34 third parties, including, academic researchers, consumer bodies, credit data agencies, credit union bodies, debt campaigning/advisory bodies, Government Departments, other lenders and trade associations. The CC commissioned a qualitative survey and quantitative research, held an open meeting in Manchester, attended by market participants, the trade association, consumer and debt campaigning/advisory bodies.

⁵⁰ The CC has the power to require the production of documents, information and to require attendance to give evidence—section 109 Enterprise Act 2002.

8. Transparency

The CC's processes are designed to permit transparency of process as well as of analysis:

Process: At the outset of the investigation, the CC publishes an Administrative Timetable identifying the projected key stages of the inquiry, falling within the statutory period of two years.⁵¹ This may be revised and refined as the inquiry progresses. The CC staff meet the main parties in the first few weeks to discuss the intended organisation of the case as well as to introduce the staff team. Parties are also provided with the details of the member of staff who will be that parties' key contact and available to answer queries as they arise about the organisation of the investigation and to alert the CC to issues arising when responding to the CCs' requests for information.

Analysis: As shown in the diagram of key stages (see *Procedural Aspects* above), the CC publishes a number of key documents. In addition to these key documents, the CC will publish a number of papers (working papers) which set out the CC's understanding at the time of publication on a particular aspect of the investigation.⁵² Additionally, the CC publishes results of surveys conducted and evidence of parties (in non-confidential format). The CC does not generally publish transcripts of hearings but has in some recent cases organised round table meetings for the purpose of exploring issues, and has published the transcripts of such meetings. For example, in *Groceries* two meetings attended by leading academics for the purpose of discussing analysis of local markets and vertical issues were held.

In addition, the CC makes available further information or clarification to the main parties, as and when appropriate. Despite this high level of transparency, parties often ask for more information, sometimes commercially sensitive information relating to their competitors. The CC considers these requests and makes available such information as it considers appropriate taking into account the parties' rights of defence but thereafter draws the line and is extremely wary of disclosing information that will adversely affect other parties. The CC has considered the use of data rooms but has not done so in any market investigation to date. It has ensured that sufficient information has been disclosed and discounted any further disclosure on the basis that it would be harmful, notwithstanding the fact that confidentiality rings could have been set up.

Home Credit provides an illustration of the volume of information published by the CC in the course of the investigation: 10 Core documents (including Administrative Timetable, Emerging Thinking, Provisional Findings, Proposed Remedies), 9 press releases, 89 written submissions, 4 surveys (2 commissioned by the CC), 9 notes of meetings and summaries of hearings and 8 working papers (in addition to the material published with the Emerging Thinking and Provisional Findings).

9. Resources

Market investigations vary greatly in the resources required to carry them out. Even though the length of the investigations of those completed to date has been similar (almost 2 years), the costs incurred by the CC have varied significantly. So too the costs incurred by the market participants are likely to vary, according to the number of parties involved but also according to the market participant's chosen approach. While some seemingly adopt a minimalist approach (even though they are a main party), others would appear to devote considerable internal resource and engage large teams of external economic and legal advisers (the contrast between parties in the same inquiry can be very striking). In addition to

⁵¹ For example see Groceries web-page:
<http://www.competition-commission.org.uk/inquiries/ref2006/grocery/index.htm>

⁵² For example, see Groceries web-page: Further Working papers.

engaging with the CC, it is noticeable that some parties chose also brief journalists and lobby government, thus further adding to their costs

CC staff teams similarly vary to suit the inquiry, and varied over time as the inquiry develops. For example, in *Groceries*, an initial team of two economists expanded to 12 at a time of peak activity, subsequently being reduced towards the end of the investigation. The CC deploys multidisciplinary staff teams, formed for the purpose of conducting each case, and scales the resources as required by that case. Flexibility and the ability to deploy specialists is maintained by organising the CC into specialist teams for career management purposes—a matrix structure. Thus, specialists such as econometricians, regulatory economists, lawyers and accountants can be deployed into whichever inquiry team most needs them. This creates a flexible structure for staffing inquiries, while also maintaining a professional focus. For example, in *Domestic LPG* there was seldom more than one economist working at any one time, in contrast to *Groceries* which peaked at 12.

The CC does not in general contract core analytical work out to external agencies, or consultancy firms. This reflects a concern not to contract out the agency's 'thinking'. Partly this reflects good practice within cases. Economic and other expert advice needs to be fully integrated into decision-making, not provided somehow from outside. The CC would be concerned if by contracting out significant analysis to consulting firms, key staff would be lost to the private sector in such of such work, thus "hollowing out" the agency.

To deal with this very varied workload, therefore, the CC adopts a range of strategies to increase staff flexibility, including flexible hours. The CC over-recruits in some teams, and seconds staff out to other government agencies and the private sector in quieter periods. Wherever possible, the CC identifies external professionals willing to act as short-term or temporary staff. On occasions, the CC uses consultancies for the provision of such staff, but only on a secondment basis: the CC employs the individual consultant who is treated as a CC employee, but does not employ the consulting firm. Even so, conflicts of interest considerations are taken into account when hiring the individual, including consideration as to the restrictions that will apply once the individual returns to his consultancy. In *Groceries* to assist in the review of the large volume of emails (see—*Evidence*—above) the CC recruited 8 paralegals for a 2 month period and expert forensic IT specialists, the latter providing expertise that was not available within the CC and the former, satisfying a need for additional resource at a time of high activity.

The CC also has a panel of external academic economic advisers. These experts advise the CC staff economists on their case-work, for example participating in sessions brainstorming the likely analytical path to be followed. They do not in general directly advise decision-makers and do not act as 'expert witnesses'. They are intended to enhance the expertise of the staff, rather than replace it.

There are some specific activities that CC routinely contracts out. Most notably, it commissions the design and conduct of market research (surveys) though not without the input of the CC's statisticians (who report to the Chief Economist).

The members of the CC bring further expertise and experience to the CC. A group (generally of 4 to 6 members) appointed by the Chairman to determine a case will bring expertise in Accountancy, Banking, Law, Business and Economics.

10. Unique Features of Market Investigations

One of the more unusual aspects of the market investigation regime is that the CC does not select the markets that it reviews. As the OFT has explained, it may refer markets to the CC and similarly the utility regulators with concurrent competition powers may make market references in respect of their sector and Ministers also have a residual power to make references if the OFT has decided not to make a reference or has not reached a decision in sufficient time.⁵³ The fact that the CC does not select the markets to be investigated benefits the early stages of the case when the CC is scoping the investigation—though at later stages of the investigation the degree of co-operation will vary according to the party's perception of the likely outcome and how it will be affected by the outcome. Conducting an independent investigation from scratch means that the CC can find reasons for clearance that have not been put forward by the parties or the referring body. For example, in *Store Cards*, the OFT reference highlighted the limitations on retailers' ability freely to choose competing finance companies to provide their store card programmes. The CC cleared this part of the market, but reached an AEC finding on the consumer end of the business. Similarly, in *Northern Irish Personal Banking* (see *The Terms of Reference and Scope of CC's Investigation* above) the CC did not find coordination, as had been suspected at the time of making the reference.

Much of the investigation is conducted without the exercise of the CC's statutory information gathering powers, indicating perhaps the benefits to the parties of a co-operative process and a regime which does not seek to judge the conduct against pre-existing prohibitions or rules. Notwithstanding this, the CC places considerable importance on testing the evidence received and being prepared to challenge it. Partly in recognition of the asymmetry of information and partly in recognition of the importance of evidence based decisions, the CC seeks factual information and is prepared to use its information gathering powers.

Another factor which distinguishes market investigations from other types of market studies is the fact that the CC can take remedial action if it considers that there are competition issues that require addressing either by seeking undertakings or by making an Order. As part of the CC's consideration of remedies the CC must also consider action it should recommend others to take. This most notably includes recommendations to the Government. It might make such a recommendation if it were to propose amendment to legislation, for example. The Government has given a commitment to publish its response within 90 days of publication of its report.⁵⁴ Particularly when non-competition issues are of importance in markets, the consideration of such issues by the CC (and the recognition of significance of the non-competition issues) can be influential in the final outcome of those recommendations. For example, in *Groceries* the fact that the CC has taken into account and acknowledged the significance and role of planning law when recommending the introduction of a competition test as part of the planning regime means that the recommendation has greater authority than if the CC had not. But it also preserves the Government's freedom to act, if for reasons that it considers override the competition benefits, it chooses not to follow the CC's recommendation.

Annex II sets out the remedies determined by the CC on completed market investigations. The Schedule illustrates the use of a mix of remedies, that is, both action by it and recommendations.

⁵³ In 2007 the Office of the Rail Regulator referred the supply of rolling stock to the CC. There are no examples of references by Ministers under the Enterprise Act 2002.

⁵⁴ *Productivity and Enterprise: A World Class Competition Regime*, DTI, July 2001. In *Home Credit* the Government accepted in full the relatively 'minor' recommendation made to amend regulations for home credit.

UNITED STATES

Introduction

The U.S. Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice (the “Antitrust Agencies”) are primarily responsible for enforcing the U.S. antitrust laws. The Antitrust Agencies complement their enforcement work with a wide variety of additional activities designed to promote competition, such as research and reports, workshops, advocacy filings, *amicus curiae* briefs, and testimony before Congress. This policy work helps inform the Antitrust Agencies and others about emerging legal and economic issues affecting competition enforcement. Through this “competition research and development,” the Antitrust Agencies maintain their expertise and share important information with other policymakers, the antitrust bar, businesses, and the general public.

Market studies are one of the Antitrust Agencies’ most important policy tools.¹ As Federal Trade Commission Chairman Kovacic has observed, “[e]mpirical research facilitates the creation of what might be called ‘economic precedents’ – economic studies that demonstrate the validity of a hypothesis and, like legal precedents, can be invoked over time to support specific policy interventions.”² While market studies provide valuable information to the Antitrust Agencies and to the public, they also require significant resources and must be conducted rigorously in order to produce useful results.

The Antitrust Agencies have conducted some studies jointly to take advantage of the Agencies’ collective experience and to coordinate their policy positions.³ For example, the Antitrust Agencies’ 2004 health care report analysed new forms of health care financing and delivery, including new forms of joint ventures and consolidation by physicians and hospitals.⁴ Another example is the Antitrust Agencies’ report examining the nature of competition in the real estate brokerage industry, which included discussion of the structural characteristics of the industry, the recent growth of non-traditional brokerage models, the impact of the Internet on consumers of brokerage services, and obstacles to a more competitive environment.⁵

¹ Information about Federal Trade Commission reports, as well as the reports themselves, are available to the public at <http://www.ftc.gov/opp/reports.shtm>.

² William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 ANTITRUST L.J. 861, 865 (2005).

³ See, e.g., <http://www.usdoj.gov/atr/public/reports/index.htm> for the text of such reports.

⁴ FEDERAL TRADE COMMISSION AND THE DEPARTMENT OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004), available at <http://www.ftc.gov/bc/healthcare/research/healthcarehearingreports.htm>. In this report, the Antitrust Agencies analysed the role of competition in the health care industry and made a number of joint recommendations for industry participants and government regulators.

⁵ FEDERAL TRADE COMMISSION AND THE DEPARTMENT OF JUSTICE, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY (Apr. 2007), available at <http://www.ftc.gov/opa/2007/05/realestate.shtm>. The report included a recommendation that the Agencies and industry regulators consider the feasibility of conducting an empirical study of the brokerage industry.

Based on its statutory authority, the Federal Trade Commission (“FTC” or “Commission”) has also conducted a significant number of studies independently. The Federal Trade Commission Act (“FTC Act”) explicitly authorises the Commission to “gather and compile information concerning . . . the organisation, business, conduct, practices and management” of persons and of corporations. 15 U.S.C. § 46(a). President Woodrow Wilson, in his recommendation for the creation of the FTC in 1914, saw the new commission as “an indispensable instrument of information and publicity . . . as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided.”⁶ It has been observed that “the gathering of information and its dissemination has long been one of the chief justifications for the existence of the Federal Trade Commission.”⁷

The Antitrust Division lacks the statutory authority held by the FTC to issue compulsory process solely to conduct industry studies. As a result, the Antitrust Division has independently conducted very few industry studies in recent years. However, the Division can and does on occasion examine particular industries without using compulsory process. Two recent examples are the Telecommunications Symposium it held in November 2007 and the Workshop on Airline Competition that it will hold in October 2008.⁸

This paper focuses on how the Antitrust Agencies select industries to study and how they make use of market studies, the relationship between enforcement actions and market studies, and mechanisms for collecting data. The paper also describes the legal requirements for conducting studies. Given the FTC’s special history and role in developing such studies, most of the examples provided are FTC projects.

2. Selection of Industries to Study and Use of Market Studies

The Commission often initiates studies at the request of the U.S. Congress, the President, and Congressional oversight committees. Many of the FTC’s early studies were responses to Congressional requests. In 1916, the FTC published a Congressionally-mandated “Report on Cooperation in American Export Trade,” which explained problems that U.S. firms encountered in competing with foreign businesses.⁹ The report led in large part to the passage of the Webb-Pomerene Export Trade Act of 1918, which allows associations of U.S. producers to engage in cooperative activities solely for the purpose of export trade.¹⁰ Another example is the FTC’s “blue sky” work and its disclosure of securities issues abuses, which “played a role in heightening Congress’ perception of the need for securities industry regulation, leading to the Securities Act of 1933.”¹¹

⁶ H.R. Doc. No. 625, 63d Cong., 2d Sess. 6 (1914).

⁷ See William Breit and Kenneth G. Elzinga, “Information for antitrust and business activity: line of business reporting,” in *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR* 98 (Kenneth W. Clarkson & Timothy J. Muris eds. 1981).

⁸ See generally <http://www.usdoj.gov/atr/events/htm>.

⁹ See John F. McDermid, “*The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment*,” 37 WASH. & LEE L. REV. 105, 108 (1980).

¹⁰ FEDERAL TRADE COMMISSION, OFFICE OF POLICY PLANNING, HISTORY OF SECTION 6 REPORT-WRITING AT THE FEDERAL TRADE COMMISSION 10-12 (Apr. 1981), Available at <http://www.ftc.gov/be/econrpt.shtm>.

¹¹ F.M. Scherer, “*Sunlight and Sunset at the Federal Trade Commission*,” 42 ADMINISTRATIVE LAW REVIEW 461, 467-68 n.32 (1990) (citing Stevens, *The Federal Trade Commission’s Contribution to Industrial and Economic Analysis: The Work of the Economic Division*, 8 GEO. WASH. L. REV. 545, 564 (1940); Oppenheim, *Foreword*, 8 GEO. WASH. L. REV. 249, 272-73 (1940); M. GREEN, B. MOORE, JR., & B. WASSERSTEIN, *THE CLOSED ENTERPRISE SYSTEM* 369 (1972)).

Although these requests determine to some extent the scope of an inquiry, the FTC refines further the focus of the study in light of the substantial cost of undertaking a study and other considerations. Agency personnel must spend time carefully designing a study so that it yields useful results. Gathering data often involves a significant commitment of agency resources, and data can be costly to obtain from outside sources. There is also a burden on industry and the public when they receive a request to supply information to the agency. Analysing the data, preparing the report, and having it reviewed internally frequently require a full-time effort by many agency employees. These costs need to be considered as part of an agency's calculus in deciding when and whether to conduct particular market studies and in determining what industries to study.

For example, in May 2006, the Commission completed an extensive, Congressionally-mandated investigation to determine whether gasoline prices were being affected by "manipulation" and to determine whether "price gouging" occurred following Hurricane Katrina.¹² The investigation included the full-time commitment of a significant number of attorneys, economists, financial analysts, and other personnel with specialised expertise in the petroleum industry. As described in the following section, the FTC obtained substantial information from industry. Even with this commitment of resources, it was not possible to study every pricing and output decision in this very complex industry. Thus, the FTC used its knowledge and expertise from previous investigations and studies, as well as the concerns raised by knowledgeable observers and market participants about competition in the industry to focus on levels of the industry and parts of the country where problematic behaviour was most likely to have occurred and to have had an effect on consumers.¹³

The Antitrust Agencies also conduct studies on their own initiative, which frequently build on experience the Agencies have gained in enforcement matters. The Antitrust Agencies target their resources by focusing on aspects of industries that are of particular importance to consumers, such as petroleum, health care, and real estate. For example, the FTC's Bureau of Economics prepared a staff report that analysed structural changes in the petroleum industry such as the large mergers in the late 1990s.¹⁴ As that report explained, technological, economic, and regulatory factors spurred the transformation of the industry. The report concluded that most sectors of the petroleum industry remain unconcentrated or moderately concentrated, and that an increase in concentration due to a merger is not sufficient to find that a merger was anticompetitive. As detailed in the report, the FTC has challenged mergers or required divestitures when it has concluded that a merger is likely to reduce competition.

The Antitrust Agencies may also focus on dynamic industries that are rapidly changing. In this regard, the FTC's report on the relationship between the antitrust and the patent laws gave special attention to pharmaceuticals, biotech, computer hardware, software, and the Internet.¹⁵ Similarly, FTC staff issued a

¹² FEDERAL TRADE COMMISSION, INVESTIGATION OF GASOLINE PRICE MANIPULATION AND POST-KATRINA GASOLINE PRICE INCREASES (Spring 2006), *available at* http://www.ftc.gov/ftc/oilgas/competn_reports.htm.

¹³ Other Congressionally mandated reports include FEDERAL TRADE COMMISSION STAFF REPORT, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: CONTACT LENSES (Mar. 2004), *available at* <http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf>, and FEDERAL TRADE COMMISSION, ACCOUNTING FOR LAWS THAT APPLY DIFFERENTLY TO THE UNITED STATES POSTAL SERVICE AND ITS PRIVATE COMPETITORS (Dec. 2007), *available at* <http://www.ftc.gov/os/2008/01/080116postal.pdf>.

¹⁴ FEDERAL TRADE COMMISSION, BUREAU OF ECONOMICS STAFF STUDY, THE PETROLEUM INDUSTRY: MERGERS, STRUCTURAL CHANGE, AND ANTITRUST ENFORCEMENT (Aug. 2004), *available at* http://www.ftc.gov/ftc/oilgas/competn_reports.htm.

¹⁵ FEDERAL TRADE COMMISSION, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (Oct. 2003). The Antitrust Agencies recently issued a joint report regarding competition issues raised by activities involving intellectual property rights, DEPARTMENT OF JUSTICE AND

report on broadband connectivity that responded to the recent “net neutrality” debate relating to Internet access.¹⁶ Likewise, the Antitrust Division intends to produce a report based upon what was learned in its 2007 Telecommunications Symposium.¹⁷

The FTC’s attempt in the 1970s to study a broad swath of the economy was less successful. The agency initiated in 1973 a “Line of Business” program that was intended to address a long-perceived need for systematic financial data. The data were collected from accounting categories that would typically appear on a firm’s income statement or balance sheet. The program required special accounting for about 260 industry categories by 460 large U.S. manufacturing and distribution firms that collected and reported data on over 4,000 lines of business. The data were much more disaggregated than those collected at the standard firm or business unit levels. A staff of FTC accountants, research analysts, and economists devised the rules for collecting the data and provided various quality controls.

The requirements for special accounting systems, confidentiality needs, and the likely fear that the data would later be used against them in legal proceedings made this program very controversial among the firms. Firms strongly resisted efforts to initiate the program, with more than 100 surveyed companies suing to enjoin the collection of the 1973 data. Litigation over the collection of data continued from 1975 to 1978, and data were ultimately collected for 1974 through 1977. The project was also criticised by academic commentators, who focused on data collection and accounting problems that might make the data of relatively little use.¹⁸

In 1981, the Commission suspended the data collection program and, in 1984, voted to terminate the program without issuing a report. FTC economists analysed the data through the mid-1980s, and consultants were given access to the data for academic research. Since then, however, the FTC has not conducted any economy-wide studies, instead targeting its resources by focusing on aspects of particular industries.

The Antitrust Agencies do not systematically examine prices in particular industries. One exception is the FTC’s monitoring of retail and wholesale prices of gasoline and diesel fuel.¹⁹ FTC staff monitors gasoline and diesel prices to identify “unusual” price movements and then examines whether any such movements might result from anticompetitive conduct that violates the antitrust laws. FTC economists developed a statistical model for identifying such movements. The agency’s economists regularly scrutinise price movements in 20 wholesale regions and approximately 360 retail areas across the country. The staff reviews daily data from a private data collection agency, and receives information weekly from the public gasoline price hotline maintained by the U.S. Department of Energy (“DOE”). The staff

FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (Apr. 2007). Both reports are *available at* <http://www.ftc.gov/bc/tech/property/reports.htm>.

¹⁶ FEDERAL TRADE COMMISSION STAFF REPORT, BROADBAND CONNECTIVITY COMPETITION POLICY (June 2007), *available at* <http://www.ftc.gov/bc/tech/cable/broadband.htm>.

¹⁷ See <http://usdoj.gov/atr/public/workshops/telecom2007/index.htm#report>.

¹⁸ See Breit and Elzinga, *supra* n. 7. After the program was terminated, a former FTC Bureau of Economics director defended the program, see Scherer, *supra* n. 11, at 477-79 (1990). For a discussion of the program more generally by its key proponents in the 1970s and early 1980s, see *FTC History: Bureau of Economics Contributions to Law Enforcement, Research, and Economic History and Policy, Roundtable with Former Directors of the Bureau of Economics*, Transcript at 205 – 213 (Sept. 4, 2003), *available at* <http://www.ftc.gov/be/workshops/directorsconference/index.shtm>.

¹⁹ See Federal Trade Commission, *Gasoline and Diesel Price Monitoring*, *available at* http://www.ftc.gov/ftc/oilgas/gas_price.htm.

monitoring team uses an econometric model to determine whether current retail and wholesale prices are anomalous in comparison to the historical price relationships among cities.

The Antitrust Agencies rely on market studies as an effective tool for advocating regulatory and legislative reform. In the pharmaceutical industry, a number of recommendations from the FTC's report on generic drugs have been implemented.²⁰ As a result of those recommendations, the Food and Drug Administration revised its regulations for approving generic drugs and which patents can be listed with that agency. In addition, the Medicare Act passed by Congress in 2003 incorporates key FTC recommendations to facilitate entry of generic drugs and requires that the FTC be notified of certain agreements between branded and generic drug firms. The 2003 Medicare Act also instructed the FTC to perform another market study, this time of vertical integration between pharmacy benefit managers and mail-order pharmacies, based on the Commission's experience with the industry obtained while reviewing numerous mergers.²¹ The FTC's study of competition in the contact lens industry, as well as the joint FTC/DOJ study of competition in the real estate brokerage industry, also have served as the foundation for advocacy filings with state legislators and testimony before the U.S. Congress. The Antitrust Division has also authored a number of in-depth studies of the competitive performance of various regulated industries, including airlines, insurance, milk marketing, ocean shipping, and numerous energy industries.²² The purpose of these reports was to create greater public awareness of the costs of regulation and thereby to encourage greater consideration of the benefits of competition and of market-based solutions when crafting or revising regulations and/or legislation.

3. Relationship between Enforcement and Market Studies

The Antitrust Agencies do not use market studies as a substitute for conducting investigations and initiating enforcement, but there are some important complementarities between the Antitrust Agencies' enforcement actions and their market studies. The Agencies frequently decide to study markets in which they have long-standing expertise based on past enforcement actions. This expertise gives the Agencies a significant advantage in targeting their resources to the most fruitful avenues of inquiry.

The Antitrust Agencies build a substantial base of knowledge relating to specific industries in the normal course of enforcing the competition laws. That knowledge is naturally focused most directly on the firms, geographic markets, product segments, and business practices that create the competitive concern leading to a potential enforcement action. Market studies can be useful for expanding that knowledge to allow for a better understanding of proposed laws or regulations. They also help to foster an understanding of the market that can allow future antitrust investigations in the market to focus more quickly on potential problem areas.

On some occasions, the FTC's studies of particular industries have also instigated important enforcement matters. In 1949, the FTC began an intensive investigation of cartels in the international petroleum industry. Its report concluded that concentration in that industry was "probably more

²⁰ FEDERAL TRADE COMMISSION, *GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY* (July 2002), available at <http://www.ftc.gov/bc/healthcare/research/healthcarehearingreports.htm>.

²¹ FEDERAL TRADE COMMISSION, *PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES* (Aug. 2005), available at <http://www.ftc.gov/reports/pharmbenefit05/050906pharmbenefitrpt.pdf>.

²² See, e.g., *Competition in the Oil Pipeline Industry: A Preliminary Report* (1984); *Competition in the Coal Industry* (1983); *Antitrust Advice on the License Application of the Texas Deepwater Port Authority* (1979) (pursuant to Section 7 of the Deepwater Port Act of 1974); *Outer Continental Shelf Federal/State Beaufort Sea Oil and Gas Lease Sale No. BF* (1980); *1985 Report of the Department of Justice to Congress on the Airline Computer Reservation System Industry* (1985).

widespread than in any other field of enterprise.”²³ The report led the DOJ in 1952 to initiate a criminal investigation of the oil industry.²⁴ More recently, initiatives such as the gasoline and diesel price monitoring project have unveiled information that has led to investigations and enforcement actions. FTC staff have followed up on observations of anomalous pricing patterns to examine bulk supply and demand conditions and practices for gasoline and diesel fuel in the Pacific Northwest. In the pharmaceutical sector, information collected for the FTC’s generic drug study was later used for several enforcement matters.²⁵

Typically, however, the Antitrust Agencies do not use studies as the basis for enforcement actions. In connection with the FTC’s current study of authorised generic pharmaceutical drugs, the agency has stated that it “would not exercise its enforcement authority solely on the basis of information collected in response to the [compulsory process] Orders. Rather, it would do so only after gathering additional information from a company and/or other sources through an investigation separate from the proposed study.”²⁶ For the Antitrust Agencies’ study of the real estate industry, there was a strict separation between staff conducting the study and staff conducting formal investigations of anticompetitive practices of groups of real estate brokers. Information obtained from the formal investigations was not used for the Antitrust Agencies’ report. This division between the Antitrust Agencies’ enforcement and policy functions has likely increased the willingness of firms to supply information to the Agencies.

4. Sources of Data

As suggested by the examples above, the Antitrust Agencies use data from a variety of sources. The FTC Act provides the agency with formal powers to collect information for studies, as discussed below. The DOJ Antitrust Division does not have formal powers that are specifically intended for studies, and thus uses other methods of gathering data. The choice of data collection methods depends on, among other things, the type of study being conducted, particular characteristics of the industry being studied, the level of agency resources devoted to the study, and time constraints for completion of the study. The choice of data is also influenced by legal requirements that apply to all federal agencies which involve how agencies collect data, the purposes for which data can be collected, and mechanisms for ensuring that information disseminated by agencies meets certain quality standards. Those legal requirements are discussed in the next section.

There are several types of formal compulsory process that the FTC can use to obtain data for a study. With each type, the recipient of compulsory process is entitled to object to the information request through a mechanism that can ultimately reach the full Commission and is appealable to the courts. If a party fails to comply with the compulsory process, the Commission may seek enforcement of the request in a federal district court. The FTC must balance the advantages of using formal information requests with the costs of formulating the requests, obtaining agency approval for issuing them, and litigating any challenges to the requests.

²³ BURTON I. KAUFMAN, *THE OIL CARTEL CASE: A DOCUMENTARY STUDY OF ANTITRUST ACTIVITY IN THE COLD WAR ERA* 29 (1978).

²⁴ *Id.* DOJ eventually brought civil suits against marketing and pricing agreements, which were settled by consent decree.

²⁵ “*More than Law Enforcement: The FTC’s Many Tools – A Conversation with Tim Muris and Bob Pitofsky*,” 72 ANTITRUST L.J. 773, 777 n.1 (2005) (citing as examples *Bristol-Myers Squibb Co.*, No. C-4076 (Apr. 14, 2003) (consent order); *FTC v. Perrigo Co. & Alpha Pharma Inc.*, No. 04-1397 (D.D.C. Aug. 25, 2004) (consent orders)).

²⁶ 72 Fed. Reg. 25304, 25312 (May 4, 2007). Authorised generics are generic drugs sold by, or on behalf of, the branded manufacturer.

Compulsory process obligates recipients to produce the data in the format required by the Commission. Section 6(b) of the FTC Act, 15 U.S.C. § 46(b), empowers the Commission to require the filing of “reports” or “answers in writing to specific questions” for the purpose of obtaining information about “the organisation, business, conduct, practices, management and relation to other corporations, partnerships, and individuals” of the entities to whom the inquiry is addressed. In addition, the Commission is authorised to issue “civil investigative demands” – which are similar to subpoenas – to investigate possible antitrust and consumer protection violations. This form of compulsory process, like orders issued under Section 6(b), may require the recipient to “file written reports or answers to questions.” 15 U.S.C. § 57b-1(c)(1).

The Antitrust Agencies may also use information that is voluntarily supplied by firms, that they purchase from third parties, or they obtain from other government agencies. The information the FTC collected for the 2006 report on gasoline price manipulation and post-Katrina gasoline price increases illustrates the use of many different types of sources. Staff conducted more than 65 voluntary interviews with industry participants and representatives of state and federal agencies, and also conducted investigational hearings (similar to depositions) of industry officials. Staff gathered quantitative data from several sources. The Commission issued 139 civil investigative demands to a wide spectrum of petroleum industry firms. The Commission also issued 99 orders pursuant to Section 6(b) of the FTC Act. In addition, the Commission used firm-level data supplied by the Department of Energy and purchased a large volume of wholesale and retail pricing data from a private data collection company.

The FTC occasionally obtains quantitative data through the use of voluntary requests (voluntary access letters) to industry.²⁷ The Commission’s recent study of the effects of credit-based insurance scores on the availability and affordability of automobile insurance illustrates the advantages and disadvantages of relying solely on voluntarily provided data.²⁸ For that Congressionally mandated study, FTC staff obtained access to automobile insurance policy data provided voluntarily by five firms representing 27% of the United States automobile insurance market in 2000. Three Commissioners issued a joint statement accompanying the report that explained the data and methodology used for the report.²⁹ One Commissioner dissented from the report and criticised the agency’s decision to use information obtained voluntarily rather than through compulsory process. Commissioner Harbour concluded that there were several deficiencies in the data, such as that “the data cannot be independently verified to determine whether any bias was introduced during the selection process” and that the “data did not contain critical elements on individual policyholders.”³⁰ As a result, she “doubt[ed] the reliability of any conclusions the report might draw.”³¹ Several consumer groups criticised the report’s conclusions and also expressed concern that the FTC would use the same type of voluntarily-provided information for a similar study on the impact of credit-based insurance scores on the availability and affordability of homeowners

²⁷ Voluntary access letters were used for the FEDERAL TRADE COMMISSION STAFF REPORT, THE USE OF SLOTTING ALLOWANCES IN THE RETAIL GROCERY INDUSTRY (Nov. 2003), *available at* <http://www.ftc.gov/opa/2003/11/slottingallowance.shtm>.

²⁸ FEDERAL TRADE COMMISSION, CREDIT-BASED INSURANCE SCORES: IMPACTS ON CONSUMERS OF AUTOMOBILE INSURANCE (July 2007), *available at* <http://www.ftc.gov/opa/2007/07/facta.shtm>.

²⁹ Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch, *available at* <http://www.ftc.gov/opa/2007/07/facta.shtm>.

³⁰ Dissenting Statement of Commissioner Harbour at 4, *available at* <http://www.ftc.gov/opa/2007/07/facta.shtm>.

³¹ *Id.* at 1.

insurance.³² In response, the Commission has approved a resolution authorising the use of compulsory process to obtain homeowners' policy information from insurance companies.³³ The Commission has placed on its website a draft model order and is seeking comment from the public.³⁴ The Commission has noted, however, that it expects the use of compulsory process to delay its completion of the report.³⁵

Some studies draw upon hearings and workshops that gather knowledge from informed outsiders.³⁶ The Antitrust Agencies use hearings "to obtain the current thinking of business operators within the profession about developments that bear upon the formulation of competition policy."³⁷ In addition, the Agencies can "invite academics to present the results of empirical or theoretical work and to help guide the formulation of the agency's own research agenda and to encourage academics to consider research programs that might be of interest to the competition policy community."³⁸ Policy-makers from other federal and state agencies also frequently share their views in these proceedings.

For example, in 2003 the Antitrust Agencies conducted 27 days of joint hearings on the health care industry.³⁹ The hearings gathered testimony from approximately 250 panellists, including representatives of various provider groups, insurers, employers, lawyers, patient advocates, and leading scholars. The Antitrust Agencies also sponsored a workshop and received 62 written submissions from interested parties. The resulting report made a number of joint recommendations to improve competition in health care markets and provided the Agencies' perspective on several antitrust enforcement issues. The FTC recently held a workshop on innovation in health care delivery to update its knowledge on developments since the 2003 workshop.⁴⁰

Shorter workshops are typically used to provide the agency and others with a preliminary assessment of an industry. The FTC's report on broadband connectivity was based on a 2-day workshop and voluntary interviews with and submissions by industry, consumer groups, and other interested parties. Staff supplemented this information with its own research, which relied on scientific and legal journal articles, as well as government reports and studies. The report looked at national trends in the provision of Internet access but was not intended to analyse local markets, which would have required a far more sweeping inquiry. The Antitrust Division held a Telecommunications Symposium in 2007 to address the current

³² Prepared Statement of the Federal Trade Commission, "*Credit-Based Insurance Scores: Are They Fair?*," before the Subcommittee on Oversight and Investigations, House Committee on Financial Services (Oct. 2, 2007), available at http://www.ftc.gov/os/testimony/P044804_Credit-based_Insurance_Scores.pdf.

³³ *FTC Seeks Public Comments on a Model Order to Obtain Data for Study of the Effect of Credit-Based Insurance Scores on Consumers of Homeowners Insurance*, available at <http://www.ftc.gov/opa/2008/05/comprofyi.shtml>. See also Prepared Statement of the Federal Trade Commission, "*The Impact of Credit-Based Insurance Scoring on the Availability and Affordability of Insurance*," before the Subcommittee on Oversight and Investigations, House Committee on Financial Services (May 21, 2008), available at <http://www.ftc.gov/os/2008/05/080521creditbasedtest.pdf>.

³⁴ *FTC Seeks Public Comments on Model Order*, *supra* n. 33.

³⁵ "*Credit-Based Insurance Scores: Are They Fair?*," *supra* n. 32, at 9.

³⁶ A list of workshops and conferences, along with relevant materials, is available at <http://www.ftc.gov/ftc/workshops.shtml>.

³⁷ Kovacic, *supra* n. 2, at 866.

³⁸ *Id.*

³⁹ Materials from the hearings are available at <http://www.ftc.gov/bc/healthcare/research/healthcarehearing.htm>.

⁴⁰ See <http://www.ftc.gov/bc/healthcare/hcd/index.shtml>.

state of competition and likely future developments in providing voice, video, and broadband services to consumers, and will hold a workshop on airline competition later this year.

Gathering information through workshop testimony can provide a useful overview of a particular industry and help discern important competition and consumer protection issues related to its operation. Also, interviews with industry participants can help to identify other sources of information that could be used to address questions of interest. Objective data, whether obtained through compulsory process or voluntary means in some cases, collected by the Antitrust Agencies themselves, such as the price survey in the study of the strength of competition in the contact lens industry, or purchased from outside sources, provide a more reliable basis for policy-making than do purely anecdotal data. On the other hand, these data are usually more costly to obtain. Moreover, as noted above, even quantitative data can be open to criticism, so the strongest studies incorporate a variety of types of information.

5. Procedural Requirements

The Antitrust Agencies follow a number of best practices when conducting a study, some of which are based on legal requirements applicable to most federal agencies. The Agencies typically announce publicly that they are considering initiating a study and frequently provide an opportunity for the public to provide comments on how the study should be conducted. Information in the Antitrust Agencies' reports is normally subject to one or more levels of internal staff, supervisory, or formal agency review for quality before the information may be disseminated. Once a study is completed, the report is made available to the public.

There is no standard procedure for setting a timetable for a study. Often the request for a study will come with a corresponding deadline. The amount of available time will frequently determine the scope of the study. The principal authors of the study will work backwards from the deadline, estimating the amount of time needed for a number of tasks, potentially including: printing for public distribution; final review and approval; final editing; incorporating feedback from within the agency; drafting; document and data analysis; document and data acquisition; obtaining approval of data acquisition methods; initial feedback from the public; initial study design; interviews of industry participants and experts; and internal discussions and initial planning. The amount of time allotted to each task depends on many factors, and flexibility is often required due to unanticipated complications.

5.1 Confidentiality and Transparency

The Antitrust Agencies' authority to disseminate information is subject to legal restrictions or limitations applicable to the disclosure, use, or transfer of information that it collects or maintains.⁴¹

The Antitrust Agencies seek to publish the results of their studies in as broad and as prompt a manner as possible, consistent with applicable disclosure restrictions. The FTC aggregates and anonymises the data so that trade secrets and other confidential commercial or financial information will not be disclosed. The Freedom of Information Act, 5 U.S.C. § 552, also establishes an effective statutory right of public access to federal agency information, unless confidentiality protections or other exemptions apply.

⁴¹ See, e.g., 15 U.S.C. § 57b-2 (b) & (f); 16 C.F.R. § 4.10(d) (information obtained pursuant to compulsory process or in lieu thereof in a Commission law enforcement investigation); 15 U.S.C. § 46(f) (trade secrets and confidential commercial or financial information obtained by the Commission); 15 U.S.C. §§ 1313(c)(3), 1314(g) (information obtained by the Antitrust Division pursuant to compulsory civil process); 15 U.S.C. § 18a(h) (information obtained by the Antitrust Agencies pursuant to Hart-Scott-Rodino pre-merger notification requirements).

5.2 *Paperwork Reduction Act*

Studies conducted by the Antitrust Agencies are subject to the Paperwork Reduction Act, 44 U.S.C. §§ 3501-20, which requires federal agencies to inform the public about the nature of the study and requires agencies to “maximise the practical utility of and public benefit from information collected.” 44 U.S.C. § 3504(c)(3)-(4). The Act also requires federal agencies to consider methods of collecting data that reduce the burden on industry members or other suppliers of data. The Act is intended to reduce the burden on companies and individuals of (1) collecting information, including training employees if applicable, (2) preparing information in the format required by the agencies, and (3) if applicable, consulting with a company’s legal department regarding the collection requirements.

The Paperwork Reduction Act applies when a federal agency asks similar questions that are directed to ten or more persons or business entities, but does not apply if the agency uses data already prepared by outside entities. The Act does not apply when the agency invites comment from the general public provided that a commenter is not required to supply specific information to the agency. The Act does not apply to subpoenas and other investigatory requests for data or information once a case or file is opened that is directed against a particular party. When the U.S. Congress mandates that the Commission conduct a study, Congress may waive the Act’s requirements when a study must be completed in a short time frame. This was done for the FTC’s study on pharmacy benefit managers, which allowed the agency to quickly issue subpoenas to 20 industry participants.

If the Paperwork Reduction Act applies, the agency must submit its plans for collecting the information to the Office of Management and Budget (“OMB”), which is part of the Executive Office of the President and has a role in supervising executive branch agencies. OMB has issued guidelines that cover a wide range of issues such as the agency’s choice of methods for conducting the survey, sampling techniques, modes of data collection, questionnaire design and development, and statistical standards.⁴²

The OMB guidelines include criteria for determining when a study will “maximise public utility.” According to those criteria, the agency must “justify why the information is needed and how it furthers the agency’s goals.”⁴³ When appropriate, the agency should “highlight the knowledge gaps that the information collection is designed to address,” and must demonstrate a “direct connection between the information needs and specific research questions.”⁴⁴ The agency must also ensure that the information collected does not duplicate other information available to the agency.⁴⁵

The Paperwork Reduction Act imposes a number of procedural requirements on federal agencies. The agency must publish an initial public notice announcing that OMB clearance is being sought, and include a discussion of the general design of the study, the benefits to the public, and an estimate of the anticipated burden in terms of hours and cost. The public has an opportunity to submit comments to the agency on these topics. The agency then publishes a second notice responding to any comments submitted and seeks further comment from the public. At the same time, the agency submits to OMB the sample requests for information, notices, comments, and additional documentation. OMB has up to 60 days to render its decision on the agency’s proposed collection of information and often will provide input on the method of collecting data, the design of the survey, and other issues covered by its guidelines.

⁴² Office of Management and Budget, *Guidance on Agency Survey and Statistical Information Collection*, 9 (Jan. 2006), available at <http://www.whitehouse.gov/omb/infoereg/infocoll.html#PRA>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

For example, the FTC sought Paperwork Reduction Act clearance for its ongoing study of authorised generic pharmaceutical drugs.⁴⁶ The study will analyse the likely short- and long-run competitive effects of authorised generics in the prescription drug marketplace. The FTC sought OMB approval for the mandatory information requests it intended to send to brand name, generic, and authorised generic companies. The FTC received extensive comments from industry on ways to reduce the burden of the information requests. In response, the FTC revised its proposed information requests to reduce burden by targeting more narrowly the information required for the study.

As the authorised generics study illustrates, the Paperwork Reduction Act furthers the goal of transparency for agency studies. The Commission has a dedicated website specifically for the study, which includes the public notices seeking comment on the study, the comments received, and examples of the OMB-approved mandatory information requests as well as an example of the requested format for providing information. Even when the Paperwork Reduction Act does not apply to a study, the Antitrust Agencies use a transparent process that informs the public about a study and typically provides a forum for the public to comment.

5.3 *Information Quality Act*

The Information Quality Act and OMB guidelines implementing the Act require federal agencies to ensure and maximise the quality, objectivity, utility and integrity of information (including statistical information) that they disseminate. Pursuant to those mandates, the FTC and the DOJ have each issued guidelines that explain how the agency strives to achieve those goals.⁴⁷

The FTC's guidelines state that information or data may be subject to public comment or exposure before the agency uses the information. This public comment process provides an opportunity for interested parties, including persons who may be most affected by the dissemination, to corroborate or dispute the objectivity, utility, or integrity of the information. In these cases, the FTC may provide to the public the underlying data or methods the agency uses (e.g., statistical models, assumptions, etc.), to the extent consistent with any confidentiality restrictions.

The FTC and DOJ have each outlined an administrative mechanism by which affected persons may seek and obtain appropriate correction of information the agency maintains and disseminates that does not comply with the agency's or OMB's guidelines. Each agency submits to OMB an annual report on the number and nature of complaints regarding agency compliance with the OMB guidelines and how the agency resolved such complaints.

5.4 *Federal Advisory Committee Act*

Federal agencies must comply with the Federal Advisory Committee Act, 5 U.S.C. app. § 1 *et seq.*, which provides that certain advisory committees must be established pursuant to a published determination of need and under a charter filed with the agency's congressional oversight committees. Among other things, the membership of an advisory committee subject to the Act must be fairly balanced with respect to the relevant points of view; meetings must be open to the public; detailed minutes must be kept; and documents considered must be disclosed unless they are exempt from the Freedom of Information Act. The Act does not apply to meetings consisting entirely of employees from federal agencies. In rare circumstances, the FTC relies on a formal advisory committee to provide input into its report.

⁴⁶ Information about the study is available at <http://www.ftc.gov/os/comments/genericdrugstudy3/>.

⁴⁷ The FTC guidelines are available at <http://www.ftc.gov/ogc/sec515/index.shtm>. The DOJ guidelines are available at <http://www.usdoj.gov/iqpr/dojinformationqualityguidelines.htm>.

6. Conclusion

The Antitrust Agencies have found market studies to be a valuable component of their policy activities and an important complement to their enforcement work. Market studies provide an opportunity for in-depth analysis of industries that are particularly important to consumers. By using studies as a method of competition research and development, the Antitrust Agencies support their policy activities with well-documented findings.

While market studies have many benefits, they should be undertaken carefully and with a clear goal in mind. In the United States, before federal agencies can collect data from industry and others, they must comply with U.S. laws that, among other things, provide the public an opportunity to comment on the design of the study and the method of collecting data. When designing a study, competition agencies should consider the many sources of data available: some sources may be relatively easy to access, while others are more burdensome for the agency, the industry, and the public. The usefulness and reliability of the data should be balanced against the costs of acquiring it, in particular the burden on the industry involved. If a competition agency considers these factors, a study is likely to result in an efficient use of agency resources while also providing useful findings for the formulation of competition policy.

EUROPEAN COMMISSION

Introduction

Sector inquiries are the most effective tool at the Commission's disposal to gain in-depth knowledge of barriers to competition in a given sector. According to Article 17 of Council Regulation (EC) 1/2003¹, the Commission may conduct general inquiries into a particular sector of the economy or a particular type of agreements across various sectors where a trend of trade between EU Member States, price rigidity or other circumstances suggest that competition may be restricted or distorted within the Common Market.

This provision is not new; it essentially replaces the old Article 12 of Regulation (EEC) 17/62². The information provided in this note however mostly refers to the most recent sector inquiries carried out by the Commission since the entry into force of Regulation 1/2003 on 1 May 2004, which comprise two sector inquiries into the energy sector (concerning respectively the gas and electricity markets), two inquiries into financial services (retail banking, and business insurance), and the on-going inquiry into the pharmaceuticals sector.

1. Purpose of the Commission's sector inquiries, and link to enforcement action

The Commission uses sector inquiries to identify possible obstacles to competition where it has indications that competition may not be working as it should be in the sector concerned. Sector inquiries allow the Commission to gain an in-depth understanding of the dynamics and functioning of competition within a market as a whole rather than focusing on specific companies or practices. Indications that specific undertakings have infringed EC competition law are not required.

Sector inquiries are a proactive tool allowing the pooling of Commission resources on issues of particular relevance for the competitiveness of industry in general and consumer welfare and setting enforcement priorities. This is reflected in the choice of the sectors into which inquiries have been conducted thus far. They also contribute to the Commission's efforts to base its antitrust enforcement on a solid economic approach. The improved understanding that these inquiries give also informs the Commission's policy decisions about the framework for the market concerned, helping it to regulate better.

Indeed, although sector inquiries are primarily a tool to better understand the market from the point of view of competition policy, that is to give effect to Articles 81 and 82 of the EC Treaty (and possibly but not necessarily leading to the opening of specific competition cases), they may also uncover regulatory issues leading to reflections about the right balance between competition policy and regulatory intervention. Competition law enforcement can often tackle aspects of the problem identified by the sector inquiry but often the root of the problem does not lie in individual company behaviour as such. However, framing the problem in competition terms is often useful to find more far-reaching and durable solutions. In this way, the sector inquiries often complement other priority actions of the Commission, such as those

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p. 1).

² Council Regulation (EEC) No 17: First regulation implementing Articles 85 and 86 (now 81 and 82) of the Treaty (OJ 13, 21.2.1962, p. 204).

aimed at the gradual opening up of the EU energy markets and at promoting the integration of the EU's financial markets.

Sector inquiries are primarily an information gathering and analysis exercise that provides the Commission with in-depth knowledge about markets; this means that they do not replace, but feed "upstream" any possible antitrust proceedings in specific cases which may follow.

To the extent that the inquiry confirms the existence of anticompetitive agreements or practices or abuses of a dominant position, the Commission or, where appropriate, the national competition authorities, could envisage using the information collected in order to take the appropriate measures to restore competition in the relevant markets, including addressing individual decisions to the entities concerned based on Article 81 and Article 82, on their own or, for the Commission, in conjunction with Article 86 of the EC Treaty.

Sector inquiries are also helpful in that not only do they help direct the Commission's attention to where enforcement cases should be opened, by uncovering evidence, but also the fact that they shine a spotlight on anti-competitive business practices is sometimes enough to get the companies themselves moving to solve the problems. For example, following the publication of the preliminary report on the findings of the sector inquiry into retail banking, several market players took voluntary action to address some of the problems identified³.

Sector inquiries also yield valuable information that can guide the Commission's thinking on merger and state aid cases. They also set the framework for coordination among national competition authorities and the Commission, to ensure coherence in their actions.

2. Approach

2.1 Choice of markets

As indicated above, sector inquiries have been initiated where there have been indications of malfunctioning markets.

In the case of the inquiry into the energy sector, the Commission was concerned about significant price increases in the market and complaints by customers that they were not receiving an adequate number of genuinely competitive offers from the existing suppliers. These signs, combined with the small number of new entrants, as well as with the limited market integration and high market concentration, suggested a restriction or distortion of competition at the EU level.

In the case of the inquiries into the financial services sector (retail banking and business insurance), such indicators were in particular market fragmentation and entry barriers (such as significant variations in prices and profitability, increasing levels of concentration on a domestic level, limited number of cross-border mergers). In retail banking there were indications of a lack of demand-side power and effective choice, whereas in the insurance industry there were practices of close cooperation.

The on-going inquiry into the pharmaceuticals sector was launched following indications that there has been a decline in innovation as measured by the number of novel medicines reaching the market and instances of delayed market entry by suppliers of generic medicines. There are also indications of commercial practices by pharmaceutical suppliers including notably patenting or the exercise of patents

³ For example, in Portugal issuers and acquirers met some of the Commission's concerns by reducing domestic interchange fees somewhat and removing preferential bilateral domestic interchange fees.

rights which may not serve to protect innovation but to block or delay innovative and/or generic competition. Other practices reported to the Commission were litigation, which may be vexatious; and agreements, which may be collusive. Such practices may cause market distortion when they unduly fence off incumbent suppliers of drugs from innovative or generic competition, for example, due to *de facto* extended patent protection through unilateral conduct or agreements.

2.2 *Data collection*

Once the Commission has adopted a decision under Article 17 of Regulation 1/2003, it has investigative powers to obtain all necessary information from undertakings and associations of undertakings. The Commission can request (by simple letter), or require by decision, all necessary information from undertakings and associations of undertakings, and impose fines in case of misleading or incorrect information. Up to now it has not been necessary to proceed with formal decisions requiring undertakings to provide information, although the Commission has prepared for this eventuality.

The Commission can also take oral statements from natural or legal persons that consent to do so. The Commission also has the power to undertake inspections in the framework of the inquiry or, ask a national competition authority to conduct such an inspection on its behalf.

In concrete terms, the energy sector inquiry involved requests for information in the form of 3000 questionnaires sent to market participants. As an example, for the electricity sector the Commission collected information in particular on i) price formation mechanisms in the wholesale market, which are also relevant for price formation in the subsequent supply chain; ii) electricity generation and supply (merit order curves, prices, costs, market transparency etc); iii) barriers to entry (e.g. long-term agreements and balancing arrangements); iv) legal and operational regimes for inter-connectors and v) relations between network operators and their affiliates.

With regard to the inquiry into retail banking, questionnaires relating to activities from 2000 onwards were sent to some 250 issuing and acquiring banks in the payment cards market; and some 250 banks providing retail banking services to consumers and small and medium enterprises (SMEs). Specifically in relation to payment systems, the Commission services conducted extensive market surveys of clearing and settlement (retail payment) systems and payment card networks throughout the EU. The Commission also gathered information from other important players in retail banking, such as bank associations, banking regulators, national central banks and credit registers. The views of consumers and small business were also surveyed via the relevant national associations and official sources such as the Eurobarometer surveys.

In the sector inquiry into business insurance, the Commission sent requests for information to approximately 270 insurance and reinsurance firms, and some 170 intermediaries throughout the EU. In addition to insurance firms, the Commission surveyed some 80 insurance associations (national insurance associations, intermediaries associations and risk management associations). The Commission also sent targeted questionnaires to insurance supervisors and national competition authorities.

The pharmaceutical sector inquiry started with unannounced inspections allowing the Commission gaining immediate access to relevant information, such as the use of intellectual property rights, litigation and settlement agreements covering the EU which, by its nature, companies tend to consider highly confidential. However, since inspections do not allow a systematic overview of the entire sector (since only a limited number of companies can be visited), the next step in the sector inquiry consisted in sending general questionnaires to some 150 companies/associations and national authorities in March and April 2008 (e.g. originators, generics doctors, pharmacists, hospitals, wholesalers, parallel traders, insurance companies, marketing authorisation authorities).

The questionnaires asked the pharmaceutical companies to provide general information on their respective business models. In the specific questions companies were asked about the patent history of certain drugs as well as any litigation or dispute that occurred and any settlement agreements concluded between the pharmaceutical companies. The questionnaires also comprised questions on other entry barriers.

2.3 *Involvement of market participants and transparency*

Sector inquiries are major initiatives in which the Commission involves the widest possible range of stakeholders. The figures given above reflect the number and variety of stakeholders surveyed. In parallel to its information gathering exercise, the Commission holds meetings with all stakeholders. Involvement and transparency are also ensured by way of a public presentation of the findings of the inquiry and a public consultation on the preliminary report that the Commission publishes before issuing its final report and making recommendations to address the market failures identified.

In carrying out sector inquiries, the Commission also cooperates in various ways with the national competition authorities and regulators, some of which have seconded staff to the Commission to help with the sector inquiries. The former are consulted when the Commission launches/scopes a sector inquiry, and are regularly informed of the progress of the inquiry, and consulted on the results of the inquiries prior to their publication.

The energy sector inquiry provides an example of the synergies of the Commission's interaction with national competition authorities and regulators: the Commission consulted the national competition authorities and national sector regulators in preparing the energy sector inquiry. This allowed the Commission to ask fewer questions on storage issues, because the European regulators' group on electricity and gas carried out its own investigation into compliance with the new voluntary rules on storage access.

DG Competition of the European Commission also cooperates closely with other Directorates-General of the Commission. The latter are responsible for regulatory issues whereas DG Competition concentrates on market functioning and the companies' behaviour on the market. In the case of the financial services sector inquiry, the Commission's Joint Research Centre provided important assistance in the economic and econometric analysis of the markets.

2.4 *Organisational aspects*

Once launched, sector inquiries follow a fixed path from the gathering of information to its analysis, to public presentation of the preliminary report and consultation of stakeholders during which further information may be collected, to the adoption of a final report and recommendations. This may take from 18 to 30 months. For example, the energy sector inquiry was started in June 2005 and the final report adopted in January 2007. Also the sector inquiries into financial services were started in June 2005, with the final report on retail banking adopted in January 2007 and the final report for business insurance adopted in September 2007.

A tentative timetable has also been established for the pharmaceuticals sector inquiry started in January 2008, where the aim is to adopt the final report in the first half of 2009.

As to staffing, sector inquiries are very resource-intensive and will usually involve a minimum of five experts while they are being carried out, but often many more. Large scale inquiries involve between 10 and 20 officials. The inspections carried out in the context of the inquiry into the pharmaceutical sector involved almost 100 officials, and a special task force has been set up to analyse the information gathered during the inspection and requested subsequent to the inspection.

2.5 *The advantages of sector inquiries compared with other information gathering methods*

The formal powers associated with sector inquiries provide a number of advantages: firstly, the recipients of a request for information, or a decision regarding the provision of information, are obliged to supply that information. The Commission has the means to sanction parties providing misleading or incorrect information, or (following a decision that requires the provision of information) incomplete responses or responses received outside of the set deadlines. The Commission can also request all necessary information from governments and national competition authorities. This ensures a high response rate, and good quality and completeness of data.

At the same time, the undertakings or associations of undertakings are duly informed of the legal basis and purpose for which the information is being requested and given the necessary guarantees that confidential information and business secrets will be protected.

3. Findings of the Commission's sector inquiries

The findings of the sector inquiry into the electricity industry found serious problems. Most wholesale markets remain national in scope, with high levels of concentration in generation, vertical integration of generation, supply and network activities, and the low level of cross-border trade is insufficient to exert pressure on (dominant) generators in national markets. There is a serious lack of transparency in the electricity wholesale markets, and price formation is complex.

The sector inquiry into the gas industry revealed that at the wholesale level, markets generally maintain the high level of concentration of the pre-liberalisation period. Lack of liquidity and limited access to infrastructure prevent new entrant suppliers from offering their services to the consumer. Cross-border sales do not presently exert any significant competitive pressure. There is a lack of reliable and timely information on the markets. There is a lack of transparency in price formation.

The sector inquiry allowed the Commission to draw conclusions as regards where antitrust investigations could be appropriate and effective. As a follow-up to the inquiry, the Commission conducted a number of antitrust investigations into energy companies. Among others; the Commission has been investigating two cases against E.ON in the electricity sector which have recently led E.ON to offer structural remedies to increase competition in the German electricity market. These remedies entail E.ON selling its electricity transmission system network to an operator which does not have any interest in the electricity generation and/or supply businesses and divesting 4800MW of generation capacity to competitors. Other notable on-going proceedings against energy companies, which flow from the energy sector inquiry, are the cases against RWE and the ENI Group concerning suspected foreclosure of the German and Italian gas supply markets respectively.

The sector enquiry into retail banking product markets raised concerns about a conjunction of sustained high profitability, high market concentration and evidence of entry barriers in some Member States. Some credit registers, holding confidential data that lenders use to set loan rates, may be used to exclude new entrants to retail banking markets. Some aspects of cooperation among banks, including savings and cooperative banks, can also reduce competition and deter market entry. Product tying, e.g. where a loan customer is forced to buy an extra insurance or current account, is widespread in most Member States. Obstacles to customer mobility in banking – notably the inconvenience of changing a current account – are high.

As concerns payment cards and payment systems, the inquiry pointed to highly concentrated markets in many Member States, particularly for payment card acquiring, which may enable incumbent banks to restrict new entry and charge high card fees. There are also large variations in merchant fees and

interchange fees between banks across the EU. High and sustained profitability – particularly in card issuing – suggests that banks in some Member States enjoy significant market power and could impose high card fees on firms and consumers. A series of rules and practises weaken competition at the retailer level, and divergent technical standards across the EU prevent many service providers from operating efficiently on a pan-EU scale.

Regarding the business insurance sector, the sector inquiry pointed to sustained differences of insurers' underwriting profitability in different Member States which suggest a significant degree of market fragmentation along national lines and a potential for price reductions. In some Member States, long-term insurance contracts as well as certain distribution structures may reduce the scope for competition. Some re-insurance companies active in the EU have so-called "best terms and conditions" clauses in their contracts with their clients, the direct insurers. These clauses lead to a harmonisation of terms and conditions at the most favourable level for the re-insurers concerned, to the detriment of the direct insurer and, ultimately, of the final business insurance customer. The same practice also appears to exist in co-insurance. The lack of transparency of intermediaries' remuneration also reduces the potential for price competition in relation to insurance mediation services. Notable differences in the degree of cooperation among insurers observed in different Member States raise doubts about the justifications of such cooperation and about the scope of the exemption granted by the present Insurance Block Exemption Regulation.

The broad scope of the inquiries into the financial services sector allowed meeting the primary objective of the inquiry, i.e. deepening the Commission's understanding of the relevant markets and setting priorities. These are the competition problems regarding payment cards and payment networks identified by the sector enquiry. In particular, the sector inquiry helped the Commission forge its approach to multilateral interchange fees and thus fed into the parallel action taken in the MasterCard case, which was brought to an end on 19 December 2007.

4. Conclusion - outlook

The Commission considers that the sector enquiries carried out thus far have been successful in meeting their objectives. Looking to the future, the Commission will focus on areas where there appear to be durable competition problems, where these problems may be due to competition infringements, where there are implications for better regulation and where the sector is key for consumers and/or competitiveness. Taking into account the resources implications, the sectors chosen for an inquiry will be selected very carefully.

CHILE

1. Background

1.1 *The Context*

Chile has an important tradition in competition enforcement. The first statute on competition and market access was enacted in 1959, although the current institutional framework was established by Decree Law n° 211 (DL 211) in 1973 and its subsequent amendments which were approved during the past decade. In its first article, this legal statute establishes that the Law's target is "to promote and defend free competition in markets", and in subsequent articles it defines the institutional framework.

The current Competition System is integrated by two authorities, the competition agency, the *Fiscalía Nacional Económica* (FNE, or National Economic Prosecutor's Office), which has investigative powers, but no remedial ones, and the *Tribunal de Defensa de la Libre Competencia* (hereinafter, TDLC), a Competition Court with remedial and adjudicative powers, part of the Judiciary. These institutions are in charge of the prevention, investigation –the FNE–, and sanction –the TDLC– of the conducts that infringe the competition law for the protection of market competition.

In June 2006 the Government presented before Congress an important bill that includes a number of amendments to the competition law regarding the FNE, providing for additional investigative powers and limited remedial powers (consent agreements for mergers and antitrust enforcement requiring judicial approval), and in relation to the TDLC, providing for the strengthening of its independence, amendments to its procedures, and raising its maximum fines. This bill is currently before the Senate for the second stage of legislative discussion.

1.2 *Faculties of the Agency*

The FNE is an independent public service with legal capacity and budget of its own, administratively linked to the Government through the Ministry of Economy (Article 33 of DL 211). Its faculties and duties as an enforcement agency are defined in Articles 39, 40 y 41 of Title II of DL 211.

In compliance with DL 211 in force, the FNE deals with the promotion and enforcement of free competition, by detecting, investigating and prosecuting violations to the competition statute, and subsequently submitting complaints to the Competition Court and other Courts of Law if necessary. The FNE also acts as an expert elaborating technical reports to the Competition Court in cases not initially prosecuted by the agency. And last, the agency plays an increasing role in competition advocacy.

Finally, and for the agency to compel market participants to provide data for market studies and research, the bill under discussion before the Senate now explicitly provides for the FNE to conduct sectorial enquiries and market surveys; the lack of this power has, in some cases, lead to the opening of a formal investigation which allows the request of information from private parties.

1.3 *The agency's internal organisation*

From the first term of 2007 onwards, the FNE has adopted a new internal structure, organising its staff in four divisions -Legal, Economic, Research and Management Divisions- and an Institutional Affairs Department. The Executive staff also encompasses the Prosecutor's Advisory units (Auditor and Attorney General).

This restructuring arose basically from the need to increase the professional expertise of the investigative units –Legal and Economic Divisions- and the resources devoted to prosecution, and also to strengthen a research unit confined to capacity building and non contingent issues. The Research Division aims to provide the investigative units with a wider and deeper assessment of markets –not limited to a specific case-, exploring potential risks for competition and anticipating anti-competitive strategies from their players. In this way the Research Division aims at increasing the impact of the enforcement actions that the FNE initiates, achieving an effective contribution to fulfilment of the FNE's mission: *“To enable the benefits of exchange in a market economy based on free and sound competition, thus allowing the largest general welfare of citizens; and to prevent agents enjoying individual or joint market power from harming the public interest by violating the economic freedom of others”*.

2. Market Studies

2.1 *What does the FNE considers a “Market Study”?*

The FNE understands as market studies all those activities enhancing its current knowledge on specific economic activities, on the grounds of a systematic method of analysis (scientific method) and internally peer reviewed. They can be carried out by professionals at the FNE or by external consultants, whose fees are paid from the FNE's own funds or by means of external resources received by the FNE.

These market enquires have lead to internal working papers and data bases, so their results and main conclusions are treated as internal information and knowledge within the FNE; nevertheless, these studies can and have been made public in the context of cases or reports submitted to the Competition Court. Thus, these market studies feed the professionals works of the enforcement units, as well as serve as material that can also be considered a baseline for technical reports to the Competition Court, and for the National Economic Prosecutor's founded opinions when responding consultations made by Legislators (an advocacy working line of the FNE). The agency frequently acts as a technical support for the Legislative power and other agencies of the Executive. In this sense, market studies help the FNE by strengthening its requested opinions on specific topics in relation to markets and economic activities not necessarily covered by current or past investigations.

2.2 *Objectives of these Market Surveys*

The goals of markets surveys to be developed by the FNE are the following:

- to gain insight into the market structure of particular sectors, identifying their players and the business practices prevailing therein;
- to improve the understanding on how firms operate and the conditions under which their business practices are likely to be anticompetitive;
- to assist the enforcement units (Legal and Economic Divisions) in its investigative and prosecuting roles;

- to identify entry conditions in different markets, while assessing whether there are elements which turn the entrance of new players to the markets more difficult, or affecting its opportunity or sufficiency. Note that the examined entry conditions consider both legal barriers (particularly the competitive impact of norms and sector regulations) and strategic barriers raised by incumbents;
- to identify the policies and practices of governmental agencies and sectorial regulators that might have substantial adverse effects on market competition; and
- to identify whether the agency's previous enforcement efforts were necessary and successful, that is, to measure the impact of its actions on market performance.

The market surveys can also provide a ground for launching an *ex – officio* investigation whenever their outcomes suggest that in a market a certain feature, structure or condition, or combination of them, prevent, restrict or distort competition therein.

2.3 *Determination of the Industries to be surveyed*

In an initial stage, market studies have been conducted under a strategic focus based on current challenges for the FNE raised by its contingent investigative duties. As the number of the general market studies already concluded rise, it has become possible to explore new markets outside of the contingency, thus building up the capacity of being proactive and to better respond to eventual challenges on these markets.

In a first stage, consideration was given to the following criteria as general guidance to decide in which markets to conduct studies:

- those economic sectors which have not been discussed or investigated before and with high impact on consumers;
- those markets with high entry barriers;
- those markets with few players;
- potentially conflictive, based on the number of complaints or public notoriousness;
- the likelihood of mergers;
- where previous studies suggest the convenience of further inquires, and those that for any other reason need to be studied in greater depth.

2.4 *Where to get the required information: the relevant role of strategic partnerships*

Despite the fact the FNE cannot currently compel stakeholders and other market participants to provide data for market studies, the latter comes both from those who are willing to provide it and also from public sources —other agencies and market agents, seminars, publications, institutional Web sites, or financial sheets and statements. In some cases, the data comes from those who trade it: consultants, research and information companies and other firms. The FNE can resort too to information elaborated in previous cases, provided it does not violate due confidentiality or affect the informant or related third parties.

As already explained, the agency can request information from the market participants but our statute only considers for mandatory information requests in cases where a formal investigation is brought up. Acknowledging that the competition agency needs to cope with this problem, the Government has sought to grant the agency's powers to compel market participants to provide data for market studies, and not just for investigations been conducted. Accordingly, and as underlined before, this is an issue currently being discussed before the Senate along with the other amendments to the DL 211.

Furthermore, in the case of investigations in process, the FNE can lay claim on other agencies' information (Article 39, letters f), and g)). This is in addition to public information available and hence likewise obtainable and only limited by the reach of other laws concerning the use of private data and statistical confidentiality.

Notwithstanding the above, concerning market studies, the FNE has signed cooperation agreements with other agencies and sectorial regulators. An example of this is the cooperation agreement signed between the competition agency and the National Consumer Service (*Servicio Nacional del Consumidor-SERNAC* in charge of consumer protection in Chile. SERNAC has been involved in the raising of field information for studies on matters of common interest. Other examples of strategic partnerships between agencies are:

- *Junta Aeronáutica Civil (JAC)*, sectorial regulator for air transport. The strategic relationship with this agency had adopted the form of roundtables with the object of improving the sector's competitiveness, following the FNE recommendations, including the submission of information by JAC to the FNE on a permanent base.
- *Superintendencia de Servicios Sanitarios (SIS)*, the Chilean sanitary services regulator (water and sewage). There has been a collaborative relationship originated by the investigation of a specific case that triggered judiciary actions by the FNE. In this case, the strategic partnership led to the timely communication and access of relevant information by the competition agency, and also to an adequate coordination between the competition and the sectorial regulator in order not to affect each other's objectives.
- *Superintendencia de Electricidad y Combustible (SEC)*. Coordination has taken place in the gas and fuel markets, in those cases in which companies' actions have exceeded the reach of the regulator faculties. In these cases the regulator submits to the FNE both the case and all its available information for the FNE to consider prosecution.

Finally, it is worth to consider that a new market study is jointly being carried out by the Health Superintendency and the FNE, to examine medical and health services' markets from the competition perspective, following their common interest in assuring that this markets work in an efficient way.

2.5 Budget constraint for Market Surveys

Hiring external consultants with the purpose of elaborating markets studies is a relatively recent practice in the FNE. Yet in the recent years this has meant an expenditure of about 3% to 4 % of its budget, a figure that is expected to increase over the following years. Considering internal human resources allocated to this activity, this figure reaches about 6% to 8% of FNE's total budget. As an estimation, each market study takes, on average, four to six months of full dedication by a qualified professional or a small team with the related institutional support.

2.6 *Main experiences*

During the recent years, the FNE has conducted several market studies. They have served both to back up the FNE's position in judiciary procedures and to enhance the institutional knowledge on specific markets of high concentration or in which there may be a high probability of future investigations.

2.6.1 *Health Insurance Companies industry*

A series of studies on this market conducted both internally and externally, served as a basis for the FNE's actions taken against the main providers of health insurance companies in 2005.

2.6.2 *Supermarket industry*

The Chilean supermarket industry has become increasingly concentrated over the last decade, due to both the organic growth of the main actors and to mergers that have reduced the number of firms in the former. This has affected the relationships between supermarkets and their trading partners, both 'up-stream' (suppliers) and 'down-stream' (customers). The study analysed the relationship among participants upon the base of publicly available empirical evidence, and its results were one of the elements considered in the recent actions of the Competition authorities in this market.

2.6.3 *Banking sector*

The Chilean banking industry has rapidly grown since the latest 80's, at a rate much higher than the GDP's. This expansion has simultaneously come about and has been caused by an ongoing sector's deregulation and technological changes of great magnitude. For its part deregulation has allowed the banking market, among other effects, to develop new products and trading platforms. This diversification has been followed by the rise in fees and the introduction of commissions for the new services provided, affecting the income structure of the industry, with implications to the industry's organisation. Alongside, during the 90's and in this decade a decrease was seen in the number of banks in the market due to a wave of mergers and acquisitions that significantly increased the industry's concentration and introducing additional challenges to competition authorities.

With all this in mind, the Economic Division prepared its first banking survey in 2005. Two years later, the FNE funded an external study which was undertaken by academics researchers, which consisted mainly in an econometric analysis measuring the competitiveness of the Chilean banking industry as a whole. Nevertheless, the new products and platforms of services currently supplied made the aggregate analysis insufficient to assess the ongoing competition in each of them, and therefore further research is currently conducted as an extension.

2.6.4 *Petroleum market and Gasoline stations*

In 2007 the FNE funded some research carried out by external economists, oriented to testing the existence of collusion at gasoline retail distribution using structural and *screening* econometric models.

2.6.5 *Sanitary Services*

Following a complaint submitted by a group of housing construction companies, which alleged against the main water and sewage services companies to be charging excessive tariffs in geographical areas not subject to a concession system, the FNE hired an external team to produce a study and to strength its position in the claims brought following the respective investigation. This is another example in which the participation of external advisors complements the internal expertise of the permanent team, with benefit for both current actions and to boost internal preparation for future challenges in a specific field

that requires a high degree of specialisation and which is subject to permanent changes in technology and regulation rules.

2.6.6 *Telecom*

Such as it was the case of banking, the telecom sector has been studied several times and by different teams, both internal and external. It is also the case that this industry is subject to vertiginous technological change and modifications on regulatory rules. The following are the main studies on this subject:

Mobile telephony market

There are two studies on this particular matter, one of them was internally produced, and the second one, by external advisors. Both of them are complementary and help to explain how the mobile telephony market operate therein and interact with other connected markets (as local telephony and long distance carriers) and facilities. Both studies contributed to identify competition issues and imperfections, and were used as a basis for the National Economic Prosecutor's opinion in the congressional discussions concerning new legislation on this market.

Third generation technology in mobile telephony (3G)

Once again, external and internal research efforts were successfully combined in order to develop the necessary technical expertise to intervene in this highly complex market. These studies focused on how do the bidding procedures of new radio spectrum to be awarded to enhance 3G services affect the mobile telephony market, and to a lesser extent, the new mobile Internet services market. Besides, as a result of these studies, the FNE presented recommendations for the design of further bidding auctions of the radio spectrum, as requested by the TDLC in a consultation filed by the telecom regulator.

2.6.7 *Air transport market*

In 2007, an external study was contracted by the FNE, to evaluate the determinants that affect the entry on air transport market (particularly for the route Santiago – Lima), with special emphasis in the analysis on air traffic rights as an asset that affects entrance in this market. As a result, the FNE is now studying how the traffic rights bidding procedures need to be established to lower the barriers for new competitors.

2.6.8 *Some ongoing in 2008*

Health services providers

Health benefits (or medical and health services) are a set of essential health activities and procedures for diagnosis, treatment and monitoring of disease. In general, they can be grouped in: 1) medical care; 2) diagnostic tests; 3) clinical and / or therapeutic support procedures; 4) surgical interventions and 5) other services. At present there is considerable information from the Health Superintendency regarding the number of medical attentions, available beds, existing health institutions and other public and private data. Yet the FNE can benefit from enhancing its knowledge and comprehension of the industry and of the way its participants interact, and therefore reaching a general diagnosis or appraisal of competition in the market for medical and health services in Chile.

This is of the utmost importance since one of the government's priorities is to ensure the whole population's timely access to health care, neglecting neither its quality nor the efficiency in resource use. This, coupled with the social welfare to be obtained at improving competition and therefore efficiency in the provision of health services, urges a thorough study of this economic sector.

The proposed study aims at answering what is meant by a "market" of health benefit providers, thus becoming a systematic effort to identify and understand the sector's performance from the perspective of competition.

Construction

From the economic point of view the construction industry is highly complex, not only because of the interaction of several markets, both upstream -diversity of inputs- and downstream, but also because this industry has a high impact on the national economy as a whole, particularly given its pro-cyclical nature, its high incidence in GDP and its multiplier effect on output and employment.

International experiences strongly suggest the convenience of focussing on these economic activities, and therefore the Chilean agency is clearly interested in enhancing its knowledge on the actual working of these markets, to identify and describe the relevant markets involved and to better understand the interactions therein.

Next *steps* concerning procedures

Further research on market studies will be orientated according to the priorities pointed out within the FNE, by the directives team, following the criteria resulting from the current process of strategic planning. Despite there are other challenges and commitments for the research team in 2008-2009, such as the elaboration of methodologies and internal guidelines, including for the making of market studies, the FNE will continue to increase the resources allocated to this activity and complement its internal resources with the search of external funding and partnerships, thus allowing the continued expansion of its internal knowledge on the working of markets.

CHINESE TAIPEI

1. Overview

“Product Market” is understood as a market involving closely substitutable products or services in terms of function or price that can satisfy specific needs. In an era of rapidly advancing technologies and rising consumer awareness, each enterprise is under the pressure to strive to satisfy consumers’ needs and develop a variety of products with improved functionalities. The prevalence of international trade gradually extends the area where the enterprises are competing in offering product and services, and enlarge trading counterparts’ ability to choose and switch trading partners freely. It has increased the difficulties for the competition authorities in defining product market and geographic market. Although competition authority still can collect relevant market information from secondary sources such as research reports and industry databases; however, those secondary data still cannot completely meet the need of case analysis. Hence, conducting market studies is most likely to be a feasible measure for competition authorities to satisfy this need.

Market studies are aiming at specific products and utilising scientific method to systemically collect and analyse industry and related market information in order to understand characteristics such as supply and demand of the particular product in the relevant market, industry structure and geographic distribution. However, market studies require effective planning, organisation, execution and control to find whether the contents conform to research subjects. This contribution will briefly introduce the method, steps and results of market studies conducted by the Fair Trade Commission (hereinafter the FTC).

2. Approach

The FTC conducts research projects by itself or academic institutes based on its annual budget and budget proposals. The method, advantages and disadvantages of executing a research project are described as follows:

1. Staff study project: The one-year plan is written and managed by staff-member of the FTC, in charge of investigating major cases on specific industries. Those personnel collect and analyse data related to the Fair Trade Act and related issues for involving industry of the research project according to the practical experiences in cases investigation. The FTC staffs have managed to take time from their work to conduct market studies, therefore, the results of staff study report should be more likely to meet the needs of the FTC itself. However, the FTC is only a competent authority for Fair Trade Act, it is not the regulatory authority for involving industry in the research projects. Therefore, the researchers are facing the difficulties that they cannot collect enough market information and have limited ability to analyse the industry’s related information. In other words, the usefulness of staff study results is somewhat limited.
2. Co-study project: The FTC commissioned professors in the law or economic department of the domestic universities to conduct one-year co-study project based on the research subjects and budget constraints. The professors themselves must schedule to conduct the research independently and are required to submit the results of research project to the FTC. Co-study project normally could provide the latest trends of legislation and enforcement practices of foreign jurisdictions and serve as very helpful references for the FTC in enforcing the Fair Trade

Act. However, if the scholars rely on theories or opinions which are still not generally accepted by their peers in related academic fields to draw the research conclusions, it would not be appropriate for the FTC to directly quote the conclusions as the basis for analyzing cases and amending laws.

3. Others: The FTC also communicates with the industries and enterprises through various activities such as inviting professionals to deliver speech on specific issues, holding consultation meetings with regulatory authorities and related trade associations, and conducting educational programs for public compliance of the Fair Trade Act to further the understanding of the current market status of the products and services.

As to the standard for choosing a subject for market studies, it is based on the following factors:

1. Resources of the Unit: The scale of market studies is usually decided by the amount of annual budget available. The research costs for market studies conducted in a market with complicated structure and poor secondary data would be higher than usual. The numbers and quality of the FTC staff involving in staff-study projects also affect the researchable range of the projects.
2. The Degree of Product Differentiation: The higher the similarity between products, the higher the difficulty for enterprises to win over trading opportunities; hence, the higher the willingness of the enterprises to engage in concerted actions or mergers.
3. Product Life Cycle: Product Life Cycle (referred to PLC) means the whole process from new product been introduced to the market to the time the product been eliminated by the market, the process is discriminated into Introduction Stage, Growth Stage, Maturity Stage and Decline Stage. Since unit production cost and consumer awareness are distinct in different stages, the market competition faced by enterprises in selling products at the various stages will also be different.
4. Market Variability: If consumers think their choices are not significantly constrained, it would be hard for enterprises to win over trading opportunities; hence, the higher the willingness of the enterprises to engage in concerted actions or mergers.
5. Current Competition in the Market: If the number of enterprises in a market is high and the number of products is numerous, the competition in the market is fiercer.

Market information could be categorised into primary and secondary data, the data collecting method for those two types of data is described as follows:

1. Secondary Data: including surveying the information on market analysis related to existing FTC cases, looking up related reports by newspapers, magazines and media, and referring to research reports and industry database made by research institutes.
2. Primary Data: including the collecting and organising the investigators' experiences for analysis, utilising postal surveys or interviews with related enterprises, on the spot observation method and the sending of direct request to enterprises and related regulatory authorities for data.

Using the market studies into the petroleum market in Chinese Taipei is an example. Because of the concerns with national security, the state-owned Chinese Petroleum Corporation, Taiwan was the sole enterprise which had the monopoly power in the production, sale, import and export of petroleum products for a long time. In 1987, in order to achieve the policy objective of "Internationalisation, liberalisation and systemisation", the Ministry of Economic Affairs drafted the timetable for privatisation of state-owned

enterprises. The Ministry also amended “The Regulations on the Set Up of Gasoline Stations” in the same year and opened up the opportunities of setting up gasoline station to private enterprises. In October 2001, the final reading of Petroleum Administration Law established the basic structure for full liberalisation of petroleum product market.

The market participants of petroleum market in Chinese Taipei include the following types of operators:

1. Oil Refinery: Refers to a business that uses oil as its raw material to engage in the manufacture of petroleum products through the process of distillation, refining, or blending. There are two oil refineries in Chinese Taipei including Chinese Petroleum Corporation, Taiwan and Formosa Petrochemical Corporation.
2. Petroleum Wholesale Enterprises: There are 193 petroleum wholesale enterprises.
3. Retail Gasoline station Operator: a gasoline station is referred to as a business place with an oil storage facility and metered fuel-servicing equipment installed so that gasoline or diesel oil can be supplied for motor vehicles, machinery and other purposes. There are 2,618 gasoline station operators.

In order to understand the development for retail petroleum products before and after the liberalisation, the FTC started to conduct gasoline station market structure investigation annually since 1998. The investigation targets on the private-owned gasoline stations (1,005 stations totally) other than the direct sale stations operated by Chinese Petroleum Corporation, Taiwan (the leading manufacturer in oil refinery in Chinese Taipei) in 1998. The FTC conducted a survey in 1999 and 2000 respectively, on private-owned motor gasoline stations (500 stations totally) which reached a certain amount of gas sales. In addition, the FTC conducted “Investigation into the Market Structure of Motor Gasoline station” in 2001, 2005 and 2008 separately. In 2001, the investigation targets are private-owned motor gasoline stations (500 stations totally) which reached a certain amount of gas sales in the first half of the year. In 2005, the investigation targets were set on gasoline station operators who own more than ten gasoline stations according to the statistical data from the Bureau of Energy, Ministry of Economic Affairs. In 2008, there is a trend towards conglomeration among the gasoline station operators; hence, 14 gasoline station operators (approximately 1,498 gasoline stations which are 57% of the total 2,618 gasoline stations) are selected as investigation targets.

The research methods used by the FTC for petroleum market studies were as follows:

1. Questionnaire: Understanding the information of gasoline station operators such as corporate profile, gasoline station structure, gasoline sales volume, and alliance status and distribution networks.
2. Interview: Conducting in-depth interviews with the headquarters of different gasoline station group to understand their promotion activities, subsidiary business items and the subsidiary business items which could be extended in the future.
3. On-site observation: Sending personnel to conduct the spot observation regarding the operation of the gasoline stations located in different places.

3. Relationship between Enforcement and Market Studies

Article 26 of the Fair Trade Act states, “The FTC may investigate and handle, upon complaints or ex officio, any violation of the provisions of this Law that harms the public interest.” In conducting investigations, the FTC could ask the complaints, respondents and related third parties to provide market information related to the case according to Article 27 of the Fair Trade Act, so the personnel in charge of the case could judge both parties’ market power in the relevant product and geographic markets. The use of general market studies, on the other hand, does not empower the FTC to ask the interviewed enterprises to cooperate and provide related market information, hence, the results are normally limited due to interviewed enterprise’s unwillingness to cooperate. The market information obtained under the formal power of the FTC could not only meet the needs in cases investigation, but also provide more realistic and effective market information that are usually difficult to gather from secondary data. They could also supplement the decisive information that is usually difficult to acquire through general market studies. Furthermore, if the FTC finds any anti-competitive evidences in the process of collecting market information, those evidences could also be the basis for *ex officio* investigation and handling of the case.

Take the market studies of distribution industry as an example, the supplementary decision of the FTC Commissioners’ meeting on “The case regarding 2006’s investigation on the market structure and developing status of chain convenience stores in Chinese Taipei” stating that “the operation department should re-analyse on whether the chain convenience stores systems by charging suppliers the additions fees violates the regulations in the “Guidelines on Additional Fees Charged by Distribution Business”. After investigation, the FTC made a decision that there is a “direct connection” between “information processing fee” charged by chain convenience stores and the sales of products or costs reduction, the behaviour of charging additional fees is in compliance with the generally acceptable transaction practice and does not create duplicated burden on suppliers; hence, such practices are not improperly charged additional fees.

4. Strategies for Using Market Studies

The FTC thinks that the results obtained from market studies could achieve the following objectives:

1. To understand the characteristics such as market structure, connection between upstream and downstream enterprises and production and marketing process through the collecting and organising of information such as integrated development and industry changes in the targeted market.
2. To understand the information of the enterprises in the targeted market including enterprises’ basic data, operating structure, production and marketing characteristics, operating range, financial status, transaction status and investment situation.
3. To recognise the information of the enterprises operating in the distribution channel of targeted market including the enterprises’ basic data, sales condition in the distribution channels, operating structure, status of the wholesale market, operating status of the shops, product display status, human resource application, and the degree of information technology utilisation.
4. To analyse the global competition situation of the targeted market in different geographic market.
5. To evaluate the development of strategic alliance among various industries, diversification, product digitalisation in the targeted market, and the amendments to the relevant laws and regulations.
6. To establish the basis for future market study for the FTC. We hope that the results of market studies could benefit future case investigation and handling, offer to other government agencies

for their making policies or to be used in academic research. It could also be the references for regulation or legislation reform.

5. Conclusion

The FTC conducts market studies by itself or academic institutes based on its annual budget and budget proposals, and the results are abundant. However, currently, the FTC still does not quote the conclusion of market studies as the direct evidences in case analysis. Still, considerable human and financial resources have been put into market studies. If the quality of researchers and the completeness of market information could be enhanced, the quality of market study reports will be considerably improved and would benefit the FTC by enabling it to better define the relevant markets and evaluate enterprises' market power in related cases.

INDONESIA

1. Introduction

Trade and industry sector in Indonesia have developed an up and down trend following world economy condition either in term of macro and micro economic. Under several recent and upcoming deregulation and privatisation policy by the government (as stated within economic policy development in Middle Term Development Planning of 2004-2009 and Roadmap for State-owned enterprises), hence competition issues between business actors or state-owned enterprises had been evolved. Conceptually, fair competition will promote innovation, efficiency, and productivity of business actor, thus will create a significant competitiveness. Therefore, the aforementioned will influences Indonesian economy positively, either in productivity and performance of related trade and industry or public welfare in general.

As a competition agency that being entrusted the supervision of the Law No. 5/1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, the Commission for the Supervision of Business Competition (hereafter refer to “KPPU”) has the authority to create and maintain fair business competition between business actors. According to this law, KPPU has two main objectives, competition law enforcement and competition advocacy. In order to conduct this objectives optimally, KPPU is challenged to have comprehensive information on certain sectors/ industries in Indonesia. Moreover, KPPU also has to completely understand every aspect of trade and industry in Indonesia. Therefore, a market study will be very beneficial in waking this path.

2. Approaches in selecting markets to study

In defining appropriate market to study, KPPU always uses three main criteria, which are markets that treated as a strategic market and has significant contribution for economic development and people welfare; markets that highly concentrated; and markets that highly regulated. The selection will based on executive and legislatives proposal as well as our own initiative based on daily monitored issues. All stipulation on market study shall be determined through the Commission Assembly’s consent, a formal meeting by Commissioners lead by Chairman of KPPU that perform a quorum.

During 2002-2007, KPPU had performed several market studies in transportation, oil and gas, electricity, pharmaceutical, finance, and retail sector. Considering characteristics and depth of analysis needed for each sector, hence sometime we need more than one time market study to understand competition issues in certain sector. Level of perceptive and competency on certain sector will affect the quality and accuracy of decision and policy takes by KPPU as they will be important for strengthening our institution in supporting its missions stated by the Law No. 5/1999.

3. Data and other information for the study

We obtained data and other information for market studies from several approaches, which are; desk study, researches published by other institutions (universities, business associations, mass media, and research institutions); acquire them from the third party; formal request to other institutions (government, business association, business actor, consumer representative, researcher, and NGO); field observation; and consultation with relevant experts.

These data and information collection methods reveal their benefits and disadvantages based on the source of documents. For example, data and information which come from business actor and business association tends to be subjective and being adjusted to certain condition that their considered. Data and information from researcher, academician, and university often too general and will need more in-depth analysis to use them. As data and information from the Government, frequently should be re-check due to several inconsistency between Government institution for certain type of data and information. Even primary data is affected by the sampling methods that used. To overcome this obstacle, KPPU always uses the overall methods and compare them to find reliable data and information. Anecdotal data and information was used in market study even more as one of our consideration.

4. Unique feature of market study

Market study done by a competition agency is hardly differing from other institutions, especially in the objectives and type of data required. Market study done by other institution is quite general, while a study done by competition agency is more specific and focus only on the competition aspect, like market structure, potency of abuse of dominant position, measurement of market power (buying/selling power), and defining relevant market. An aspect which only be handled by a competition agency. This unique feature gives quite a challenge for competition agency in supervising their competition law. Considering this specific condition, market study generally done in quite long period of observation, which is 5-10 month and extendable. Determination of timetable and milestone is specified at the beginning of activity and done in detail on steps need to be done.

All market studies are done by specific directorate in KPPU, the Directorate of Competition Policy, which carry out by more than 30 (thirty) staffs. Generally, one market study is held by a team that consists of five staffs, thus one staff usually hold more than two market studies at the same time. Considering this workload, KPPU allocates quite large funding to conduct a market study, especially to obtain data (throughout research cooperation with the universities), field observation, and consultation with relevant experts.

Under specific characteristic of data needed by competition agency, there are only few researchers in Indonesia who's able to search for relevant data and information. Thus sometime cause financial resources allocated to acquire them didn't met our requirement. This is depending on the characteristic of observed industry/sector. Indonesian pharmaceutical industry considers as one of industry with limited public data and information.

Furthermore in deciding the best format in performing market study, we shall consider the quality of publicly available data and information as well as level of transparency by business actors. Should these two factors are pledge consistent, then a market study must perform individually by competition agency to ensure institution credibility, decision objectivity, and reliability of data owned. However, this will also depend on allocated number of human resources, time, and industries observed. Recently, Indonesia is still doing this study in partial.

5. Market study and law enforcement

Market study is hoped to map industrial structure and identify several business actor's behaviour which related to the Law No. 5/1999. This study is expected as an input for KPPU in providing advice and recommendation to the Government or sector regulator and competition law enforcement process. Its also generally know in KPPU that result of market study shall be used as accompanying evidences in competition law enforcement. However, this result can not entirely used in competition law enforcement due to direct evidence through examination is still the main element for Indonesian competition law. Under

which condition that result of market study is irrelevant with direct evidence within an examination, thus our decision will based on this direct evidence accordingly.

An ideal usage of market study's result is as assistance in defining relevant market, market structure, and indication to violation needed by an examination process. To formalise market study in one side will assure certainty and reliability of data and information produced, but in the other side will distress or agitate business activities if it's used vigorously. Moreover, this formalisation cannot be adopted in Indonesia considering presumption of innocence principle in our current law system.

6. Strategies for using market studies

Market study is defined as a useful instrument in competition law and policy enforcement. This study can easily gives industrial structure of trade and industry, especially on number of business actor, product diversification and differentiation, vertical integration, concentration ration, and or market power. This study also will able to identified and analyse indication on violation of competition law within certain sector; to identified and analyse Government's regulation in term of its competition values; and to measure market performance and its impact on fair competition.

In Indonesia, we differentiated market study for law enforcement and competition advocacy process. In competition advocacy process as well as for regulatory and legislative reform, we have specific study named "government's policy analysis". This study is aimed to supervise Government's existing and upcoming regulation in economic sector that has intention to associate with competition policy. Throughout this process, we will know in detail how far this policy will has impact on fair competition. If this study showed that certain Government's policy will open force of monopolistic practices and unfair business competition, thus KPPU will provide its advice and recommendation to the respective Government. This advocacy is expected to guarantee fair business competition and public welfare in general.

LITHUANIA

1. Background

Article 19 of the Law on Competition (thereof - the LC) defines the powers of the Competition Council of the Republic of Lithuania (thereof – the CC) one of which is to investigate markets. However, contrary to a case investigation where the criteria for its initiation are very strictly defined in the LC, the ability of the CC to initiate a market study is not legally constrained. Such flexibility in turn can result in higher number of market studies conducted; however, there is not an extensive record of this being done by the CC in the past. Over the last five years, the competition authority has initiated several market studies in banking sector, in retail of consumer goods sector, and a more general study of price changes in the food markets.

As practice of the CC shows, it can be useful to initiate a market study when facing noticeable changes in a market, such as significantly increased concentration and a steep rise of prices. It is not possible to draw definite conclusions on competition problems merely on the basis of these changes. Therefore, in such cases market studies can be used as a tool to take a closer look at the competitive situation in the market, as well as a way to collect the evidence and information that would be sufficient to process a case if it is necessary. Of course it can also lead to a conclusion that there are no particular competition concerns in a market.

For example, in 2004, after joining the EU, Lithuania experienced a quite sharp rise of food product prices that reoccurred in summer of 2007. Such processes in the markets of basic commodities considerably affect all the consumers, and especially the low income households; thus in Lithuania it was also followed by a wave of public debate as well as the official request issued by the Government for the responsible ministries to determine what factors caused price changes in food sector. Similarly, the CC set a task to establish if the price changes in various levels of supply chain were more likely to be explained by the changes in economic environment, such as increased costs, lower reserves or supply (e.g. due to increased exports) or by anticompetitive behaviour of undertakings in the markets. The following analysis disclosed price parallelism of certain milk products as well as the fact that the relevant undertakings were regularly and frequently exchanging the confidential and detailed information about their sales through the association. Consequently, the CC initiated a case investigation of possible collusive behaviour in the milk market.

The CC took similar approach when initiating a study in the retail market of consumer goods in 2003 and conducted repeated analyses in 2004 and in 2006. From 2004 such regular retail market studies constituted a part of “The Plan of Measures to Ensure the Publicity of Finances of Major Retail Companies and the Equal Competition Conditions for the Retailers” initiated by the Government. These actions were a follow-up to the significant changes that began around the year of 2000 in a retail sector. The market statistics revealed a clear tendency of increasing overall turnover but decreasing number of enterprises active in the market and persistently growing role of four major national retail chains. The last data of 2006 showed that the market turnover increased by 10.2 percent in total, however, the major part of such increase came from the increased sales of the supermarkets (amounting to 15.4 percent), and not of the smaller, retail chains-independent retailers (which grew only by 1.8 percent). Moreover, the number of shops of smaller independent retailers displayed the decrease of 2.3 percent, while number of supermarkets increased by 7.9 percent.

Increasing share of retail chains might have been the result of simply higher efficiency due to economies of scale and scope, store size or brand positioning efforts. The fact that total number of retailers decreased though the total turnover increased is more likely to indicate that these retailers exited the market because of inefficiency. On the other hand, it could also mean that retail chains are strengthening their position in the market through their purchasing power upstream and so leaving the smaller retailers worse-off. The complaints from suppliers and smaller retailers about the abuse of a market power by retail chains were occasionally appearing in the media however none of these complaints were officially submitted to the CC. Therefore, the CC decided to conduct a market study that could provide with the missing information as well as enable to make reasonable conclusions on the competitive situation in the market.

Some sectors in Lithuania, e.g. the financial sector, have been very quickly developing in the last decade, and it is possible that the CC or the consumers do not yet have the needed experience and knowledge of peculiarities of these specific markets to indicate that some possible competition restrictions are present. In such cases, of course, it can be useful to look at the practices of the other institutions that are more experienced. For example, the market of retail banking remained uncharted area for the CC until very recently. In 2006, following the sector inquiry on retail banking initiated in mid 2005 by the European Commission, the CC conducted two closely related market studies of retail banking sector.

The findings on the demand side in the market for current accounts indicated that the mobility of the customers is quite low despite the fact that all commercial banks open and close current accounts for free. The inquiry has identified that main factors constraining consumer switching are administrative costs and inconveniences that customer faces when changing a bank. On the lending market the switching is more costly procedure, as the lending facilities cannot be directly transferred to another bank and can be only refinanced by another loan. The special fee up to 3 percent applies to the debt that is repaid before the term, besides, the customer has to bear other costs, e.g. credit refinance fee, mortgage fee, charges for notary or real estate assessment services. On the other hand, the information about the solvency and riskiness of the customers is available to all credit institutions without major restrictions, therefore the banks do not become less willing to take on new customers, and this, in turn, reduces the bank's interest to lock-in the existent clientele.

On the supply side, some entry restrictions to the market of banking services exist but they are of a very general nature and include formal requirements to banks, licensing procedure and standard minimum capital required. A license issued to a branch of the foreign bank is governed by the same provisions of the Law on Banks that are applied to domestic credit institution. There are no actual barriers for new participants to enter the Lithuanian payment systems. The two existing common settlement systems in the country – LITAS and KUBAS - operate on an „open membership“ principle, apply no membership fee, and do not impose any special legal or technical conditions that could restrict the entry of new members.

The transactions with payment cards are mostly carried through two international payment card systems operating in Lithuania – VISA and MasterCard that determine interchange fee of participants, licensing and other conditions of membership. There are some domestic payment card systems but they operate only on a very limited scale. The license fee for the joining of the MasterCard system is EUR 50,000 - 150,000, and that for the VISA – up to EUR 545,000. In addition banks pay fees for licenses to issue the relevant individual products. The fee policy could have played a role in the decision making of smaller banks many of which have chosen to join only one payment card system. In the period of 2003 – 2005 only 2 new smaller banks entered the market but did not have any tangible impact on its structure.

Demand-side statistics showed an observable increase in the payment card usage, both in units and in the number and value of transactions. The merchant charges have been gradually decreasing but did not become lower than interchange fees that stayed constant over the period under review. Such tendencies

could indicate that there is no evident market power of the acquirers and that the competition for the merchants between them has intensified. The payment card purchasing fee for the cardholders has been also significantly reduced by smaller banks or kept stable by the major banks. The fact that the revenue from card issuing activity grew faster than the number of issued cards could indicate that the high demand of payment cards allowed for the issuers to maintain high fees for the customers. However, no particular competition concerns were found during a study.

2. Implementing a market study

The market studies conducted by the CC are relatively straightforward in terms of the techniques applied. The data gathering process is usually based on forming the questionnaire in accordance with the objectives of a market study and sending it out to the market participants and related parties, such as suppliers, customers, industry associations, or market regulatory bodies. Although the amount of data can vary depending on the length of the questionnaires used and the number of replies received, the analysis itself is limited to the fairly simple aggregation of the answers by undertakings and publicly available official data in order to arrive at some common conclusions. As a result, market studies are not very resource-intensive, i.e., usually there is one or two persons directly responsible for the implementation of a particular market study. Besides, although there are no legal time constraints imposed on the duration of a market study, in practice the results are ready in a period from two to nine months.

Such basic analysis methods may not be sufficient if a more comprehensive market study is initiated, yet so far they have met the needs of the CC. In addition to that, the simplicity of market studies is obviously advantageous as it allows to devote more resources of the institution to the case investigations, as well as it is less time consuming for the undertakings involved in it, that is the ones that have to prepare the answers to the questionnaires and in other ways cooperate with the CC. Following this, it requires very little coordination and supervision of a staff assigned to a study, allowing more flexibility in its planning and implementation.

In a similar fashion, a market study is not a strictly planned process and a detailed written and officially approved plan of it is not required. However, the person or a team usually presents to the Council the outline of a market study at the moment of its initiation. The outline can include main objectives of a planned study, as well as the markets in question, the type of information required, the possible sources of such information depending on their reliability and availability, or the methods to collect the information. Thus, the team should make a preliminary study on publicly available official data as it is most reliable and accurate. Also, the team should identify the other sources of needed information that may not be official but is most trusted or least biased and that may have to be collected through additional written requests to the undertakings.

In general, the outline gives a view on the scope and depth of a particular market study; however, one should note that it is non-finite and can change over time depending on the findings. For example, during the study of price changes in food sector in 2004 and 2007, the primary task of the CC was to identify if there were enough external factors that could explain the price changes. Once the CC detected the information exchange between the milk producers, it expanded the study to the analysis of the structure as well as the ability and (or) incentives of undertakings to act unilaterally in the relevant markets. It would have been costly to initiate such an extended study in all the other markets in question (e.g. markets of meat or crop products) as it would have required much more detailed information and analysis, including definition of the relevant markets upstream and downstream (production, wholesale, retail) of numerous food products, calculation of the relevant market shares, as well as identifying a market power of each undertaking. The primary study also showed that the increases in wages, energy costs and prices of inputs explained the major part of the price changes for crop, flour, bread, meat and poultry products. The other market specific factors further contributed to the price increases, for example, the prices of crops in the

national market were also affected by the growing demand of crops in China and India as well as smaller crop yield in Europe and Australia due to climatic conditions.

When appropriate, the CC enhances its market studies by cooperating with other institutions. For example, it is a common practice to ask the Department of Statistics for assistance in gathering the official published data in a more efficient and quicker way. Similarly, during the analysis of price changes in food sector, the CC cooperated with the Ministry of Agriculture, which administered the national database of information about agricultural and food markets. Under commission of the Government, the Ministry of Agriculture was simultaneously conducting the price change analysis based on the aggregated national data. It provided the preliminary findings to the CC, so that the comparison of average price, cost, or demand movements with the movements of prices, costs and turnovers of specific undertakings allowed detecting any divergences from the general tendencies that could reflect possible competition distortions.

3. Data

Market studies are based on both the official aggregated data and the individual empirical data but it should be emphasised that the latter type is usually of particular interest and importance for arriving at conclusions about the possible competition problems. This is especially true when the qualitative information is analysed, for example, typical contracts between supplier and buyer, business terms and conditions, etc. Thus the major bulk of information upon which the market study is made, is obtained through written requests for information addressed to the market participants and related parties. According to Article 19 of the LC, the CC is empowered to oblige the undertakings to submit the information required for market investigations, while Article 41 states that a fine up to 1 percent of the gross annual income can be imposed on the undertaking if it fails to provide requested information, or provides incomplete or incorrect information. Nonetheless, the reliability of the data obtained from the undertakings that are at the same time an object of a study should be well addressed.

Article 22 of the LC states that any commercial secrets provided by undertaking to the CC in the absence of the undertaking's consent, must be used only for the purpose the information was provided. It should be said that usually the undertakings ask to treat most of the submitted data as commercial secrets therefore Article 22 must be applied. It is reasonable to expect that the undertakings have fewer incentives to influence the findings of a market study than those of a case investigation. Therefore, the commitment by the CC not to use the obtained data without undertaking's permission elsewhere, e.g. for the investigation of infringement, decreases the likelihood that the data provided is biased. However, there are several ways how the CC could perform the test of soundness of individual data.

First, as it was noted above, one can look for clear deviation of individual information from the official average data. Second, one can check if data, and in particular the qualitative one, is robust to the source of it, i.e. if there are significant differences in the data depending on whether it was gathered from the suppliers, buyers or consumers. In case where the data from several sources show considerable degree of contradiction, the CC should at first judge which data sources have least incentives to manipulate the evidence and is most trusted and competent. It could also look for alternative data sources although at the moment they are either non-existent or very costly, if bought from market research and consultancy firms.

The credibility of information provided also depends on the type of the data. It is normally considered that the data or documents that were created before the date of the request for data, such as internal accounting forms or reports, are more reliable than the documents or data that were created specifically for the above mentioned request. The subjective opinion or written responses to the request by the market parties are used for conclusions with more care as well as it is tested against the other existing evidence.

The ability of the CC to obtain individual data should be greatly enhanced in the nearest future (expected in mid 2008) after it is granted an access to the Inter-institutional Fiscal Data Storage (IFDS). IFDS is a database formed on a basis of tax declarations of legal persons, and it includes various financial indicators like turnover and cash flows, profit reports, or foreign trade of undertakings registered and paying taxes in Lithuania. Although IFDS would not cover qualitative information, like regulations present in the markets or common trading terms; it would be a comprehensive and official and therefore reliable source of quantitative information.

4. The use of market studies

There are few ways how market studies can be useful. First, market studies can reveal the evidence that is needed to initiate the case investigation and that otherwise is not in the disposition of the CC, as in the above mentioned case of milk market study. One can also expect that the likelihood of errors decreases once the CC conducts market study prior to processing a case because it allows collection of more information and means that more resources and time are devoted to the analysis of competition in the market. However, there are several issues arising when a market study is followed by an action of enforcement.

First, it can be difficult to determine how well the public should be informed about the initiated market study, its objectives, or results. Some transparency is necessary to ensure easy data collection from the undertakings and effective cooperation between them and the CC. To put it in simple words, the institution willing to obtain some data has to give an explanation what it needs it for and where the data is going to be used, otherwise it can create conflicting situation with the businesses and aggravate further cooperation. Publicly announced initiation of a market study also allows tracking what is being done by the other institutions, and prevents it from duplications of such work as well as it creates opportunities of coordination of the studies among the relevant institutions.

However, in certain situations the level of transparency should be limited. For example, if a market study has an objective to collect the evidence on suspected prohibited agreement or abusive behaviour, the CC should of course not state it directly in the written requests for data to the undertakings. Such statement, especially when it is not based on any appreciable evidence, would impede obtaining of unbiased data and information, as well as it would inflict public speculations and unnecessary tensions in the market. In such cases it seems sufficient to give general explanation to the undertakings without being too specific. For example, it was officially stated that the objective of the milk market study was to identify the main factors that caused price changes, although the CC as well had the intentions to find more evidence on the concerted practices and the information exchange between the major milk producers.

In a similar fashion, the institution should announce the results of market studies with care. For example, if the findings establish that there are enough grounds to suspect possible infringement of the LC, the public announcement of them should be scheduled after initiation of particular case investigation and after first investigative actions, like dawn raids. In general, it is also important that the results of market studies do not reveal any individual data, especially if it is considered as business secrets or any other type of confidential information, unless a permission of such data publication is acquired from the related undertaking before-hand.

The limited use of the evidence gathered during a market study that follows from Article 22 could be another troublesome issue in the following case investigations. As it was said before, such limitations decrease the likelihood of an undertaking providing biased data, however, it can become a time consuming process both for the CC and the undertakings if it means that additional permissions to use it must be acquired and sometimes - that the same data must be gathered once more.

Of course, market studies can also prove that there are no appreciable competition concerns in a market. Such information still can be of value to the CC, which has formal powers and a social duty to monitor the markets and to be able to identify competition concerns quickly. The relevant findings can be used to put an end to various public speculations about competition distortions thus releasing the possible tension between market participants and related parties and contributing to a more effective functioning of the markets in question. For example, one could also notice that a number of public complaints from suppliers and smaller retailers about the abuse of a market power by retail chains has somewhat decreased after the CC conducted the studies in several proceeding years and each time reconfirmed that there were no significant competition distortions identified.

The CC is granted special powers, which are defined in Article 4 of the LC, to examine the conformity of legal acts or other decisions adopted by public and local authorities with the requirements of the LC and to require the authorities to amend or revoke legal acts or other decisions restricting competition. Some of these acts and decisions are of regulatory nature therefore it is also possible to use the results of market studies in changing or lifting regulatory acts that are distorting competition. The CC also has a possibility to address the same issue through stating its position in a form of recommendations submitted to the relevant authorities. The obvious advantage of the latter approach is that it is less costly in terms of staff resources and time used when comparing to initiation of case investigation. However, it must be noted that recommendations sent to the authorities under market studies are not obligatory, contrary to the situation where the CC concludes that Article 4 was infringed and obliges the authorities to change their laws accordingly to the LC or to revoke them. Therefore, the recommendations are more likely to be sent in those cases where they concern sporadic decisions that have minor affect on competition. Previously the CC has taken this approach during case investigations concerning prohibited agreements or abuse of a dominant position. To illustrate, during the case of the information exchange between major milk producers, the CC discovered a decision by Minister of Agriculture defining recommended method of calculating raw milk purchasing price. The decision could have restricted the ability of milk purchasers to set the prices independently, though the actual scope of its application seemed to be very minor, and therefore the CC considered submitting a written recommendation to the Ministry of Agriculture to overturn it instead of initiating an investigation of infringement under Article 4.

Finally, market studies can act as an infringement-detering tool. In other words, regular monitoring of the markets, which has been done by the CC, for example, in the retail market, as well as the awareness of market participants that they are under a close surveillance, can diminish their incentives to seek extra profits by infringing the LC. On the other hand, market studies together with the actions of competition enforcement are considered as a competition advocacy tool, informing undertakings and clarifying for them “what is good and what is bad” in competition sense.

ROMANIA

Prioritisation of enforcement efforts is always a challenge for competition authorities, due to increasing workload in the competition field during recent years.

This is the reason why the work dedicated to market studies is perceived by RCC both as an internal and external activity. We shall focus in our presentation on the recent initiatives of RCC of conducting internal market studies. However, for an optimal management of its resources, RCC intends that part of this work to be externalised. The main areas of focus of the market studies that will be outsourced in the near future are retail banking, pharmaceutical and maritime sectors.

Monitoring of market structures and behaviour helps in prioritising the enforcement actions according to the nature and the gravity of the competition issue and the impact on consumers and according to the extent a sector or an industry falls behind in performance.

That is why market studies and sectoral enquiries are employed in order to assess the evolution of key industry sectors and to detect obstacles to competition.

Considering the limited number of resources at our disposal, and the legal obligation that we have to analyse all incoming complaints and intimations, we were faced with the necessity to define a prioritisation strategy for our ex-officio investigations.

In order to address this aspect, the Competition Council - together with the Competition Component of the 2002 Twinning Project (under the responsibility of Italy) - elaborated a set of "Guidelines for a more pro-active approach in the enforcement of competition rules".

The purpose of these guidelines was to provide the Competition Council with a pre-determined policy to be used when deciding which alleged anticompetitive practices should be subject to ex-officio investigations. In accordance with this policy, priority should be given to investigations concerning "hardcore restrictions" of competition having an effect at national level (as opposed to local level) and relating to sectors essential for the Romanian economy. For RCC, this list of sectors includes **communications, media, banks, insurance, transport and pharmaceuticals**. The sector list is not exhaustive. Other sectors relevant for Romanian economy may be included in the future. The list may be reviewed regularly on a yearly basis. These sectors have been identified based on: the European Union liberalisation policies, the Romanian Government economic programme for the years 2000-2004 and Romania's Constitution.

In particular, the authority's objective should be to determine its priorities according to the following criteria¹:

1. **The type of infringement concerned**, conferring priority to investigate "hardcore" violations of competition.
2. **The geographic scope of the market concerned**, conferring priority to investigate infringements having an effect at national – and in some cases regional - level (as opposed to local level).
3. **Products or services concerned**, conferring priority to investigate infringements concerning products or services of a sector essential for the Romanian economy.

In addition, obvious criteria in evaluating any given market would be **the degree of concentration** in the relevant market and indications of collusion, the price trends not connected with developments in cost or demand factors, irregular price differences, lack of innovation, the presence and level of barriers to entry, or a decreased level in switching of suppliers by customers.

The guidelines provide an explanation on how to interpret each criterion. Furthermore, they include a table which assigns pondered marks to each of them. Inspectors are simply asked to tick the appropriate box in the table. The figure resulting from this exercise provides an index of the **overall impact on competition of alleged infringements**.

This table enables the RCC to set its own priorities in accordance with transparent, coherent, objective and lasting criteria. In particular, it enables the RCC to:

- Classify infringements according to their gravity, geographic scope and industry concerned;
- Evaluate them in the right market context;
- Compare the impact on competition of different kinds of infringement;
- Make a pre-investigative assessment of the overall impact on competition of alleged infringements;
- Employ the different instruments of competition policy to tackle detected problems.

The approach proposed in the guidelines would enable the RCC to confer *priority* to *ex-officio* investigations concerning infringements having a strong adverse impact on consumer welfare.

Beginning with 2007, on the basis of the attributions conferred by the Competition law no.21/1996, RCC started to make more use of another important enforcement tool which consists in conducting sectoral enquiries. That means that RCC has the competence to instigate market studies in areas where there are

¹ In defining the criteria we took into account:

- the principles contained in the *Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty* (Published in the Official Journal: OJ C 9, 14.01.98), where the European Commission defines minor, serious, and very serious infringements of competition rules.
- *the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (2004/C 101/05)*.

concerns that a particular market is not working well for consumers but where competition regulation enforcement action does not appear, immediately, to be the appropriate response.

The market study in the bread grains market instigated by RCC in 2007 is an example in this respect. By means of this exploratory study, RCC intends to gain the best possible understanding of how market is working and whether the needs of consumers are being well served.

This particular study intends to underline the national and community policy in this area, the practices and the regulation, the evolution of the main market segments such as the production, storage and trading, their competitive features, the market mechanisms, the consume of bread grains, the level of concentration and a price/cost analysis.

And, of course, if the study reveals the need for further investigation or action under any of RCC's enforcement powers, the RCC will act accordingly.

Another important market studies have been instigated at the beginning of 2008, such as one on the real estate market and the legal services associated with the real estate transactions and another, on retail market of food products.

The real estate market and the legal services associated with the real estate transactions was selected for in-depth study as it is of direct interest to consumers and of high overall economic significance (conveyancing services). The objectives of this research are the following:

- to assess the market structure and mechanisms;
- to grasp and correct the possible competition problems on the conveyancing services market;
- to assess the transaction costs incurred by the buyer and/or seller of property or land, the quality of the notary, real estate agents and cadastral' services and their effects on the final price of transaction;
- to encourage market transparency by highlighting the results of the study to the public.

Acknowledging the substantial size of this market, it is obvious that any reduction in conveyancing related legal fees as a result of pro-competitive reforms will bring significant financial benefits to consumers.

It is important to stress that DG Competition commissioned a similar study in August 2006, integrating a legal and an economic perspective, on professional and related regulation and its impact on the efficiency and performance of the conveyancing services market in 21 EU countries.

Another important study instigated at the beginning of this year is the one concerning the vertical relations between suppliers and large retailing groups.

This study analyses the increasing buyer power of large retailing groups over their suppliers, stemming from the increasing growth of retail activity in a few such groups in Romania, with special focus on the food sector. The study aims at determining if, and to what extent, the expansion of the modern retail formats in Romania such as chain stores and hyper/supermarkets can distort the negotiating power between buyers and sellers, possibly permitting behaviour that is incompatible with competition legislation.

Existing market studies show that the level of concentration of the modern retail formats at the expense of traditional formats is increasing slightly but it is still low compared to other European Countries.

In the course of this particular sectoral enquiry, due attention will also be paid to some of the marketing practices applied by retail companies such as listing fees, slotting fees etc. and to certain clauses of the contracts.

Results of the studies presented above are expected at the end of 2008.

Data collection plays an important role in market studies.

We consider that the following steps may help to get the data needed to carry out market studies on time and correctly:

- identify at the earliest stage possible what data are required for the study;
- find out what types of data are available (newspaper articles, industry and investment reports, publicly available data collections);
- ask for the minimum amount of data required to carry out the desired studies to interested third parties such as suppliers, customers, trade associations or employees' associations, in order to obtain information about the market in question.

However, availability and standardisation of data are sometimes turned out to be common problems. On one hand, it may happen that the data in request are not readily produced by related state institutions or firms. On the other hand, having a standardised data set for all firms active in a market can be as well difficult due to different calendars for accounting purposes or different assumptions of the cost items. Hence, in our opinion, data gathering should be cautiously made.

When a need arises, outsourcing some of the economic analyses to academicians or private consultants may help to see different perspectives related to the cases. Besides, an expert report may make up for the lack of in-house capacity relating to sophisticated economic analyses. However, in accordance with the increased role economic analysis has gained over the recent years in competition proceedings in Europe, RCC aims at developing in-house economic capacity by means of special workshops and seminars. And we do hope that this would expedite the analysis of competition cases and the performance of professional market studies and sectoral enquiries and would eventually contribute to a better decision making in problematic cases.

RUSSIAN FEDERATION

1. Approach

The main criteria used to define appropriate markets to study is Hypothetical Monopolist Test (HMT, SSNIP – test). This test is a basis for FAS Russia's comparison of price rate, price dynamics, structure of commodity flows and analysis of competitors' data.

In order to perform market analysis the data is gathered by FAS Russia from economic entities and authorities. Competition authority has all needed authority to perform it. According to the present legislation reluctance to answer FAS Russia inquiries can lead to the administrative responsibility.

This information should contain:

- state statistics data characterising activity of economic entities;
- information received from taxation, customs and other state bodies, bodies of local self-government;
- information received from natural and legal persons;
- results of merchandising examination, specialised organisations' opinion,
- as well as opinion of certain specialists and experts;
- departmental and independent informational centres and services data;
- consumers' associations and producers' associations data;
- mass media information;
- data of the antimonopoly body's own studies and data of the antimonopoly bodies of other states;
- data of marketing, sociological studies, selective questioning and questionnaire design of economic entities, citizens, public organisations;
- technical specifications and other standards;
- applications of natural and legal persons to the antimonopoly body;
- other sources of data.

Use of empirical evidence is an essential part of the market analysis, as only on its basis it is possible to analyse price and production dynamics on the certain market, to clarify the mostly important factors,

influencing the market, identify the list of its participants and prepare conclusion on presence or absence of the dominant position.

Complex market analysis – is a very difficult and time-consuming process, that requires long and careful work. FAS Russia acts in strict time frames. According to the acting legislation FAS Russia has three months for notification consideration, and in order to issue a decision on violation of antitrust legislation – nine months. Thus competition authority needs to balance difficulties concerning with gathering empirical evidence and time frames.

Involvement of the market participants (sellers, customers and etc.) is really important because they generally better understand specifics and can provide additional information both quantitative and qualitative. But involvement of the market participants is needed only at the stage of gathering information, but its analysis and interpretation should be performed solely by the competition authority. Though FAS Russia sometimes order market analysis from other organisation, but it is done only in order to monitor the market interesting for competition authority. Also it is important to note, that competition authority in Russia as controlling state authority has access to commercial confidentiality of private companies that is not available for the third parties.

FAS Russia aspires to the transparency in all activities, but thinks that it should be reasonable (for example, competition authority doesn't have the right to disclose information received from commercial organisations).

Talking about transparency, if we mean transparency of the market functioning and data that needed to conduct market analysis, it's definitely a good thing. But it is important to remember that FAS Russia has all the authorities to receive it.

If we would consider transparency from the point of analysis process, then it is important to know that:

- when prolonging the period of notifications consideration in order to conduct market analysis competition authority is bound to inform community by placing all the information on the official website;
- while considering case on the violation of antitrust legislation in the year 2007 FAS Russia in the administrative regulation specified that materials on market analysis should be added to the case data.

As for the transparency of the market analysis results, FAS Russia is bound by the commercial confidentiality of the economic entities.

There are no distinctive features of conducting market analysis in comparison to other competition authorities. There are some peculiarities but they not major ones (analytical procedures that are used in the antitrust legislation are seen in the book "Analysis of goods markets in antimonopoly regulations", 2007).

As it was already said at paragraph 4, FAS Russia is really limited by the time frames, defined by law on the market analysis. At the same time for conduction of a more detailed and full analysis it is needed much more time. For this purpose FAS Russia takes the following steps:

1. Annually FAS Russia determines Plan of the market analysis, according to which competition authority on its initiative collects the information on markets, where:
 - large transactions are expected;
 - there are structural problems that can lead to the restriction of competition;
2. As notifications from the economic entities are received on the regular basis, FAS Russia collects information on the key and problematic from the point of view of antitrust regulation, markets and due to this analysis can be done faster;
3. It is really important to choose a right method of market analysis that would balance between labour intensity and duration of its conduction. Therefore the Russian legislation approves several methods for defining borders of the goods market and geographical borders of the goods market:
 - method, based on the data provided by the customers of a certain good and on result of the selective questionnaire of the customers;
 - method, based on the results of market observations and economic-statistical calculations;
 - method, based on expert evaluations of the goods characteristics and peculiarities of goods consumption;
 - method, based on data on goods markets, competitors and formation of the price policy, provided by the sales person.
4. Often in order to perform detailed and difficult analysis working groups are created within the authority, that includes employees from different departments. For example in 2005 during the investigation of the biggest case against JSC “Evrocement-group”, market analysis was performed by the employees from three different departments.

Human resources devoted to market studies are usually different and depends on various factors (value of the starting data, market characteristics and topic for analysis).

There is no exact statistics on it, working groups are based on individual basis, employees are working with different tasks simultaneously. However, if to examine one working group working with industrial problematic (consist of 4 employees), then following nonofficial assessment can be done, concerning the amount of the conducted market analysis:

- Preparation of the market analysis on the case on violation of competition (here will be done more thorough analyses)
- Preparation of materials and verifications on 120 petitions;
- Preparation of material and verifications on inclusion/exclusion of two economic entities in the Commercial register with the market share of more than 35%;
- Preparation of a market analysis according to the Working plan of market analysis.

As for the financial resources, according to the Budget report of the authority, FAS Russia is planning to spend on the market analysis around 65,2 million roubles.

Authorities should conduct market studies both themselves and by contracting it out to the third parties. But it should be considered that cost of the internal analysis is usually lower than the cost of contracted out analysis.

2. Relationship between Enforcement and Market Studies

Acting legislation of the Russian Federation obliges the authority to conduct market analysis before admitting violation of the antitrust legislation.

During conduction of market studies FAS Russia has a right to demand from economic entities commercial confidentiality information. Without this competence the effectiveness of market studies would be much lower. Also it is important to mention, that if FAS Russia didn't have legal authority for conduction of market analysis, then it would be much more difficult process, because FAS Russia would have grounding to distract resources from other tasks.

If as a result of market studies several violations of antitrust legislation were found, then FAS Russia will have to start a case on violation of antitrust legislation.

FAS Russia conducts market studies for:

- Consideration of cases on violation of antitrust legislation;
- Control over economic concentration
- Order of the Government of the Russian Federation
- On its own initiative

3. Strategies for Using Market Studies

There several strategic goals defined by FAS Russia for conduction of market study: 1) to reduce violations of the antitrust legislation; 2) define appropriate measures for improvement of the competition environment on the market.

Legislation of the Russian Federation clearly regulates all the stages of the case consideration. From the moment of detection of the violation of the antitrust legislation FAS Russia is obliged to bring a case and launch a formal investigation procedure.

Market studies conducted by the competition authority are really important at the moment of regulation or legislation reforms. FAS Russia annually presents to the Government of the Russian Federation Report on competition in the economy of Russia, where there is not only assessment of the present situation but also proposals on advancement of the state policy in the most sensible sectors of the economy. At the same time antitrust market study is oriented on defining market borders, companies' market share and their ability to influence market.

SOUTH AFRICA

1. Introduction

Market studies have been an approach used by the Competition Commission of South Africa (“CCSA”) recently with 4 (four) studies initiated to date, namely in banking, infrastructure inputs, hospitals and food. Although these market studies are ongoing, the anticipated outcome of each would be a recommendation of whether to initiate complaints against identified respondents for specific contraventions of the Competition Act 89 of 1998, as amended, (“the Act”).

The CCSA is also engaged in various other market research which is linked to cases under investigation and merger assessments. The outcome of this market research would be input into the appropriate market definition and competition effects of the conduct or merger under consideration.

This paper focuses on the CCSA’s four market studies as identified above, namely in banking, infrastructure inputs, hospitals and food. The market study into banking (hereafter “the banking enquiry”) differed in its approach to the remaining studies in that it was a public enquiry and was conducted mainly by external consultants. The effect of the CCSA’s different approaches to these market studies is highlighted hereunder.

2. Legislative framework

The CCSA considers it its statutory responsibility to carry out market studies, both within its investigative functions and with a view to determining if an investigation should be initiated by the CCSA. In this regard, the relevant legislative provisions which enable the CCSA to conduct market studies are set out below.

Section 21(1)(a) of the Act states that the CCSA is responsible to implement measures to increase market transparency.

Section 21(2)(b) states that the CCSA may, *inter alia*, enquire into and report to the Minister of Trade and Industry on any matter concerning the purposes of the Act. The purpose of the Act is set out in section 2 as follows:

- to promote the efficiency, adaptability and development of the economy;
- to provide consumers with competitive prices and product choices;
- to promote employment and advance the social and economic welfare of South Africans;
- to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

- to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

3. Criteria for selecting market studies

In deciding whether to initiate a market study in an industry, the CCSA considers the following criteria:

- the importance of the industry to the poor;
- whether the industry falls within the priority industries identified in the governments Accelerated and Shared Growth Initiative for South Africa (“AsgiSA”);
- whether the study would be in line with the CCSA’s priorities as identified in its strategic planning process;
- whether the CCSA has previously received complaints in the industry.

The CCSA initiated its banking enquiry following an independent report the CCSA had commissioned earlier entitled *The National Payment System and Competition in the Banking Sector*. Amongst the concerns raised were that the stimulation of competition in the South African banking industry was inhibited by:-

- weak and incomplete disclosure to industry and consumers;
- a possible complex monopoly of essential infrastructure (national payments system); and
- a monolithic licensing and/or registration structure.

Prior to the initiation of the banking enquiry, it was widely reported that South Africa was one of the most expensive countries in the world for business owners to bank in, more so than fellow emerging economy Brazil itself, to which South Africa [had] often been likened.¹

The banking enquiry was conducted for the CCSA by a panel, appointed by the Competition Commissioner and chaired by a former Deputy Judge President of the High Court of South Africa (Natal Provincial Division) and Judge of the Competition Appeal Court. The panel was assisted by a full-time administrative and technical staff, and by expert consultants where necessary. The enquiry’s programme of action included the receipt of submissions from banks, consumer groups and members of the public, two sets of public hearings, the analysis of the information provided and the presentation of a final report.

The food market study which the CCSA recently started was prompted by growing public concern about soaring food prices in the absence of adequate justification as well as previous complaints the CCSA investigated in the staple food segment of the market². The CCSA is currently negotiating possibility of collaborating with other developing nations on its food market study.

Similarly, the hospital market study arose from public concerns about increasing private hospital prices, reports of over-servicing and the perceived lack of effective competition amongst private hospitals

¹ ***South African bank charges still more than Brazil's*** by Stephen Timm, 04 April 2005

² The CCSA uncovered wide spread price fixing and market allocation amongst bread manufacturers and firms in the milling industry.

in South Africa. Its programme of action included interviews with stakeholders at various levels, namely service providers, regulators and third party funders.

AsgiSA identified **barriers to entry, limits to competition and limited new investment opportunities as some of the** constraints to the desired economic growth in South Africa, especially in upstream production sectors such as iron and steel, paper and chemicals and inputs such as telecommunications and energy. The government identified, *inter alia*, investment in infrastructure and other infrastructure projects as a possible counter to the constraints it had identified. Resulting from this, the CCSA embarked on a series of awareness programmes for the construction industry and a market study into infrastructure inputs (including construction services).

4. Information gathering

The CCSA's information gathering strategies have been informed by both the nature of the relevant market study and the desired outcomes of the study.

In the banking enquiry the CCSA sought, amongst other things, to bring about transparency to the banks' fee determination processes and methodology, with the aim of enabling consumers to meaningfully compare the services offered by each financial institution. The CCSA, therefore, considered it important to make public the information it requested, to allow the banks to respond (in general terms) in public and to hold public hearings in order for consumers to voice their concerns to the enquiry.

The remaining studies, namely infrastructure inputs, hospitals and food, have been conducted with significantly less publicity as each study sought primarily to determine if any competition concerns arose from the anti-competitive outcomes or market failures evident in each of the infrastructure, hospital and food markets. These studies initially gathered and assessed existing and publicly available information on the respective industries. Thereafter, with respect to the infrastructure and hospital studies, the CSSA interviewed and corresponded with industry participants in order to:

- gain an understanding of the competitive landscape of each industry;
- determine if there were any grounds for the CCSA to initiate an investigation into the industry; and
- identify legislation or State policies which permit uncompetitive behaviour.

The infrastructure study has thus far yielded two complaint initiations by the CCSA and the hospital study enabled the CCSA to make informed suggestions for proposed health legislation the Government intended to implement.

The CCSA is of the view that the publicity it brought to bear on the respondents to the banking enquiry was beneficial as it raised awareness and led to constructive self-reflection on the part of the banks. It also encouraged the submission of accurate data from the respondents, given that their submissions would be open to public scrutiny. However, the publicity may well have been a factor which discouraged the full co-operation of one financial institution. The said institution did not make any submissions to the banking enquiry. A further disadvantage, which may partly be attributed to the public nature of the banking enquiry, was the length of time it took to conduct the enquiry and the negative impact this had on the timelines set by the team.

5. Staffing of market studies

The banking enquiry utilised the expertise of external consultants, one CCSA employee and general support from the CCSA whereas the remaining market studies have been conducted entirely by CCSA staff.

The CCSA's decision to appoint external consultants on the banking enquiry was primarily informed by the following considerations:

- The banking and payment systems employed by the banks were highly technical in nature, therefore, the banking panel required the expertise of technically skilled persons;
- One of the major outcomes of the banking enquiry would be a determination of whether to initiate an investigation into the banking industry. Accordingly, the panel required competition law and economic expertise;
- The panel also required a skilled project manager given the public nature of the enquiry and thus the need to manage stakeholder expectations;
- The sensitivity of the enquiry and the lack of specifically empowering legislation required a reasoned balance of rights and obligations for all participants. This required legal expertise to ensure administrative fairness;
- Finally, the concerns raised had a significant impact on ordinary consumers. The CCSA, therefore, thought it important to have consumer representation on the panel.

The varied representativity on the banking enquiry panel has been highly beneficial. It ensured that the abovementioned goals were realised. However, the main disadvantage to staffing the panel with mainly external consultants has been that the skills (both the technical banking industry skills and those of partaking in a public enquiry) have not been transferred to CCSA staff or are being transferred with difficulty. This presents the CCSA with a challenge in that, should the enquiry's final report recommend the initiation of an investigation, the CCSA will most likely need to call upon the external consultants, albeit to a lesser degree, to assist with such an investigation.

6. Relationship between enforcement and market studies

In general, the CCSA's conducts market studies on the basis of anti-competitive outcomes which the CCSA has observed in a priority market. The studies are conducted by inter-divisional teams comprising members of the CCSA's Policy and Research Division ("P&R"), Enforcement and Exemptions Division ("E&E") and Mergers and Acquisitions Division ("M&A"). Should the study reveal a possibility of anti-competitive conduct on the part of identified firms, E&E then initiates an investigation in terms of the Act. The use of inter-divisional teams ensures collaboration across divisions and this enables an effective flow through to decisions about complaint initiations and other remedial issues. Thus far E&E has initiated two investigations as a direct result of the infrastructure market study, which is still ongoing.

Public debate surrounding the possible inclusion in the legislation of formal powers to conduct market studies has suggested that the CCSA's powers of information gathering be extended to formally include requests by summons but to exclude the powers of search and seizure. This extension of the CCSA's powers may have the benefit that it would provide additional compulsion to firms, firstly, to participate in the market study and secondly, to provide accurate information. Furthermore, information gained through

this process will serve to streamline the CCSA's investigation phase by focusing it on the most relevant companies and conduct.

7. Strategies for using market studies

As mentioned above, the CCSA utilises market studies to address anti-competitive conduct and conditions in markets where there appear to be competition concerns, but where the causes of the concerns cannot readily be identified and where there would be insufficient grounds for the Competition Commissioner to initiate an investigation.

The advantages of market studies for the CCSA have been the following:

- by bringing publicity to the industry, they can help to change the behaviour of firms in the industry;
- they can bring much needed transparency to markets and its participants, compelling them to justify their conduct;
- they assist to streamline the investigations which result from the market studies; and
- in the case of the hospital study, market studies have also assisted by enabling the CCSA to make considered suggestions for legislative reform in the health care industry.

BIAC

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its Roundtable on Market Studies on June 11, 2008.

1. Introduction

Market studies are seen by business as filling a gap in the regulatory toolbox in those limited number of jurisdictions where the power to conduct such studies exists. However, there is no common model for such studies and, indeed, surprising diversity between jurisdictions both in substance and form. In most cases such studies are limited to competition concerns but in some cases¹ there are no such limitations. In those cases the justification for the choice of markets to investigate is not always clear and response to populist or political demands cannot be excluded.

One common feature of market studies, though, is that they are complex and difficult exercises to structure and manage. Typically they take as long as two years to complete and consume significant regulatory resources.² Regulators therefore need to be selective and conscious of "value for money" considerations. Equally they can involve significant expenditure on the part of individual companies and substantial distraction of management time in order to respond properly. These costs arise with external advisers, internal advisers and lost opportunity costs through tying up the time of key managers who have businesses to run.

As the outcome of market studies generally has to be described as "patchy" with limited visible results in many cases there are recurring questions about market selection and value for money. In some jurisdictions this has resulted in a certain polarisation of views between regulators (who welcome the "freedom to roam" as well as the opportunity to deepen their knowledge of markets which such studies provide) and the business community (who resent the time and costs involved particularly where no anti-competitive behaviour is alleged or found). The question arises whether such broad brush investigations are a justifiable use of the extensive resources which regulators have to deploy on such exercises given that their main focus should be on dealing with actual anti-competitive behaviour.

¹ For example, OFT market studies which can look at "markets which are not working properly" at the instigation of consumer groups or on its own volition.

² In its 2005-2006 plan the OFT expected to carry out up to ten market studies at a cost equivalent to 10% of its budget. Market investigations carried out by the UK Competition Commission are believed to take up some 50% of its budget.

2. Approach

- *What criteria are used to select appropriate markets to study?*

In general, the criteria used by the various authorities to select appropriate markets to study is not transparent to the business community. Moreover the different areas selected for study by various jurisdictions prevents business from discerning a pattern that might help to identify the criteria being applied.

The EC has selected telecoms, 3G rights, insurance, energy, financial services and most recently, the pharmaceuticals sector as the subject matter of market studies/investigations. The latter is an example where seemingly very little evidence has been the basis for a wide ranging and costly investigation. When the European Commission announced the pharmaceutical sector inquiry, the Commission stated that it became concerned about the sector as a result of its own monitoring of the sector as well as through specific cases such as the *AstraZeneca* case.

The inquiry is said to be a response to "indications" that competition in Europe's pharmaceuticals markets may not be working well on the basis that "fewer" new medicines are being brought to market, and the entry of generic medicines sometimes "seems to be" delayed.³

More generally, the Commission has stated that it "uses sector inquiries when it wants to improve its knowledge about a particular sector with a view to better identifying possible obstacles to competition. Essentially, the Commission opens a sector inquiry if it has indications that competition may not be working as it should be in the sector concerned. A sector inquiry is primarily an information gathering and analysis exercise that provides the Commission with in-depth knowledge about markets. It is therefore 'upstream' of any antitrust proceedings in specific cases, which may or may not follow." (Commission Memo 08/20, 16 January 2008) It is, of course, open to question whether a mere perception that a market is not functioning as it should be is a sufficient basis for the expense and burden of a market study particularly as there could be multiple factors at work which might be causing market dysfunction such as investment flow, regulatory impediments, technological barriers none of which factors are susceptible to a cure based on competition principles.

In the UK the OFT makes use of a wide range of sources to identify possible candidates for market studies. These may include:

- Information acquired in the course of its own competition or consumer enforcement work;
- Evidence from enquiries and complaints to the OFT;
- Suggestions from other interested parties, such as businesses, trade associations or consumer groups;
- Suggestions made by other government departments, trading standards departments, and regulatory bodies, and
- Internal OFT research.

³ Commissioner Kroes stated "Individuals and governments want a strong pharmaceuticals sector that delivers better products and value for money. But if innovative products are not being produced, and cheaper generic alternatives to existing products are being delayed, then we need to find out why and, if necessary, take action."

Market studies may also be launched in response to "super-complaints" by designated consumer bodies if, on consideration of the complaint, it meets the criteria for a study.

The OFT will select areas which appear to be the best candidates for study, and conduct a preliminary review into them. This initial selection will take into account factors such as the following:

- The scale and significance of the possible problems/ consumer detriment in the market;
- Significance to productivity and economic growth;
- The prospects of obtaining evidence and identifying remedies;
- Whether the likely benefits from a study would justify the possible cost and disruption to business;
- Whether the OFT is the most appropriate body to undertake the study; and
- Whether a study appears preferable to enforcement action.

No single criterion is judged in isolation, but a key point is that a market study approach will generally be adopted where the problems identified are perceived to be industry- wide practices or are not susceptible to enforcement action. References to the Competition Commission for an in-depth market investigation are limited to addressing competition concerns.

In the US, the Federal Trade Commission (FTC) may "prosecute any inquiry necessary to its duties in any part of the United States" (FTC Act Sec. 3, 15 U.S.C. Sec. 43) and may "gather and compile information concerning, and * * * investigate from time to time the organisation, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions * * * Federal credit unions * * * and common carriers * * *." (FTC Act Sec. 6(a), 15 U.S.C. Sec. 46(a)).

Another investigative tool, available in both competition and consumer protection matters, appears in Section 6 of the FTC Act, 15 U.S.C. Sec. 46. Section 6(b) empowers the Commission to require the filing of "annual or special * * * reports or answers in writing to specific questions for the purpose of obtaining information about "the organisation, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals" of the entities to whom the inquiry is addressed.

The FTC's 6(b) authority enables it to conduct wide-ranging economic studies that do not have a specific law enforcement purpose. (An example is the "Line-of-Business" study conducted in the 1970's, which required corporations to report line of business profitability and other data on a yearly basis.) Section 6(b) also enables the Commission to obtain to specific questions as part of an antitrust law enforcement investigation, where such information would not be available through subpoena because there is no document that contains the desired answers. Section 6 also authorises the Commission to "make public from time to time" portions of the information that it obtains, where disclosure would serve the public interest (15 U.S.C. Sec. 46(f)).

The FTC has issued economic reports on the beef, petroleum, tobacco and steel sectors and more recently on the carbonated soft drinks bottling industry.⁴ The FTC draws upon its extensive experience in structural changes and mergers within an industry as the basis for its economic reports.

In December 2007, the Canadian Competition Bureau published a study into certain self-regulated professions. This was the first report of its kind.⁵ The Bureau looked into five significant professions - lawyers, accountants, optometrists, pharmacists and real estate agents. The general aim appeared to be a consideration of productivity. The Bureau stated that the "intent of the study is to identify restrictions self-regulated professions place on the entry of prospective members into the profession and on how existing members do business that may unnecessarily hinder competition." The study considered whether professional regulatory practices unduly hinder competitiveness without safeguarding a clear public interest in the most efficient manner possible.⁶

- ***How do competition authorities go about the process of gathering data and other information for the study?***

Again, the processes vary from jurisdiction to jurisdiction. Some authorities are more intrusive in their methods and more demanding in terms of the information. The EC has, for example, used a mixture of "dawn raids" and wide-ranging questionnaires (information requests). Given that such studies are basically fact finding activities rather than investigations of suspected anti-competitive behaviour the use of dawn raids in this context would seem to be wholly disproportionate and inappropriate.

In the UK, the OFT can request information under section 5(1) of the Enterprise Act 2002 although there is no formal requirement to respond. The OFT generally sends out detailed questionnaires, conducts structured meetings and telephone surveys. The UK Competition Commission has its own statutory basis for requesting information which requires companies to respond. It also obtains information by way of hearings with relevant parties and commissioning surveys.

The US FTC has conducted discussions with interested parties, called for public views and conducted its own research in addition to using prior research.

The Canadian Competition Bureau collected information on professional regulations in each province by way of questionnaires.

- ***What are the advantages and disadvantages of using empirical evidence in market studies? What about anecdotal evidence?***

This depends upon the underlying purpose of the study/investigation. As a general rule original evidence is needed to support any firm conclusions drawn. Hence, prior research, public views and discussions with interested parties are fundamental to a successful market study. BIAC notes that many authorities claim that the relevant study will not necessarily lead to competition law enforcement.

⁴ See FTC website: <http://www.ftc.gov/be/econrpt.shtm>.

⁵ [http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/\\$FILE/Professions%20study%20final%20E.pdf](http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/$FILE/Professions%20study%20final%20E.pdf). Prior to 1986 the Canadian Restrictive Trade Practices Commission was authorised to conduct hearings into industry issues but this power was rescinded partly in response to complaints from business about the enormous expense and questionable utility of these inquiries.

⁶ Speech by Sheridan Scott Commissioner of Competition (17 April 2008), available at: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02658e.html>.

However, this is certainly one of the main possible outcomes. Further, it should be noted that the study will be agenda setting and should have a firm basis in any event.

- ***Is it a good idea to seek the involvement of market participants (sellers, customers, and any other stakeholders), or is it better to conduct the study without them? What are the pros and cons of each approach?***

If the purpose of the study is only to get an outline understanding of a market, it is possible that the involvement of market participants is not necessary. However, if the purpose is to understand the market thoroughly - as would generally be the case - it will be necessary to seek the involvement of market participants.

This seems to be supported by most authorities but the nature of the process is important. In the EU, DG Competition has stated that it values dialogue with stakeholders over scope and process. In respect of the pharmaceuticals sector inquiry, the Commission considered that stakeholder consultation after the first round of questionnaires helped in scoping the inquiry later. It is also of the view that it prefers more balanced and less defensive dialogue.⁷ However, the reality is that the pharmaceuticals sector is surprised at the scope of the inquiry and the demands it is placing on undertakings. This would suggest that the nature of the dialogue and scoping tends not to be consensual.

In the UK, the OFT generally writes to a range of stakeholders who are associated with the market to seek factual information and views in the initial stages of the study. The Competition Commission also contacts all relevant parties and invites evidence generally. Again, however, issues have been raised about the intrusive demands placed.

Studies that exclude the participation of stakeholders are likely to affect the implementation of effective solutions that require the buy-in of stakeholders. On the other hand, delays occasioned by the submission of responses from all the stakeholders inevitably affects the timetable for the study and its cost.

- ***In general, how much transparency is appropriate when conducting market studies?***

Market studies have tended to be opaque from a business perspective. Information requests are extensive and usually cover a wide spectrum of issues, making it difficult to determine what the precise concerns or focus areas of the study are. Often, the timetable is unspecified and is subject to "drift". Business would encourage competition authorities to be more transparent and focussed in their goals.

- ***Do the market studies done by a certain competition authority (or authorities) have distinctive features in comparison to those done in other jurisdictions? If so, what are those features?***

As noted above, the approach of competition authorities in various jurisdictions does vary and there are a number of distinct features in particular countries. Competition authorities should be adopting a "best practice" approach that is consistent across jurisdictions. Market studies can be a significant burden and cost of doing business and greater convergence towards accepted best practices would help to minimise these burdens.

⁷ DG Comp meeting with CBI Competition Panel 25 April 2008.

- ***How do you go about setting timetables and milestones for completing market studies?***

Some authorities are bound by statute (such as the UK's Competition Commission), others merely have administrative timetables (e.g. the European Commission⁸ and the UK's OFT⁹). The absence of a fixed timetable can lead to long drawn out investigations that are ultimately ineffective. Competition authorities should also bear in mind the great burden placed on management time by such investigations and studies.

- ***What human and financial resources (approximately) are devoted to market studies (including those for which consultants have been hired)? Have the results been worth the resources spent? Please explain why or why not***

From a business perspective, significant resources have to be devoted to each inquiry. A company's external costs in a typical OFT market study/Competition Commission investigation can be over £4m and internal costs over £2.5m. This leads to questions about the cost effectiveness of the study. For example, the investigation into the Northern Ireland banking market is estimated to have cost over £20m against a market size of just £170m and the process continued for two and a half years.¹⁰

- ***Should competition agencies conduct market studies themselves or should the work be contracted out? What are the advantages and disadvantages of each approach? (E.g., are there any concerns about credibility or objectivity?)***

If the purpose is to merely understand (in a general nature) how certain markets operate, then contracting out is a viable option. If they are likely to be a precursor to competition law enforcement, then contracting out is less attractive.

BIAC notes that there are certainly powers to contract out. According to the OFT's guidance on market studies, it may decide to commission specific research from consultants who will be selected by a competitive tender process.¹¹ In selecting potential bidders the OFT will usually consider any potential conflict of interests. Contractors must be capable of handling commercially sensitive information in accordance with the Data Protection Act 1998 and the Enterprise Act 2002.

- ***Summary***

BIAC believes that there are compelling arguments for greater scrutiny of the need for market studies and a relatively high barrier should have to be met before such studies are launched. There is also a need for much greater focus on the organisation and management of market studies which have been prone to

⁸ The EC will usually adopt a timeline of not more than 18 months (DG Comp meeting with CBI, 25 April 2008).

⁹ The OFT will usually publish an indicative timescale for completion of the study which will take account of the perceived complexity of the issues, the extent to which new information needs to be gathered and whether research needs to be commissioned. The timetable may be affected by other factors, for example the analysis of new information may reveal additional issues that require scrutiny or external research may not be delivered when expected.

¹⁰ In its recent "Fit to Compete" review of the UK Competition Regime the CBI stated that"much more rigorous cost-benefit controls need to be applied to ensure they represent a sensible use of the public purse and provide value for money."

¹¹ OFT guidance brochure on market studies available here:
http://www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft519.pdf

repeated errors which do not help to achieve the optimum outcome of what can be a very resource intensive exercise and which result in undue burdens upon the business community. These errors include "scope creep" - the failure to properly identify the objectives of the exercise at the outset which can then result in delay and inconclusive results. There are other factors which need to be right in order to achieve optimum results. If questionnaires are used then they should be road tested to ensure that the right questions are being asked and that relevant information will be produced. There should be sufficient flexibility to allow information to be provided in the format in which it is maintained by the relevant business to avoid the cost of having to create data in a different form. Care needs to be taken to send questionnaires to the right businesses at the right level at the correct address with a reasonable period in which to respond. The timetable for the study needs to be clearly stated and understood to minimise the risk of drift which further increases the costs involved. All these practical factors point to the need for careful case management in order to get the best results at the minimum cost for all concerned. In this context the criteria for a successful market study might be described as a study which:

- ***Is completed on a timely basis***
 - Based on clear and specific objectives;
 - With the business community understanding what the competition authority is trying to achieve; and
 - The business community understanding the reasons for the outcome.

3. Relationship between Enforcement and Market Studies

- ***What complementarities exist between enforcement and market studies?***

BIAC recognises that certain complementarities exist. Enforcement cases could be indicative of wider concerns in the market and thus alert the authority to the need for a market study. Market studies may reveal specific conduct that could lead to enforcement action by the authority or reveal features which might be conducive to anti-competitive conduct - e.g. laws or regulations which confer market power by raising barriers to entry. Further, in areas of enforcement that are novel, a market study may be the most appropriate way forward. For example, BIAC notes that there are wide discrepancies and uncertainties as to what constitutes an abuse of dominance/monopolisation. A market study that examined certain issues could be a more appropriate way of clarifying the law and enforcement practice rather than an action for breach of competition law.

- ***What best practices should be followed when a market study turns up evidence of a competition offence?***

The normal procedure for enforcement action should be followed, with a fresh team leading the case. For example, in the UK the Competition Commission would not be able to investigate a potential infringement of the UK competition rules which it had come across. This would need to be referred back to the OFT.

- ***What are the pros and cons of having formal powers to conduct market studies?***

Depending upon the specific threshold for authorising a study and subject to clear definition of the scope of the exercise in each case, such powers should allow the relevant competition authority to investigate the level of competitiveness in a market without the need for specific enforcement action. They may also enable a more tailored response to address problematic features than would be available under

conventional enforcement powers - e.g. the establishment of self-regulation; recommendations to Government etc.

On the other hand formal powers to conduct market studies could lead to the authority using such powers to conduct investigations that are to a greater or lesser extent speculative where its narrower enforcement powers cannot be invoked. There is also a risk of introducing regulation into markets which do not require it.

- ***What conditions or requirements, if any, should be met before authorisation to use those powers is granted? How extensive should the powers themselves be?***

There is a tendency for the threshold for use of the powers to be very low and the powers to be very extensive. This leads to investigations that are disproportionate in nature and over-burdensome. A balance has to be struck. It should be best practice for competition agencies to publish guidelines on how markets are selected and investigations carried out. Consultation with the parties involved and the wider market are crucial at key stages in the process in order to minimise unnecessary burdens and costs.

- ***Summary***

BIAC considers that market studies are complementary to enforcement activity though there is a risk that market studies could delay or impede appropriate and timely enforcement action. There is also the question of whether market studies utilise resources which might be better devoted to enforcement activities. On the other hand market studies are often viewed as a valuable tool in opening up public sector dominated markets.

4. Strategies for Using Market Studies

- ***Are market studies useful instruments? What purposes do they serve?***

Market studies can provide an indication of the impact of laws and regulations on competition and consumers and can facilitate wider action by the competition authority to promote competition or the consumer interest in a variety of ways. They also enable competition authorities to address conduct which is not in itself illegal - e.g. non-collusive parallel pricing or customer inertia. Used well, they can allow the authority to decide on the level of intervention required in the market without having to target specific market participants. The risk is that they are used either because they are perceived to be easier than a competition law investigation or as a means of conducting an intrusive "fishing expedition".

- ***For example, are they used to carry out investigations without having to do so formally? Is that a good practice?***

This is clearly not good practice. It could also result in legal challenges from business, impacting on the authority's enforcement credibility.

- ***Another possible use for market studies is to wield them as a tool for effecting regulatory and legislative reform. Have you found them to be effective for that purpose? Why or why not?***

BIAC supports the use of market studies to consider the rolling back of regulation and, in some cases, legislative reform.

The UK's House of Lords Select Committee's report on *UK Economic Regulators*¹² put forward a similar proposal. However, the UK Government has rejected suggested reforms put forward by the OFT as a result of a market study e.g. in terms of removing restrictions on establishing pharmacies, which suggests that the market study tool is not necessarily effective in this context.

In the US the FTC notes that historically its economic reports have significantly contributed to its mission by stimulating further research, providing evidence for cases and rulemaking, influencing legislation and improving competition in the marketplace.¹³

5. Conclusions

BIAC does not consider market studies to be an essential component of an effective competition enforcement regime. However, they can serve a useful purpose if properly deployed and managed. It should not be used as a substitute for enforcement action and consideration needs to be given to what proportion of a competition agency's resources should be deployed in this way given the level of cost involved and the more direct impact of enforcement action. BIAC can support the use of market studies on this limited basis but has residual concerns about the risk that such studies might be used by competition authorities in a drive to raise their profiles through being seen to be taking proactive steps to challenge apparent consumer detriment in markets in a manner which is beyond the scope of competition principles. It is for this reason that BIAC believes that in each case clear and compelling arguments must be present for the use of such methods, i.e. there is no other way in which a suspected breach of competition principles can be identified and understood.

¹² HL Paper 189-I, 13 November 2007.

¹³ See FTC website at: <http://www.ftc.gov/be/econrpt/231984.pdf>.

SUMMARY OF THE DISCUSSION

The Chairman Frederic Jenny opened the roundtable by observing that while no background paper was prepared for this roundtable, a very extensive contribution from the UK on market studies was submitted and, on top of this, there was a major conference organised in London during the prior week by the United Kingdom's Office of Fair Trading (OFT) on the topic of market studies. Some of the countries were represented at the conference in London and the Chairman indicated that the proceedings of the London conference will be made public and will constitute an interesting source of information about market studies in addition to the OECD market studies roundtable¹. At that conference, representatives from OFT, the UK Competition Commission, the business community, lawyers and other antitrust enforcers, and a number of stakeholders, gathered to examine issues surrounding OFT's and the Competition Commission's extensive experience in conducting market studies.

The Chairman then introduced Peter Freeman and John Fingleton from the UK Competition Commission and OFT, respectively, and indicated that they would introduce each of the three main topics for the RT, including a brief discussion of the UK experience because the UK is a country where market studies have been quite developed and are an important issue.

Before turning to the UK to introduce the first topic, Chairman Jenny made five observations derived from his reading of the contributions:

First, nearly every competition agency conducts market studies even though not all of the agencies mean the same thing by "market." There are some countries, however, with a richer experience than others, especially the US and Japan which have a very long experience. In the US, market studies were initiated at the beginning of the 20th century, and in the case of Japan's contribution, there are references to market studies going as far back as the late 1940s.

Second, the use of market studies is quite varied depending on the countries. Some countries use them primarily for litigation; others use them primarily for competition advocacy. Market studies can constitute a lead-in to litigation when anticompetitive behaviour is suspected in a sector but the competition authorities don't exactly know what is the nature and source of the competition problem. In this circumstance, they use market studies to try to identify the possible competitive problems. Alternatively, market studies can constitute a lead-in for competition advocacy. This is particularly the case, for example, when there is no suspicion of any violation of antitrust laws, but yet it doesn't seem that the market is really functioning well for consumers. In those cases, market studies may lead to proposals to deregulate or some other form of relief.

Third, it is quite clear that, in a number of countries, market studies are used both for competition and also for consumer policy and in the market studies these two uses are often intertwined. Maybe these market studies are a good way to develop the link between consumer policy and competition policy.

Fourth, there is a wide variety of practices and institutional environments in which market studies are conducted. In some countries, one can use the powers of investigation of the antitrust authority to obtain

¹ http://www.offt.gov.uk/advice_and_resources/resources/resource_base/market-studies/conference

data and other information for market studies. In other countries, the competition agency can only employ voluntary gathering of data. There are market studies where there is a lot of consultation with stakeholders, and other market studies which are carried out without apparent consultation involving stakeholders. There are market studies which are a bit superficial, but still thorough enough to render a general idea of the conditions affecting market performance. In certain countries, there are very elaborate processes, sometimes involving Parliament, in which the competition authority follows a very strict procedural regime.

Fifth, the outcomes from market studies can be very different. As a matter of fact, these contrasts in results and outcomes are apparent in the contributions for the construction industry RT. These differences may have to do with the fact that the methodologies were quite different. There are also market studies which are very controversial. For example, there are historical US market studies where the Congress decided that the competition agency that performed the market study would no longer be allowed to study or report on a sector – the insurance sector -- precisely because the incumbents in the market sector applied political pressure on Congress to do so. Some market studies can be major failures in terms of influence and others can be very influential in promoting regulatory change in a country --- so there is a wide diversity of outcomes. The contributions to the RT presented good and bad examples of outcomes from market studies that should lead the delegates to consider the best uses that can be made of market studies.

Given the large number of contributions, the Chairman decided to divide the RT into three major sub-topics:

1. What have been the objectives of market studies and how have they been chosen? Has there been a prioritisation process and, if so, how has it worked?
2. What have been the most effective approaches used in doing market studies?
3. What have been the best techniques for making use of market studies for enforcement or competition advocacy?

Chairman Jenny began the presentations and questions by giving the floor to John Fingleton for an introduction to the RT debate on market studies.

The UK Delegate (OFT) began his presentation with a brief announcement about the first criminal cartel case brought in the UK. It was the Dunlop Oil & Marine Ltd case in which OFT cooperated with the U.S. Justice Department. On the day of the RT, the Crown Court gave prison sentences of three years each for two people and 2 ½ years each for several other people found guilty of cartelisation. The Court also disqualified a third individual from holding any directorship positions for 7 years. The delegate expressed satisfaction at the successful prosecution of the case and noted that the decision took place just 2 weeks shy of the 5th anniversary of the UK's Enterprise Act. He viewed this first criminal collusion case in the UK as a great example of international cooperation. He expressed the view that the case would not have been concluded so successfully without the preparation that occurred in OECD Competition Committee over the years. He then thanked colleagues who contributed to the work on cartel issues in the Committee.

The delegate began his comments on market studies by noting that OFT has done 32 market studies and that another ten market studies have been completed by his colleagues at the Competition Commission. He also noted that the Competition Commission has done 7 or 8 market investigation references, most of them referred to the Commission by OFT.

The delegate indicated that OFT starts the selection of market studies from the point of view of whether markets are working for consumers. There are three possible sources of problems that might cause markets not to work well for consumers:

- Private restrictions: monopolies, cartels;
- Public restrictions: state monopoly, barriers to entry;
- Inefficient market equilibria.

The number of categories of market problems that are considered by OFT is perhaps the most distinctive feature of the UK regime. The delegate observed that everybody recognises that market studies that deal with state restrictions and competition are a very useful complement to the type of enforcement activity that deals with private restrictions and competition. OFT does not often use market studies to deal with private restrictions, but there are two examples where private restrictions were identified as the problem. One was concerning car warranties, a case where OFT could have used Article 81 provisions, but focused instead on getting the industry to agree to change its practice through a market study. Another was regarding distribution of medicine. In this matter, there was an allegation of abuse of dominance, and the OFT analysed it as a market problem rather than a unilateral conduct problem.

The use of market studies to tackle public anticompetitive restrictions is a more common focus of market studies. OFT does not just look at individual markets, but also looks systematically at issues across markets. For example, two OFT market studies covered what can be described as “competitive neutrality,” public subsidies and the commercial use of public information.

The third source of market problems can be described as “inefficient market equilibria.” This is a situation where there may not be a private or public restriction on competition, but OFT sees serious problems with how the market is working. Some of these are what can be described as an “everybody standing up at a football match” type of problem --- so if everybody is standing up, everybody is worse off and if everybody sat down, welfare would be higher. The difficult question is determining how the markets move from one equilibrium to another, and deciding whether or not competition agencies have a positive effect. There are other types of inefficient equilibria where cross-subsidies look very extreme; payment of insurance protection is a very good example.

In terms of OFT’s goals, market studies are fundamental to an effects-based approach. Hence, OFT views market studies as a means to tackle problems at their source and a good opportunity to build relationships with consumers and business stakeholders. Market studies are ultimately about delivering change through processes which are, for the most part, voluntary, but not always.

In terms of how potential topics for market studies are prioritised, OFT set this out in some detail in its contribution to the RT. OFT’s market studies prioritisation process is akin to finding the best person to fill a job vacancy. It involves a process akin to a job search, where the employer advertises and people queue up – that is the equivalent to complaints received by OFT. OFT also engages in the equivalent of “headhunting” – OFT calls this “horizon scanning.” OFT invests effort in finding good candidates. OFT then has prioritisation principles that are like the job criteria --- they focus on impact significance, risk assessment and resources. Then OFT has the actual process whereby it applies those principles. That is equivalent to narrowing the stream of candidates down to the successful candidate. It is like the long listing and short listing interview process until OFT finds the one to take forward.

The UK delegate concluded that the key thing to emphasise is that OFT does not just look for a theory of harm, but also tries to see at the outset whether the market problem is something that might be capable of being remedied. OFT has rejected many candidates for market studies where there are significant problems in the market but where OFT’s staff doubts there is a viable solution to improve market performance. That is important because OFT is often criticised for “fishing expeditions.” In fact, OFT tends to be very judicious about selecting market studies.

Chairman Jenny thanked the UK representative for his introduction to the topic of the RT. Then he turned to Korea whose contribution described a systematic large-scale plan for market studies called the “Clean Market Project.” This project was undertaken by the competition authority and has now been completed. He asked the Korean delegation to describe, given the fact that this project is finished, how this project came about, what it involved and what is next.

Korea indicated that, as the project name indicates, the major goal of the Clean Market Project (implemented between 2001 and 2005) was to identify and address the root causes of market failure in certain sectors and, thereby, enforce the competition law more efficiently and effectively by taking an industry-based or a sector-based, comprehensive approach instead of a case-by-case piecemeal approach. Until then, most competition law enforcement in Korea had been initiated through individual cases. Under the old approach, it was very difficult to determine whether the same anticompetitive practice did or did not occur repetitively or whether any regulatory reform or structural changes should be followed to ensure the proper functioning of the markets. As an example of the success of the new approach, Korea fundamentally changed the sale and purchase patterns in the school uniform manufacturing and distribution sector through the Clean Market Project in 2001. More specifically, through this project, Korea cracked down on anticompetitive price levels in this sector, improved regulation, and introduced a joint purchasing system. The project also halved the number of consumers bringing a case to the court to ask for compensation by providing consumers with information on compensation or filing procedures. These efforts led to 40% reduction in school uniform price.

Regarding the selection of criteria, annually the competition agency selects six to seven markets based on the following criteria:

- sectors or markets where the regulation and anti-competitive practice are prevalent;
- sectors in which consumer complaints are frequently filed;
- sectors where market concentration is very high and has remained so for a very long period of time.

Regarding future market studies, although the market studies conducted under the Clean Market Project were concluded in 2005, the Korean competition agency continues to conduct market studies using a systematic and comprehensive approach to ensure the markets function well. More specifically, the market studies conducted are focusing on the sectors that are of particular importance to consumers such as mobile telephone service, powdered milk, and private education services. Other targets for market studies include dynamic industries where competitive conditions are gradually changing as well as sectors where government regulation or policy may be restricting competition.

Chairman Jenny next turned to Japan whose contribution explained that market studies focus on new trade fields or existing trade fields where the competitive environment has changed notably. He asked the Japanese delegation to describe how it goes about selecting the sectors for market studies and also what prompts those market investigations. Is it a desire to know more about the sector when the JFTC does not have much experience with the sector? Is it an enforcement perspective or the perspective of regulatory reform as described by Korea?

Japan confirmed the Chairman’s comment in the introduction of the RT that Japan has been conducting market studies for a long time. These market studies are called “fact-finding surveys.” Almost every year the competition agency has been conducting fact-finding surveys since Japan’s introduction of the Antimonopoly Act in 1947. They have been conducted with the idea of achieving insight into specific markets and industry trade practices and other issues in accordance with the different needs of the

competition policy at different times. They differ from the JFTC investigations, which focus on specific acts in violation of the Antimonopoly Act. The targeting of the fact-finding surveys includes the following two types of trade fields:

- new trade fields --- an example of this is a survey on electronic shopping malls in 2006;
- existing trade fields where the competitive environment is changing in a major way --- this includes the survey on financial institutions and borrowing companies in 2006 when the major deregulation in this industry took place.

The fact-finding surveys are not meant only to satisfy the JFTC's internal needs to understand the market and industries. The JFTC often targets those trade fields with potential problems from the viewpoint of competition policy. For example, before conducting the survey on electronic shopping malls, there were concerns about unfair trade practices such as abuse of dominant bargaining positions by internet shopping mall operators against the tenants of these shopping malls. There was also a concern about non-internet companies that attempt to hinder entry into e-commerce. Another example was that prior to starting the survey on trade practices between financial institutions and borrowing companies, it was reported that large banks were using unfair trade practices such as abuse of a dominant bargaining position vis-à-vis borrowing by small and medium enterprises. Therefore, these two studies represent not only an effort by the JFTC to familiarise itself with the new trade practices or changing competitive environment, but also a follow-up on suspicions or possible problems in terms of the Anti Monopoly Act.

Chairman Jenny thanked the delegate from Japan, Mr. Goto, a professor of economics and a commissioner of the JFTC for over a year, and welcomed him to the Committee. The Chairman observed that Mr Goto mentioned a rather delicate topic toward the end of his presentation, namely the relationship between law enforcement and market studies. The Chairman stated that there are very different stands which are taken by different countries on this relationship. As illustrations, he identified Mexico and Canada as two countries that indicate that market studies do not commonly lead to law enforcement. The Mexican contribution states: "*market studies are often the result of findings from law enforcement investigations rather than law enforcement investigations stemming from market studies.*" The Canadian contribution indicates that the Bureau doesn't use industry or market studies as a means to obtain evidence for enforcement, nor has the Bureau inadvertently come across evidence of anti-competitive activity that raises issues under the provisions of the Competition Act during the course of other broader market or industry studies. So, in both cases, the contributions indicate that market studies are quite separate from law enforcement.

The Chairman contrasted the quotes from the Mexican and Canadian contribution to the EC contribution which states: "Sector enquiries are primarily an information-gathering and analysis exercise that provides the Commission with in-depth knowledge of those markets; this means that they do not replace, but feed upstream, any possible antitrust proceedings in specific cases which may follow." It seems that there are some indications that market studies may lead to law enforcement, in that whatever is learned in those market studies may be useful in deciding whether or not to bring infringement proceedings. One of the questions that comes to mind, according to the Chairman, is whether this approach exposes the Commission to the risk of being accused of engaging in "fishing expeditions," doing market studies just as a way, in fact, to start an investigation, but without saying so --- starting with a softer approach and then narrowing. The Chairman observed that in some jurisdictions there are issues raised about whether using market studies in this way sufficiently protects the right of the defendants, and he invited the EC delegation to address these issues.

The EC spokesperson expressed a personal belief that there is not a major difference between the EC approach and those of Mexico and Canada on the basis described by the Chairman. In line with UK

delegate's introduction, the EC has pursued a competition policy which goes beyond competition law enforcement. That is to say that although the EC traditionally has a very strong record on enforcement, the competition agency believes --- a belief it thinks is shared by many of the RT delegations --- that the aim of competition agencies is to promote competition for the benefit of consumers and business. There may be several ways to do that: one way may ultimately lie in terms of enforcing competition law; another may be in advocating for specific changes to regulation or the change in behaviour of the regulators; or perhaps indeed it may lie in inviting the industry itself to change its habits without undermining the rights of potential defendants.

On the specific issue of the powers used by the EC for market studies, these are investigatory powers under Regulation 1. If there is a very strong case-related issue, the EC has always carried out market studies of a smaller kind. For example, the competition agency carried out, even after the energy sector enquiry, a special study on the evolution of electricity prices which immediately led to some antitrust investigations which were deeper than the sector enquiry. The EC competition agency also carried out benchmarking studies on liberal professions as well as a study which preceded the adoption by the Commission of the Code of Conduct on (financial) clearing and settlements. So there are several EC market studies supporting the antitrust work as well as feeding into policy development elsewhere in the Commission.

The innovation initiated in the last 5 years, based upon the revision in Regulation 1 and following the example of some of the member-state authorities represented at the RT, has been to carry out much more comprehensive sector-wide inquiries. These comprehensive, sector-wide inquiries have two advantages: they focus the agency on either those competition issues which can be addressed by change in regulation, or those which are addressed by pursuing antitrust actions. As far as the connection between the information gathered in a sector enquiry on the one hand and any subsequent investigation on the other, the delegate stated that the EC competition agency uses the investigatory powers under Regulation 1 which are subject to judicial control. Hence, if the agency asks something excessive from a company, the firm has a right to seek redress from the courts. The second and most important caveat to what the EC competition agency does compared with some nationalities at the RT is as follows: whatever the agency produces as a report, and whatever information is collected in a sector enquiry, cannot legally be used subsequently in any antitrust investigation, unless the agency again requests the information from the parties concerned. This procedural requirement is a clear protection of the rights of defence of those involved, and it also puts the EC competition agency more in the camp described by the Chairman as the Mexican and Canadian approach, rather than an approach to market studies which is going gung ho in relation to potential infringements of antitrust laws.

The EC delegate then turned to a discussion regarding the concern about "fishing expeditions." The EC's view on a sector-wide enquiry in terms of resources is that these enquiries are generally at least two or three times the size of a second-phase merger investigation. The EC competition agency holds that the way in which one conducts such an enquiry, as well as the relationship between the agency and the sector concerned, is extremely critical to the effectiveness of the final result. This is not just in terms of making sure the agency gets the information needed to identify the problems, but also in making sure that a consensus emerges in the industry to cooperate with the proposed remedy. There appears to be more impatience at the supra-national level than there is at national level about the pace and breadth of sector inquiries, consequently the EC competition agency seeks to bring any sector enquiry to a rapid conclusion. Therefore, in each of the three announced sector inquiries (including the two completed inquiries), the EC competition agency stated from the beginning: "these will be over in 18 months." Quick completion avoids resource-intensive activity, and also focuses the agency on achieving results which make sense at a European level, as opposed to a national level. The EC competition agency can not, as the agency has learned, duplicate what is going on at a national level; however, at the same time, EC-level market studies

also enable each national agency to see what messages can be delivered for their own antitrust action, if any, or what messages need to be delivered to improve the regulatory environment.

On the energy side, the EC has been able to achieve both objectives, having both conveyed messages for a third liberalisation package on the regulatory side, and also performed a series of antitrust investigations which have tackled, in a very focused way, harm to industrial and business consumers in the European energy sector.

In the financial services area, the EC competition agency followed up and completed investigations on payment cards on the antitrust side. The agency also has been able to provide a great deal of information which supports the implementation of the EU financial services action plan and the regulations regarding the single European payments area.

On the pharmaceutical side, the EC competition agency focused specifically, as indeed the US FTC did, on the frontier between blockbuster and generic drugs. These investigations attempted both to establish that there has been no abuse of the previous patent rights once they have expired, and to see if there were any grounds at all for further investigation on the antitrust side, or indeed whether there should be some initiative toward changes in regulation at the national level or the European level.

Chairman Jenny turned next to Italy to ask questions which are very close to the questions posed to the EC. The Italian contribution indicates that the competition authority can undertake enquiries when “*the development of trade, the evolution of prices or other circumstances suggest that competition may be impeded, distorted or restricted.*” It also states that “*the information acquired with market studies can serve as a background for enforcement or advocacy interventions.*” The quotes raised questions for the Chairman: When the authority has the feeling that there is something impeding, restricting or distorting competition, how is it to decide whether it conducts a market study rather than opening formal antitrust proceedings? Can the agency use the information obtained through market studies for enforcement action?

The delegate from Italy responded that the situation in Italy is not much different from the one that was described by the EC delegation. The only major difference is that the Italian competition agency has had these powers since the start, from 1990 when the Italian law was introduced. The Italian competition agency started out with the authority to open fact-finding investigations. Although the wording may look very similar to antitrust infringements because it includes “*impede restrict or distort,*” in practice what the agency has done is open a fact-finding investigation when there was a feeling that the market didn't function properly. This approach parallels the UK's approach to market studies, as described by the UK delegate: investigations are opened when there are public restrictions or when there are inefficient market equilibria. The Italian competition agency never opened a fact-finding investigation when it thought that there was a violation of the antitrust law. In fact, the agency has conducted only 31 fact-finding investigations since 1990 --- fewer than 2 per year. But, nonetheless, all the investigations involved sectors where the market did not function properly because of inefficient equilibria --- none functioned poorly because of violations of the antitrust laws or because of public restrictions on competition. Just a few examples --- in professional services, the agency did a fact-finding investigation to see how the professions could operate without legal restrictions on advertising and without a fixed minimum tariff. This study also examined how to open up access to the professions with respect to deontological codes (codes of ethics). The agency could not intervene directly regarding these codes, nor could it intervene directly against the professions with respect to the practices that were analysed, because such codes were authorised by law. Nonetheless, this fact-finding investigation was instrumental in convincing the government to reform professional services. A fairly similar situation originated with respect to banking services in Italy. In January 2007, the agency got the power to enforce the competition law in banking. The first thing the agency did was to open up a fact-finding investigation of the cost of closing checking accounts. It was quite clear from the fact-finding investigation by the EC on retail banking that Italy had the highest costs

incurred when a customer closes a checking account. It was not even an indirect cost. Rather, banks asked depositors to pay a direct fee if they wanted to close a checking account. It was important to open up that fact-finding investigation to show in detail what the banks were doing --- it was common practice, but certainly not a concerted practice or a horizontal agreement. The interesting thing was --- and this is why the agency said in its RT contribution that there is complementarity between enforcement and advocacy --- that once the agency opened the investigation, immediately many banks decided to eliminate such unjustified charges for closing check accounts. The reason for the change was that banks looked at the effects of these charges on their reputation (like everybody else) and wanted to be cooperative and indeed complied immediately with what they thought was the authorities' desire.

The contribution also stated that market studies can be used as an input for law enforcement decisions, but certainly this use is of much less important than for competition advocacy with respect to public restrictions on competition or for inefficient equilibria cases. When fact-finding investigations are used to initiate competition law enforcement, it is not an *ex ante* decision. Rather, this use of market studies originates during the course of the investigation. Further, the information from studies cannot be used directly for law enforcement; instead, rather the fact-finding investigation informs the agency that there is a dominant position and that it might have been abused. If that is the case, the agency opens an antitrust investigation on that specific issue.

Chairman Jenny observed that there appears to be no direct link, at least in the case of the EU and Italy, between market investigation and enforcement. He noted that there are some safeguards that are written into the law, such as not being able to use the information from a market investigation directly in a law enforcement investigation; instead, the agency has to resubmit a request for the relevant papers.

The Chairman turned next to the Russian Federation for some clarifications about its contribution. There were two aspects of the Russian contribution about which the Chairman expressed interest. One of them was about choosing which sectors may become the subject of market studies. It appears from the contribution that the competition authority is obligated to conduct a market study if the government requests one, as was the case in the discussion in the U.S. contribution. The second thing was that the competition authority is required to conduct a market study within a short time frame before it can open a case investigation. The chairman asked the Russian to describe the exact role of this type of market investigation and how these sorts of investigations relate to the formal law enforcement investigations of the agency.

The Russian delegate responded that the competition authority conducts market studies at the request of the government. The goal of these market studies has been clarification of the current situation and developments in any industry where serious problems with competition arise, be it a case of companies' behaviour, state regulations, or pricing concerns. It doesn't happen very often, but in 2007, for instance, the Federal Antimonopoly Service conducted market studies regarding: electricity sector reform; fertilisers; fuel; bread; cement prices; social insurance; and retail banking services. It presented the results of these studies to the government. This year, according to a new competition law, the agency will prepare an annual report on competition in the Russian Federation and the general result of market studies will be included in this report.

Concerning competition law enforcement, the Federal Antimonopoly Service has very strict time limits for market studies: three months for merger cases and nine months for investigations of violations of competition law. On the other hand, according to the competition law and some significant court decisions, relevant market analysis is an inseparable part of any Federal Antimonopoly Service decision. In this situation, the only way to work effectively is to concentrate resources on the most interesting markets where there are structural problems, for instance, or expected large transactions that could lead to restrictions on competition. Market studies in such sectors are planned as part of the annual program of

market analysis that is initiated and implemented by the Federal Antimonopoly Service. If, as a result of market studies, some violations of competition law are found, the Federal Antimonopoly Service will have to start a case and do an in-depth investigation within definite time frameworks. Usually, in these situations, the working group performing the market study just transforms into a Federal Antimonopoly Service investigation team to examine the alleged law violation, and this, in turn, leads to a final decision regarding the complete case.

Chairman Jenny recognised Greece for a comment.

The Greek delegate pointed out that, also under the Greek law, whenever there is a problem in the market because there are a lot of restrictions on competition in the sector, or whenever the agency sees that there is inefficiency, the Ministry of Development or the Hellenic competition authority *ex officio* can start a sector enquiry. This inquiry can also lead to a reasoned decision which could result in behavioural or structural measures to improve market performance. So the Greek system differs from that of other countries at the RT in this regard.

Chairman Jenny turned to Romania whose submission noted that one of the objectives of its market studies has been to identify and address situations where transaction costs are higher than necessary --- which may or may not involve a competition problem but may be purely a consumer problem. The Chairman expressed the view that this is an excellent example of integration of competition policy and consumer policy and asked the Romanian delegation what kind of market studies they have done and how successful they have been in devising remedies in cases where transactions were found to be higher than those thought necessary by the agency.

Romania's delegate responded that at the beginning of 2007, on the basis of the powers conferred by the Romanian competition law, the Romanian Competition Council started to make more use of sector enquiries. That means that the competition authority instigates market enquiries to gain in-depth knowledge of possible barriers to competition in a given sector where it has certain indications that competition may not be working as it should be. In the written submission, the Council focused especially on the recent study of the real estate market and the legal services associated with real estate transactions. One specific goal in the study was to assess whether the transaction costs incurred by the buyer or the seller of the property or the land are or are not excessive. Why were this sector chosen and this objective chosen? The Council realised the substantial size of this market, its major significance and impact on consumers, and also its importance to the economy as a whole. In fact, as DG Competition underlined a bit earlier, the competition authority also has a main objective of promoting competition to the benefit of consumers. This study integrates both the legal and the economic perspective, comparatively, on the professional practices and related regulation of the industry. These practices can have great impact on the efficiency and performance of the conveyancing services (property transfers) markets in Romania vis-à-vis other EU member countries. The focus will be to examine whether there are any anti-competitive matters at stake. Due attention will be paid during this sector enquiry to the market structures and market mechanisms, to the quality of the notary or cadastral (survey) services and the role of real estate agents and of course the effect of all of these on the final consumer. It is too early to anticipate the results of this sector enquiry. Nevertheless, depending on the findings and of course according to the legal competencies of the Romanian Competition Council, the study can result either in enforcement action or in a competition advocacy effort or both. However, in this particular case, it is more likely that the study will lead to a competition advocacy effort. Competition advocacy would likely consist of recommendations, rather than legal remedies, aimed at introducing pro-competitive reforms that could result in the reduction of conveyancing-related fees and thus result in financial benefit for consumers.

Chairman Jenny next again directed a question to the EC delegation. To provide context, the Chairman read a sentence from the EC contributions which he felt indicated that there is indeed a desire to

make competition policy and the consumer policy consistent and to use market studies as a tool for this: “*sector enquiries are a proactive tool allowing the pooling of Commission resources on issues of particular relevance for the competitiveness of industry in general and consumer welfare.*” There could be several ways to read this sentence, but the Chairman asked the delegation to discuss the intended meaning of the statement and particularly the term “*pooling of resources.*” Through which processes are the pooling of the concerns of DG Comp and of DG Consumer realised? There is a program undertaken by DG Consumers called the Consumer Market Watch and the Chairman asked whether there is any relationship between this initiative --- which is obviously looking at how markets work for consumers --- and the market studies that DG Comp might undertake, and, if so, how does the process work?

The EC delegate responded: If DG Competition launches a sector enquiry with formal investigative power under Regulation 1, even though there is no allegation against any particular undertaking in that enquiry, that enquiry has to be based upon the legal provision that the agency believes there to be a competitive problem in the sector under which it may be necessary to apply Articles 81 or 82, not excluding the fact that the problem is not going to be dealt with merely by the competition rules. This is quite a serious form of enquiry for DG Comp. It is not just a wishful-thinking market review or a scoreboard of consumer prices; it is, rather, a very intrusive instrument. The delegate expressed confidence that representatives of BIAC would endorse this interpretation. Consequently, DG Competition has to use it very carefully. This is why the delegate recognises that, at the European-level, a sector wide enquiry involving undertakings in 27 member states is something DG Competition should undertake only with a specific timeframe and under a clear obligation to find results which will make a difference at the European level, often in the area of regulation. This is why DG Competition focuses on sectors like energy, financial services and pharmaceuticals. From that point of view, the conduct of an investigation of this sort is entirely within DG Comp with cooperation necessarily from national competition authorities and national regulators. At the same time, it is normal for DG Competition to inform colleagues on the consumer side and on the internal market side. Once an investigation reaches the stage of producing a preliminary report and a final report, the recommendations clearly involve all the services of the Commission in assessing whether, for example, regulation is necessary or not, whether there is a need for more self-imposed discipline in the sector. At this point, colleagues in the consumer policy area would be involved in that follow-up discussion. During this stage of investigation, DG Competition must respect the due process for the rights of those who are investigated and must focus on reaching a result which is primarily aimed at solving the competition problems. The language, as used in the EC contribution, talks about “*pooling of resources,*” which phrase refers to an array of DG Competition staff, including merger staff, people working on state aids questions, and people working on antitrust investigations. The agency supplements these specialists to form a team for a sector enquiry. This allows them to bring their previous knowledge to the investigation, but also afterwards can ensure that they make the right conclusions for the use of our own competition law instruments. This is in parallel to whatever goes on in the rest of the Commission, and at the national level, in reviewing progress on creating benefits for businesses and consumers through competition --- which can come through initiatives like Commissioner Kuneva’s initiative for a consumer scoreboard. Colleagues in the Economic Affairs Directorate General have also proposed systematic market monitoring, but this would be at a very macroeconomic level compared to the relatively intrusive questioning of companies in the context of a sector enquiry initiated under Regulation 1 of the EU.

Chairman Jenny thanked the EC delegate and observed that there appears to be not much of a link at the investigatory level but maybe more at the remedies level, partly because the instrument which is used by the Commission involves powers of investigation which are given under Regulation 1-2000.

The Chairman then turned to South Africa noted that it provided an interesting contribution in terms of how the competition agency targets the sectors that are going to be investigated through market studies. In particular, South Africa does have one criterion which is fully understandable, but is not reflected in the

other contributions. The South African contribution states: *“the selection process for market studies explicitly includes the importance of the industry for the poor.”* The Chairman asked the delegation to explain how the South African competition agency operationalises this criterion; what market investigations - if any - have been undertaken precisely on the basis of this criterion even if it is not the only criterion; and what kinds of relief have been found in markets that were investigated because they were particularly important for the poor?

The South African delegate responded that the current statute grants the Competition Commission general powers and functions that enable it to carry out market studies. Several have been completed already. However, this is a rather empty power, to the extent that it does not allow the Commission to use its formal investigatory powers to conduct these studies. In other words, the statute does not allow the Commission to subpoena documents for this purpose, and it does not allow the Commission to compel evidence or information to be given under oath. The Commission began some time ago to run a campaign to persuade the executive branch and the legislature to extend the Commission’s investigative powers to the conduct of market studies. The Commission’s concerns originated in what the UK delegate referred to as sub-optimal or inefficient economic equilibria. These occur particularly in markets that are characterised by long-established stable oligopolies and by inherited monopolies, usually the result of privatised state-owned entities.

The campaign to obtain powers of investigation for market studies coincided with the Commission’s articulation and publication of its prosecutorial and advocacy strategy, a strategy that was focused, in significant part, on supporting the pillars of government policy. These pillars included a growth strategy that was driven by infrastructural expenditure and a poverty alleviation strategy that had many elements and components to it. Hence, the market studies selected by the Commission focused on supporting these elements of government policy. As a result of this selection process, there was a market study done regarding infrastructure provisions because bid rigging was perceived to be a significant problem. There were, additionally, market studies done regarding market performance improvements that could be characterised as contributing to the government’s poverty alleviation strategy. These market studies were in the food sector, very broadly construed, and also in health care and pharmaceuticals. The Commission also conducted a market study in a sector where there has been a particularly strong public demand for a market enquiry, namely the banking sector. The manner in which these market studies were conducted was very wide-ranging. The banking enquiry was a very formal enquiry run by a panel appointed by the Commission and headed up by a former High Court judge. The other enquiries were more low-key. Sometimes these enquiries resulted in the referral of cases to the tribunal, as with one of the bid-rigging cases brought by the Commission. The banking report should be released soon and there will be a range of outcomes. Some cases may end up in referrals; others may end in advice being given to other regulatory bodies; others may end up in policy advice to government about how to cure particular problems that have been identified in the market study.

To date, the campaign to gain full investigation powers for market studies has not succeeded. The legislation is going to be amended and there will be a new section called Market Enquiries, but the government has decided not to include investigative powers because of a concern in the legislature about “fishing expeditions” conducted through market studies. The delegate expressed the expectation that additional adjustments would be made in the legislation because the substitute provisions being forwarded by the government regarding an offence called Complex Monopoly may turn out to be constitutionally dubious. The final results after Parliamentary debate are unknown, so there is some hope that the Commission’s request for investigation power for market studies will be addressed.

Chairman Jenny stated that it was interesting to hear that the selection of market studies was made with a focus on the broader map of economic and strategic design of government policy and how there was an articulation between the two.

The Chairman turned next to Norway to continue with the issue of selecting market studies or markets that should be studied. Norway made a distinction, in its contribution, between *ex ante* and *ex post* market studies. He asked the Norwegian delegation to expand on this distinction, describe its experience with *ex post* studies in particular and describe whether *ex post* studies have been done on a systematic basis or selected using explicit criteria.

Norway's delegate responded that *ex post* market studies analyse possible effects in a market after a change in regulation or after an intervention from the authority has taken place. The objective is to establish what happened in the market as a result of some action. The studies have been conducted by a very skilled staff with very good relationships with academia both in Norway and worldwide. The studies employ very up-to-date methods of analysis that recognise both the possibilities and the limits of the techniques employed in the studies. The *ex post* studies strive to establish the "contra factual" situation: what would have happened if the policy intervention had not taken place? The studies try to first establish examples of likely effects that are intuitively understandable and striking. The studies try to examine time spans which are long enough to identify the full range of possible effects.

The delegate provided two examples. In the first case, in assessing the possible effects of creating competition in the Norwegian domestic airline industry, the competition agency had great success using a very simple approach of displaying the consumer price index for domestic aviation. This index, when charted in a graph, shows what happened under monopoly and then what happened when competition was introduced. When competition was introduced, prices dropped and the competition agency was able to illustrate that consumers gained considerably. Very simple methods using public statistics that everybody can see are very compelling. Given this form of evidence, it only required a few comments from the competition authority and then people understood what was going on. In the second instance, after price regulation in the market for books was modified in 2005, the competition authority monitored the sale prices of books in the market. The competition authority will publish this second study shortly. This study is based on a selection of scanned data from bookstores and book clubs, and the authority relied heavily on advanced econometric methods to analyse the data. What the report will show is that after the partial lifting of the regulation on book prices, sales increased, the number of new issues has not diminished (as some claimed would happen), and prices have come down. This market study result will be public a few weeks after the RT.

Regarding the power of investigation, Section 24 in the Norwegian Competition Act obliges anyone to provide the information necessary for the competition authority to perform its responsibilities under the Act, including market studies. The agency is very careful to see that this regulation is not misused because the agency does not want to unnecessarily burden industry. When the agency initiated the investigation in the book market, it referred to this section when talking to the organisation of booksellers and to the individual bookstore owners. Very shortly after the start of inquiry, the booksellers realised that having the study was consistent with their interests, so booksellers participated voluntarily during much of the process.

After the success of the market study in the airline industry, very few Norwegians questioned the importance of competition in this market and the role of the competition authority.

In more controversial areas like books, the agency's studies discipline the debate by establishing some simple facts in relation to what actually is going on in the market. As some observers have noted, known authors, publicists and bookstore owners are often very literate and outspoken, and the agency is convinced that there is a big advantage in being able to create some factual data for this debate with such market participants.

What criteria has the agency used to pick market studies? In some instances, the agency has done a market study because it was ordered to do so by the Parliament or by the Ministry. This typically involves sectors which have been newly deregulated, in which case the Parliament or the Ministry has asked the agency to monitor what is going on in such sectors. An example was the market study ordered by Parliament following the deregulation of pharmaceutical sales in 2000. The agency also has the authority to select its own market studies. In doing so, the agency tries to look at the situation 1, 2 or 3 years ahead and ask, “What will be the important questions and challenges to the competition authority in explaining what is happening to the market? Why may or may not the agency intervene? Why has the existing market situation developed?” The agency also tries to anticipate active topics so that it will be prepared to give advice or seek its own remedies to rectify anticompetitive or inefficient situations.

Chairman Jenny recognised the EC for a comment.

The EC delegated suggested that the RT appeared to be distinguishing three categories of market studies, two of which are case-related.

1. First: after a competition agency makes a decision in a case, what was the market outcome of the remedy? This could be called an *ex post* evaluation (market study) in it identifies outcomes and effectiveness of actions by the competition agency.
2. Second: the market study is related to case investigations, such as determining whether a form of remedy has been effective enough in the past to warrant similar remedies in the future.
3. Third: the market study is in relation to the identification of competition difficulties in a sector where the competition agency is uncertain as to the origin of the difficulties. This occurs where the market study is not directly case related, but the agency has a genuine open mind that requires a holistic approach and more market knowledge in order to educate the competition agency and other decision makers as to the right way to facilitate competition and competition law enforcement on the one hand and regulation on the other.

Chairman Jenny agreed with the comment before turning to the U.S. delegation. The U.S. contribution indicated that a fair number of market studies have been conducted at the request of the legislative branch or the executive – and this is similar to the practice reported by the Russian delegation. The Chairman asked what kinds of market studies assignments are received by the competition agencies? In particular, are the assignments arbitrary or is there value in the process by which the executive or the legislative branches are able to identify market problems that from the view of the competition agencies are useful to study? The Chairman also asked under what circumstances the U.S. competition agencies have decided to do an evaluation or a market study that is related to a prior litigation activity?

The first U.S. delegate spoke from the perspective of the Federal Trade Commission because there are some differences in the statutory authorities of the two U.S. competition agencies. In the first place, it is important to recognise that the market studies conducted for the legislative and executive branches are designed to serve an information-gathering function. Although earlier presentations from delegates suggested the use of market studies to distinguish between one or two potential equilibria that may be efficient locally, but not globally, the FTC has found that there can be a great number of such equilibria or a great number of explanations (with contrasting associated remedies) for the course of events that led to the existing equilibrium. Market studies can make a major contribution by sorting out the equilibria and the explanations for the condition of the market. A good example is the directive that the President gave the FTC and Justice Department to examine the causes of gasoline price increases during the spring and summer of 2006. From an economic perspective, there were a plethora of theories, ranging from simple shifts in supply and demand in competitive markets to outright collusion that could explain price spikes.

Given the considerable expertise the FTC has in analysing mergers in the petroleum areas, it was not surprising that the executive branch asked the FTC to examine the evidence objectively, in order to determine what might be the underlying causes. In other instances, assigned studies are less related to perceived economic performance problems. For example, the insurance business has been excluded from FTC evaluations for many years now, yet Congress lifted these restrictions in ordering the FTC to conduct a market study of some practices of automobile insurance companies. The restrictions on market studies have also been lifted for current studies regarding use of credit scores by home insurance suppliers to set prices. Both the insurance and gasoline price examples are legitimate public policy concerns from the point of view of a decision maker in the executive or legislative branch. Knowing the underlying causes of gasoline price increases and insurance prices, for example, can help legislators and the executive avoid remedies that are unlikely to improve market outcomes. The delegate expressed the view that the common element in these examples is really the importance of the unbiased and competent market studies conducted by competition agencies serving as an aid to the ultimate decision makers --- the President and Congress. The delegate also observed that the skilled workforce of the competition agencies, 70 Ph.D. economists in the case of the FTC allows the agency to extend insights and analysis of economic theory from one market to others, even if the agency does not work in the markets or interest on a regular basis. Ultimately, the real value of the ability to conduct thorough and sophisticated market studies is to ensure that policy makers have the best possible economic analysis available for making policies on complex questions such as the causes of high gasoline prices.

With respect to merger retrospectives, the delegate described *ex post* market studies as being, as a matter of economics, a fairly difficult area to analyse. Among the difficulties is the small number of litigated cases compared to the relatively large number of cases that are settled, as well as this number being compared to the anticompetitive mergers that might be consummated in the absence of the competition laws and existing law enforcement practices. Effectively, the litigated cases constitute the transactions viewed by both their proponents and the competition agencies as somewhat marginal. Hence, either the agencies or any competent analyst must have excellent data in order to be able to disentangle competitive effects, non-competitive effects, changes in market conditions, and various other exogenous variables that might explain the observed price movements. Principally for that reason, the retrospective market studies done by the FTC are done more because excellent data is available, rather than because there was a systematic decision made to analyse results of specific past decisions. Despite this qualification, the delegate expressed the view that merger retrospectives are important as a self-evaluation tool. Therefore, the bottom line is that there is no formal process at the FTC to refine or change the manner in which the agency will conduct subsequent investigations that is based on retrospective market studies, although such studies become part of the agency's general base of knowledge that impacts future activities.

A second U.S. delegate then spoke from the perspective of the Department of Justice, stating that serving the information needs of the legislature is an important responsibility of the executive branch and of the independent agencies of the government, but that often the competition agencies are able to supply this information without conducting a separate market study because the agencies already have accumulated a great deal of relevant expertise and relevant data.

The U.S. delegation then pointed out another useful application of market studies, namely providing guidance for firms about the application of competition laws under novel situations. For example, the FTC conducted informal evaluations of a couple of industries --- health care and real estate brokerage --- where there were new emerging business practices of obvious interest to new industry participants. The potential issues included government restraints on new forms of business, for example. An additional goal, and use, of information gathered in the course of these workshops, as well as through industry-wide solicitation of comments, was to help to advise industry participants about how competitive issues would be addressed under the law. Another intended use was to provide guidance to these firms about the kinds of practices

that would be viewed as pro-competitive by the competition agencies and, therefore, should not be inhibited based on fear of antitrust liability.

Regarding retrospective market studies, most U.S. market studies are conducted in the context of particular investigations. If there is a merger in an industry, one (or both) agencies may decide to study that industry. The competition agencies will, for example, use their formal processes, or their right to get information from the parties and third parties, if there is a need to evaluate the competitive consequences of a proposed transaction. Once an enforcement decision has been made, for example a decision not to bring a case (because entry is easy or it is not conducive to coordination), it becomes in the natural interest of the agency not to challenge the transaction, but rather to examine whether the markets have evolved in the way anticipated or suspected by the agency. For the most part, however, the U.S. competition agencies do not devote a great number of resources to retrospective market studies, unless there is another enforcement matter in the industry. Retrospective market studies are very resource intensive, very time-consuming, and there are inherent problems in sorting out what caused the observed set of outcomes in the absence of access to a large amount of information. Moreover, when evaluating whether a particular enforcement decision was right or wrong, or whether another set of decisions was right or wrong, it is very important to ask the right questions. Simply asking whether challenging a merger was right in light of the way the industry actually evolved is not necessarily informative in providing guidance for future ex ante decisions. Doing this might simply reveal that the agency made a mistake in its predictions, rather than revealing any way in which the agencies can predict better in the future. This, ultimately, is how the agencies think enforcing the competition laws is done most effectively.

Chairman Jenny next called on Ireland. The Chairman observed that since 1997, the Irish competition agency has been conducting market investigations, and that these seem to be a tool in Ireland to advance competition advocacy and promote regulatory reforms in various sectors. The Chairman asked the delegation to discuss the interesting changes in criteria used to select market studies, including identifying the old criteria, the reason for the change, and the identification and evaluation of the new criteria.

Ireland's delegate stated that the original criteria were the usual factors such as percentage of the GDP accounted for by the sector concerned, the importance to the economy, the extent of regulations, etc. After several years of operating under this targeting mechanism, the agency found problems with the old criteria. The problems were that they were quite loose and open ended and this led to an inability to complete some studies as originally planned. As a result, the agency had to adjust the scope of several unmanageable studies in order to bring them to a close. Being a relatively small agency, the Irish agency found that traditional market studies tied down staff for too long. The agency is committed to do one more of the traditional market studies next year --- this final one will be on the medical profession. After that, the competition agency will be applying additional criteria for market studies. Impact on consumers is the most obvious of these, but there will also be much more focus on statutory regulated markets, and on public restrictions on competition. The agency will also adopt criteria regarding the practicality of finishing future studies within the planned time frame. Further, there will be an effort to adopt criteria, mentioned in the Canadian contribution, regarding the probability that the market study staff will be able to develop recommendations that have some chance of being accepted and implemented. In general, the agency has resolved to conduct fewer large market studies and will focus more on shorter projects and on shorter and quicker analyses of both legislative proposals (which may impact in competition) and on markets where legislation may already be restricting competition. The real aim in refining those criteria is to be faster and more agile; to do more and shorter projects; and to be faster to react to developments as they happen, both in the markets and where legislation and regulation are concerned. Overall, not only is there a huge stock of existing anti-competitive legislation in Ireland, but also there is a flow of new legislation and regulation which may be capable of restricting competition. Over the years, the agency has become expert at dealing with government and government bodies --- "we can spot anticompetitive regulation a mile away" --- and the agency has gained some expertise at this stage in the "dark art" of

political economy. The agency can do the most good with its limited resources and hard earned expertise by focusing on the numerous existing and proposed public restrictions on competition associated with government regulation.

Chairman Jenny closed the first section of the RT with the observation that competition agencies employ a wide diversity of angles in conducting market studies, but there is an increasing desire for greater assurance that the market studies will produce discernable benefits, including effective and realistic remedies that will make markets work better even if there is no law enforcement issue revealed in the course of the study. Overall, the approaches discussed at the RT were quite interesting and often complementary to competition law enforcement.

Having concluded the first section of the RT, the Chairman introduced the second part of the discussion which centres on the question “what are the most effective approaches to doing market studies?” The Chairman noted that, during the first part of the RT, differences between countries were revealed regarding whether or not the competition agency has authority to use powers of investigation to conduct market studies. There are other differences including differences in market study designs, the extent to which the stakeholders/market participants are consulted during the course of conducting market studies, and whether or not input from stakeholders is integrated into the process of developing market studies. To introduce this issue of the most effective approaches to do market studies, the Chairman called on the delegation from the UK

The UK delegate started by recollecting that the competition agencies used quite a number of different processes to conduct the 42 pieces of work identified as market studies or equivalents. Late last year, OFT undertook a review of these market studies and organised the London conference discussed earlier in the RT. The purpose of the conference was to bring together the feedback received and to develop and implement a more systematic way of doing market studies, as outlined in the UK contribution for the RT.

The essential conclusion of the review process was that the competition agencies should institute more pre-launch preparation to get the scope of the project right, looking at impact estimation, doing a proper stakeholder map, risk assessment, getting the governance right and putting the right resources in place.

- Launch of a study: key involvement with stakeholders is possible before the launch (informally) and certainly around the time of the launch; a key feature at the launch is setting out the timing of the study and its schedule relative to other studies.
- Data collection and analysis: follows after initial design and stakeholder input.
- Publication: getting the right narrative or story about market studies during the publication phase is a key element for success. Market studies, because they are flexible tools, are widely open to misinterpretation and confusion about what the competition agency is doing. So increasingly, the agencies are trying to get the narrative right.
- Follow through ---usually, in the UK’s case, this means the government’s response. Follow through is sometimes handled by the Competition Commission.

Stakeholder feedback about market studies often involves concerns that some market studies are too open ended. Feedback also includes complaints that market studies take too long although fewer than 10% of the 42 UK market studies have taken more than three years to complete. The delegate concluded that the tail end of the distribution certainly merits some attention, but it is not representative. In contrast, many market studies are completed within very tight timelines. The third complaint is that data requests

can be burdensome. At the same time, industry has been very keen that when a matter goes to the Competition Commission it gets a fresh look with separate requests for data --- and that is a key feature of the UK system.

A second UK delegate took the floor to describe market investigations conducted by the Competition Commission (CC.). Although these market studies are part of the competition enforcement regime, they are more formal, have a limited duration, and have long-lasting consequences. They operate well in the UK context because they operate in a clear legal framework with their own procedures leading to a decision and their own separate category of enforcement measures. The market studies of the Competition Commission have four key categories of features:

- independence,
- procedures,
- evidence, and
- effectiveness.

Regarding independence, all CC. market studies stem from referrals by other entities and all referrals are taken up in the order received. CC. market studies employ an empirical approach and remedies are developed without any preconceptions. Market studies are staffed through a collegiate group system. The investigation team consists of a set of commissioners with a chairman. The team is independent of the Commission but its powers are derived from those of the Commission. The decision of the team is the Commission's decision. The decision of the team does not come back to any plenary review.

Regarding procedure, the CC. market study procedure is highly transparent. It provides access to the decision-makers through a system of hearings --- a key feature of the process. It is a highly intense process that has to be used sparingly. The delegate reported his personal impression that the hearings have been fair, and that companies may not agree with our conclusions, but they feel that they have had the opportunity to present their case. The procedure is also characterised by strict adherence to published administrative time tables. CC. market studies finish, including the remedies phase, in 2 years or less.

Regarding evidence, the CC. market studies utilise extensive, formal powers that have been more heavily employed in recent years, perhaps because of the more contentious atmosphere of cartel cases. An example is the supermarket inquiry where one formal request led to the production of over 100,000 e-mails. In recent years, the CC. also has emphasised primary evidence, such as data, correspondence and records, rather than secondary evidence developed by firms for the enquiry. C.C. market studies rely on a strong and consistent involvement by market participants. The counterpart of the intensity of the C.C. market studies is that the market participants are closely involved.

Regarding effectiveness, the delegate noted that the effectiveness depends in large part on the cases referred to the CC. and it must be understood that the CC. cannot change the technological and other fundamental conditions that shape market demand, supply, and performance. He indicated that he agreed completely with the four conditions that BIAC identified as essential features for an effective market studies program: the investigation should be completed in a timely manner, it should have clear and specific objectives, and business should understand both the intentions behind the investigation and the reasons for the remedies.

Chairman Jenny thanked the UK Delegate (Competition Commission) for describing the very formalised process of the CC. in the U.K and noted that other submissions for the RT described much less

formal processes. He used Lithuania's contribution as an example. Its market studies are almost entirely short surveys that are not resource-intensive and are often developed and proposed informally. In contrast, one of the other countries with a rather formal process is Poland. The Polish contribution indicates that at the beginning of each year the Office prepares a document entitled the "Plan of Competition Studies." This document consists of two parts. The first part includes guidelines concerning the methodology for conducting the competition studies and the second part comprises the description of all the competition studies planned for a given year carried out by the units of the competition authority that are conducting such studies. It states that the Offices have developed a model for the stages and elements in market studies.

Before offering the floor to Poland, Chairman Jenny, recognised South Africa for a follow-up question involving the UK's Competition Commission.

The South Africa delegate asked about the range of remedies available to the CC. because it appears that the CC. market studies can impose remedies despite the absence of any illegal conduct by market participants. The delegate characterised such potential remedies as "no fault" remedies, and stated that this would be viewed as unconstitutional in South Africa. The delegate asked how the CC. acquired these powers and the range of remedies available to the CC.

The UK delegate (CC.) responded that the range of remedies is very broad, except that it does not include fines. Some examples are conduct rules, changing agreements between firms, and divestment of assets. The whole range of authorised remedies is described in over 10 pages of text in Schedule 8 to the Enterprise Act. The issue raised by the delegate from South Africa about "no punishment without law" is a serious one that is given a lot of attention by the CC. The key consideration is that the CC. is not attacking illegal conduct; rather, the CC. is looking at markets and the behaviour of people in markets, the structure of markets, and the behaviour of consumers. The CC. uses remedies, subject to the control of the law, and as reviewed by an appropriate tribunal, to improve the operation of the market for the benefit of society. Sometimes the CC.'s remedy is divestment, but it is not axiomatic that a market investigation will lead to a divestment remedy. Further, competition concerns may not be the only reason for a divestment remedy. Divestment happens to be an issue on the table at the moment in the airports enquiry. The CC. is looking at ownership of UK airports by the British Airport Authorities. The CC. is asking whether is it right that the airports are owned by the same corporation that regulates the airports. Divestment is not a foregone conclusion in this case, but if that is the outcome, the Delegate stated that he did not know of any process under competition law anywhere else that would enable a divestment to be ordered by a competition authority other than the CC. approach --- with its very strong legal framework, due process, and proper rights of review.

Chairman Jenny recognised the Polish delegation to explain the formal aspect of their market studies procedure and how the agency developed this model. The Chairman asked if there is a charter that is provided to the stakeholders describing how the agency is going to proceed.

The delegate from Poland indicated that the first time the Polish competition authority prepared a formal market studies plan was in 2004, and the practice began at the request of the President, who wanted to know what kind of market studies were done in the competition authority. The structure of the competition authority includes nine regional offices, and each one has done its own market studies. The market studies conducted by the regional offices have ranged from small to large, but they usually have focused on local markets. At the agency headquarters, there are three departments which can do market studies within the enforcement department, in addition to the market analysis department, which is a specialised department for market studies. In the past, there were cases when market studies overlapped, so the idea of an annual plan was to coordinate the agency's market studies. When the agency set up the process of creating an annual list of market studies based on the proposals from individual units within the

agency, then the agency determined that this was a good occasion to create guidelines about the organisation and methodology for conducting market studies. Every January, from 2004 to the present, a list of market studies with the indication of the unit responsible for each study has been created, along with information about the title, organisation, and the methodology for the research. Every year there are some modifications, usually dealing with the organisation of the research, but the core of this part of the annual plan stays the same. For example, the 2008 plan for competition studies has 6 sections:

- Section 1 lists the types of market research done by the agency and which office units deal with each type;
- Section 2 contains the research guidelines, principally the criteria for choosing the markets to be studied;
- Section 3 describes the coordination between different units by stating what research is done by which unit or regional office;
- Section 4 is more complex because it sets out model research procedures. There are two procedures. One is a full procedure and the second is a simplified procedure. The full procedure divides the research into stages and each stage has its goals and activities. The description includes activities which need to be done, usage of data bases, computer applications, and other resources which are available. There are some conclusions in the descriptive materials about the topics and data which should be gathered or researched in the conduct of market studies. The simplified procedure is for quick and simple market research. This material just mentions things that should not be omitted during any market research.
- Sections 5 and 6 concern the presentation and distribution of the results of market studies and of the plan itself.

To set up this methodology, the agency used the data practices from the previous market research based on the best reports done in the past. The plan also includes elements based on academic experience of the staff. The first goal of the process was to provide reference materials for staff doing market studies for the first time, as well as for new employees. The second goal was to discipline units conducting market research so that the market studies produced will be more usable and of improved quality. To date, the process has been worthwhile because the agency and other officials have better knowledge about what is going on. Further, the accessibility of all the information gathered, including data, during market studies, especially the smaller ones, has improved greatly.

Chairman Jenny turned next to Hungary. The Chairman asked the Hungarian delegation to describe the process that the competition agency has used for interacting with stakeholders, in particular concerning hearings prior to completion of market studies.

The delegate from Hungary started with a description about the context of market studies in Hungary. Market investigations are formal procedures with very strong information-gathering powers with respect to market participants, but these parties have certain rights in the process. Partly because of this formal process, there are some statutory guarantees for the parties and the delegate stated that some parties tend to confuse market investigations with law enforcement proceedings. To clarify the difference between market investigations (studies) and law enforcement proceedings, the agency holds consultations with market participants not only at the end of the sector enquiry but also at the beginning. This is partly a technical exercise, as well as being used to verify what sort of information the agency needs and whether it is feasible to obtain this information. The process helps the agency to refine its data requests. The distinction between a sector enquiry and a law infringement investigation is emphasised by the fact that the

agency integrates input from parties at the end of each sector inquiry (market study). The agency is required by statute to publish a draft report that results from a sector enquiry. Usually this involves posting the draft report on the agency's website and circulating it among firms which were requested to provide information. The agency is required to provide a 30-day comment period for these firms and there is an option to hold hearings on the comments. In practice, the agency goes beyond the requirements by circulating the draft report to potential interested institutions, other than the firms which were involved, namely government agencies which operate in the same policy field. On several occasions, the agency also distributed the draft report among persons from academia or consulting firms or persons involved in the related business sectors to invite their comments. These are not statutory requirements, but the agency believes that it is a useful approach. Usually, two hearings are held: one with the 1st group and one with 2nd group (which is not compulsory). In the 2nd set of hearings, the competition agency meets with government institutions, people from academia and the indirectly related businesses to hear their opinions and to discuss the draft report. These hearings serve as a check that the analysis is sound. There is a separate and later consultation (hearing) with the firms which are involved in the sector enquiry. For the second set of meetings, the agency is prepared to vigorously defend the draft report because the hearings with the government and academic group have already been completed and the draft report has been adjusted accordingly. After all of the hearings are completed, the competition agency prepares the final report and publishes it. The agency publishes a package that includes the report by the agency and summaries of the hearings or comments submitted by the firms involved in the proceedings. In addition, if a firm has substantive comments, it can ask to publish these comments independently. The competition agency has found this process of engaging the market participants and interested parties to be very useful. The agency has been able to manage the process quite well with respect to time, and has not found that final reports from market studies are noticeably delayed because of the integration of the input of parties. The delegate expressed the view that integrating the input of market participants and others results in improved quality of the final report. The process is also very useful in terms of the transparency of the process, and as a result of this transparency participants perceive that sector inquiries are quite different from the individual law enforcement proceedings.

Chairman Jenny thanked the Hungarian delegate and observed that many of the contributions articulated the view that market studies benefit from the input of firms for all of the reasons described by the Hungarian delegate, such as transparency, but also that giving the market participants a stake in the market studies can improve the quality of the studies. The Chairman noted that some countries expressed reservations about the involvement of the firms, although these reservations do not apply to the involvement of academics. As an example, the Chairman quoted from the Spanish contribution: "*the different views of market participants can be very useful when it comes to get a thorough understanding of the market but their involvement may increase the cost of the study.*" This quote implies that since participation by market participants increases the cost of the study, then it is not such a good idea. The Chairman invited Spain to explain its position and the statement that integrating input from market participants increases the costs of market studies?

The delegate from Spain explained that, to date, the competition agency has not involved market participants except in the fact-finding phase of its market studies. That means that the agency has not circulated drafts of the reports for comments or suggestions. The competition agency agrees that for an elaborate market study, obtaining more information is better, but the agency has found that many of the activities aiming at getting this information from market participants can be very demanding in terms of time, as well as human and other resources, while at the same time resources are quite limited. Hence, for each market study, the agency has to find a balance between the benefits of having more information and the costs of gathering such information. This means, for example, that in the first phase of fact-finding, the agency may conclude that it is better to narrow the list of market participants that it will interview or to whom it will send a questionnaire. This does not preclude broadening the information gathering in the second phase, once the agency has the most important competition issues in the sector well identified. But

in the 1st phase, the competition agency may select a narrower information-gathering process because of resource constraints.

Chairman Jenny noted that the Spanish presentation focused on the scope of the study rather than the involvement of market participants in the results and analysis. The Chairman also noted that the contributions covered several other aspects of how studies are conducted. For example, Ireland emphasised the importance of the timing of consultation with parties in market investigations. Some contributions discussed the practice of setting milestones and timetables for market studies, and some discussed whether it is proper or helpful to outsource market studies to consulting organisations. Other contributions discussed access to data for market studies that was gathered by a different competition agency, as well as coordination between agencies when multiple market studies of a sector are occurring simultaneously.

The French contribution states that “cooperation with other institutions and economic players is key, and that this is also needed to strengthen cooperation with sectoral regulators.” The Chairman asked if the Conseil de la concurrence has taken any initiative building on the reviews of sectoral regulators. He also asked the French delegation to describe the Conseil’s market study on waste collection and why this sector was chosen. He also asked the DGCCRF to describe its own surveys.

The delegate for France from the *Conseil de la concurrence* responded that because of the lack of resources, the Conseil de la Concurrence’s experience has been quite limited as far as market studies are concerned. To save money, the agency tends to rely on sectoral regulators’ surveys and to find synergies that could be of interest to the agency. This approach has been used in the telecom and electricity sectors. But there are limits to that approach. Sometimes these surveys are too technical and the appropriate questions, from a competition authority perspective, are not posed or answered. In other words, it is important that the competition authority be involved in determining the specifications of the study.

Why did the *Conseil de la concurrence* choose to survey waste processing chains? The agency had several cases (plastic; oils; and tires) with competition concerns that involved waste processing. It is a highly regulated sector and thus it is important to assess the impact of these regulations on competition. These activities are subsidised locally and at the state level, and measuring the impact of these subsidies on competition is also meaningful. Some of these waste processing issues are emerging (i.e. electrical waste), and the question is whether at this early stage some precautions should be taken. There are some industrial groupings with a related risk of collusion. How should the agency analyse them? This is a sector with a strong vertical integration notably through utilities which are powerful players on different markets (water, transportation etc.), quite often mentioned in competition cases.

It is interesting to have an horizontal perspective on these sectors which are most of the time looked at separately by investigators. It is also a way to have some benchmarking and to apprehend what are the best options from a competition perspective.

The delegate from France representing the DGCCRF began by noting that at the recent OFT seminar (held the previous week, in June), some consumer organisations regretted that market studies were too theoretical and thus far from real consumers’ concerns. The delegate pointed to two market studies conducted by the DGCCRF that are centered on market function issues.

The first one concerned Real estate agents. The study followed up several consumer complaints in a context of significant price increases in this sector. The second case was in the electricity sector, in the context of liberalisation of that sector to make sure that competition was at work.

In both cases, the focus was on the impact of regulation on demand, with a lot of companies being surveyed. In the first case, there have been some prosecutions as many companies were infringing consumer information requirements. In the second case, it was more a pedagogic effort. In that latter case, most of the time, customers had shifted from traditional suppliers to some commercial approach offered by new entrants.

Chairman Jenny next turned to the Netherlands as another country whose contribution discussed harmonisation between sector regulators and the competition authority. He noted that in the Netherlands there are both market studies undertaken by sector regulators and market studies undertaken by the general competition law. He asked the delegation to describe what kind of coordination exists between these various market studies.

The delegate from the Netherlands explained that the competition agency, NMA, has been reviewing the energy, transport and financial sectors of the economy on an annual basis since 2003. Before that, the agency also performed many market studies, but they were conducted on a more ad hoc basis, often in the course of specific competition case investigations or competition advocacy efforts.

In the field of market studies in the energy and transportation sectors, the delegate pointed out that the NMA consists of the competition department plus the sector-specific regulators for energy and transportation. They both form a part of the agency and operate under the responsibility of NMA's board. Both regulatory offices have a legal obligation to monitor and regulate their respective markets which includes the wholesale electricity market, the wholesale gas market, retail energy markets and the railway sector. In order to do that job, the offices perform periodic market studies. The market studies in the energy and transport sectors primarily focus on the regulation of the market, for example on infrastructure bottlenecks --- but there is also a focus upon competition issues. The competition department has contributed to the sector studies, but the sector studies and the work of the competition department have benefited from the experience developed within the sector regulators. In the financial sector, the Ministry of Finance asked the NMA to carry out an ongoing series of reviews in order to obtain a better understanding of competition issues in that part of the economy. This request resulted in the publication of annual financial sector monitor reports and these sector studies support the antitrust work and merger assessments conducted by the agency. Moreover, these reports have complemented the regulatory efforts of the two sector regulators in the financial field. The financial sector monitor seeks to identify and publicise competition risks in the financial sector. The financial sector monitor facilitates the dialogue between the NMA and various parties active in financial services. These parties are subject to competition enforcement, for example banks and insurers. As a result, the financial sector monitoring work contributes to NMA's guidance and advocacy efforts. It also contributes to coordinating policy and performance with the Netherlands central bank, which is responsible for the stability in the market and the financial system. This work also aids policy coordination with the financial markets authority, which supervises transparency and market integrity. The dialogue among the three authorities may concern market structure as well as market conduct. Careful coordination stimulates mutual awareness and coordination and contributes to a proper functioning of the financial sector. This was an explicit wish of the Ministry of Finance and it raises awareness of competition issues within the other sector regulators.

In answer to the Chairman's question about coordinating work in the various markets, for energy and transport, the work is mainly done by the staff members of the office of energy regulation and the office of transport regulation for which external experts may be and often are hired. The staff conducts the studies in close cooperation with colleagues from the competition department, and in some cases the results of energy studies have been used as background material in antitrust cases as well as in merger cases. As regards the market studies in the financial sector, coordination is done by a special team set up within the competition department.

Chairman Jenny commented that it is very interesting to consider what the French delegate, had to say that related to the Dutch situation. He was quite right in saying that market studies undertaken by regulators who have different objectives than competition may not be usable for the competition authority, but the Netherlands seems to have a system where, through dialogue between the regulators and the competition department, one ends up having market studies that can serve several purposes. In some sectors, the cost of the multiplicity of sector studies by different bodies is perceived as being quite high by the market participants. So anything that can facilitate coordination and cooperation between those market studies is useful.

The Chairman then returned to the issue of data collection because it is an issue which is very much in the contributions. He noted that a number of countries do have investigatory powers that they can use for market studies. At the same time, other contributions indicate a strong interest in obtaining investigative powers for market studies. South Africa is an example. Another example is Canada. The Chairman asked Canada to explain why the competition agency seeks investigative powers for market studies in the first place and why the authority has not been granted to date?

The delegate from Canada provided context about market studies in Canada. The competition agency conducts two types of market studies in addition to *ex post* studies. The agency is in the process of reviewing all merger remedies since the overhaul of the competition statute in 1986. The first type is “industry studies” that assess the overall state of competition in a market and the agency tends to do those when there is an unusual situation in a market. A good example of an industry study was the inquiry into gasoline prices after hurricane Katrina. Another example was a crisis in Canada when the borders around the world were closed to Canadian cattle trade because BSE was detected in Canadian cattle. The second type of market study is advocacy-based. The agency terms these “market studies,” and they are aimed at persuading federal and provincial regulators to favour market forces.

The debate regarding formal investigative powers concerns industry studies, and the form of the issue is whether the Competition Bureau is the right body to conduct these broad industry studies. The debate also is in the context of whether the Bureau should be given extra resources to conduct industry studies, because this type of study is extraordinarily resource intensive and outside the Bureau’s typical mandate.

In 2005, the federal government introduced proposed amendments to the Competition Act to give the Bureau access to formal powers to subpoena documents --- but not to search or inspect or use wiretaps for industry studies. The Bureau supported that amendment, which contained a number of conditions which were designed to address stakeholder concerns, as described in the Canadian contribution. These items included publishing in advance the scope of the study, identifying the actual topics in the study, and guidelines about the processes to be used in developing the study. The Bureau supported this proposal because it would be useful to have access to formal powers in certain circumstances. For example, some parties prefer, as a matter of policy or sensitivity, to be subpoenaed and to provide documents in a formal way. These parties will not cooperate otherwise. In some cases, it is useful to access data generally such as in commodity markets, but, in less regulated sectors, it would be useful to have subpoena powers to obtain data. The professions are a good example of the latter concern. For example, the results of disciplinary proceedings by professional organisations are unlikely to be accessible except by subpoena. In fact, the Bureau was not able to get access to this type of information for prior market studies. As a result, the reports on the professions were more theoretical and more descriptive than they might otherwise have been. The proposed amendments died when the previous government fell for other reasons.

Chairman Jenny turned next to the U.S. contribution in which he found statements that appear to contradict the consensus in the other contributions in favour of formal investigatory powers for market studies. In particular, he found that the FTC has such powers, while the DOJ does not. The U.S. contribution states that both groups do market studies from time to time, even though the FTC often

foregoes using its investigatory powers in favour of voluntary submissions. In at least one instance, this caused one Commissioner to question the accuracy of the findings in a market study. The conclusion of the contribution states *“when designing a study, competition agencies should consider the many sources of data available; some sources may be relatively easy to access, while others are more burdensome for the agency, the industry and the public.”* The Chairman concluded that the contribution appeared to call for not using formal investigatory powers, despite the fact that this could lead to less reliable results. The Chairman asked the U.S. delegation for an explanation and clarification.

The U.S. delegate from the Department of Justice responded first and confirmed that the DoJ does not have authority to use compulsory process solely for the purpose of conducting an industry or market study. Despite this, DoJ has conducted a considerable number of market analyses. In issues involving potential anticompetitive conduct, DoJ can use compulsory process to obtain necessary data, documents, testimony, and other forms of information which can sometimes involve many if not all market participants. In a competition advocacy setting, where there are regulated industries with sector regulators which have compulsory process powers, DoJ sometimes can gain access to information that has been gathered through the compulsory process powers of these sector regulators. For example, in the telecoms field or the field of electric power generation, there are sector regulators and through the sector regulatory process there is information that becomes available for purposes of market analysis. Finally, the lack of market studies conducted by DoJ is not necessarily attributable to lack of compulsory process, but may be due to lack of interest in formal market studies and the ability of the FTC to conduct such studies.

The U.S. delegate from the FTC confirmed that the FTC is unique with respect to U.S. antitrust agencies, in its authority to use compulsory process to conduct industry studies, and affirmed that this responsibility is not taken lightly. In particular, the FTC seeks to avoid unnecessary burdens on industry participants and individual firms due to the “whims” of stakeholders in industries being studied. As an economic matter, there exists a whole industry of researchers who do scientific research on economic matters without the ability to utilise compulsory process, and there are well-established economic techniques that can allow one to use data other than data obtained through compulsory process. The availability of alternative sources of data is one reason why the Justice Department has been able to do some market studies and why many of the market studies undertaken by the FTC have not relied on compulsory process. Where feasible, the FTC attempts to obtain information from third parties on a voluntary basis. A good example is the oil and gas market analysis work of the FTC. In this market study, staff relied on other government agencies that already collect data rather than burdening industry participants to provide that same information separately. Another example was in the pharmaceutical area where the FTC purchased private data sets that had the information needed to answer fundamental questions, such as the cross-elasticity of demand, etc. Part of the reason for using voluntary submissions or private data sets is that there are huge efficiencies (and time savings) from using those sources. In the instances where the FTC does issue compulsory process, the agency is often inundated with data sets from multiple firms that are stored in completely incompatible formats, and then it is the agency’s burden to convert that data into a form that is usable. Even from the pure resources point of view, it does not always make sense to obtain data through compulsory process.

At the same time, compulsory process can be critically important for market studies. For example, important information might not be available through other means, and one might be concerned that, if one did not issue compulsory process to obtain this information, one might be left with tainted or biased information. So the real question is whether or not there are alternative means to obtain the essential data. If there are alternatives with lower social costs, the agency wants to use those. In any data-intensive market study, one has to be careful about sample selection problems, because these could impact the results.

With respect to the credit scoring study that the FTC undertook, the Commission voted to accept a voluntary approach to gathering the data, because staff and the majority of Commissioners did not believe that it was feasible for the parties to select the data in a manner that would have rigged the results in one way or another. The reason is that the firms did not themselves have the data needed to systematically skew the data that they submitted. It took a great deal of effort for the FTC itself to obtain and organise the data from the Social Security Administration that would have been necessary for the parties to successfully skew the data. The FTC also concluded that the process of obtaining insurance policy information voluntarily saved a lot of time and money that would have been required to organise equivalent, subpoenaed data.

Chairman Jenny asked a follow up question about whether having formal powers is useful because it encourages firms to voluntarily supply information.

The U.S. delegate stated that the formal powers allow the FTC to precisely obtain the tiny bit of information that the agency may not be able to obtain through other means. Further, that one bit of information can be an extremely important econometric control that could allow staff to untangle conflicting explanations for observed prices or other behaviour. Restricting compulsory process to these limited situations makes the data request or the information request significantly less burdensome for industry participants and reduces the FTC's burden of trying to get the information in a useful form.

Chairman Jenny recognised Brazil for a comment.

The delegate from Brazil asked if the U.S. competition agencies can get access to some of the data that sector regulators have, or if there are legal barriers to access, or whether sector regulators are simply unwilling to provide access for market investigations?

The U.S. delegate responded that there are a number of limits on the ability to share data with regulators, especially confidential information. However, in some settings, and over time, the regulators compile extensive records of facts in regulatory matters that are useful and available. So there is a reservoir of information about how the industry works, not necessarily the econometric data, but nonetheless a reservoir of information that has been gathered through a whole variety of means. The competition agencies can tap into this data for purposes of the competition analysis sections of market studies.

Chairman Jenny noted that the implication of the comment from Brazil is that severe limitations on sharing data with sector regulators have been a drawback. He invited BIAC to comment, and suggested that BIAC must be comforted by the idea that throughout the process portion of the RT the discussion has focused on involving market participants, thereby doing two things: making sure that the burden on firms is not too great and that data requests from competition agencies are coordinating with regulators so as to minimise additional data requests directed at market participants.

The BIAC delegate observed that businesses do not like burdensome information requests; however, they recognise that incomplete inquiries pose a threat (can impose costs) as well. Markets tend to be very complicated with a variety of competition and other forces at work, and BIAC is concerned that an incomplete study is not likely to provide a valid basis for identifying issues accurately or implementing effective solutions. Hence, BIAC is concerned about the risk of the competition agency or other government bodies being quick, but wrong. BIAC contends that much of the excessive burden and the risk of faulty analysis can be addressed in the following ways: by having clear and transparent objectives for market studies; by taking practical measures such as road testing the questionnaires before they are issued; by adopting a flexible approach to the provision of data so that, for example, it isn't required that industry produce new data which they don't normally keep simply because it happens that what they do normally keep is in slightly different form; by careful attention to logistics and project management; and by making

sure that letters requesting or requiring information are sent to the right people in the right places with sufficient time to answer the questions. The delegate observed that these elements were included in the best practices discussed in the UK contribution and presentation. Another very important element from BIAC's standpoint is adherence to a timetable in conducting market studies.

The delegate stated that the RT discussion reinforced BIAC's interest and support for developing international best practices in this area. Currently, there is a great deal of variety in the powers and procedures used in conducting market studies. Such variations are very rarely welcomed by industry. The delegate acknowledged that market studies will not be popular with businesses in general, but if they are necessary, businesses would like them to be conducted quickly, efficiently, and smoothly, with as little disruption as possible. Businesses are concerned about the high costs to businesses of responding to data and other information requests for market studies. The concerns of business in this regard are just as real as the budget constraints faced by agencies, as mentioned by delegate Philip Lowe from the EC.

In order to minimise monetary costs and business disruptions (as well as to encourage correct analysis), BIAC urges development of international best practice guidelines for market studies along with associated uniformity in the statutory frameworks, performance measures used in market studies, and criteria used to select market studies. At present, BIAC finds marked inconsistencies and a general lack of transparency. BIAC prefers that competition agencies learn from each others' successes and failures so that the failures do not end up being repeated in every country. The delegate concluded with the observation that convergence has been achieved in other areas, why not in the area of market studies?

Chairman Jenny acknowledged BIAC's call for best practices in this area. The Chairman asked if BIAC's contribution indicates that it is very bad news when a business person arrive at the office on Monday morning and finds out that there is going to be a market study investigation for 1 year and a half, but it is even worse news if the investigation lasts three weeks because the authority does not have the means within that time frame to have a very informative market investigation?

BIAC's delegate responded that a three week market study would be good news and bad news. The good news is that it is only 3 weeks and the bad news is that some probably disastrously incorrect decision will be taken which is going to blight the business for the rest of your life.

Chairman Jenny noted that the market studies RT is the first of its kind and the RT provides reason to reflect on whether there is scope for developing some kind of best practices guideline for market studies. The Chairman then recognised the U.S. for a comment.

The U.S. delegate noted that there should be a difference in the perceptions of businesses about industry studies compared to market investigations. In the case of a market investigation involving a firm, the best outcome from the business person's perspective is merely maintenance of the status quo. In contrast, an industry study can improve the situation by convincing an antitrust or competition authority to change their view of the way the industry works. The status quo can, in fact, improve. As an example, the delegate suggested that an antitrust agency might have a very critical view of resale price maintenance for new products if all of examples examined by the agency involved firms with a market share of 70% or more. However, if the agency studied an entire industry and observed, for example, that this practice is pervasive among firms with small market shares as well as large market shares, the agency might be less inclined to prosecute firms for taking this approach. In this way, industry studies can have an upside for businesses in an industry being studied.

Chairman Jenny responded that the U.S. comment should lift the spirits of BIAC.

The Chairman next introduced the last part of the RT which concerns the best uses possible of market studies and the best techniques for making use of market studies. The Chairman invited the UK to initiate the discussion again because of the UK's wide experience (both positive and negative) in conducting various types of market studies.

The UK delegate (OFT) summarised the UK's experience by acknowledging mixed success with market studies in terms of their implementation. The general agreement derived from the OFT conference on market studies is that the quality of OFT's market studies has been very good, but very often, in particular with market studies that affect state restrictions on competition, there have been implementation difficulties. Recommendations have been in the interests of consumers and designed to improve productivity in the economy, but these recommendations have not always been effective when they undermine large vested interests that tend to be louder in the political process. Several market studies that tackle state restrictions on competition have not been implemented or not implemented fully. On the other hand, some of them have been very successful. Examples of successfully implemented market studies include car warrantees, the legal professions, elder care homes and real estate agents.

The following factors appear to account for the success of some UK market studies.

Market studies worked particularly well when the agency managed to fit in with the government's timetable and the government's wider agenda for change in a particular sector.

- Market studies worked particularly well in instances where the agency managed to clearly articulate the theory of harm and to explain why the remedies proposed would make things better, but there is a delicate balance between under-claiming (retail pharmacy study, perhaps) and over-claiming benefits.
- Better success appeared to occur when there was full stakeholder engagement and involvement. OFT seeks to be a change manager and that is often best done through persuasion rather than force.

OFT has an assessment program that it has applied to all market studies (as shown in the appendix to the UK contribution) but OFT does one formal evaluation per year. In the case of car warrantees, a study that cost 300 000 sterling, OFT's evaluation showed benefits of over 120 million sterling. It also showed that those benefits would have been larger if the market study had been accompanied by a better customer education campaign. Largely the benefits were obtained by fleet managers and business buyers better than by private buyers of cars. In contrast, the evaluation of the taxi service study (that resulted in removal of restrictions on entry into the taxi market) showed that while consumer welfare went up overall, total welfare went down because there was a net productivity reduction. The lesson from this evaluation was that removal of entry controls should have been accompanied by a reduction in the fare level because reducing entry restrictions alone resulted in excess entry. OFT has sought to learn from the evaluations and has been frank about admitting errors that harm rather than benefit consumers and markets.

The UK delegate (OFT) emphasised that giving an industry a "clean bill of health" can be, and has been, a very important form of success in conducting market studies. In some instances, uninformed and intentionally false claims about market practices arise in public discussion. The competition authorities in the UK have managed to dismiss quite a lot of such dubious claims. In some instances, individuals or groups have tried to convince the competition authorities to prevent competition rather than to enhance it. Market studies can be an excellent way to rebuff these efforts, but again a balance must be struck so that market studies arise where there is at least a potential competitive problem that can be analysed to confirm or deny the concern. If the industry is obviously competitive with no indications of a market failure, conducting a market study could be viewed as needlessly burdening the industry.

Another critical function of market studies is to improve public understanding of competition and of market performance. Public perceptions influence policies and policies could move in deleterious directions if public perceptions are not adequately informed about competition matters.

Sometimes the beneficial effects of market studies take a great deal of time to work their way into public opinion and government policy. Benefits may accrue 10 or even 20 years after the completion of market studies. As an example, the delegate pointed to low-fare air travel in Europe which had its origins in market studies done in the 1980s and 1990s. Even in the cases where market study recommendations have not been implemented, they remain in the public domain ready for consideration when the right time comes. Potential long-term benefits should not be forgotten and measures of success should not be limited to short-term effects.

As a final point, the UK delegate indicated that OFT is looking at new methods of engaging with stakeholders in an effort to improve the outcomes of market studies. He is optimistic that a small amount of extra effort to increase stakeholder engagement could help turn good outputs into good market outcomes.

The representative from the UK Competition Commission added the point that despite making some mistakes, the market studies program in the UK has progressed a long way since the first market study by the Monopolies Commission. In that instance, the market study found that the market for false teeth in the UK was riddled with restrictive practices and collective boycotts, but 2 of the 7 Commissioners voted against any action on the grounds that corrective action would be unfair because the rest of British industry was also riddled with collective boycotts and exclusive agreements.

Chairman Jenny turned next to Mexico and noted that he had referred several times to the contribution from Mexico during the RT. He described the contribution as very interesting contribution because it describes a system for selecting market studies that is highly strategic and explicitly includes foresight about how recommendations from the study could be implemented. This includes plans for communicating the results of the market study and engaging with officials and market participants to try to make sure that the recommendations will be implemented and be beneficial for consumers. He asked the delegation to describe the approach further.

The delegate from Mexico explained that a systematic approach to market studies is a necessity because of resource constraints and limited authority. The competition agency has no formal powers beyond issuing an opinion of the Chairman, which is the form that market studies can take under Mexican law. Further, the agency has no formal powers to gather information, to compile information or to impose remedies. Therefore, the agency has had to rely on persuasion for every aspect of conducting market studies. The process of orchestrating market studies starts very early because of severe resource constraints and because the agency cannot afford to create market studies that are never used. The agency has to be acutely aware that each market study impacts the reputation of the agency and impacts the probability of success of future market studies. Producing solid work, articulating the reasons for the study and explaining the results compellingly can all help build the agency's reputation. The agency is determined to choose its battles carefully and that entails being consistent over time with respect to both the analysis and the explication of the analysis. Market studies are important because the Mexican economy has many problems that have to do with regulations that have a significant negative effect on competitive conditions and each of them could be studied, but this would be ineffective. The agency's recently developed strategy is to focus on some specific sectors, namely telecom, energy, transport and financial services --- sectors with the greatest impact on the economy as a whole. Consistent effort over time is necessary in such large sectors because the effect of any one market study by the competition agency in any of these sectors is likely to be incremental.

The second element in choosing market studies has to do with the relevance of the specific issues raised, and this ties in with the way the agency envisions marketing the results. The agency seeks to choose market studies that are likely to have a positive impact on overall efficiency and where the agency can make a case that consumers will benefit, a case that “speaks to the man in the street.” The concept is not to delve into politics, but to choose market studies that will make the best use of taxpayers’ money. The choice of the sector in which to do a market study lays the groundwork for what the agency does later on.

Once the analysis for a market study is completed, there are two things that are crucial for success. The first is explaining the results in layman’s terms. The second is making clear that consumers and overall economic efficiency have been harmed by whatever problems with regulation have been identified. It is also crucial to build a case about how this could be changed by the proposed remedies. The reason why these steps are so important is that they are all necessary to counteract vested interests. The agency has found that if things are only discussed in a small room, the outcome tends to be unbalanced and to the detriment of consumers. Taking things public precludes the use of arguments which could be made around small tables, but are rather embarrassing if used in public. Making competition concerns about regulatory policies public increases the likelihood of remedial action being taken by those with authority to do so ---- in most cases enacting recommendations of the competition agency would entail actions by regulators or Congress. The agency has to persuade these authorities in order to bring about positive change, and that is much easier to do if the agency goes public with a message that is easily understandable and with something that makes a difference in everyday life.

With regard to lobbying efforts, it makes sense in the Mexican context to simultaneously approach both Congress and the executive branch. Going to both can result in ‘healthy competition’ between the branches of government. Often if either branch takes up the issue, it puts political pressure on the other branch to do so as well.

The delegate concluded by noting that success in implementing recommendations from market studies is always partial and sometimes long in coming. Recommendations often remain in the public domain for an extended period, and even if there is little effect from the study recommendations initially, eventually people often come round and use the analysis and recommendation later. One should not think that work is done once the agency issues the market study --- rather, that is often when the heavy work starts, because the agency has to consistently push the recommendations and sell them to decision makers outside the agency. A long-term, determined effort increases the likelihood of eventually having a positive impact from market studies.

Chairman Jenny turned to the EC for the final presentation. He observed that the EC contribution mentions a number of market studies done by DG Competition in electricity, retail banking, and payment card systems. The contribution offers some thoughts on the aftermath of those various sector enquiries that he asked the delegation to explain as well as steps taken to manage follow through regarding these market studies.

The EC delegate acknowledged that the evaluation of market study enquiries should not be limited to short-term effects, but rather should include long-term effects. Because the EU competition authority is relatively new and its market studies are recent, evaluation of the long-term effects will have to wait. To date, enquiries regarding electricity and payment cards have been completed. The enquiry regarding farmers is still in process.

The delegate stated that the energy enquiry changed the political map of energy discussions in Europe. He noted that the first paper issued as the result of the sector enquiry was greeted in 2005 by a general consensus around the table of energy ministers that they did not want to hear about any changes in the regulatory framework for energy in the EU. They said there wasn’t a problem or that any problems

would not be addressed for at least 10 years. Instead, the interim report and the final report were compelling enough to change minds inside the Commission and in the Council. Within a year, the European Council called for a third liberalisation package specifically for energy. The competition agency has been arguing for particular solutions within that regulatory package that are focused on the inadequacy of the existing operation of transmission networks and under-investment in these networks and on ownership unbundling. The Commission has gone on to look at other alternatives to ownership unbundling. The member states recently affirmed the principles of unbundling, although certain member states prefer a regulatory solution to the problem of unbundling. These states also now recognise that it is commercial decisions which may eventually determine whether ownership changes or not.

Separately, the competition agency maintained that the energy inquiry could result in antitrust investigations. Although this did not happen immediately, DG Competition recently launched several investigations of foreclosure in the gas and electricity sectors. Already these investigations have proven to be successful to the extent that two major companies in Germany, one in gas and one in electricity, have agreed in advance of the investigations to unbundle their transmission networks. In one instance, the firm also agreed to divest a significant amount of electricity generation capacity. The delegate concluded that major changes in regulatory approaches and in the corporate decision making processes in the sector have occurred as a result of the energy inquiry.

On the payment card side, the delegate concluded that a major effect of the enquiry has been to provide a great deal of information for the agency's ongoing investigations into the practices of MasterCard and Visa. On the retail banking side, the enquiry resulted in the transfer of much information to national competition agencies that should be useful as these entities investigate banking practices.

The delegate noted that even if the output of market studies has been limited in some instances, a major objective of market studies should be creating a process of reflection and re-examination by policy makers. Good examples of market studies of this type have involved liberal professions and the market for content on mobile telephones --- a very crucial question for the development of content market and technology market.

The EC delegate expressed openness to the input from BIAC regarding best practices for market studies. The competition agency is also trying to learn from the experiences of agencies with long histories of conducting market studies. The competition agency generally prefers to have a strong enforcement record along with market enquiries in some sectors where the proper direction for policy development is not yet clear. It does not intend to launch a wide barrage of market studies to satisfy its curiosity. The intent to limit and carefully target market enquiries is reinforced by the impracticality of managing more than two market enquiries simultaneously.

On the question of obtaining data, the delegate agreed with the US comment that there are plenty of situations where accessing publicly available data is a more effective method than using investigatory powers. However, the agency is not content, as some sector regulatory agencies appear to be, to rely entirely on submissions about the dynamics of competition from interested parties in the regulated sectors.

Chairman Jenny concluded with three comments:

- Regarding their goals, market studies are a very flexible tool which can accommodate a number of objectives, but their primary role is as a tool to promote change through competition advocacy or law enforcement. In practical terms, this means that targeting of market studies is most productive when it focuses on the prospects for change rather than simply the importance of the problem.
- Regarding the conduct of market studies, although the RT revealed many different approaches used to conduct market studies, it should be relatively simple to agree on good practices and to identify approaches that work less well regarding transparency, formalising the process of conducting market studies, setting timelines and sticking to them, and involving market participants. More discussion would be needed if the OECD wanted to develop best practice guidelines, but the RT discussion revealed that there are some approaches that are more useful than others, including not using formal powers broadly, but rather minimising costs by making very narrow use of compulsory process when necessary.
- Regarding the effects of market studies, while market studies can be a very powerful tool for change, success requires focused management once the market study or sector study has been completed. In particular, there is a lot of work required to promote the results and recommendations. Follow through for market studies may be a very long process --- sometimes it takes 20 years to see the results, but that should not discourage competition agencies from undertaking focused follow through to make the best possible use of market studies.

The Chairman closed the RT by thanking the delegates for all of the contribution, both in written and oral forms.

COMPTE RENDU DE LA DISCUSSION

Le Président Frederic Jenny ouvre la table ronde en signalant qu'il n'y a pas de document de référence pour cette réunion mais que le Royaume-Uni a soumis une contribution très détaillée sur les études de marché et que, de plus, une importante conférence sur ce thème a été organisée à Londres au cours de la semaine précédente par l'*Office of Fair Trading* (OFT) du Royaume-Uni. Certains des pays étaient représentés à la conférence de Londres et le Président indique que la documentation de cette conférence sera rendue publique et constituera une source intéressante d'informations sur les études de marché, s'ajoutant à la table ronde de l'OCDE¹. Lors de cette conférence, des représentants de l'OFT, de la Commission de la concurrence du Royaume-Uni, des milieux d'affaires, des juristes et d'autres responsables de l'application du droit de la concurrence ainsi qu'un certain nombre de parties prenantes se sont réunis pour examiner des questions concernant la vaste expérience de l'OFT et de la Commission de la concurrence en matière de réalisation d'études de marché.

Le Président présente ensuite Peter Freeman et John Fingleton, venant respectivement de la Commission de la concurrence et de l'OFT du Royaume-Uni, qui présenteront chacun des trois principaux thèmes de la table ronde, y compris un bref exposé sur l'expérience acquise par leur pays, où les études de marché sont très développées et constituent une question importante.

Avant de donner la parole au Royaume-Uni pour la présentation du premier thème, le Président Jenny formule cinq observations que lui inspire la lecture des contributions soumises :

Premièrement, presque toutes les autorités de concurrence procèdent à des études de marché même si toutes ne donnent pas le même sens au terme « marché ». Il y a cependant des pays qui ont une expérience plus riche que les autres, surtout les États-Unis et le Japon, qui réalisent des études de ce type depuis très longtemps. Aux États-Unis, les études de marché ont commencé au début du XX^e siècle, et la contribution du Japon fait référence à des études remontant à la fin des années 40.

Deuxièmement, le recours aux études de marché est très variable d'un pays à l'autre. Certains pays les utilisent principalement en cas de litige, d'autres pour des campagnes de sensibilisation à la concurrence. Les études de marché peuvent servir d'entrée en matière dans un litige lorsqu'un comportement anticoncurrentiel est soupçonné dans un secteur mais que les autorités de concurrence ne savent pas exactement quelles sont la nature et l'origine du problème. Dans ce cas, elles procèdent à des études de marché fin de tenter d'identifier les problèmes éventuels. Dans d'autres cas, les études de marché peuvent servir d'entrée en matière pour une sensibilisation à la concurrence. C'est le cas, en particulier, lorsqu'il n'y a aucun soupçon d'infraction aux lois antitrust, mais que, pourtant, le marché ne semble pas vraiment bien fonctionner pour les consommateurs. Dans ces cas, les études de marché peuvent conduire à des propositions de déréglementation ou d'autres formes d'assouplissement.

Troisièmement, il est tout à fait évident que, dans un certain nombre de pays, les études de marché servent à la fois pour la politique de la concurrence et pour la politique à l'égard des consommateurs, et ces deux utilisations sont souvent imbriquées l'une dans l'autre. Ces études sont peut-être un bon moyen de développer le lien entre ces deux politiques.

¹ http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/conference

Quatrièmement, des études de marché sont réalisées selon des pratiques et dans des contextes institutionnels très divers. Dans certains pays, on peut utiliser les pouvoirs d'enquête d'une autorité de concurrence pour obtenir des données et d'autres informations nécessaires pour des études de marché. Dans d'autres, l'autorité de concurrence peut seulement recueillir des données sur une base volontaire. Certaines études de marché donnent lieu à de multiples consultations avec les parties prenantes, d'autres sont menées sans consultation apparente des participants. Certaines sont assez superficielles, mais quand même assez approfondies pour donner une idée générale des conditions qui influent sur le fonctionnement du marché. Dans certains pays, il existe des procédures très élaborées, faisant parfois appel au Parlement, dans lesquelles l'autorité de concurrence suit une procédure stricte.

Cinquièmement, les résultats des études de marché peuvent être très différents. En fait, ces contrastes dans les résultats sont manifestes dans les contributions établies pour la table ronde sur le secteur de la construction. Ces différences peuvent être dues au fait que les méthodologies utilisées ne sont pas les mêmes. Certaines études de marché sont aussi très sujettes à controverse. Il y en a, aux États-Unis, par exemple, où le Congrès a décidé que l'autorité de concurrence qui a procédé à l'étude ne serait plus habilitée à enquêter ou à faire rapport sur un secteur – le secteur des assurances – précisément parce que les entreprises en place dans ce secteur ont exercé des pressions politiques en ce sens sur le Congrès. Certaines études de marché peuvent avoir un impact totalement nul et d'autres peuvent se révéler très efficaces pour promouvoir une réforme de la réglementation dans un pays – les résultats sont donc très divers. Les contributions à la table ronde donnent des exemples de bons et de mauvais résultats, qui devraient conduire les délégués à réfléchir au meilleur usage qui peut être faite de ces études.

Compte tenu du grand nombre de contributions soumises, le Président décide de diviser la table ronde en trois sous-thèmes principaux :

1. Quels étaient les objectifs des études de marché et comment ont-ils été choisis ? Y a-t-il eu une hiérarchisation des priorités et, dans l'affirmative, comment cela a-t-il fonctionné ?
2. Quelles ont été les méthodes les plus efficaces utilisées pour les études de marché ?
3. Quelles ont été les meilleures techniques appliquées pour utiliser les études de marché en vue de l'application du droit de la concurrence ou de la sensibilisation à la concurrence ?

Le Président Jenny passe aux exposés et aux questions en donnant la parole à John Fingleton pour une introduction au débat sur les études de marché.

Le Délégué du Royaume-Uni (OFT) commence son exposé par une brève annonce concernant la première affaire d'entente portée devant la justice au Royaume-Uni. Il s'agit de l'affaire Dunlop Oil & Marine Ltd, dans laquelle l'OFT a coopéré avec le Département de la justice des États-Unis. Le jour de la table ronde, le Crown Court a prononcé des peines d'emprisonnement de trois ans chacune à l'encontre de deux personnes et de 2 ½ ans chacune à l'encontre de plusieurs autres personnes reconnues coupables de cartellisation. Le tribunal a aussi interdit une troisième personne d'accès à un poste directorial pour une durée de sept ans. Le Délégué se déclare satisfait des condamnations prononcées dans cette affaire et note que la décision a été rendue juste à deux semaines du 5^e anniversaire de la Loi britannique sur les entreprises. Il considère cette première affaire pénale d'entente dans son pays comme un excellent exemple de coopération internationale. Selon lui, cette affaire n'aurait pas abouti à un si bon résultat sans la préparation suivie au Comité de la concurrence de l'OCDE au fil des ans. Il remercie ensuite ses collègues qui ont contribué aux travaux du Comité sur les ententes.

Le Délégué fait tout d'abord observer que l'OFT a procédé à 32 études de marché et que dix autres ont été réalisées par ses collègues de la Commission de la concurrence. Il note aussi que la Commission de la concurrence a mené 7 ou 8 enquêtes, pour la plupart à la demande de l'OFT.

Le Délégué indique que l'OFT commence par choisir les études de marché selon le critère du fonctionnement des marchés pour les consommateurs. Il y a trois sources possibles de problèmes qui peuvent faire que les marchés ne fonctionnent pas bien pour les consommateurs :

- des restrictions privées : monopoles, ententes ;
- des restrictions publiques : monopole d'État, obstacles à l'entrée ;
- des équilibres inefficients sur le marché.

Le nombre de catégories de problèmes du marché examiné par l'OFT est peut-être la caractéristique la plus distinctive du régime britannique. Selon le Délégué, tout le monde reconnaît que les études de marché portant sur des restrictions publiques et la concurrence complètent très utilement l'activité d'application du droit de la concurrence ciblée sur les restrictions privées et la concurrence. L'OFT ne recourt pas souvent à des études de marché pour des cas de restrictions privées, mais il y a deux exemples où des restrictions privées ont été identifiées comme étant le problème à traiter. L'un concerne les garanties automobiles, une affaire dans laquelle l'OCDE aurait pu utiliser les dispositions de l'article 81 mais s'est plutôt employée, grâce à une étude de marché, à faire accepter à ce secteur de modifier ses pratiques. Un autre concerne la distribution de médicaments. Dans cette affaire, il y avait une allégation d'abus de position dominante, et l'OFT l'a analysée comme un problème propre au marché et non comme un problème de conduite unilatéral.

Le recours à des études de marché en cas de restrictions publiques à la concurrence est plus courant. L'OFT n'enquête pas seulement sur les différents marchés mais s'intéresse aussi de façon systématique aux problèmes qui concernent l'ensemble des marchés. L'OFT a, par exemple, réalisé deux études couvrant ce qu'on peut appeler la « neutralité concurrentielle », les aides publiques et l'utilisation commerciale d'informations publiques.

La troisième source de problèmes de marché réside dans ce qu'on peut appeler des « équilibres inefficients ». Il s'agit d'une situation où il n'y a pas forcément de restriction privée ou publique à la concurrence mais où l'OFT décèle de sérieux problèmes de fonctionnement du marché. Certains dysfonctionnements sont le genre de problème qui se pose lorsque « tous les spectateurs se lèvent pour mieux voir » – c'est-à-dire que si tout le monde se lève, tout le monde voit moins bien, et si tout le monde s'asseyait, le bien-être serait plus élevé. La difficulté est de déterminer comment les marchés passent d'un équilibre à un autre, et de décider si les autorités de concurrence ont un effet positif ou non. Il y a d'autres types d'équilibres inefficients où les subventions croisées paraissent tout à fait extrêmes ; le paiement d'une garantie d'assurance en est un très bon exemple.

Du point de vue des objectifs de l'OFT, les études de marché sont fondamentales pour une approche fondée sur les effets. L'OFT considère donc les études de marché comme un moyen de traiter les problèmes à la source et une bonne occasion de nouer des relations avec les consommateurs et les parties prenantes du monde des entreprises. Les études de marché visent en fin de compte à opérer des changements par des processus qui sont, pour la plupart, volontaires, mais pas toujours.

En ce qui concerne la hiérarchisation des thèmes potentiels d'études de marché par ordre de priorité, l'OFT expose le processus de façon assez détaillée dans la contribution qu'il a soumise pour la table ronde. La fixation des priorités revient en quelque sorte à trouver la personne qui convient le mieux pour pourvoir

un emploi vacant. Ce processus s'apparente à une recherche d'emploi, où l'employeur publie une annonce et où les candidats font la queue pour se présenter – l'équivalent des plaintes reçues par l'OFT. L'OFT a aussi une fonction équivalente à celle de « chasseur de têtes » – ce qu'il appelle « scruter l'horizon ». L'OFT recherche les meilleurs candidats. Sont ensuite appliqués des principes de hiérarchisation des priorités qui sont analogues à des critères d'emploi – centrés sur l'importance de l'impact, l'évaluation des risques et les ressources. Il s'agit alors d'appliquer effectivement ces principes. Cela équivaut à réduire la liste des candidats en sélectionnant les meilleurs, ce qui correspond au passage de la liste préliminaire à la liste restreinte lors des entretiens d'embauche, pour arriver à désigner le candidat qui convient.

Le Délégué du Royaume-Uni conclut que le point principal à retenir est que l'OFT ne cherche pas seulement à établir une théorie du préjudice mais tente aussi de voir, dès le départ, si le problème de marché peut être corrigé. L'OFT a écarté de nombreux thèmes possibles d'étude de marché dans des cas où il y avait des problèmes importants sur le marché mais où les agents de l'Office doutaient qu'il existe une solution viable pour améliorer le fonctionnement du marché. Cela a de l'importance car l'on reproche souvent à l'OFT d'aller « à la pêche aux renseignements ». En réalité, l'Office se montre généralement très judicieux dans la sélection des études de marché.

Le Président Jenny remercie le représentant du Royaume-Uni pour son introduction au thème de la table ronde. Il s'adresse ensuite à la Corée qui, dans sa contribution, décrit un vaste plan systématique concernant les études de marché, appelé « Projet de marchés propres ». Ce projet a été entrepris par l'autorité de concurrence et est maintenant achevé. Le Président demande à la Délégation coréenne d'expliquer, maintenant que ce projet est terminé, comment il a vu le jour, en quoi il a consisté et ce qui est prévu ensuite.

La Corée déclare que, comme le nom du projet l'indique, l'objectif principal du Projet de marchés propres (mis en œuvre entre 2001 et 2005) était de déterminer et de traiter les causes profondes de la défaillance du marché dans certains secteurs et, ce faisant, d'appliquer le droit de la concurrence de manière plus efficace et plus efficace en adoptant une approche sectorielle, globale, au lieu d'une approche au cas par cas. Jusque-là, l'application du droit de la concurrence en Corée s'opérait à l'occasion de différentes affaires. Suivant l'ancienne approche, il était très difficile de déterminer si la même pratique anticoncurrentielle se répétait ou non ou s'il fallait procéder à une réforme de la réglementation ou à des changements structurels pour assurer le bon fonctionnement des marchés. Comme exemple de la réussite de la nouvelle approche, la Corée a modifié radicalement les systèmes de vente et d'achat dans le secteur de la fabrication et de la distribution d'uniformes scolaires, dans le cadre du Projet de marchés propres, en 2001. Plus précisément, ce projet a permis de mettre fin aux niveaux de prix anticoncurrentiels dans ce secteur, d'améliorer la réglementation et de mettre en place un système d'achats communs. Il a permis aussi de réduire de moitié le nombre de consommateurs portant une affaire devant la justice pour demander une indemnisation en les informant des procédures d'indemnisation ou de recours. Ces efforts ont abouti à une réduction de 40 % du prix des uniformes scolaires.

En ce qui concerne les critères de choix, l'autorité de concurrence sélectionne six à sept marchés selon les critères suivants :

- les secteurs ou marchés soumis à réglementation et où les pratiques anticoncurrentielles sont courantes
- les secteurs dans lesquels les plaintes de consommateurs sont fréquentes
- les secteurs où la concentration du marché est très élevée et ce, depuis très longtemps.

Pour les études de marché futures, bien que celles entreprises dans le cadre du Projet de marchés propres se soient terminées en 2005, l'autorité coréenne de concurrence maintient une approche globale et systématique afin d'assurer le bon fonctionnement des marchés. Plus précisément, les études de marché portent sur les secteurs qui revêtent une importance particulière pour les consommateurs, comme les services de téléphonie mobile, le lait en poudre et les services d'éducation privés. Les études peuvent être ciblées aussi sur des branches d'activité dynamiques où les conditions de concurrence évoluent progressivement ainsi que sur des secteurs où la réglementation ou l'action publique peut restreindre la concurrence.

Le Président Jenny se tourne ensuite vers le Japon, qui explique dans sa contribution que les études de marché portent sur des domaines commerciaux nouveaux ou existants où les conditions de concurrence ont changé notablement. La Délégation japonaise est invitée à décrire comment les secteurs à étudier sont sélectionnés et pour quelles raisons il est procédé à des enquêtes sur le marché. Est-ce pour en savoir plus sur le secteur lorsque la Commission de la concurrence n'a pas grande expérience de cette branche d'activité ? Est-ce dans la perspective de l'application du droit de la concurrence ou de la réforme de la réglementation, comme en Corée ?

Le Délégué du Japon confirme, comme le Président l'a fait observer dans la présentation de la table ronde, que son pays a une longue tradition d'études de marché. Ces études sont appelées « enquêtes sur les faits ». Presque tous les ans depuis la promulgation de la Loi anti-monopole en 1947, l'autorité de concurrence mène des enquêtes de ce type. L'idée est de pénétrer des marchés particuliers et des pratiques commerciales sectorielles et d'autres problèmes suivant les différents besoins de la Loi sur la politique de la concurrence à divers moments. Ces enquêtes diffèrent de celles de la Commission de la concurrence, qui portent sur des actes spécifiques contraires à la Loi anti-monopole. Les enquêtes sur les faits sont ciblées sur deux types de domaines commerciaux :

- les nouveaux domaines commerciaux – on peut citer comme exemple une enquête sur les centres commerciaux électroniques en 2006 ;
- les domaines commerciaux existants, où l'environnement concurrentiel évolue grandement – on peut citer l'enquête sur les institutions financières et les entreprises qui empruntent, réalisée en 2006 lors de la vaste déréglementation de ce secteur.

Les enquêtes sur les faits ne sont pas destinées seulement à satisfaire les besoins internes de la Commission de la concurrence qui cherche à comprendre le marché et les branches d'activités. Elles sont ciblées sur les domaines commerciaux où il existe des problèmes potentiels du point de vue de la politique de la concurrence. Avant l'enquête sur les centres commerciaux électroniques, par exemple, il y avait des craintes de pratiques commerciales déloyales telles que l'abus de position de négociation dominante par les opérateurs de l'Internet à l'encontre des locataires de ces centres commerciaux. L'on craignait aussi que des entreprises n'opérant pas sur l'Internet ne tentent d'empêcher l'entrée dans le commerce électronique. On peut citer comme autre exemple le fait qu'avant le lancement de l'enquête sur les pratiques commerciales entre les institutions financières et les entreprises emprunteuses, l'on entendait dire que les grandes banques recouraient à des pratiques déloyales elles que l'abus de position de négociation dominante par rapport aux petites et moyennes entreprises. Ces deux études représentent donc non seulement un effort fait par la Commission de la concurrence pour se familiariser avec les nouvelles pratiques commerciales ou avec des conditions concurrentielles en évolution, mais aussi une suite donnée à des soupçons ou à des problèmes potentiels du point de vue la Loi anti-monopole.

Le Président Jenny remercie le Délégué du Japon, M. Goto, professeur d'économie et membre du personnel de la Commission de la concurrence pendant plus d'un an, et lui souhaite la bienvenue au Comité. Il fait observer que M. Goto a mentionné, vers la fin de son exposé, un sujet assez délicat, à savoir

la relation entre les mesures d'application de la loi et les études de marché. Le Président déclare que les différents pays ont des positions très diverses à ce sujet. À titre d'exemples, il cite le Mexique et le Canada, qui indiquent tous deux que les études de marché conduisent rarement à des mesures d'application de la loi. Dans sa contribution, le Mexique explique que ce sont souvent les études de marché qui font suite aux conclusions d'enquêtes sur l'application du droit de la concurrence et non l'inverse. La contribution canadienne précise que le Bureau n'utilise pas les études de marché ou de l'industrie pour obtenir des éléments de preuve pouvant servir pour l'application de la loi, et qu'il n'est jamais arrivé qu'il tombe par inadvertance sur des preuves d'activités anticoncurrentielles posant des problèmes au regard des dispositions de la Loi sur la concurrence au cours d'autres études plus générales du marché ou de l'industrie. Donc, dans les deux cas, les contributions indiquent que les études de marché sont tout à fait distinctes des mesures d'application de la loi.

Le Président oppose les citations des contributions mexicaine et canadienne à celle de la CE, selon laquelle les enquêtes sectorielles sont principalement un exercice de collecte d'informations et d'analyse qui permet à la Commission de comprendre en profondeur ces marchés ; cela signifie qu'elles ne remplacent pas, mais alimentent en amont, d'éventuelles procédures antitrust dans des cas spécifiques qui pourraient suivre. Certains éléments semblent indiquer que les études de marché peuvent conduire à des mesures d'application du droit de la concurrence en ce sens que, tout ce que l'on apprend à l'occasion de ces études peut être utile pour décider d'ouvrir ou non une procédure pour infraction. Une des questions qui vient à l'esprit, selon le Président, est celle de savoir si cette approche expose la Commission au risque d'être accusée d'aller « à la pêche aux renseignements » en menant des études de marché juste, en réalité, pour démarrer une enquête, mais sans le dire – en commençant en douceur pour adopter ensuite une approche plus pointue. Le Président fait observer que, dans certains pays, des questions se posent quant à savoir si utiliser des études de marché de cette manière protège suffisamment les droits de la défense, et il invite la Délégation de la CE à aborder ces questions.

L'intervenant de la CE estime, personnellement, qu'il n'y a pas de grande différence entre l'approche de la CE et celles du Mexique et du Canada comme le laisse penser le Président. Conformément à ce qu'a déclaré en introduction le Délégué du Royaume-Uni, la CE poursuit une politique de la concurrence qui va au-delà de l'application du droit. En effet, même si la CE a toujours recouru largement à des mesures d'application de la loi, l'autorité de concurrence est d'avis – un avis qu'elle pense partagé par bon nombre des Délégations participant à table ronde – que son objectif est de favoriser la concurrence au profit des consommateurs et des entreprises. Cela peut se faire de diverses manières : un moyen de le faire peut être, en fin de compte, de faire appliquer le droit de la concurrence ; un autre peut être de plaider en faveur de modifications spécifiques dans la réglementation ou de changements dans le comportement des organismes de régulation ; ou peut-être, de fait, d'inviter l'industrie elle-même à changer ses habitudes sans saper les droits des défenseurs potentiels.

Sur la question spécifique des pouvoirs utilisés par la CE pour les études de marché, il s'agit des pouvoirs d'enquête prévus dans le Règlement 1. La CE a toujours mené des études de marché de petite envergure. L'autorité de concurrence a, par exemple, réalisé, même après l'enquête sur le secteur de l'énergie, une étude spéciale sur l'évolution des prix de l'électricité, qui a immédiatement conduit à des enquêtes antitrust plus approfondies que l'enquête sectorielle. L'autorité de concurrence de la CE a aussi procédé à des études d'évaluation comparative sur les professions libérales ainsi qu'à une étude qui a précédé l'adoption par la Commission du Code de conduite du secteur de la compensation et du règlement (financiers). Il y a donc plusieurs études de marché de la CE qui ont été réalisées à l'appui des activités antitrust et qui servent en même temps pour l'élaboration de politiques dans d'autres entités de la Commission.

L'innovation introduite au cours des cinq années passés, fondée sur la révision du Règlement 1 et suivant l'exemple des autorités de certains États membres représentés à la table ronde, a consisté à réaliser

des enquêtes sectorielles beaucoup plus générales, qui présentent un double avantage : l'autorité de concurrence centre son attention sur les problèmes de concurrence qui peuvent être résolus par une modification de la réglementation ou ceux auxquels il est répondu par des actions antitrust. En ce qui concerne la connexion entre les informations collectées dans le cadre d'une enquête sectorielle, d'une part, et dans le cadre d'une éventuelle enquête ultérieure, d'autre part, le Délégué indique que l'autorité de concurrence de la CE recourt aux pouvoirs d'enquête prévus dans le Règlement 1, qui sont soumis à un contrôle judiciaire. Par conséquent, si l'autorité de concurrence pose à une entreprise des questions qui outrepassent ces pouvoirs, l'entreprise a le droit de demander réparation auprès des tribunaux. La seconde et la plus importante réserve à ce que fait l'autorité de concurrence de la CE en comparaison de celles de certains pays présents à la table ronde est la suivante : aucun rapport établi par l'autorité ni aucune information recueillie dans le cadre d'une enquête sectorielle ne peut être légalement utilisé ultérieurement dans une enquête antitrust, à moins que l'autorité ne demande de nouveau aux parties intéressées de fournir cette information. Cette obligation procédurale est une protection manifeste des droits de la défense, et elle place aussi l'autorité de concurrence davantage dans le camp décrit par le Président comme étant l'approche mexicaine et canadienne, et non une approche des études de marché trop radicale par rapport aux infractions potentielles au droit de la concurrence.

Le Délégué de la CE aborde ensuite la question de la « pêche aux renseignements ». De l'avis de la CE, les enquêtes sectorielles, du point de vue des ressources, sont généralement d'au moins deux ou trois fois la taille d'une enquête sur la deuxième phase d'une fusion. L'autorité de concurrence de la CE pense que la façon de conduire ce type d'enquête, ainsi que la relation entre l'autorité et le secteur en question, est absolument décisive pour l'efficacité du résultat final. Il ne s'agit pas simplement de faire en sorte que l'autorité de concurrence obtienne les informations dont elle a besoin pour identifier les problèmes, mais il faut aussi veiller à ce qu'un consensus se dégage dans le secteur pour accepter la mesure correctrice proposée. L'impatience semble plus grande au niveau supranational qu'au niveau national au sujet du rythme et de l'étendue des enquêtes sectorielles, et de ce fait, l'autorité de concurrence de la CE cherche à terminer rapidement toute enquête sectorielle. Par conséquent, dans chacune des trois enquêtes sectorielles annoncées (dont les deux qui sont achevées), l'autorité de concurrence de la CE a déclaré dès le début qu'elles seraient achevées dans un délai de 18 mois. Lorsque l'enquête est menée rapidement, on évite une activité nécessitant beaucoup de ressources, et l'autorité cherche surtout à obtenir des résultats qui aient un sens au niveau européen, par opposition au niveau national. L'autorité de concurrence de la CE ne peut pas, comme elle l'a appris, faire double emploi avec ce qui est fait au niveau national ; en même temps, toutefois, les études de marché menées au niveau de la CE permettent aussi à chaque autorité nationale de voir quels messages peuvent être délivrés pour sa propre action antitrust, s'il y en a, ou quels messages doivent être délivrés afin d'améliorer le cadre réglementaire.

Dans le domaine de l'énergie, la CE a été en mesure d'atteindre ses deux objectifs, ayant à la fois transmis des messages en faveur d'un troisième ensemble de mesures de libéralisation de la réglementation et réalisé une série d'enquêtes antitrust axées sur le préjudice causé à l'industrie et aux entreprises dans le secteur énergétique européen.

En matière de services financiers, l'autorité de concurrence de la CE a poursuivi et achevé des enquêtes antitrust sur les cartes de paiement. Elle a aussi été en mesure de fournir une grande masse d'informations à l'appui de la mise en œuvre du plan d'action de l'UE relatif aux services financiers et des réglementations concernant l'Espace unique de paiements de la zone euro.

Dans le domaine pharmaceutique, l'autorité de concurrence de la CE a centré son attention, tout comme la FTC aux États-Unis, sur la délimitation entre les médicaments des grands laboratoires et les médicaments génériques. Ces enquêtes ont visé à la fois à s'assurer qu'il n'y avait pas d'utilisation abusive des droits de brevet après leur expiration et à voir s'il y avait des raisons de poursuivre l'enquête antitrust

ou, de fait, s'il fallait prendre une quelconque initiative en vue de modifier la réglementation au niveau national ou au niveau européen.

Le Président Jenny s'adresse ensuite à l'Italie pour poser des questions très proches de celles posées à la CE. La contribution italienne indique que l'autorité de concurrence peut procéder à des enquêtes lorsque le développement des échanges, l'évolution des prix ou d'autres circonstances laissent penser qu'il peut exister des entraves, des distorsions ou des restrictions à la concurrence. On peut y lire aussi que les informations obtenues dans le cadre d'études de marché peuvent servir de référence pour des interventions visant à faire appliquer la loi ou à sensibiliser à la concurrence. Ces déclarations soulèvent des questions pour le Président : lorsque l'autorité de concurrence a le sentiment que quelque chose empêche, restreint ou fausse la concurrence, comment décide-t-elle si elle va mener une étude de marché plutôt que d'ouvrir une procédure antitrust officielle ? L'autorité peut-elle utiliser les informations recueillies au cours d'études de marché pour une action d'application de la loi ?

Le Délégué de l'Italie répond que la situation dans son pays n'est guère différente de celle décrite par le Délégué de la CE. La seule différence importante tient au fait que l'autorité de concurrence italienne détient ces pouvoirs depuis le début, c'est-à-dire depuis 1990, année où la loi sur la concurrence a été promulguée. L'autorité de concurrence italienne était, au départ, habilitée à ouvrir des enquêtes sur les faits. Même si le libellé peut paraître tout à fait similaire aux infractions au droit de la concurrence car il contient les termes, « entraver, restreindre ou fausser », dans la pratique l'autorité de concurrence ouvre une enquête sur les faits lorsqu'elle a le sentiment que le marché ne fonctionne pas bien. Cette approche va dans le même sens que celle du Royaume-Uni concernant les études de marché, telle que l'a décrite le Délégué britannique : des enquêtes sont lancées en cas de restrictions publiques ou d'équilibres inefficients sur le marché. L'autorité de concurrence italienne n'a jamais ouvert d'enquête sur les faits lorsqu'elle soupçonnait une infraction à la loi antitrust. En réalité, elle n'a mené que 31 enquêtes sur les faits depuis 1990 – moins de 2 par an. Néanmoins, toutes les enquêtes ont porté sur des secteurs où le marché ne fonctionnait pas convenablement en raison d'équilibres inefficients – aucun ne fonctionnait mal en raison d'infractions aux lois antitrust ou à cause de restrictions publiques à la concurrence. Pour ne citer que quelques exemples – dans le domaine des services professionnels, l'autorité de concurrence a procédé à une enquête sur les faits afin de voir comment les professions libérales pouvaient fonctionner sans restrictions légales à la publicité et sans tarif minimum fixe. Cette étude visait aussi à examiner comment ouvrir l'accès aux professions libérales du point de vue des codes déontologiques (codes d'éthique). L'autorité de concurrence n'a pas pu intervenir directement au sujet de ces codes, et elle n'a pas pu intervenir directement non plus contre les professions en question au sujet des pratiques analysées, car ces codes étaient autorisés par la loi. Cette enquête sur les faits a néanmoins aidé à convaincre les pouvoirs publics de réformer les services professionnels. Il y a eu une situation assez similaire avec les services bancaires en Italie. En janvier 2007, l'autorité de concurrence a obtenu le pouvoir de faire appliquer le droit de la concurrence dans le secteur bancaire. La première chose qu'elle a faite a été d'ouvrir une enquête sur le coût de la clôture des comptes chèques. Cette enquête de la CE sur la banque de détail a révélé clairement que l'Italie était le pays où la fermeture d'un compte chèques coûtait le plus cher aux clients. Il ne s'agissait même pas d'un coût indirect mais d'un droit direct à payer pour fermer un compte chèques. Il était important d'ouvrir une enquête afin de montrer dans le détail ce que faisaient les banques – la pratique était courante, mais il ne s'agissait certainement pas d'une pratique concertée ni d'un accord horizontal. Ce qui a été intéressant – et c'est pourquoi l'autorité de concurrence indique dans sa contribution à la table ronde qu'il y a complémentarité entre l'application du droit et la sensibilisation à la concurrence – c'est que, une fois l'enquête ouverte, de nombreuses banques ont immédiatement décidé de supprimer ces frais injustifiés. En effet, inquiètes des effets de ces accusations sur leur réputation (comme n'importe qui d'autre), elles ont voulu se montrer coopératives et, de fait, elles se sont conformées immédiatement à ce qu'elles pensaient être le souhait des autorités.

Il est indiqué aussi dans la contribution de l'Italie que les études de marché peuvent servir pour la prise de décisions concernant l'application du droit de la concurrence, mais que cette utilisation est certainement beaucoup moins importante que pour la sensibilisation à la concurrence dans les cas de restrictions publiques à la concurrence ou d'équilibres inefficients. Lorsque des enquêtes sur les faits sont utilisées pour une intervention visant à faire appliquer le droit de la concurrence, il ne s'agit pas d'une décision *ex ante*, mais plutôt d'une décision qui prend forme au cours de l'enquête. Par ailleurs, les informations recueillies dans le cadre d'études de marché ne peuvent pas servir directement pour l'application de la loi ; en fait, l'enquête informe l'autorité de la concurrence de l'existence d'une position dominante et d'un éventuel usage abusif de cette position. Si c'est le cas, l'autorité de concurrence ouvre une enquête antitrust sur ce problème particulier.

Le Président Jenny fait observer qu'il n'y a pas de lien direct, du moins dans le cas de l'UE et de l'Italie, entre les études de marché et l'application du droit de la concurrence. Il note qu'il existe des sauvegardes écrites dans la loi, telles l'impossibilité d'utiliser directement des informations recueillies au cours d'une étude de marché pour une enquête sur l'application du droit ; au lieu de cela, l'autorité de concurrence doit soumettre une nouvelle demande de présentation des documents nécessaires.

Le Président demande ensuite à la Fédération de Russie quelques éclaircissements au sujet de sa contribution. Deux aspects de la contribution russe l'intéressent. Le premier est le choix des secteurs qui pourraient faire l'objet d'une étude de marché. Il ressort de la contribution que l'autorité de concurrence est obligée de mener une étude de marché si le gouvernement en demande une, comme cela apparaît aussi dans la contribution des États-Unis. Le second est le fait que l'autorité de concurrence est tenue de procéder à une étude de marché dans un bref délai avant de pouvoir ouvrir une enquête. Le Président demande à la Russie de préciser le rôle exact de ce type d'enquête et d'indiquer quel est le rapport entre ces enquêtes et les enquêtes formelles de l'autorité de concurrence sur l'application de la loi.

Le Délégué de la Russie répond que l'autorité de concurrence procède à des études de marché à la demande du gouvernement. Ces études ont pour but de préciser la situation du moment et l'évolution dans toute branche d'activité où se posent de sérieux problèmes de concurrence, qu'il s'agisse du comportement des entreprises, des réglementations publiques ou de problèmes de tarification. Cela n'arrive pas très souvent, mais en 2007, par exemple, le Service fédéral anti-monopole a mené des études de marché sur la réforme du secteur de l'électricité, les engrais, les carburants, le pain, les prix du ciment, la sécurité sociale et les services de banque de détail. Il a présenté les résultats de ces études au gouvernement. Cette année, en vertu d'une nouvelle loi sur la concurrence, l'autorité de concurrence établira un rapport annuel sur la concurrence dans la Fédération de Russie et le résultat général des études de marché figurera dans ce rapport.

En ce qui concerne l'application du droit de la concurrence, le Service fédéral anti-monopole a des délais très stricts pour les études de marché : trois mois pour les fusions et neuf mois pour les infractions à la loi sur la concurrence. En revanche, conformément à la loi sur la concurrence et à certaines décisions importantes des tribunaux, l'analyse de marché est indissociable de toute décision du Service fédéral anti-monopole. Dans cette situation, le seul moyen de travailler efficacement est de concentrer les ressources sur les marchés les plus intéressants où il y a des problèmes structurels, par exemple, ou sur de vastes opérations attendues qui pourraient avoir pour effet de restreindre la concurrence. Des études de marché dans ces secteurs sont prévues dans le cadre du programme annuel d'analyse des marchés qui est établi et mis en œuvre par le Service fédéral anti-monopole. Si, à l'issue d'études de marché, des infractions au droit de la concurrence sont avérées, le Service fédéral anti-monopole devra ouvrir une affaire et procéder à une enquête approfondie dans des délais bien précis. Habituellement, dans ces situations, le groupe de travail réalisant l'étude de marché ne fait que se transformer en une équipe du Service fédéral anti-monopole chargée d'enquête afin d'examiner ladite infraction et cela conduit à une décision finale concernant l'affaire dans son ensemble.

Le Président Jenny donne la parole à la Grèce pour une observation.

Le Délégué de la Grèce indique que, en droit grec, chaque fois qu'il y a un problème sur le marché en raison d'un grand nombre de restrictions à la concurrence dans le secteur, ou chaque fois que l'autorité de concurrence constate une inefficience, le Ministère du développement ou l'autorité hellénique de la concurrence peut lancer d'office une enquête sectorielle. Cette enquête peut aussi conduire à une décision motivée qui peut aboutir à l'application de mesures structurelles ou de mesures visant les comportements en vue d'améliorer le fonctionnement du marché. Le système grec est donc différent, à cet égard, de celui des autres pays participant à la table ronde.

Le Président Jenny s'adresse à la Roumanie, qui a noté dans sa contribution qu'un des objectifs de ses études de marché est d'identifier et de résoudre des cas où les coûts de transaction sont plus élevés que nécessaire – ce qui peut ou non poser un problème de concurrence mais peut être purement un problème pour les consommateurs. De l'avis du Président, c'est un excellent exemple d'intégration de la politique de la concurrence et de la politique à l'égard des consommateurs, et il demande à la Délégation roumaine quel type d'études de marché est mené dans son pays et dans quelle mesure on réussit à trouver des mesures correctrices dans les cas où l'autorité de concurrence constate que les coûts de transactions sont plus élevés que ce qu'elle juge nécessaire.

Le Délégué de la Roumanie répond qu'au début de 2007, en vertu des pouvoirs qui lui sont conférés par le droit de la concurrence roumain, le Conseil de la concurrence a commencé de recourir à des enquêtes sectorielles. Cela signifie que l'autorité de concurrence lance des études de marché afin de mieux comprendre les obstacles possibles à la concurrence dans un secteur donné lorsque certains indices laissent penser que la concurrence ne fonctionne pas aussi bien qu'elle le devrait. La contribution écrite du Conseil porte surtout sur la récente étude du marché de l'immobilier et des services juridiques liés aux opérations immobilières. Un des objectifs spécifiques de l'étude était de déterminer si les coûts de transaction supportés par l'acquéreur ou le vendeur du bien ou du terrain étaient ou non excessifs. Pourquoi ce secteur a-t-il été choisi et cet objectif fixé ? Le Conseil s'est rendu compte de la taille considérable de ce marché, de son importance majeure et de son impact sur les consommateurs, et aussi de son poids dans l'ensemble de l'économie. En fait, comme la DG de la concurrence l'a souligné un peu auparavant, l'autorité de concurrence a aussi pour objectif principal de favoriser la concurrence au profit des consommateurs. Cette étude intègre la double perspective juridique et économique, comparativement, sur les pratiques professionnelles et la réglementation sectorielle correspondante. Ces pratiques peuvent avoir un fort impact sur l'efficacité et le fonctionnement du marché des services liés au transfert de propriété en Roumanie par rapport à ceux des autres États membres de l'UE. Il s'agira d'examiner s'il y a des aspects anticoncurrentiels en jeu. Il sera prêté dûment attention, lors de l'enquête sectorielle, aux structures et aux mécanismes du marché, à la qualité des services notariaux ou cadastraux et au rôle des agents immobiliers et, bien entendu, à l'effet de tout cela sur le consommateur final. Il est trop tôt pour prédire les résultats de cette enquête sectorielle. Néanmoins, en fonction des résultats et, bien sûr, des compétences juridiques du Conseil roumain de la concurrence, l'étude peut déboucher soit sur une action en vue de l'application de la loi, soit sur un effort de sensibilisation à la concurrence, ou sur les deux à la fois. Dans ce cas particulier, toutefois, il est plus probable que l'étude conduira à une initiative de sensibilisation. La sensibilisation à la concurrence consisterait sans doute à formuler des recommandations, plutôt qu'à appliquer des mesures correctrices d'ordre juridique, en vue de l'adoption de réformes visant à renforcer la concurrence qui pourraient mener à la réduction des droits liés au transfert de propriété et, ainsi, procurer un avantage financier aux consommateurs.

Le Président Jenny pose de nouveau une question à la Délégation de la CE. Pour donner le contexte, le Président lit une phrase de la contribution de la CE qui, selon lui, indique qu'il y a, de fait, un désir de rendre la politique de la concurrence et la politique à l'égard des consommateurs compatibles et d'utiliser pour cela les études de marché : « *les enquêtes sectorielles sont un outil efficace qui permet de mettre en*

commun les ressources de la Commission sur les questions qui revêtent un intérêt particulier pour la compétitivité de l'industrie en général et pour le bien-être des consommateurs ». Comment arrive-t-on à rapprocher les préoccupations de la DG de la concurrence et de la DG des consommateurs ? La DG des consommateurs a un programme appelé *Consumer Market Watch* et le Président demande s'il y a une relation entre cette initiative – qui vise manifestement à déterminer comment les marchés fonctionnent pour les consommateurs – et les études de marché que la DG de la concurrence pourrait entreprendre et, dans l'affirmative, comment cela marche.

La réponse du Délégué de la CE est la suivante : Si la DG de la concurrence lance une enquête sectorielle conformément au pouvoir d'enquête formel que lui confère le Règlement 1, même s'il n'y a aucune allégation à l'encontre d'une entreprise particulière, cette enquête doit être fondée sur la disposition juridique selon laquelle l'autorité de concurrence pense qu'il y a dans le secteur un problème concurrentiel qui pourrait nécessiter le recours aux articles 81 ou 82, sans exclure le fait que le problème ne sera pas résolu simplement par les règles de concurrence. C'est là une forme sérieuse d'enquête de la DG de la concurrence. Il ne s'agit pas simplement d'une étude de marché pour la forme ou d'un tableau des prix à la consommation ; il s'agit d'un instrument très intrusif. Le Délégué se dit sûr que les représentants du BIAC souscriraient à cette interprétation. La DG de la concurrence doit par conséquent l'utiliser avec grand soin. C'est pourquoi le Délégué reconnaît que, au niveau européen, une enquête sectorielle couvrant 27 États membres est quelque chose que la DG de la concurrence ne devrait entreprendre que dans un cadre temporel précis et avec une obligation claire d'arriver à des résultats qui apportent quelque chose au niveau européen, souvent dans le domaine de la réglementation. C'est la raison pour laquelle la DG de la concurrence centre son effort sur des secteurs comme l'énergie, les services financiers et les produits pharmaceutiques. De ce point de vue, la réalisation d'une enquête de ce type relève entièrement de la DG de la concurrence, avec la coopération, nécessairement, des autorités de concurrence nationales et des organismes de régulation nationaux. En même temps, il est normal pour la DG de la concurrence d'informer ses collègues qui s'occupent des consommateurs et de ceux qui s'occupent du marché intérieur. Une fois qu'une enquête atteint le stade de l'établissement d'un rapport préliminaire et d'un rapport final, les recommandations appellent clairement tous les services de la Commission à contribuer à évaluer si, par exemple, une réglementation est nécessaire ou non, s'il est besoin d'une plus grande autodiscipline dans le secteur. À ce niveau, les collègues du domaine de la politique à l'égard des consommateurs participeraient aux débats qui suivraient. Au cours de cette étape de l'enquête, le DG de la concurrence doit respecter la procédure concernant les droits de ceux qui sont soumis à enquête et doit s'employer à parvenir à un résultat visant principalement à résoudre les problèmes de concurrence. Comme dans la contribution de la CE, il est question de « *mise en commun des ressources* », une phrase qui fait référence à un large éventail d'agents de la DG de la concurrence, notamment le personnel qui s'occupe des fusions, ceux qui travaillent sur les questions relatives aux aides publiques, et les personnes qui travaillent sur les enquêtes antitrust. L'autorité de concurrence complète ces spécialistes afin de former une équipe pour une enquête sectorielle. Cela leur permet d'apporter leurs connaissances antérieures dans l'enquête, mais aussi, par la suite, peut leur permettre de tirer les bonnes conclusions pour l'utilisation de nos propres instruments relatifs au droit de la concurrence. Cela s'opère parallèlement à ce qui se fait dans le reste de la Commission, et au niveau national, pour examiner le progrès accompli en matière de création d'avantages pour les entreprises et les consommateurs grâce à la concurrence – par exemple, par le biais d'initiatives comme celle de la Commissaire Kuneva, qui a mis en place un tableau de bord des marchés de consommation. Ses collègues de la Direction générale des affaires économiques ont aussi proposé un suivi systématique du marché, mais cela serait à un niveau très macroéconomique en comparaison des questions relativement intrusives posées aux entreprises dans le cadre d'une enquête sectorielle lancée en vertu du Règlement 1 de l'UE.

Le Président Jenny remercie le Délégué de la CE et fait remarquer qu'il semble n'y avoir guère de lien au niveau de l'enquête mais peut-être davantage au niveau des mesures correctrices, en partie parce

que l'instrument utilisé par la Commission comporte des pouvoirs d'enquête prévus par le Règlement 1-2000.

Le Président s'adresse ensuite à l'Afrique du sud, notant que ce pays a soumis une contribution intéressante du point de vue de la façon dont l'autorité de concurrence cible les secteurs à soumettre à une étude de marché. En particulier, l'Afrique du sud utilise effectivement un critère qui est parfaitement compréhensible, mais qui n'apparaît pas dans les autres contributions. La contribution sud-africaine précise que « *le processus de sélection pour les études de marché tient compte explicitement de l'importance du secteur pour les pauvres* ». Le Président demande à la Délégation d'expliquer comment l'autorité de concurrence sud-africaine applique ce critère ; quelles études de marché – s'il y en a eu – ont été entreprises précisément sur la base de ce critère même si ce n'est pas le seul, et quels types de solutions ont été trouvés sur les marchés étudiés en raison de leur importance particulière pour les pauvres.

Le Délégué de l'Afrique du sud répond que le statut actuel de la Commission de la concurrence lui confère des fonctions et pouvoirs généraux qui lui permettent de procéder à des études de marché. Plusieurs études ont déjà été réalisées. Il s'agit cependant d'un pouvoir sans grand contenu dans la mesure où il ne permet pas à la Commission de faire usage de ses pouvoirs d'enquête formels pour mener ces études. En d'autres termes, la Commission n'est pas habilitée à assigner les parties prenantes à produire des documents à cette fin, ni à les contraindre à fournir des éléments de preuve ou des informations sous serment. La Commission a lancé, il y a quelque temps, une campagne visant à convaincre la branche exécutive et le corps législatif d'étendre ses pouvoirs d'enquête pour la réalisation d'études de marché. À l'origine, elle s'intéressait à ce que le Délégué du Royaume-Uni a appelé des équilibres économiques sous-optimaux ou inefficients. Ces phénomènes s'observent en particulier sur des marchés qui se caractérisent par des oligopoles stables, établis de longue date, et par des monopoles hérités du passé, généralement par suite de la privatisation d'entités publiques.

La campagne pour l'obtention de pouvoirs d'enquête pour les études de marché a coïncidé avec l'élaboration et la publication par la Commission de sa stratégie en matière de poursuites et de sensibilisation, centrée, pour une grande part, sur le soutien aux piliers de la politique gouvernementale. Ces piliers sont une stratégie de croissance tirée par les dépenses d'infrastructures et une stratégie de réduction de la pauvreté, qui comporte de nombreux éléments et composantes. Les études de marché sélectionnées par la Commission visent par conséquent à soutenir ces volets de l'action gouvernementale. Ce processus de sélection a conduit à réaliser une étude de marché sur la fourniture d'infrastructures car les soumissions concertées étaient perçues comme un problème important. Il y a eu, en outre, des études menées en vue d'améliorer le fonctionnement du marché, comme contribution à la stratégie gouvernementale de lutte contre la pauvreté. Ces études ont visé le secteur de l'alimentation, considéré dans un sens très large, et les domaines des soins de santé et des produits pharmaceutiques. La Commission a aussi procédé à une étude dans un secteur où la demande publique d'enquête sur le marché était particulièrement forte, à savoir le secteur bancaire. Ces études de marché ont été de très grande envergure. Dans le secteur bancaire, l'enquête a été très formelle, menée par un groupe spécial désigné par la Commission et dirigé par un ancien juge de la Haute Cour. Les autres enquêtes ont été plus modestes. Elles ont parfois abouti à saisir les tribunaux, comme cela a été le cas pour les affaires de soumissions concertées portées en justice par la Commission. Le rapport sur le secteur bancaire devrait être publié prochainement et il y aura toute une série de résultats. Certaines affaires seront soumises à la justice ; dans d'autres cas, des conseils pourraient être prodigués aux autres organismes de régulation ; dans d'autres encore, des conseils pourraient être donnés au gouvernement sur la façon de résoudre des problèmes particuliers identifiés dans l'étude de marché.

À ce jour, la campagne pour l'obtention de pleins pouvoirs d'enquête pour les études de marché n'a pas réussi. La législation va être modifiée et il y aura un nouvel article intitulé « Études de marché », mais le gouvernement a décidé de ne pas octroyer de pouvoirs d'enquête car le corps législatif craint que les

études de marché ne soient l'occasion d'« aller à la pêche aux renseignements ». Le Délégué déclare s'attendre à des modifications supplémentaires de la législation car les dispositions de remplacement transmises par le gouvernement au sujet d'une infraction appelée « monopole complexe » pourraient se révéler être constitutionnellement douteuses. Les résultats finals après débat parlementaire sont inconnus, et l'on espère donc que la demande de la Commission relative à l'obtention d'un pouvoir d'enquête pour les études de marché sera abordée.

Le Président Jenny dit avoir été intéressé d'apprendre que la sélection des études de marché se fait sur la base de considérations économiques et stratégiques générales de l'action gouvernementale, et de voir comment ces aspects s'articulent les uns par rapport aux autres.

Le Président se tourne ensuite vers la Norvège afin de continuer sur la question du choix des études de marché ou des marchés à étudier. La Norvège fait une distinction, dans sa contribution, entre les études ex ante et ex post. Le Président demande à la Délégation norvégienne de donner des précisions sur cette distinction, de décrire l'expérience de son pays en matière d'études ex post en particulier et d'indiquer si les études ex post sont réalisées de façon systématique ou choisies en fonction de critères précis.

Le Délégué de la Norvège répond que les études de marché ex post consistent à analyser les effets possibles sur un marché d'une modification de la réglementation ou de l'intervention de l'autorité de concurrence. L'objectif est d'établir ce qu'il s'est passé sur le marché par suite d'une action. Les études sont menées par un personnel hautement qualifié, entretenant de très bonnes relations avec les milieux universitaires, tant en Norvège que dans le reste du monde. Les méthodes d'analyse utilisées sont des méthodes de pointe qui tiennent compte des possibilités et des limites des techniques appliquées dans les études. Les études ex post ont pour but d'établir la situation « contrefactuelle » : que ce serait-il passé en l'absence d'intervention des pouvoirs publics ? L'on tente tout d'abord d'établir des exemples d'effets probables qui sont intuitivement compréhensibles et frappants, et d'examiner des périodes de temps assez longues pour identifier la gamme complète d'effets possibles.

Le Délégué donne deux exemples : Dans le premier cas, lorsqu'elle a cherché à évaluer les effets possibles de l'introduction de la concurrence dans le secteur norvégien du transport aérien, l'autorité de concurrence a fort bien réussi en adoptant une approche très simple consistant à représenter graphiquement l'indice des prix à la consommation pour l'aviation nationale. Cet indice, présenté sous forme de graphique, montre ce qu'il s'est passé en situation de monopole puis dans des conditions de concurrence. Lors de la mise en concurrence du secteur, les prix ont baissé et l'autorité de concurrence a été en mesure de prouver que les consommateurs y ont beaucoup gagné. Les méthodes très simples, faisant appel à des statistiques publiques que tout le monde peut consulter, sont tout à fait convaincantes. Avec ces éléments d'observation, il a suffi de quelques commentaires de l'autorité de concurrence pour que les gens comprennent ce qu'il se passait. Dans le second cas, après que la réglementation en vigueur sur le marché du livre eut été modifiée en 2005, l'autorité de concurrence a suivi les prix de vente des livres sur le marché. Cette seconde étude sera publiée prochainement. Elle est basée sur une sélection de données scannées en provenance des librairies et des clubs de lecture, et l'autorité de concurrence a recouru largement à des techniques économétriques avancées pour analyser ces données. Ce que le rapport montrera, c'est qu'après la levée partielle de la réglementation des prix des livres, les ventes ont augmenté, le nombre de nouvelles publications n'a pas diminué (contrairement à ce que certains avaient annoncé) et les prix ont baissé. Le résultat de cette étude de marché sera rendu public quelques semaines après la table ronde.

En ce qui concerne le pouvoir d'enquête, l'article 24 de la Loi norvégienne sur la concurrence oblige quiconque à fournir les informations nécessaires à l'autorité de concurrence pour assumer ses responsabilités conformément à la Loi, y compris la réalisation d'études de marché. L'autorité de concurrence veille scrupuleusement à ce que cette réglementation ne soit pas utilisée de manière abusive

car elle ne veut pas imposer une charge inutile à l'industrie. Lorsqu'elle a lancé l'enquête sur le marché du livre, elle s'est référée à cet article lorsqu'elle s'est adressée à l'organisation des libraires et aux propriétaires de librairies. Peu après le démarrage de l'enquête, les libraires se sont rendu compte que l'étude était dans leur intérêt, et ils ont donc participé volontairement à une grande partie du processus.

Après la réussite de l'étude de marché sur le secteur du transport aérien, très peu de Norvégiens ont mis en doute l'importance de la concurrence sur ce marché et le rôle de l'autorité de concurrence.

Dans des domaines plus sujets à controverse, comme les livres, l'étude de l'autorité de concurrence a discipliné le débat en établissant des faits simples sur la réalité du marché. Comme certains observateurs l'ont noté, les auteurs connus, les publicitaires et les propriétaires de librairies sont souvent très cultivés et ont leur franc-parler, et l'autorité de concurrence est convaincue qu'il y a grand avantage à être en mesure de créer des données factuelles pour le débat avec ces participants au marché. Quels critères l'autorité de concurrence a-t-elle utilisé pour choisir les études de marché ? Dans certains cas, elle a procédé à une étude sur ordre du Parlement ou du Ministère. C'est le cas, généralement, pour les secteurs récemment déréglementés, où elle a été chargée de suivre l'évolution sur le marché. On peut citer comme exemple l'étude demandée par le Parlement par suite de la déréglementation des ventes de produits pharmaceutiques en 2000. L'autorité de concurrence est aussi habilitée à choisir ses propres études de marché. Ce faisant, elle tente de voir quelle sera la situation 1, 2 ou 3 ans plus tard et se pose les questions suivantes : « Quelles seront les questions et les difficultés importantes à prendre en compte pour expliquer ce qu'il se passe sur le marché ? Pourquoi peut-elle ou ne peut-elle pas intervenir ? Pourquoi le marché en est-il arrivé à la situation existante ? » L'autorité de concurrence tente aussi de prévoir les thèmes à traiter de façon à être prête à donner des conseils ou à trouver elle-même des solutions pour corriger des situations anticoncurrentielles ou inefficaces.

Le Président Jenny donne la parole à la CE, qui souhaite formuler une observation.

Selon le Délégué de la CE, on semble, au cours de cette table ronde, distinguer trois catégories d'études de marché, dont deux sont liées à des affaires.

1. Premièrement : après qu'une autorité de concurrence a pris une décision dans une affaire, quel a été le résultat de la mesure correctrice appliquée sur le marché ? On pourrait parler d'évaluation (étude de marché) ex post en ce sens que l'on identifie les résultats et l'efficacité des mesures prises par l'autorité de concurrence.
2. Deuxièmement : l'étude de marché est liée à une enquête sur une affaire, visant par exemple à déterminer si un type de mesure correctrice a été suffisamment efficace dans le passé pour justifier que des mesures analogues soient prises dans l'avenir.
3. Troisièmement : l'étude de marché est liée à l'identification de problèmes de concurrence dans un secteur où l'autorité de concurrence ne connaît pas avec certitude les causes de ces problèmes. C'est le cas lorsque l'étude de marché n'est pas directement liée à une affaire, mais l'autorité de concurrence a une véritable ouverture d'esprit qui exige une approche holistique et une meilleure connaissance du marché afin de trouver, et d'enseigner aux autres décideurs, le bon moyen de faciliter la concurrence et l'application du droit en la matière, d'une part, et de la réglementation, d'autre part.

Le Président Jenny se déclare d'accord avec cette observation, avant de se tourner vers la Délégation des États-Unis. Il est indiqué dans la contribution américaine qu'un bon nombre d'études de marché ont été réalisées à la demande de la branche législative ou de l'exécutif – une pratique qui est similaire à celle décrite par la Délégation russe. Le Président demande quels types de mission sont confiés aux autorités de

concurrence en matière d'études de marché. En particulier, s'agit-il de missions assignées de façon arbitraire ou d'un processus suivant lequel les branches exécutive ou législative sont en mesure d'identifier des problèmes sur le marché que les autorités de concurrence jugent utile d'étudier ? Le Président demande aussi dans quels cas les autorités de concurrence des États-Unis ont décidé de procéder à une évaluation ou à une étude de marché comme suite à une procédure en justice.

Le premier Délégué des États-Unis s'exprime du point de vue de la *Federal Trade Commission* (FTC) car il y a des différences dans les pouvoirs réglementaires des deux autorités de concurrence du pays. En premier lieu, il importe de reconnaître que les études de marché menées pour les branches législative ou exécutive sont censées remplir une fonction de collecte d'informations. Même si les exposés précédents des délégués proposent de recourir à des études de marché pour distinguer entre un ou deux équilibres potentiels qui pourraient être efficaces localement, mais non au niveau mondial, la FTC estime qu'il peut y avoir un grand nombre d'équilibres de ce type ou un grand nombre d'explications (avec des mesures correctrices contrastées en conséquence) au cours des événements qui ont conduit à l'équilibre existant. Les études de marché peuvent être fort utiles en distinguant entre les équilibres et les éléments expliquant l'état du marché. On en trouve un bon exemple dans la directive que le Président a donnée à la FTC et au Département de la justice, leur demandant d'examiner les causes des hausses de prix de l'essence au cours du printemps et de l'été 2006. D'un point de vue économique, il existe une foule de théories, allant des simples variations de l'offre et de la demande sur des marchés concurrentiels à la collusion pure et simple, pouvant expliquer les hausses de prix. Compte tenu des compétences d'expert considérables que la FTC possède en matière d'analyse des fusions dans le domaine pétrolier, il n'est pas surprenant que la branche exécutive la charge d'examiner objectivement les données d'observation afin de déterminer les causes probables du phénomène. Dans d'autres cas, les études confiées à la FTC sont moins liées à des problèmes perçus de performance économique. L'activité d'assurance, par exemple, est exclue des évaluations de la FTC depuis de longues années maintenant, mais pourtant le Congrès a levé ces restrictions en chargeant la FTC de mener une étude de marché sur certaines pratiques des compagnies d'assurance automobile. Les restrictions applicables aux études de marché ont aussi été levées pour les études en cours concernant le recours à des scores de crédit par les compagnies d'assurance nationales pour fixer les prix. Les exemples des assurances et des prix de l'essence sont tous deux des préoccupations légitimes d'action publique du point de vue d'un décideur dans la branche exécutive ou législative. Le fait de connaître les causes des hausses de prix de l'essence et des prix des assurances, par exemple, peut aider les législateurs et l'exécutif à éviter des mesures correctrices qui n'ont guère de chances de d'améliorer le fonctionnement du marché. Le Délégué estime que l'élément commun dans ces exemples est réellement l'importance que présentent des études de cas réalisées par des autorités de concurrence compétentes et impartiales pour aider les décideurs en dernier ressort – le Président et le Congrès. Le Délégué fait aussi observer que le personnel qualifié des autorités de concurrence, 70 économistes titulaires d'un Ph.D. dans le cas de la FTC, permet à l'autorité de concurrence d'étendre les vues et analyses de la théorie économique d'un marché à l'autre même si elle ne travaille pas régulièrement sur les marchés ou intérêts en cause. En fin de compte, le véritable intérêt de conduire des études de marché minutieuses et fines consiste à faire en sorte que les décideurs aient à leur disposition les meilleures analyses économiques possibles pour élaborer leurs politiques sur des questions complexes telles que la cause du niveau élevé des prix de l'essence.

S'agissant des études rétrospectives sur les fusions, le Délégué décrit les études de marché ex post comme étant, en économie, un domaine assez épineux à analyser. Il cite parmi les difficultés le petit nombre d'affaires qui se trouvent devant la justice en comparaison de l'assez grand nombre d'affaires qui sont réglées, ainsi que ce nombre comparé aux fusions contraires aux règles de concurrence qui pourraient avoir lieu en l'absence de lois sur la concurrence et des pratiques existantes d'application de la loi. En fait, les affaires portées en justice sont les transactions qui sont considérées, tant par leurs partisans que par les autorités de concurrence, comme un peu marginales. Par conséquent, aussi bien les autorités de concurrence que tout analyste compétent doivent disposer d'excellentes données pour pouvoir démêler les effets concurrentiels, les effets non concurrentiels, l'évolution des conditions du marché et diverses autres

variables exogènes qui pourraient expliquer les fluctuations de prix observées. Pour cette raison principalement, les études de marché rétrospectives réalisées par la FTC le sont davantage parce que d'excellentes données sont disponibles que parce qu'une décision systématique a été prise d'analyser les résultats de certaines décisions passées. Malgré cette réserve, le Délégué estime que les études rétrospectives sur les fusions sont importantes en tant qu'outil d'auto-évaluation. Par conséquent, le fond du problème c'est qu'il n'y a pas à la FTC de processus formel, fondé sur des études rétrospectives, pour affiner ou modifier la manière dont l'autorité de concurrence mènera les enquêtes ultérieures même si ces dernières font partie de la base générale de connaissances de l'autorité de concurrence qui a une incidence sur ses activités futures.

Un second Délégué des États-Unis s'exprime en suite de la perspective du Département de la justice, déclarant que répondre aux besoins d'informations du corps législatif représente une responsabilité importante de la branche exécutive ou d'organismes indépendants de l'administration, mais que, souvent, les autorités de concurrence sont en mesure de fournir ces renseignements sans mener une étude de marché distincte car elles sont déjà accumulées une grande masse de compétences et de données pertinentes en la matière.

La Délégation américaine souligne ensuite une autre utilité des études de marché, à savoir guider les entreprises en matière d'application des lois sur la concurrence dans des situations nouvelles. La FTC a procédé, par exemple, à des évaluations informelles de deux secteurs – les soins de santé et le courtage immobilier – où apparaissent de nouvelles pratiques commerciales qui intéressent manifestement les nouveaux participants au marché. Les problèmes qui peuvent se poser sont les restrictions publiques imposées aux nouvelles formes d'entreprise, par exemple. Un objectif, et une utilisation, additionnels des informations recueillies au cours de ces ateliers, ainsi que par les observations que le secteur a été invité à formuler, a été d'aider à indiquer aux participants du secteur comment les questions de concurrence seraient abordées dans la nouvelle loi. Une autre utilisation visée était de guider ces entreprises sur les types de pratiques qui seraient considérées comme proconcurrentielles par les autorités de concurrence et, par conséquent, ne devraient pas être empêchées par crainte de poursuites au titre des dispositions antitrust.

En ce qui concerne les études de marché rétrospectives, la plupart des études menées aux États-Unis le sont dans le contexte d'enquêtes particulières. S'il y a une fusion dans un secteur, une des autorités de concurrence (ou les deux) peut décider d'enquêter sur cette branche d'activité. Les autorités de concurrence, par exemple, utiliseront leurs processus formels, ou le droit d'obtenir des informations auprès des parties prenantes et de tierces parties, s'il est nécessaire d'évaluer les conséquences d'une transaction envisagée du point de vue de la concurrence. Une fois qu'une décision en matière d'application du droit de la concurrence a été prise, par exemple s'il est décidé de ne pas porter une affaire devant la justice (parce que l'entrée sur le marché est aisée ou parce que l'affaire ne se prête pas à une coordination), il est dans l'intérêt naturel de l'autorité de concurrence de ne pas contester l'opération, mais plutôt de chercher à déterminer si les marchés ont évolué comme elle l'avait prévu ou supposé. Pour la plupart, toutefois, les autorités de concurrence des États-Unis ne consacrent pas de ressources importantes aux études de marché rétrospectives, à moins qu'il y ait un autre problème d'application de la loi dans le secteur. Les études de marché rétrospectives nécessitent des ressources considérables, prennent beaucoup de temps et il y a des problèmes inhérents à la recherche des causes des résultats observés sans possibilités d'accès à une grande masse d'informations. De plus, lorsqu'on évalue si une décision particulière en matière d'application de la loi est bonne ou mauvaise, ou si une autre série de décisions est bonne ou mauvaise, il est très important de poser les questions appropriées. Le fait de demander simplement si l'on a eu raison de contester une fusion du fait de l'évolution effective du secteur n'apporte pas forcément grand-chose pour la prise de décisions ex ante dans l'avenir. Cela peut simplement révéler que l'autorité de concurrence a fait une erreur dans ses prévisions, au lieu de lui donner un moyen d'améliorer ses prévisions dans l'avenir. Telle est, en fin de compte, la façon la plus efficace, aux yeux des autorités de concurrence, de faire appliquer le droit de la concurrence.

Le Président Jenny invite ensuite l'Irlande à prendre la parole. Il fait observer que, depuis 1997, l'autorité de concurrence irlandaise mène des études de marché et que ces dernières semblent servir à conduire des campagnes de sensibilisation à la concurrence et à promouvoir des réformes de la réglementation dans divers secteurs. Le Président demande à la Délégation de décrire les changements intéressants apportés aux critères utilisés pour choisir les études de marché, notamment d'identifier les anciens critères, la raison pour laquelle ils ont été modifiés, et d'exposer et d'évaluer les nouveaux critères.

Le Délégué de l'Irlande indique qu'au départ les critères utilisés étaient les facteurs habituels, tels que la part du secteur en question dans le PIB, son importance pour l'économie, l'étendue des réglementations etc. Après plusieurs années d'utilisation de ce mécanisme de ciblage, l'autorité de concurrence a jugé que les anciens critères posaient des problèmes. Ils étaient en effet assez vagues et indéfinis, d'où l'impossibilité de réaliser certaines études comme prévu initialement. L'autorité de concurrence a donc dû ajuster le champ couvert par les études ingérables afin de les mener à leur terme. Du fait de sa taille relativement modeste, l'autorité irlandaise a estimé que les études de marché traditionnelles mobilisaient trop longtemps le personnel. Elle a pris l'engagement de mener une nouvelle étude traditionnelle l'an prochain – la dernière, qui portera sur la profession médicale. Après cela, l'autorité de concurrence appliquera des critères additionnels pour choisir les études. Le plus évident est l'impact sur les consommateurs, mais les enquêtes seront beaucoup plus ciblées sur les marchés réglementés et sur les restrictions publiques à la concurrence. Seront aussi utilisés des critères relatifs à la possibilité, dans la pratique, d'achever les futures études dans les délais prévus. Par ailleurs, un effort sera fait pour adopter des critères, mentionnés dans la contribution canadienne, concernant la probabilité d'acceptation et de mise en œuvre des recommandations formulées par les agents chargés des études de marché. D'une manière générale, l'autorité de concurrence a décidé de mener un moins grand nombre d'études de marché de grande ampleur et de se concentrer davantage sur des projets plus courts et sur des analyses plus brèves et plus rapides des projets de loi (qui peuvent avoir un impact sur la concurrence) et sur les marchés où la législation restreint peut-être déjà la concurrence. Le véritable objectif de l'affinage de ces critères est d'aller plus vite et d'être plus vif, de mener des études plus nombreuses et plus courtes et de réagir plus rapidement aux évolutions qui se produisent, tant sur les marchés qu'en matière de législation et de réglementation. Globalement, non seulement il existe un énorme stock de lois anticoncurrentielles en Irlande, mais de nouvelles lois et réglementations sont adoptées qui pourraient limiter la concurrence. Au fil des années, l'autorité de concurrence est devenue experte pour traiter avec les autorités gouvernementales et les organismes publics – « nous sommes capables de repérer de très loin une réglementation anticoncurrentielle » – et elle a déjà acquis certaines compétences dans l'« art obscur » de l'économie politique. L'autorité de concurrence peut arriver au meilleur avec ses ressources limitées et ses compétences d'expert durement acquises en centrant son effort sur les nombreuses restrictions publiques à la concurrence qui existent ou qui sont envisagées dans le contexte de la réglementation publique.

Le Président Jenny clôt la première partie de la table ronde en faisant observer que les autorités de concurrence adoptent des approches très diverses pour la réalisation d'études de marché mais qu'elles cherchent de plus en plus à faire en sorte que ces études procurent des avantages tangibles, notamment des mesures correctrices efficaces et adaptées à la réalité qui permettent aux marchés de mieux fonctionner même si l'étude ne révèle pas de problème d'application du droit de la concurrence. Globalement, les approches examinées au cours de la table ronde ont été fort intéressantes, complétant souvent le contrôle de l'application du droit de la concurrence.

Ayant clos la première partie de la table ronde, le Président présente la deuxième partie du débat, centrée sur la question de savoir « quelles sont les méthodes les plus efficaces pour réaliser des études de marché ? ». Le Président note que, au cours de la première partie de la réunion, des différences entre les pays ont été mises en lumière quant à la question de savoir si l'autorité de concurrence est habilitée à utiliser ses pouvoirs d'enquête pour conduire des études de marché. Il y a d'autres différences, notamment dans la conception des études de marché, la consultation des parties prenantes/participants au marché au

cours de l'étude et la question de savoir si les contributions des parties prenantes sont intégrées ou non dans le développement des études de marché. Pour présenter cette question des approches les plus efficaces pour la réalisation d'études de marché, le Président fait appel à la Délégation du Royaume-Uni.

Le Délégué du Royaume-Uni rappelle tout d'abord que les autorités de concurrence ont recouru à un bon nombre de procédures différentes pour réaliser les 42 exercices identifiés comme études de marché ou équivalents. Vers la fin de l'année dernière, l'OFT a entrepris un examen de ces études de marché et organisé la conférence de Londres dont il a été question au début de la table ronde. Cette conférence avait pour but de rassembler les retours d'informations reçus et d'élaborer et mettre en œuvre une procédure plus systématique pour la réalisation d'études de marché, comme il est indiqué dans la contribution soumise par le Royaume-Uni pour la table ronde.

La principale conclusion de l'examen a été que les autorités de concurrence doivent renforcer la phase de préparation avant le lancement de l'étude afin de bien définir le champ d'application du projet, en estimer l'impact, bien repérer les parties prenantes, évaluer les risques, assurer une bonne gouvernance et prévoir les ressources nécessaires.

- Lancement d'une étude : il est possible de faire appel aux parties prenantes avant le lancement (de façon informelle) et au moment du lancement; lors du lancement, il est essentiel de fixer le calendrier de l'étude et de programmer les travaux en fonction des autres études.
- Collecte et analyse des données : cette étape fait suite à la conception initiale et l'apport d'informations par les parties prenantes.
- Publication : il est essentiel, pour la réussite du projet, de bien décrire et présenter l'étude de marché au cours de la phase de publication. Les études de marchés, du fait de leur souplesse, prêtent souvent à erreur d'interprétation ou à confusion sur ce que fait l'autorité de concurrence. Les organismes chargés de la concurrence s'efforcent donc, de plus en plus, de bien expliquer leur travail.
- Suivi de l'étude jusqu'à la fin – habituellement, dans le cas du Royaume-Uni, cela signifie la réponse du gouvernement. Cette tâche est parfois confiée à la Commission de la concurrence.

Dans leurs retours d'informations au sujet des études de marché, les parties prenantes déclarent souvent craindre que ces études ne soient trop générales. Elles se plaignent aussi du fait que ces travaux durent trop longtemps, bien que moins de 10 % des 42 études menées au Royaume-Uni aient demandé plus de trois ans pour être achevées. Le Délégué conclut que la queue de la distribution mérite certainement attention mais qu'elle n'est pas représentative. Par contraste, de nombreuses études de marché sont réalisées dans des délais très courts. Le troisième motif de plainte tient au fait que les demandes de renseignements peuvent imposer une lourde charge. En même temps, lorsqu'une affaire est soumise à la Commission de la Concurrence, les entreprises sont très satisfaites de savoir que cette dernière va examiner le cas d'un œil neuf, sur la base d'informations qu'elle aura demandées séparément – et c'est là une caractéristique importante du système britannique.

Le Délégué du Royaume-Uni prend la parole pour décrire les enquêtes de marché menées par la Commission de la Concurrence. Bien que ces travaux fassent partie du régime de contrôle de l'application du droit de la concurrence, ils sont plus formels, ont une durée limitée et ont des conséquences durables. Les études de marché fonctionnent bien au Royaume-Uni car elles sont réalisées dans un cadre juridique clair, suivant des procédures spécifiques qui conduisent à une décision et à des mesures d'application relevant d'une catégorie distincte. Les études de marché de la Commission de la concurrence présentent quatre caractéristiques essentielles :

- l'indépendance
- les procédures
- les éléments de preuve
- l'efficacité

Du point de vue de l'indépendance, toutes les études de marché de la Commission de la concurrence portent sur des affaires soumises par d'autres entités, toutes traitées suivant l'ordre d'arrivée. La Commission de la concurrence utilise une méthode économétrique et des mesures correctrices sont mises au point sans aucune idée préconçue. Les études sont réalisées par des équipes désignées à cet effet. L'équipe chargée de l'enquête est constituée d'un groupe de commissaires dirigé par un président. Elle est indépendante de la Commission mais ses pouvoirs sont dérivés de ceux de la Commission. La décision de l'équipe est celle de la Commission et ne peut pas faire l'objet d'un examen plénier.

S'agissant de la procédure, elle est hautement transparente. Elle donne accès aux décideurs par un système d'audiences – une caractéristique essentielle du processus. Il s'agit d'un processus très intense qui est utilisé avec parcimonie. Faisant part de son impression personnelle, le Délégué estime que les audiences sont loyales et que les entreprises ne sont pas toujours d'accord avec les conclusions de l'enquête, mais qu'elles ont le sentiment d'avoir eu la possibilité d'exposer leur cas. La procédure se caractérise aussi par un strict respect des calendriers publiés par l'administration. Les études de marché de la Commission de la concurrence durent au maximum deux ans, compte tenu de la phase de mise en place de mesures correctrices.

En ce qui concerne les éléments de preuve, les enquêteurs de la Commission de la concurrence font usage de pouvoirs formels très étendus, utilisés plus fréquemment ces dernières années, en raison peut-être de l'atmosphère plus litigieuse des affaires d'entente. Le Délégué cite comme exemple l'enquête visant un supermarché, où une seule demande officielle a donné lieu à plus de 100 000 messages électroniques. Ces dernières années, la Commission de la concurrence a aussi privilégié les preuves primaires, comme les données, la correspondance et les registres, par rapport aux preuves secondaires établies par les entreprises pour l'enquête. Les études de marché de la Commission reposent sur une participation forte et permanente des acteurs du marché. La contrepartie de l'intensité de ces études est que les participants au marché sont étroitement impliqués dans l'enquête.

S'agissant de l'efficacité, le Délégué fait observer qu'elle dépend pour une grande part des affaires dont la Commission de la concurrence est saisie et qu'il faut bien comprendre que la Commission ne peut pas changer les conditions technologiques et autres conditions fondamentales qui façonnent la demande, l'offre et la performance du marché. Il se dit entièrement d'accord avec les quatre conditions identifiées par le BIAC comme caractéristiques essentielles pour assurer l'efficacité d'un programme d'études de marché : l'enquête doit être réalisée dans les délais prévus, elle doit viser des objectifs clairs et précis et l'entreprise doit comprendre à la fois les intentions qui motivent l'enquête et les raisons des mesures correctrices appliquées.

Le Président Jenny remercie le Délégué du Royaume-Uni (Commission de la concurrence) d'avoir décrit le processus très formalisé de la Commission de la concurrence du Royaume-Uni et indique que les processus exposés dans les autres documents soumis pour la table ronde sont bien moins formels. Il prend l'exemple de la contribution de la Lituanie. Les études de marché de ce pays sont presque uniquement de brèves enquêtes qui ne demandent pas beaucoup de ressources et qui sont souvent conçues et proposées de façon informelle. Par contre, un des autres pays à avoir un processus assez formel est la Pologne. La contribution polonaise indique qu'au début de chaque année le Bureau de la concurrence établit un

document intitulé « Plan des études sur la concurrence », qui comprend deux parties. La première partie contient des lignes directrices concernant la méthodologie à suivre et la seconde décrit toutes les études sur la concurrence réalisées pour une année donnée par les unités de l'autorité de concurrence chargées de cette tâche. Les Bureaux de la concurrence ont établi un modèle exposant les stades et les éléments d'une étude de marché.

Avant de donner la parole à la Pologne, le Président Jenny donne la parole à l'Afrique du sud qui souhaite poser une question sur la Commission de la concurrence du Royaume-Uni.

Le Délégué de l'Afrique du sud demande quelle est la gamme de mesures correctrices dont dispose la Commission de la concurrence car il apparaît que les études de marché qu'elle réalise peuvent donner lieu à des mesures correctrices même en l'absence de conduite illégale des participants au marché. Le Délégué qualifie ces mesures potentielles de sanctions « sans faute », et déclare que cela serait considéré comme contraire à la constitution en Afrique du sud. Il voudrait savoir comment la Commission de la concurrence a obtenu ces pouvoirs et quel est l'éventail de mesures correctrices dont elle dispose.

Le Délégué du Royaume-Uni (Commission de la concurrence) répond que l'éventail de mesures correctrices est très étendu, mais qu'il n'y a pas d'amendes. Il cite comme exemples les règles de conduite, la modification d'accords entre entreprises et la cession d'actifs. Tout l'éventail des mesures autorisées est décrit en plus de 10 pages dans l'Annexe 8 à la Loi sur les entreprises. La question soulevée par le Délégué de l'Afrique du sud au sujet du principe « pas de peine sans loi » est une question sérieuse à laquelle la Commission de la concurrence prête une grande attention. L'idée fondamentale est que la Commission ne s'attaque pas à une conduite illégale mais examine les marchés et le comportement de leurs acteurs, leur structure et le comportement des consommateurs. La Commission de la concurrence recourt à des mesures correctrices, sous le contrôle de la loi, et sous le couvert d'un tribunal approprié, afin d'améliorer le fonctionnement du marché au profit de la société. La mesure appliquée est parfois la cession d'actifs, mais cela n'est pas systématique. Par ailleurs, les considérations relatives à la concurrence ne sont pas toujours la seule raison qui motive une cession d'actifs. Cette mesure est d'actualité pour le moment dans l'enquête sur les aéroports. La Commission de la concurrence se penche actuellement sur l'appartenance des aéroports du Royaume-Uni aux autorités aéroportuaires britanniques. Elle pose la question de savoir s'il est bon que les aéroports appartiennent à la société qui les réglemente. La cession d'actifs ne va pas de soi dans ce cas, mais si elle est décidée, le Délégué indique qu'à sa connaissance, il n'existe nulle part ailleurs de procédure relevant du droit de la concurrence qui permette à une autorité de concurrence d'ordonner une cession d'actifs, en dehors de celle de la Commission de la concurrence – avec son cadre juridique très strict, le respect des droits de la défense et les droits de regard appropriés.

Le Président Jenny donne la parole à la Délégation polonaise afin qu'elle explique l'aspect formel des études de marché dans son pays et qu'elle précise comment l'autorité de concurrence a élaboré ce modèle. Le Président demande s'il existe une charte qui est fournie aux parties prenantes et qui explique comment l'autorité va procéder.

Le Délégué de la Pologne fait savoir que c'est en 2004 que l'autorité de concurrence polonaise a établi un plan formel pour les études de marché et ce, à la demande du Président, qui voulait savoir quel type d'études elle réalisait. L'autorité de concurrence compte neuf bureaux régionaux, et chacun d'eux réalise ses propres études de marché. Les études menées par les bureaux régionaux sont plus ou moins vastes, mais elles portent habituellement sur les marchés locaux. Au siège de l'autorité, il y a trois services qui peuvent procéder à des études de marché au sein du service chargé de l'application du droit de la concurrence, en plus du service d'analyse du marché, qui est spécialisé dans les études de marché. Dans le passé, il y a eu des cas de chevauchement d'études de marché, d'où l'idée d'établir un plan annuel afin de coordonner les différentes études. Lorsque l'autorité de concurrence a commencé d'établir une liste annuelle des études de marché suivant les propositions émanant des différentes unités, elle a estimé que

cela était une bonne occasion pour formuler des lignes directrices concernant l'organisation et la méthodologie à suivre pour les études de marché. Depuis 2004, tous les ans en janvier, il est dressé une liste d'études de marché indiquant l'unité responsable pour chacune, et donnant des informations sur le titre, l'organisation, la méthodologie utilisée. Il y a quelques modifications chaque année, qui concernent habituellement l'organisation de l'étude mais, pour l'essentiel, cette partie du plan annuel reste inchangée. Le plan 2008 pour les études de l'autorité de concurrence, par exemple, comporte 6 sections :

- la section 1 donne la liste des types d'études de marché réalisés par l'autorité de concurrence et indique les unités qui s'occupent de chaque catégorie ;
- la section 2 contient les lignes directrices pour les études, énonçant principalement les critères de choix des marchés à étudier ;
- la section 3 décrit la coordination entre les différentes unités en précisant quelle étude est réalisée par quelle unité ou quel bureau régional ;
- la section 4 est plus complexe car elle expose le modèle de procédures d'étude. Il y a deux procédures : une procédure complète et une procédure simplifiée. La procédure complète consiste à diviser l'étude en phases, avec des objectifs et des activités pour chaque phase. La section 4 décrit les activités à mener, l'utilisation des bases de données, les applications informatiques et les autres ressources disponibles. Il y a des conclusions dans les descriptifs concernant le sujet et les données à recueillir ou à examiner au cours des études de marché. La procédure simplifiée est utilisée pour les études rapides et simples. Sont simplement mentionnées les choses à ne pas oublier au cours d'une étude de marché.
- Les sections 5 et 6 ont trait à la présentation et à la diffusion des résultats des études de marché et du plan lui-même.

Pour établir cette méthodologie, l'autorité de concurrence a utilisé les pratiques en matière de données reprises de la précédente étude de marché, à partir des meilleurs rapports faits dans le passé. Le plan comporte aussi des éléments fondés sur l'expérience du personnel. Le premier objectif était de fournir des informations de référence pour les agents procédant pour la première fois à une étude de marché, ainsi que pour les nouveaux salariés. Le second objectif était d'imposer une discipline aux unités conduisant les études de marché de façon que ces travaux soient plus faciles à utiliser et de meilleure qualité. À ce jour, cette démarche a été utile car l'autorité de concurrence et les autres responsables connaissent mieux le déroulement du processus. Par ailleurs, l'accessibilité de l'ensemble des renseignements recueillis, notamment les données, au cours des études de marché, surtout lorsqu'il s'agit de petites études, s'est grandement améliorée.

Le Président Jenny s'adresse ensuite à la Hongrie. Il demande à la Délégation hongroise de décrire le processus suivi par l'autorité de concurrence pour interagir avec les parties prenantes, en particulier les audiences préalables à la réalisation des études de marché.

Le Délégué de la Hongrie décrit tout d'abord le contexte des études de marché dans son pays. Les études suivent des procédures formelles et l'autorité de concurrence dispose de très puissants pouvoirs de recueil d'informations au sujet des participants au marché, mais ces parties ont certains droits. En raison notamment de ce processus formel, il existe certaines garanties réglementaires pour les parties et le Délégué indique que certaines parties ont tendance à confondre les études de marché avec des procédures d'application de la loi. Afin d'expliquer la différence entre les unes et les autres, l'autorité de concurrence tient des consultations avec les participants au marché, non seulement à la fin de l'enquête sectorielle mais aussi au début. Il s'agit en partie d'un exercice technique mais qui sert aussi à vérifier le type de

renseignements dont l'autorité a besoin et s'il est possible de les obtenir. Cela aide l'autorité à affiner ses demandes de données. La distinction entre une enquête sectorielle et une enquête concernant une infraction à la législation est accentuée par le fait que l'autorité de concurrence intègre les contributions des parties à la fin de chaque enquête sectorielle (étude de marché). L'autorité est tenue par la loi de publier un projet de rapport établi à l'issue d'une enquête sectorielle. Pour cela, elle affiche habituellement le projet de rapport sur son site web et le communique aux entreprises auxquelles des renseignements sont demandés. L'autorité doit obligatoirement donner un délai de 30 jours à ces entreprises pour leur permettre de formuler des observations et elle peut organiser des audiences au sujet de ces observations. Dans la pratique, l'autorité va au-delà de ces obligations en diffusant le projet de rapport auprès des institutions susceptibles d'être intéressées, autres que les entreprises en cause, à savoir les organismes publics qui opèrent dans le même domaine. À plusieurs reprises, elle a aussi distribué le projet de rapport à des personnes provenant des milieux universitaires ou d'entreprises de conseil ou à des personnes intervenant dans les secteurs d'activité connexes afin de solliciter leurs observations. Ce ne sont pas là des obligations légales, mais l'autorité trouve cette approche utile. Habituellement, deux audiences sont organisées : une avec le premier groupe et une avec le second (ce qui n'est pas obligatoire). Au cours de la deuxième série d'audiences, l'autorité de concurrence rencontre des institutions publiques, des personnes venant des milieux universitaires et des entreprises liées indirectement au secteur en cause afin de recueillir leur avis et de discuter du projet de rapport. Ces audiences permettent de s'assurer que l'analyse est saine. Il y a une consultation (audience) ultérieure séparée avec les entreprises qui interviennent dans l'enquête sectorielle. Pour la seconde série de réunions, l'autorité est prête à défendre vigoureusement le projet de rapport car les audiences avec le groupe gouvernemental et universitaire ont déjà eu lieu et le projet de rapport a été modifié en conséquence. Une fois toutes les audiences terminées, l'autorité de concurrence établit le rapport final et le rend public. Elle publie un ensemble de documents qui comprend le rapport rédigé par ses soins et des synthèses des audiences et des observations soumises par les entreprises ayant participé aux travaux. Par ailleurs, si une entreprise souhaite formuler des observations sur le fond, elle peut demander à ce que ces dernières soient publiées de façon indépendante. L'autorité de concurrence trouve fort utile cette implication des participants au marché et des parties intéressées. Elle arrive aussi à très bien gérer ce processus du point de vue des délais et ne trouve pas que les rapports finals résultant des études de marché soient sensiblement retardés du fait de la prise en compte des contributions des parties. De l'avis du Délégué, l'intégration des apports des participants au marché et d'autres parties améliore la qualité du rapport final. L'exercice est très utile aussi du point de vue de la perception de la transparence du processus, qui peut être fort différente des perceptions concernant les différentes procédures d'application de la loi.

Le Président Jenny remercie le Délégué hongrois et fait observer qu'il ressort de bon nombre de contributions que les études de marché sont améliorées par les apports d'informations des entreprises pour toutes les raisons exposées par le Délégué hongrois, notamment la transparence, mais aussi que le fait d'impliquer les participants au marché dans ces études peut en rehausser la qualité. Le Président note que certains pays expriment des réserves quant à la participation des entreprises, encore que ces réserves ne s'appliquent pas à la participation d'universitaires. Il cite, par exemple, la contribution de l'Espagne, qui fait valoir qu'il peut être fort utile d'avoir les différentes vues des participants au marché pour comprendre parfaitement le marché mais que cela peut augmenter le coût de l'étude. Cela revient à dire que, comme la participation des acteurs du marché accroît le coût de l'étude, ce n'est pas vraiment une bonne idée. Le Président invite l'Espagne à expliquer sa position et sa déclaration relative à l'augmentation du coût des études.

Le Délégué espagnol explique que, jusqu'à présent, l'autorité de concurrence n'a pas fait appel aux participants au marché, excepté au cours de la phase exploratoire de ses études de marché. Cela signifie qu'elle n'a pas diffusé de projets des rapports pour observations ou propositions. L'autorité de concurrence est d'accord sur le fait que, pour une étude de marché fouillée, il vaut mieux obtenir davantage d'informations mais elle estime que bon nombre des activités visant à recueillir ces renseignements auprès

des participants au marché demandent beaucoup de temps et de ressources humaines et autres, alors que ces ressources sont très limitées. Par conséquent, pour chaque étude de marché, l'autorité doit trouver un équilibre entre l'avantage qu'il y a à disposer d'une plus grande masse de renseignements et le coût de la collecte d'informations. De ce fait, au cours de la phase exploratoire, l'autorité peut conclure, par exemple, qu'il est préférable de réduire la liste des participants au marché qui seront interrogés ou auxquels un questionnaire sera envoyé. Cela n'empêche pas d'élargir la collecte de données au cours de la seconde phase, une fois que les principaux problèmes de concurrence dans le secteur auront été bien identifiés. Lors de la première phase, cependant, l'autorité de concurrence peut choisir de resserrer le champ de la collecte de renseignements en raison de contraintes de ressources.

Le Président Jenny remarque que l'exposé de l'Espagne a pour thème central la portée de l'étude et non la participation des acteurs du marché aux résultats et à l'analyse. Il note aussi que les contributions couvrent plusieurs autres aspects de la façon dont les études sont menées. L'Irlande, par exemple, souligne l'importance du calendrier des consultations avec les parties dans les études de marché. Certaines contributions ont trait à la pratique qui consiste à fixer des étapes et des calendriers pour les études de marché, et certaines à la question de savoir s'il est approprié ou utile de sous-traiter des études de marché auprès d'entreprises de conseil. D'autres contributions abordent la question de l'accès aux données destinées aux études de marché qui sont recueillies par une autre autorité de concurrence, ainsi que celle de la coordination entre autorités de concurrence en cas de réalisation simultanée de multiples études dans un secteur.

Dans la contribution française, il est déclaré que la coopération avec les autres institutions et acteurs économiques est essentielle et nécessaire aussi pour renforcer la coopération avec les organismes sectoriels de régulation. Le Président demande si le Conseil de la concurrence a déjà pris une initiative en se fondant sur les contributions de ces organismes. Il demande aussi à la Délégation française de décrire l'étude de marché réalisée par le Conseil sur la collecte des ordures ménagères et pourquoi ce secteur a été choisi. Il demande aussi à la DGCCRF de décrire ses propres enquêtes.

Le Délégué de la France (Conseil de la concurrence) répond que, faute de ressources suffisantes, l'expérience du Conseil de la concurrence en matière d'études de marché reste jusqu'à présent très limitée. Afin d'économiser de l'argent, le Conseil s'appuie généralement sur les enquêtes des organismes sectoriels de régulation et s'attache à trouver des synergies qui pourraient lui être utiles. Cette approche est utilisée dans les secteurs des télécommunications et de l'électricité mais elle a des limites. Ces études sont parfois trop techniques et les questions appropriées, du point de vue de l'autorité de concurrence, ne sont pas posées ou il n'y est pas répondu. Autrement dit, il est important que l'autorité de concurrence intervienne pour déterminer les spécifications de l'étude.

Pourquoi le Conseil de la concurrence a-t-il choisi d'enquêter sur les chaînes de traitement des ordures ménagères ? Il a été saisi de plusieurs affaires (matières plastiques, pétrole et pneus) posant des problèmes de concurrence dans le domaine du traitement des déchets. Il s'agit d'un secteur hautement réglementé et il importe donc d'évaluer l'impact de ces réglementations sur la concurrence. Ces activités sont subventionnées aux niveaux national et local, et il est aussi intéressant de mesurer l'effet de ces aides sur la concurrence. Certains de ces problèmes de traitement des ordures sont nouveaux (déchets électriques), et il s'agit de savoir s'il faut prendre des précautions dès maintenant. Certains groupements industriels présentent un risque de collusion. Comment l'autorité de concurrence doit-elle les analyser ? Il s'agit d'un secteur à forte intégration verticale du fait des services d'utilité publique, qui sont de puissants acteurs sur différents marchés (eau, transports etc.), très souvent mentionnés dans les affaires de concurrence.

Il est intéressant d'avoir une perspective horizontale sur ces secteurs qui, la plupart du temps, sont examinés séparément par les enquêteurs. C'est aussi un moyen d'obtenir des évaluations comparatives et d'appréhender quelles sont les meilleures solutions du point de vue de la concurrence.

Le Délégué de la France représentant la DGCCRF indique tout d'abord que, lors du récent séminaire de l'OFT (qui s'est tenu la semaine précédente, en juin), certaines organisations de consommateurs ont déploré que les études de marché soient trop théoriques et donc éloignées des préoccupations réelles des consommateurs. Le Délégué fait état de deux études de marché menées par la DGCCRF, portant sur des problèmes de fonctionnement du marché.

La première concerne les agents immobiliers. L'étude a été réalisée comme suite à plusieurs plaintes de consommateurs dans un contexte de forte hausse des prix dans ce secteur. La seconde a été menée dans le secteur de l'électricité, dans le contexte de la libéralisation du secteur, afin de s'assurer que la concurrence y jouait son rôle.

Dans les deux cas, il s'agissait de déterminer l'impact de la réglementation sur la demande, au moyen d'une enquête menée auprès de nombreuses entreprises. Dans le premier cas, il y a eu des poursuites du fait que beaucoup d'entreprises ne respectaient pas leurs obligations en matière d'information des consommateurs. Dans le second, il s'agissait davantage d'un effort pédagogique, les clients passant, la plupart du temps, de leurs fournisseurs traditionnels à de nouveaux opérateurs qui proposent une approche plus commerciale.

Le Président Jenny s'adresse ensuite aux Pays-Bas en tant qu'autre pays dont la contribution porte sur l'harmonisation entre les organismes sectoriels de régulation et l'autorité de concurrence. Il fait observer qu'aux Pays-Bas il y a à la fois des études de marché réalisées par les organismes sectoriels de régulation et d'autres qui sont menées par l'autorité de concurrence en général. Il demande à la Délégation néerlandaise de préciser le type de coordination qui existe entre ces diverses études.

Le Délégué des Pays-Bas explique que, depuis 2003, l'autorité de concurrence, la NMA, examine chaque année les secteurs financiers, de l'énergie et des transports. Auparavant, elle réalisait aussi de nombreuses études de marché plutôt de façon ad hoc, souvent dans le cadre d'enquêtes sur des affaires particulières de concurrence ou de campagnes de sensibilisation aux avantages de la concurrence.

Dans le domaine des études de marché menées dans les secteurs de l'énergie et des transports, le Délégué indique que la NMA comprend le service de la concurrence et les services de la réglementation sectorielle pour l'énergie et les transports. Ces deux services font partie de l'autorité de concurrence et travaillent sous la responsabilité du Conseil de la NMA. Les deux services de régulation sont tenus par la loi de suivre et de réglementer leurs marchés respectifs, qui englobent le marché de gros de l'électricité, le marché de gros du gaz, les marchés de détail de l'énergie et le secteur des chemins de fer. Pour ce faire, ils procèdent à des études de marché périodiques. Les études de marché dans les secteurs de l'énergie et des transports portent principalement sur la régulation du marché, par exemples les goulets d'étranglement dans l'infrastructure – mais aussi sur les questions de concurrence. Le service de la concurrence contribue aux études sectorielles mais ces dernières et les travaux du service de la concurrence bénéficient de l'expérience accumulée par les organismes sectoriels de régulation. Dans le secteur financier, le Ministère des finances a chargé la MNA de réaliser en permanence une série d'examen afin de mieux comprendre les problèmes de concurrence dans ce domaine. En réponse à cette demande, il est publié des rapports annuels de suivi du secteur financier, et ces études sectorielles servent de support aux travaux sur la concurrence et aux évaluations des fusions auxquels procède l'autorité de concurrence. De plus, ces rapports complètent les efforts de réglementation des deux organismes sectoriels de régulation dans le domaine financier. Le suivi du secteur financier vise à identifier et à faire connaître au public les risques qui pèsent sur la concurrence dans ce secteur. Ce processus facilite le dialogue entre la NMA et les diverses parties qui opèrent dans les services financiers. Ces parties, comme les banques et les assurances, par exemple, sont soumises à l'application de la concurrence. Les travaux de suivi du secteur financiers contribuent ainsi aux efforts de la NMA visant à établir des lignes directrices et à promouvoir la concurrence. Ils contribuent aussi à coordonner l'action et les résultats avec la Banque centrale des Pays-

Bas, qui est responsable de la stabilité sur le marché et dans le système financier. Ces travaux aident également à coordonner l'action avec l'autorité des marchés financiers, qui supervise les questions de transparence et d'intégrité du marché. Le dialogue entre les trois autorités peut concerner la structure aussi bien que les pratiques du marché. Une soigneuse coordination stimule la prise de conscience mutuelle et la coordination et contribue à un bon fonctionnement du secteur financier. C'est là un souhait explicite du Ministère des finances et il fait prendre davantage conscience des problèmes de concurrence aux autres organismes sectoriels de régulation.

En réponse à la question du Président relative à la coordination des travaux sur les divers marchés, pour l'énergie et les transports, les travaux sont réalisés principalement par les membres du personnel du service chargé de la réglementation du secteur de l'énergie et du service chargé de la réglementation du secteur des transports, pour lesquels il peut être fait appel à des experts extérieurs, ce qui est souvent le cas. Le personnel mène les études en étroite coopération avec leurs collègues du service de la concurrence et, dans certains cas, les résultats des études dans le domaine de l'énergie servent de référence dans les affaires de concurrence ainsi que dans les affaires de fusion. Quant aux études de marché menées dans le secteur financier, la coordination est assurée par une équipe spéciale créée au sein du service de la concurrence.

Le Président Jenny fait observer qu'il est très intéressant d'entendre ce que le Délégué français a à dire au sujet de la situation au Pays-Bas. Il a tout à fait raison de dire que les études de marché entreprises par des organismes de régulation ayant des objectifs autres que la concurrence ne sont pas toujours utilisables pour l'autorité de concurrence, mais les Pays-Bas ont un système dans lequel, par le dialogue entre les régulateurs et le service de la concurrence, on finit par avoir des études de marché qui peuvent servir à des fins diverses. Dans certains secteurs, le coût de la multiplicité des études sectorielles réalisées par différents organes est perçu comme étant très élevé par les participants au marché. Tout ce qui peut faciliter la coordination et la coopération entre ces études est donc utile.

Le Président revient ensuite à la question de la collecte de données, qui apparaît souvent dans les contributions. Il note qu'un certain nombre de pays ont effectivement des pouvoirs d'enquête qu'ils peuvent utiliser pour des études de marché. En même temps, d'autres pays indiquent dans leur contribution qu'ils souhaitent vivement obtenir ces pouvoirs pour leurs études de marché. C'est le cas de l'Afrique du sud et du Canada. Le Président demande au Canada d'expliquer pourquoi l'autorité de concurrence voudrait disposer de pouvoirs d'enquête pour les études de marché et pourquoi elle n'en a pas jusqu'à présent.

Le Délégué du Canada décrit le contexte des études de marché dans son pays. L'autorité de concurrence mène deux types d'études de marché, en plus des études ex post. Elle est en train d'examiner toutes les mesures correctrices appliquées dans des cas de fusion depuis la révision de la Loi sur la concurrence en 1986. Les études du premier type sont des « études de l'industrie » qui évaluent l'état général de la concurrence sur un marché et l'autorité entreprend généralement ces études en cas de situation inhabituelle sur le marché. On peut citer comme exemple l'enquête sur les prix de l'essence après le passage de l'ouragan Katrina. Un autre exemple a été la crise qui a sévi au Canada, lorsque les frontières des autres pays ont été fermées au bétail canadien à cause des cas d'ESB détectés au Canada. Le second type d'études est réalisé dans le cadre de campagne de sensibilisation. L'autorité de concurrence les appelle « études de marché » et elles visent à convaincre les régulateurs fédéraux et des Provinces de favoriser le jeu des forces du marché.

Le débat concernant les pouvoirs d'enquête porte sur les études de marché dans l'industrie et la question de savoir si le Bureau de la concurrence est l'organe qui convient pour mener ces études générales. Il s'agit aussi de savoir s'il faut affecter au Bureau de la concurrence des ressources

supplémentaires pour réaliser des études dans l'industrie, car ce type d'étude nécessite d'énormes ressources et n'entre pas dans le mandat habituel du Bureau.

En 2005, le gouvernement fédéral a proposé des modifications à la Loi sur la concurrence en vue de donner au Bureau le pouvoir formel d'exiger la présentation de documents – mais non de fouiller ou d'inspecter ou d'utiliser des écoutes téléphoniques pour des études de marché. Le Bureau s'est déclaré favorable à cette modification, qui contenait un certain nombre de conditions visant à répondre aux préoccupations des parties prenantes, telles qu'elles sont énoncées dans la contribution canadienne. Ces conditions sont notamment la publication préalable du champ d'application de l'étude, l'indentification des aspects à étudier, et l'émission de directives sur les méthodes à utiliser dans le cadre de l'étude. Le Bureau a appuyé cette proposition car elle serait utile pour accéder aux pouvoirs formels dans certains cas. Certaines parties préfèrent, par exemple, pour des raisons stratégiques ou de sensibilité, être assignées officiellement à produire des documents, faute de quoi elles ne coopéreront pas. Dans certains cas, il est utile d'accéder à des données de façon générale, sur les marchés de produits, par exemple, mais, dans des secteurs moins réglementés, il serait utile d'avoir des pouvoirs d'assignation pour obtenir des renseignements. Cela vaut en particulier pour les professions libérales. Il est peu probable, par exemple, que l'on ait accès aux résultats des procédures disciplinaires d'organisations professionnelles autrement que par voie d'assignation. En fait, le Bureau n'a pas pu accéder à ce type d'informations pour les études de marché précédentes. Les rapports sur les professions libérales étaient donc plus théoriques et plus descriptifs qu'ils n'auraient pu l'être autrement. Les modifications proposées sont tombées à l'eau lorsque le gouvernement précédent a chuté pour d'autres raisons.

Le Président Jenny passe ensuite à la contribution des États-Unis, dans laquelle il relève des déclarations qui paraissent contraires au consensus qui se dégage des autres contributions en faveur de l'attribution de pouvoirs formels d'enquête pour les études de marché. Il constate, en particulier, que la FTC a ces pouvoirs alors que le Département de la justice (DoJ) ne les a pas. Il est indiqué dans la déclaration des États-Unis que les deux groupes réalisent de temps en temps des études de marché, même si la FTC renonce souvent à utiliser ses pouvoirs d'enquête et préfère des soumissions volontaires. Dans un cas au moins, cela a conduit un Commissaire à mettre en doute l'exactitude des conclusions d'une étude de marché. Il est déclaré en conclusion de la contribution que lorsqu'elle conçoit une étude de marché, l'autorité de concurrence doit envisager les nombreuses sources de données disponibles ; certaines sources peuvent être relativement faciles d'accès tandis que d'autres imposent une plus lourde charge à l'autorité, au secteur d'activité et au public. Le Président conclut que la contribution semble appeler à ne pas faire usage des pouvoirs formels d'enquête, même si cela risque de nuire à la fiabilité des résultats. Le Président demande à la Délégation des États-Unis une explication et une clarification sur ce point.

Le Délégué des États-Unis, venant du Département de la justice (DoJ), répond le premier et confirme que le DoJ n'est pas habilité à recourir à une procédure obligatoire dans le simple but de mener une étude de marché. Il n'empêche que le DoJ a réalisé un grand nombre d'études de marché. En cas de soupçon de pratiques anticoncurrentielles, le DoJ peut recourir à une procédure obligatoire pour obtenir les renseignements, les documents, les témoignages et autres types d'informations dont il a besoin et qui peuvent parfois concerner de nombreux participants au marché, sinon tous. Lorsqu'il s'agit d'une campagne de sensibilisation aux avantages de la concurrence, où il y a des branches d'activité réglementées avec des organismes de régulation qui ont des pouvoirs de recours à une procédure obligatoire, le DoJ peut parfois obtenir accès aux informations collectées par le biais de ces pouvoirs des organismes. Dans le domaine des télécommunications ou dans celui de la production d'électricité, par exemple, il y a des organismes sectoriels de régulation et, grâce à la procédure de réglementation sectorielle, certaines informations deviennent disponibles aux fins d'études de marché. Enfin, le fait que le DoJ ne réalise pas d'études de marché n'est pas nécessairement imputable à l'absence de procédure obligatoire, mais peut être dû à un manque d'intérêt pour les études de marché formelles et à la capacité de la FTC de mener ces études.

Le Délégué des États-Unis venant de la FTC confirme que la FTC est unique, parmi les autorités de concurrence des États-Unis, de par le pouvoir qu'elle a de recourir à une procédure obligatoire pour réaliser des études sectorielles, et il affirme que cette responsabilité n'est pas prise à la légère. En particulier, la FTC s'efforce d'éviter d'imposer des charges inutiles aux participants du secteur et aux différentes entreprises à cause des « lubies » des parties prenantes dans les branches d'activité étudiées. En matière économique, nombreux sont les chercheurs qui effectuent des recherches scientifiques sur des questions économiques sans être habilités à recourir à une procédure obligatoire, et il existe des techniques économiques bien établies qui permettent d'utiliser des données autres que celles obtenues dans le cadre d'une telle procédure. La possibilité d'accéder à d'autres sources d'informations est une des raisons pour lesquelles le DoJ est en mesure de réaliser des études de marché et bon nombre des études de marché entreprises par la FTC ne reposent pas sur une procédure obligatoire. Chaque fois que possible, la FTC tente d'obtenir des renseignements de tierces parties, sur une base volontaire. Les travaux d'analyse du marché du pétrole et du gaz menés par la FTC en sont un bon exemple. Dans cette étude de marché, le personnel s'est appuyé sur d'autres organismes publics qui collectent déjà des données au lieu d'imposer aux participants de ce secteur la charge de fournir les mêmes informations séparément. On peut citer comme autre exemple le secteur pharmaceutique, où la FTC a acheté des séries de données privées contenant les informations nécessaires pour répondre à des questions fondamentales telles que l'élasticité croisée de la demande etc. L'utilisation de soumissions volontaires ou de séries de données privées s'explique en partie par les énormes gains d'efficacité (et économies de temps) que permet le recours à ces sources d'informations. Dans les cas où la FTC engage quand même une procédure obligatoire, elle est souvent inondée de séries de données provenant de multiples entreprises qui sont stockées sous des formats totalement incompatibles, et il lui faut alors convertir ces données dans un format utilisable. Même du simple point de vue des ressources, cela n'a pas toujours de sens de se procurer des données par le biais d'une procédure obligatoire.

Cependant, la procédure obligatoire peut être d'une importance décisive pour les études de marché. Certaines informations importantes, par exemple, ne sont pas forcément accessibles par d'autres moyens, et l'on pourrait craindre que, si l'on ne lance par une procédure obligatoire pour obtenir des renseignements, on ne dispose que d'informations douteuses ou peu objectives. La véritable question est donc de savoir s'il y a ou non d'autres moyens de se procurer les données essentielles. S'il existe d'autres possibilités qui entraînent des coûts sociaux moins élevés, l'autorité de concurrence veut les utiliser. Dans toute étude de marché nécessitant une grande quantité de données, il faut choisir soigneusement l'échantillon car cela peut avoir des effets sur les résultats.

En ce qui concerne l'étude sur l'évaluation des risques de crédit par notation que la FTC a entreprise, la Commission a voté pour accepter une approche volontaire pour la collecte de données car le personnel et la majorité des Commissaires ne pensaient pas qu'il soit faisable pour les parties de choisir les données de manière à truquer les résultats d'une façon ou d'une autre. En effet, les entreprises n'avaient pas elles-mêmes les données nécessaires pour fausser systématiquement les informations soumises. Il a fallu beaucoup d'efforts à la FTC elle-même pour obtenir et organiser les données provenant de l'administration de la sécurité sociale dont les parties auraient eu besoin pour arriver à truquer les données. La FTC a aussi conclu que le recours à la procédure volontaire pour obtenir des informations sur les polices d'assurance a permis d'économiser beaucoup de temps et d'argent par rapport à ce qu'il en aurait coûté pour organiser des données équivalentes soumises dans le cadre d'une procédure obligatoire.

Le Président Jenny pose la question de savoir s'il est utile d'avoir des pouvoirs formels car cela encourage les entreprises à fournir des informations sur une base volontaire.

Le Délégué des États-Unis indique que les pouvoirs formels permettent à la FTC d'obtenir précisément le petit nombre d'informations que l'autorité de concurrence ne peut pas forcément se procurer par d'autres moyens. Par ailleurs, cette petite quantité d'informations peut être un contrôle

économétrique extrêmement important qui pourrait permettre au personnel de démêler des explications contradictoires concernant les prix ou autres pratiques observés. Restreindre la procédure obligatoire à ces situations limitées rend la demande de données ou de renseignements nettement moins pesante pour les participants du secteur d'activité étudié et réduit la charge qu'implique pour la FTC le fait de tenter d'obtenir les informations sous une forme utilisable.

Le Président Jenny donne la parole au Brésil qui souhaite formuler une observation.

Le Délégué du Brésil demande si les autorités de concurrence des États-Unis peuvent accéder à certaines des données dont disposent les organismes sectoriels de régulation, ou s'il existe des obstacles juridiques qui l'en empêchent, ou si les organismes sectoriels de régulation ne sont simplement pas disposés à autoriser l'accès à ces données pour des études de marché.

Le Délégué des États-Unis répond qu'il existe un certain nombre de limites à la possibilité de partager des données avec les organismes de régulation, surtout en ce qui concerne les informations confidentielles. Cependant, dans certaines conditions, et au fil du temps, les organismes de régulation accumulent d'énormes registres de faits sur des questions réglementaires qui sont utiles et disponibles. Il existe donc un réservoir d'informations sur le fonctionnement du secteur, pas forcément les données économétriques, mais néanmoins une masse de renseignements recueillis par des moyens très divers. Les autorités de concurrence peuvent puiser dans ces données pour les sections des études de marché qui ont trait à l'analyse de la concurrence.

Le Président Jenny note que l'observation du Brésil signifie que le fait que le partage de données avec les organismes sectoriels de régulation est sévèrement limité est un inconvénient. Il invite le BIAC à formuler des observations et pense que ce dernier doit être conforté par l'idée que, tout au long de la partie de la table ronde consacrée à la procédure, le débat a porté sur la participation des acteurs du marché afin, à la fois, de faire en sorte que la charge pesant sur les entreprises ne soit pas trop grande et que les demandes de renseignements des autorités de concurrence soient coordonnées avec les organismes de régulations de manière à réduire au minimum les demandes de données supplémentaires adressées aux participants au marché.

Le Délégué du BIAC fait observer que les entreprises n'aiment pas les demandes d'informations qui leur imposent une lourde charge ; elles reconnaissent toutefois que des enquêtes incomplètes constituent une menace (et peuvent entraîner des coûts) également. Les marchés sont généralement très compliqués, avec diverses forces concurrentielles et autres qui jouent, et le BIAC est préoccupé par le fait qu'une étude incomplète ne constitue sans doute pas une base valable pour identifier précisément les problèmes ou mettre en œuvre des solutions efficaces. Le BIAC s'inquiète par conséquent du risque de voir l'autorité de concurrence ou d'autres organismes publics réaliser des études rapidement mais en faisant des erreurs. Selon le BIAC, le problème de la charge excessive et du risque d'erreurs d'analyse peut être en grande partie résolu de la façon suivante : en fixant des objectifs clairs et transparents pour les études de marché ; en prenant des dispositions pratiques telles que tester les questionnaires avant de les publier ; en adoptant une approche flexible pour la fourniture de données de manière que, par exemple, le secteur étudié n'ait pas obligatoirement à produire des données nouvelles qu'elles ne conservent normalement pas pour la simple raison que ce qu'elles gardent habituellement se présente sous une forme légèrement différente ; en prêtant attention à la logistique et à la gestion des projets ; et en veillant à ce que les demandes d'informations, selon une procédure volontaire ou obligatoire, soient envoyées aux bonnes personnes et aux bons endroits, avec un délai de réponse suffisant. Le Délégué fait observer que ces éléments font partie des bonnes pratiques examinées dans la contribution et l'exposé du Royaume-Uni. Un autre élément très important, du point de vue du BIAC, est le respect du calendrier de réalisation des études de marché.

Le Délégué déclare que la table ronde renforce l'intérêt et le soutien du BIAC apporté à l'établissement de pratiques internationales recommandables dans ce domaine. Actuellement, les pouvoirs et les procédures utilisés pour réaliser les études de marché sont très divers. Cela ne convient guère à l'industrie. Le Délégué reconnaît que les études de marché ne sont pas populaires auprès des entreprises en général mais que, si elles sont nécessaires, les entreprises aimeraient qu'elles soient menées rapidement, efficacement et sans heurts, en créant le moins de perturbations possible. Les entreprises sont préoccupées au sujet des coûts élevés que représente le fait de répondre aux demandes de données et autres informations requises pour les études de marché. Les préoccupations des entreprises à cet égard sont tout aussi réelles que les contraintes budgétaires auxquelles sont confrontées les autorités de concurrence, comme l'a indiqué le Délégué Philip Lowe, de la CE.

Afin de réduire au minimum les coûts et les perturbations pour les entreprises (et aussi pour encourager des analyses correctes), le BIAC demande instamment l'établissement de lignes directrices relatives aux pratiques internationales recommandables pour les études de marché ainsi que l'harmonisation des cadres réglementaires, des mesures de la performance utilisées dans les études de marché et des critères appliqués pour choisir les marchés à étudier. À l'heure actuelle, le BIAC relève des incohérences marquées et un manque général de transparence. Il préfère que les autorités de concurrence s'enrichissent mutuellement de leurs réussites et de leurs échecs de façon à éviter la répétition de ces échecs dans tous les pays. Le Délégué conclut en faisant observer que si l'on arrive à obtenir la convergence dans d'autres domaines, pourquoi pas dans le domaine des études de marché ?

Le Président Jenny salue l'appel du BIAC en faveur de l'établissement de pratiques exemplaires dans ce domaine. Il demande si, d'après la contribution du BIAC, le fait qu'un chef d'entreprise apprenne, à son arrivée au bureau le lundi matin, qu'il y aura des enquêtes pour une étude de marché pendant un an et demi est une mauvaise nouvelle ; or, ce serait encore pire si l'enquête dure trois semaines car l'autorité de la concurrence n'a pas les moyens, dans les délais fixés, de procéder à un étude de marché fondée sur des informations très précises.

Le Délégué du BIAC répond qu'une étude de marché réalisée en trois semaines serait à la fois une bonne et une mauvaise nouvelle. La bonne nouvelle, c'est qu'elle ne dure que trois semaines, et la mauvaise nouvelle c'est qu'il sera pris des décisions erronées et ayant des effets désastreux, ce qui va nuire à l'entreprise pour le reste de sa vie.

Le Président Jenny note que la table ronde sur les études de marché est la première du genre et qu'elle donne lieu à réflexion quant à la question de savoir s'il est possible d'établir des sortes de lignes directrices relatives aux pratiques recommandables pour les études de marché. Le Président donne la parole aux États-Unis qui souhaitent formuler une observation.

Le Délégué des États-Unis indique qu'il doit y avoir une différence dans la perception des entreprises concernant les études sectorielles et les études de marché. Dans le cas d'une étude de marché concernant une entreprise, le meilleur résultat, du point de vue du chef d'entreprise, est simplement le maintien du statu quo. Par contre, une étude sur une branche d'activité peut améliorer la situation en convainquant une autorité de concurrence de changer d'avis sur la façon dont le secteur fonctionne. Le statu quo peut, en fait, améliorer la situation. Le Délégué pense par exemple qu'une autorité de concurrence pourrait avoir une vue très critique du maintien du prix de revente pour de nouveaux produits si tous les exemples examinés par l'autorité de concurrence concernent des entreprises qui ont une part de marché de 70 % ou plus. Cependant, si l'autorité de concurrence a étudié un secteur entier et a observé, par exemple, que cette pratique est courante parmi les entreprises ayant de faibles parts de marché et parmi celles qui ont une part importante, elle peut être moins encline à engager des poursuites contre les entreprises qui agissent ainsi. De cette manière, les études sectorielles peuvent avoir un avantage pour les entreprises dans un secteur étudié.

Le Président Jenny répond que l'observation des États-Unis devrait remonter le moral du BIAC.

Le Président présente ensuite la dernière partie de la table ronde, qui concerne les meilleures utilisations possibles des études de marché et les meilleures techniques pour en faire usage. Il invite le Royaume-Uni à lancer le débat encore une fois en raison de la vaste expérience (tant positive que négative) de ce pays en matière de réalisation de divers types d'études de marché.

Le Délégué du Royaume-Uni (OFT) résume l'expérience de son pays en reconnaissant que la mise en œuvre des études de marché n'a pas toujours été une réussite. L'accord général auquel sont parvenus les participants à la conférence de l'OFT sur les études de marché est que la qualité des études de l'OFT est très bonne mais que, très souvent, en particulier pour les études touchant aux restrictions publiques à la concurrence, il y a eu des difficultés de mise en œuvre. Les recommandations formulées étaient dans l'intérêt des consommateurs et visaient à améliorer la productivité dans l'économie, mais elles n'ont pas toujours été efficaces lorsqu'elles savaient d'importants intérêts acquis qui ont eu tendance à se faire davantage entendre au cours du processus politique. Les recommandations de plusieurs études de marché s'attaquant aux restrictions publiques à la concurrence n'ont pas été mises en œuvre ou du moins pas intégralement. En revanche, certaines de ces études ont été parfaitement réussies, comme cela a été le cas, par exemple, des études portant sur les garanties automobiles, les professions juridiques, les maisons de retraite et les agents immobiliers.

La réussite de certaines études de marché au Royaume-Uni semble imputable aux facteurs suivants :

Les études de marché ont particulièrement bien fonctionné lorsque l'autorité de concurrence s'est arrangée pour respecter le calendrier et le programme de réformes fixés par l'État pour un secteur particulier.

- Les études de marché ont particulièrement bien fonctionné dans les cas où l'autorité de concurrence a réussi à articuler clairement la théorie du préjudice et à expliquer pourquoi les mesures correctrices proposées amélioreraient les choses, mais il est difficile de trouver le juste milieu entre insister trop peu sur les avantages (dans l'étude sur la pharmacie de détail, peut-être) et les faire paraître plus importants qu'ils ne le sont en réalité.
- Les études ont mieux réussi lorsque les parties prenantes ont été pleinement impliquées. L'OFT se veut gestionnaire du changement et, pour y parvenir, mieux vaut souvent user de la persuasion que de la force.

L'OFT a un programme d'évaluation qu'il applique à toutes les études de marché (comme le montre l'appendice à la contribution du Royaume-Uni) mais il procède à une seule évaluation par an. Dans le cas des garanties automobiles, une étude qui a coûté 300 000 £, l'évaluation de l'OFT a révélé des gains de plus de 120 millions £. Elle a aussi montré que ces avantages auraient été plus importants si l'étude de marché s'était accompagnée d'une campagne plus efficace d'éducation des consommateurs. Ces gains ont été recueillis principalement par les gestionnaires de parcs automobiles et par les entreprises clientes que par les particuliers. Par contre, l'évaluation de l'étude sur les services de taxi (qui a abouti à la levée des restrictions à l'entrée sur le marché des taxis) a montré que, si le bien-être des consommateurs s'est accru globalement, le bien-être total a diminué en raison d'une nette baisse de la productivité. L'enseignement tiré de cette évaluation a été que la suppression des contrôles à l'entrée aurait dû s'accompagner d'une réduction du prix de la course car l'assouplissement des restrictions à l'entrée, seul, se traduit par un nombre excessif d'entrées sur le marché. L'OFT a cherché à apprendre de ces évaluations et a eu la franchise d'admettre des erreurs qui portent préjudice aux consommateurs et aux marchés au lieu de leur profiter.

Le Délégué du Royaume-Uni souligne que le fait de déclarer un secteur « en bonne santé » peut être, et est, une forme très importante de succès dans la réalisation d'études de marché. Dans certains cas, des idées fausses sont propagées, par manque d'information et involontairement, au sujet des pratiques du marché. Les autorités de concurrence au Royaume-Uni ont réussi à dissiper bon nombre de déclarations douteuses. Dans certains cas, des particuliers ou des groupes ont tenté de les convaincre d'empêcher la concurrence au lieu de la renforcer. Les études de marché peuvent être un excellent moyen de repousser ces tentatives mais, une fois encore, il faut trouver un équilibre de façon à lancer des études de marché dans les cas où il existe au moins un problème potentiel de concurrence qui puisse être analysé afin de confirmer ou d'infirmer les craintes. Si l'industrie est manifestement ouverte à la concurrence sans aucun signe de défaillance du marché, une étude de marché pourrait être considérée comme imposant une charge inutile à ce secteur.

Une autre fonction essentielle des études de marché est de faire mieux comprendre au public la concurrence et la performance du marché. Les perceptions du public influent sur les politiques et ces dernières peuvent s'orienter dans de mauvaises directions si le public n'est pas suffisamment informé des questions de concurrence.

Les effets bénéfiques des études de marché mettent parfois beaucoup de temps à se faire sentir dans l'opinion publique et dans l'action gouvernementale. Ils peuvent apparaître 10 ans, voire 20 ans, après l'achèvement des études. Le Délégué cite l'exemple du transport aérien à bas coût en Europe, qui doit son existence aux études de marché réalisées dans les années 80 et 90. Même dans les cas où les recommandations de l'étude de marché ne sont pas mises en œuvre, elles restent dans le domaine public, prêtes à être prises en considération le moment venu. Il ne faut pas oublier les avantages à long terme potentiels et l'évaluation de la réussite ne doit pas se limiter aux effets à court terme.

Enfin, le Délégué du Royaume-Uni indique que l'OFT étudie de nouvelles méthodes pour faire participer les parties prenantes à un effort visant à améliorer les résultats des études de marché. Il se dit optimiste quant au fait qu'un petit effort supplémentaire pour impliquer davantage les parties prenantes pourrait aider à donner de bons résultats sur le marché.

Le représentant de la Commission de la concurrence du Royaume-Uni ajoute que, en dépit de quelques erreurs, le programme d'études du marché de son pays a beaucoup progressé depuis la première étude réalisée par la Commission des monopoles, qui avait abouti à la conclusion que le marché des fausses dents au Royaume-Uni était envahi de pratiques restrictives et de boycotts collectifs mais où deux des sept Commissaires ont voté contre toute action au motif qu'il serait injuste de prendre des mesures correctrices car les boycotts collectifs et les accords exclusifs étaient monnaie courante dans tout le reste de l'industrie britannique.

Le Président Jenny passe ensuite au Mexique et fait observer qu'il a fait référence à plusieurs reprises à la contribution du Mexique au cours de la table ronde. Il juge cette contribution fort intéressante car elle décrit un système de sélection des études de marché qui est hautement stratégique et prévoit explicitement les modalités de mise en œuvre des recommandations de l'étude de marché, notamment des plans de communication des résultats de l'étude et une coopération avec les autorités et les participants au marché en vue de s'assurer que les recommandations seront appliquées et qu'elles seront profitables aux consommateurs. Il demande à la Délégation de décrire l'approche de façon plus détaillée.

Le Délégué du Mexique explique qu'il est indispensable d'adopter une approche systématique des études de marché en raison des contraintes de ressources et du caractère limité des pouvoirs d'intervention. L'autorité de la concurrence n'a pas de pouvoirs formels autres que celui d'émettre un avis du Président, telle est la nature des études de marché conformément à la législation mexicaine. Par ailleurs, l'autorité de la concurrence n'est pas formellement habilitée à collecter et compiler des informations ni à imposer des

mesures correctrices. Elle doit par conséquent user de la persuasion pour chaque aspect de la conduite d'études de marché. L'organisation des études de marché commence très tôt en raison de sévères contraintes de ressources et parce que l'autorité de la concurrence ne peut pas se permettre de réaliser des études qui ne seront jamais utilisées. L'autorité de la concurrence doit avoir parfaitement conscience du fait que chaque étude influe sur sa réputation et sur les chances de réussite des études futures. Réaliser des travaux de qualité, exposer les raisons de l'étude et en expliquer les résultats sont forcément autant d'éléments qui peuvent aider à établir la réputation de l'organisme. L'autorité de concurrence est déterminée à choisir soigneusement ses combats et, pour cela, elle doit faire preuve de cohérence au fil du temps du point de vue à la fois de l'analyse et de l'explication de l'analyse. Les études de marché sont importantes car l'économie mexicaine souffre de nombreux problèmes liés aux réglementations qui ont un effet négatif considérable sur les conditions concurrentielles et chacune de ces réglementations pourrait être étudiée mais cela ne servirait à rien. La stratégie élaborée récemment par l'autorité de concurrence consiste à centrer son attention sur certains secteurs tels que les télécommunications, l'énergie, les transports et les services financiers – les secteurs qui ont le plus grand impact sur l'ensemble de l'économie. L'effort doit être permanent dans ces grands secteurs car l'effet d'une étude de marché réalisée par l'autorité de concurrence dans un de ces secteurs sera probablement cumulatif.

Le second élément intervenant dans le choix des études de marché a trait à la pertinence des questions spécifiques qui sont soulevées, et cela est lié à la façon dont l'autorité de concurrence prévoit de commercialiser les résultats. L'autorité de concurrence s'efforce de choisir des études de marché qui sont susceptibles d'avoir un effet positif sur l'efficacité globale et où elle peut faire valoir que les consommateurs en bénéficieront. L'idée n'est pas de se mêler de politique, mais de sélectionner des études qui utiliseront au mieux l'argent des contribuables. Le choix du secteur à étudier détermine l'action ultérieure de l'autorité de concurrence.

Une fois que l'analyse concernant une étude de marché est achevée, il y a deux choses qui sont décisives pour la réussite de l'étude. La première est d'expliquer les résultats en termes simples. La seconde est de faire comprendre que les consommateurs et l'efficacité économique générale ont subi un préjudice du fait des problèmes de réglementation identifiés. Il est aussi essentiel de faire valoir que les mesures correctrices proposées pourraient y changer quelque chose. La raison pour laquelle ces étapes sont importantes est qu'elles sont toutes nécessaires pour s'attaquer aux intérêts en place. L'autorité de concurrence estime que si l'on discute en petit comité, les résultats sont généralement déséquilibrés et défavorables aux consommateurs. Le fait de rendre les choses publiques empêche l'utilisation d'arguments qui pourraient être utilisés en privé mais qui sont assez embarrassants en public. Le fait de rendre publiques les préoccupations relatives aux politiques de réglementations accroît la probabilité de voir prendre des mesures correctrices par ceux qui sont habilités à le faire – dans la plupart des cas, la publication des recommandations de l'autorité de concurrence entraîne des actions de la part des organismes de régulation ou du Congrès. L'autorité de concurrence doit convaincre ces responsables afin d'obtenir un changement positif, et cela est beaucoup plus facile à faire si elle rend public un message qui est facile à comprendre et qui change quelque chose dans la vie quotidienne.

En ce qui concerne les efforts de sensibilisation, il convient, dans le contexte mexicain, de s'adresser simultanément au Congrès et à l'exécutif. Cela peut assurer une « saine concurrence » entre les branches de gouvernement. Souvent, si une branche se saisit de la question, cela exerce une pression politique sur l'autre et l'incite à en faire autant.

Pour terminer, le Délégué note que la mise en œuvre des recommandations formulées à l'issue des études de marché n'est que partiellement réussie et prend souvent du temps. Les recommandations restent souvent dans le domaine public pendant une période prolongée, et même si elles ont peu d'effet au départ, il en est finalement fait usage plus tard. Il ne faut pas croire que le travail est terminé une fois que l'autorité de concurrence publie l'étude de marché – c'est plutôt à ce moment-là que le travail le plus dur commence

car l'autorité de la concurrence doit en permanence œuvrer pour faire adopter ses recommandations par les décideurs. Sur le long terme, un effort déterminé accroît les chances de voir finalement les études produire un effet positif.

Le Président Jenny s'adresse à la CE pour le dernier exposé. Il fait remarquer que la contribution de la CE mentionne un certain nombre d'études de marché menées par la Direction générale de la concurrence dans les secteurs de l'électricité, de la banque de détail et des systèmes de cartes de paiement. On y trouve des réflexions sur les conséquences de ces diverses enquêtes sectorielles, que le Président demande à la Délégation d'expliquer, et il le prie de décrire les mesures prises pour donner suite à ces études de marché.

Le Délégué de la CE reconnaît que l'évaluation des études de marché ne doit pas se limiter aux effets à court terme mais tenir compte des effets à long terme. L'autorité de concurrence de l'UE étant relativement nouvelle et ses études de marché étant récentes, il faudra attendre pour évaluer les effets à long terme. À ce jour, les enquêtes sur les secteurs de l'électricité et des cartes de paiement sont achevées. L'enquête portant sur les agriculteurs est en cours.

Le Délégué indique que l'enquête sur le secteur de l'énergie a changé la configuration politique des débats relatifs à l'énergie en Europe. Il souligne que le premier document publié à l'issue de l'enquête sectorielle a été salué en 2005 par un consensus général des ministres de l'énergie déclarant qu'ils ne voulaient pas entendre parler de modifications du cadre réglementaire pour l'énergie dans l'UE. Selon eux, il n'y avait pas de problème ou, s'il y en avait, ils ne seraient pas abordés avant au moins 10 ans. Cependant, le rapport intérimaire et le rapport final ont été suffisamment convaincants pour faire changer d'avis la Commission et le Conseil. En l'espace d'un an, le Conseil de l'Europe a appelé à un troisième ensemble de mesures de libéralisation spécial pour l'énergie. L'autorité de concurrence a défendu des solutions particulières dans cet ensemble réglementaire, portant sur l'inadéquation du fonctionnement existant des réseaux de transmission et le sous-investissement dans ces réseaux et sur la dissociation de la propriété. La Commission a continué d'explorer d'autres possibilités de séparation de la propriété. Les États membres ont récemment affirmé les principes de dissociation, encore que certains préfèrent régler le problème par voie réglementaire. Ces États reconnaissent aussi, aujourd'hui, que ce sont des décisions commerciales qui peuvent en fin de compte déterminer s'il y a un changement de propriété ou non.

Séparément, l'autorité de concurrence a soutenu que l'étude sur le secteur de l'énergie pourrait donner lieu à des enquêtes antitrust. Même si cela ne s'est pas produit immédiatement, la DG de la concurrence a lancé récemment plusieurs enquêtes sur des problèmes de verrouillage du marché dans les secteurs du gaz et de l'électricité. Ces enquêtes sont déjà couronnées de succès dans la mesure où les deux grandes compagnies allemandes, l'une dans le secteur du gaz et l'autre dans le secteur de l'électricité, ont décidé, avant le lancement des enquêtes, de dégrupper les réseaux de transmission. Dans un des cas, l'entreprise a aussi décidé de se défaire d'une importante capacité de production d'électricité. Le Délégué conclut que l'enquête sur le secteur de l'énergie a entraîné des changements majeurs dans les approches réglementaires et dans les processus de prise de décision des entreprises.

S'agissant des cartes de paiement, le Délégué conclut que l'enquête a eu pour effet important de fournir une grande quantité d'informations pour les enquêtes en cours de l'autorité de concurrence sur les pratiques de MasterCard et Visa. Pour ce qui concerne la banque de détail, l'enquête a permis de communiquer aux autorités nationales de concurrence une masse considérable d'informations qui devraient leur être utiles pour enquêter sur les pratiques bancaires.

Le Délégué signale que, même si la production d'études de marché a été limitée dans certains cas, un objectif majeur de ces études devrait être de créer un processus de réflexion et de réexamen par les décideurs publics. On peut citer de bons exemples d'études de ce type concernant les professions libérales

et le marché des contenus de téléphones mobiles – une question cruciale pour le développement du marché des contenus et du marché des technologies mobiles.

Le Délégué de la CE se déclare ouvert à la contribution du BIAC concernant les meilleures pratiques pour les études de marché. L'autorité de concurrence tente aussi d'apprendre en s'appuyant sur l'expérience de ses homologues qui réalisent depuis longtemps des études de marché. L'autorité de concurrence préfère généralement accumuler de nombreux cas d'études de marché dans certains secteurs où l'orientation de l'action gouvernementale n'est pas encore claire. Elle n'a pas l'intention de lancer d'innombrables études de marché afin de satisfaire sa curiosité. L'intention de limiter et de cibler soigneusement les études de marché est renforcée par l'impossibilité, dans la pratique, de conduire plusieurs enquêtes à la fois.

Au sujet de l'obtention de données, le Délégué est d'accord avec l'observation des États-Unis selon laquelle il y a beaucoup de situations où il est plus efficace d'accéder aux données mises à la disposition du public que de recourir à des pouvoirs d'enquête. L'autorité de concurrence ne se contente pas, toutefois, comme semblent le faire certains organismes sectoriels de régulation, de s'appuyer entièrement sur les contributions des parties intéressées dans les secteurs réglementés au sujet de la dynamique de la concurrence.

En conclusion, le Président Jenny formule trois observations :

- Du point de vue de leurs objectifs, les études de marché sont un outil très souple qui peut servir un certain nombre d'objectifs, mais leur rôle principal est de servir d'outil pour promouvoir le changement par la sensibilisation aux avantages de la concurrence ou par l'application du droit de la concurrence. Dans la pratique, cela signifie que le ciblage des études de marché est plus productif lorsqu'il est centré sur les perspectives de changement et non simplement sur l'importance du problème.
- Du point de vue de la conduite des études de marché, même si la table ronde a révélé l'existence de nombreuses méthodes différentes, il devrait être relativement simple de s'entendre sur de bonnes pratiques et d'identifier les méthodes qui sont moins efficaces du point de vue de la transparence, de la formalisation du processus de réalisation des études, de la fixation et du respect d'un calendrier, et de l'implication des participants au marché. Il faudrait poursuivre les débats si l'OCDE voulait établir des lignes directrices sur les pratiques recommandables, mais la table ronde a montré que certaines méthodes sont plus utiles que d'autres, notamment celles qui consistent à ne pas recourir à des pouvoirs formels en général, mais plutôt à réduire au minimum les coûts en utilisant de façon très limitée les procédures obligatoires lorsque cela est nécessaire.
- Du point de vue des effets des études de marché, s'il est vrai qu'elles peuvent représenter un instrument très puissant de changement, elles ne peuvent réussir que moyennant une gestion rigoureuse une fois l'étude de marché ou l'étude sectorielle achevée. En particulier, il faut beaucoup de travail pour en faire adopter les résultats et les recommandations. Le suivi des travaux peut être un processus très long – et il faut parfois attendre 20 ans pour voir apparaître les résultats, mais cela ne devrait pas décourager les autorités de concurrence de le faire afin d'utiliser au mieux les études de marché.

Le Président clôt la table ronde en remerciant les Délégués pour toutes leurs contributions, aussi bien écrites qu'orales.