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Criteria for Evaluating the Effectiveness of Competition Authorities

Report by the UNCTAD secretariat

Executive summary

This report considers some of the recent initiatives undertaken by authorities in terms of criteria for the evaluation of competition law enforcement and competition advocacy. It is based on the responses to a questionnaire, sent by member States to UNCTAD. This report concurs with earlier studies on this topic suggesting that effectiveness should be viewed in terms of good outcomes and processes leading to those outcomes. For example, evaluating competition policy activities ex post is important for improving the efficiency of intervention, developing a competition culture and providing an impetus for updating and amending laws, guidelines and procedure. Evaluation activities might be purely internal, might be within Government but outside the authority or responsible ministry, or might be conducted by outside academic experts, consultants, international organizations or peers. The focus of these studies might be to examine various measures of the effectiveness of internal agency processes or the outcomes of agency interventions. Surveying changes in stakeholder perceptions can also be an indicator of the progress the authority is making towards the introduction of a competition culture. The evaluation of outcomes can be parsed into studies that examine the impact of sector studies and sector inquiries, reviews of advocacy initiatives and case selection, merger enforcement reviews (including a review of the effectiveness of remedies) and studies of the impacts of particular case interventions. The largest category of ex post evaluation has been in the area of merger enforcement. It is also important to consider the particular developing country priorities for impact evaluation.

CONTENTS

I. INTRODUCTION AND OVERVIEW

1. As recommended at the seventh session of the Intergovernmental Group of Experts on Competition Law and Policy (IGE) held from 31 October to 2 November 2006 in Geneva, the eighth session of the IGE is to hold a round-table discussion on "*Criteria for evaluating the effectiveness of competition authorities*" with a view to improving implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.[1] The following is a background note with the intent of assisting Member States in structuring their discussions around this topic.

2. There is evidence that competition policy improves productivity, and it is a fundamental tool for increasing economic growth. The removal of entry barriers can promote efficiency and the development of new enterprises. Competition policy can encourage the efficient allocation of resources within an economy, lowering the prices of important products and inputs and improving quality and hence choice.

3. Competition policy might also be a component of a country's overall development strategy, in terms of, for example, attaining the Millennium Development Goals.[2]

4. The primary sources for information in this note include UNCTAD studies, submissions we have received from Members in response to a questionnaire, the OECD report on "Evaluation of the Actions and Resources of Competition Authorities"[3] and the country submissions to the OECD round-table held on the topic. The note also draws on competition authority websites as well as academic literature on the quantification of competition authorities and their actions.

II. MEASURING EFFECTIVENESS

5. This subject should be examined through two questions, namely "Did the agency's interventions produce good results?", and "Did the agency's managerial processes help ensure that the agency selected initiatives that would yield good outcomes?"[4]. This approach distinguishes between focusing on inputs into the management of the competition law enforcement regime and focusing on the effects of that regime. Thus, determining agency effectiveness and unravelling exactly where deficiencies lie (and how they might be remedied) require continuous examination of both process inputs and policy outcomes, by looking at not only the effective work carried out by the competition authorities but also the results achieved.

[1] TD/B/COM.2/CLP/L.10.
[2] This was discussed in conferences held in Bucharest, Baku and Brno as found in http://r0.unctad.org/en/subsites/cpolicy/docs/MDGs.pdf. There were also remarks made on this topic in discussions held in Cape Town and São Paulo, as summarized in the annex to UNCTAD(2006) at http://www.unctad.org/en/docs/ditcclp20064_en.pdf.
[3] OECD (2005).
[4] OECD (2005, p. 19).

III. ASSESSING THE COMPLIANCE IMPACT OF ENFORCEMENT ACTIVITIES

6. It is difficult to assess the impact of regulatory enforcement action on social phenomena as wide-ranging as compliance or non-compliance with competition laws. Empirical research clearly shows that a range of factors beyond enforcement are likely to affect levels of compliance. It is therefore difficult to disentangle the impact of enforcement action on compliance from other factors that affect compliance. Even more difficult is the fact that "compliance" itself is a complex concept. What amounts to compliance with the law is a matter of interpretation, negotiation and frequently argumentation, between business and regulators, their lawyers and, where matters are litigated, the courts.[5] "Compliance" has a contested meaning, in the absence of a commonly accepted understanding of the way regulatory requirements should be interpreted and applied.

7. One of the criteria by which one could judge the success of an enforcement action is the extent to which it helps build a shared understanding between regulator and "regulatee" of what compliance means and how it should be put into practice (Parker et al[6], 2004). In other words, the compliance impact of enforcement action cannot be judged merely by whether the regulator wins a judgment in court. It is argued that enforcement action must be judged by the extent to which it helps bring business norms and practices into alignment with regulatory expectations. Indeed, enforcement action is most successful in terms of its "compliance" impact, if it achieves not only alignment between business and regulatory understanding of what a particular regulatory *rule* requires in a particular situation but also a shared understanding of, if not commitment to the *goals and purposes* underlying the relevant regulatory rules.[7] A shared understanding of the goals and purposes of a regulatory regime is more likely to lead to the same interpretation of the rules in different circumstances, and a shared commitment to those same goals creates an opportunity for habitual compliance.[8] There are also various ways of accomplishing "compliance" through different "styles" and techniques of regulatory compliance and enforcement.[9]

IV. THE NEED FOR EVALUATION BY COMPETITION AUTHORITIES

8. Certain key questions arise with regard to the practices of the relevant agency when considering international approaches to evaluation. First, does the agency concerned undertake ex post evaluation of its decisions relating to merger control, anti-competitive agreements and abuse of dominance? Second, what criteria are used in assessing the impact of decisions in competition cases? To further understand this, it is important to consider country-specific cases in which such an evaluation was undertaken. Finally, it is important to determine whether the country involved has drawn lessons from the experiences gained so far in the country concerned in evaluating the impact of competition decisions.

9. While merger control, actions against anticompetitive practices and abuse of dominance are regarded as the primary areas of agency activity, ex post evaluation need not

[5] Black (1997), McBarnet (1994), Reichman (1992).
[6] Parker, Ainsworth and Stepanenko (2004).
[7] Op.cit., p. 3.
[8] Black (1997, p 30-32), Meidinger (1987), Braithwaite and Braithwaite (1995), and Parker (2002, pp. 22-29).
[9] May and Wood (2003); see also Grabosky and Braithwaite (1986).

be related solely to decisions but can also extend to evaluation of advocacy initiatives and reviews of case selection practices. For instance, if productivity is a stated goal of competition policy, it is important to determine to what extent each policy lever − merger control, investigation of anticompetitive actions, advocacy and market investigations − furthers attainment of that goal.

10. Types of evaluation carried out can be grouped into those that compare the enforcement record of one country against others at a single point in time or against itself across time; those that examine the quality of the individual decisions or the decisions in general; and finally those that examine the market outcomes arising from the interventions.[10]

11. The points above concern the "how?" and the "what?", but it is also important to consider the "why?" Responses to UNCTAD's request for submissions identified the role of ex post evaluation as providing insight into the *effects* of agency enforcement activity, which in turn feeds into the *processes* by which this enforcement is carried out, in terms of both case selection and actual enforcement procedure.

12. The communications submitted by the countries have shown that evaluation performed at the initiative of the competition authority itself is preferable to external formal evaluation.

13. Before we consider some of the key benefits of ex post evaluation of competition authority actions, it is worth pausing to acknowledge that there are costs associated with this activity, in terms of both manpower and financial resources. Staffers assigned to undertaking review forego the opportunity to work on cases or general sector reviews. In countries with developed competition cultures and wide and deep economic expertise, the authority might be able to subcontract evaluation out to academics or consultants. In developing countries, however, there may be severe shortages of suitably skilled personnel in public and private sectors alike.

14. Furthermore, various country submissions leading to the seventh session of IGE, as well as to the OECD evaluation round-table, make the important point that when conducting intervention, it is important to frame the correct counterfactual. In the context of cases against anti-competitive conduct, there are costs and benefits arising from intervention *and* from non-intervention. This is similar for cases where mergers are either cleared, cleared with remedies and conditions, or blocked. It is well recognized that measurement of incorrect intervention is analytically difficult. However, several countries have reported that the review of certain decisions would be more effective if conducted at their own initiative.

1. Improving the efficiency of intervention

15. The most obvious reason for evaluation is to find means of improving intervention. Due to the resource constraints most authorities face, it is important to reflect on processes and practices and to maximize the potential effectiveness of a given agency's resources. Furthermore, this is particularly valid in the context of competition policy, where it is not possible to simply transpose a set of "best practice" laws and processes. In competition policy, while much can be learned through comparison and benchmarking, one size does not fit all, and each jurisdiction needs to find the methods that are best suited to its needs.

[10] OECD (2005, p 173) submission from Sweden.

2. Developing a competition culture

16. As documented in UNCTAD (2006), the lack of a competition culture can be a significant impediment to the effective implementation of a new competition law. It is therefore important to develop strong communication capability within a nascent authority, so that the *nature* and *effect* of the authority's interventions can be understood and appreciated. This can provide some justification for the conduct of ex post evaluations so that effects can be roughly quantified and disseminated.

3. Updating and amending laws, guidelines and procedures

17. The evaluation process can also provide a diagnosis for major procedural and administrative changes that are necessary for the optimum functioning of the authority and the law. One important example in recent years has been the effective implementation of a corporate leniency policy. External peer reviews in a variety of jurisdictions have also help generate the political impetus to effect the requisite changes.

18. In its submission, the EC notes that the Directorate-General for Competition regularly undertakes reviews of legislative acts such as the Block Exemption regulations in the period in which they come up for amendment. Such reviews typically employ case studies and surveys to determine their effect and effectiveness with a view to possible amendment.[11] General fact-finding exercises can be conducted through hearings, questionnaires and consultation. This can feed into the policy process and inform the drafting of Green and White papers that eventually lead to the amendment stage.

V. CATEGORIES OF INITIATIVES: WHO HAS CONDUCTED THE REVIEWS OF AGENCY PERFORMANCE?

19. We group the types of evaluation initiative into two sets. On the one hand, we have external reviews of procedure, advocacy, case selection and outputs, and on the other hand, there are agency-conducted reviews of process, advocacy, prioritization and outputs. These categories need not be strictly mutually exclusive. Reviews can be agency-led with varying degrees of collaboration by the private sector, academics or international organizations.

20. The other end of agency evaluation classification is to ask who the intended audience of the report is. The report can be geared exclusively to agency officials, Government more generally, or the public. The most suitable option will be determined by circumstances.

4. Review of intervention procedures by external academic experts, including UNCTAD/OECD peer reviews

21. UNCTAD and OECD peer reviews provide an important means for countries to benchmark their management processes and to receive feedback on the appropriateness of their criteria for intervention and on possible impediments to the effective implementation of their competition regimes.

[11] Details can be found in OECD (2005, pp. 210-213). Here, it will noted that the format does not have to be an actual report compiled by means of review.

22. The process of peer review can also contribute greatly to the development of a country's competition regime. Peer reviews have become a fixture of UNCTAD's work in competition law and policy as well as that of the OECD. At a recent conference, a speaker from Brazil noted that participation in various peer review processes as *donors* had also been found to be very thought provoking and helpful.[12] In its submission to the round-table,[13] Turkey notes that the value of the peer review lies in the fact that it is prepared by "experts having consulted third parties such as practitioners, academics, business associations' members, governmental officials working for various governmental agencies in addition to the officials of the Authority". In that country, it helped provide an impetus for the development of the leniency programme, modifications in merger control, increases in maximum fines for violations, procedural changes for consent agreements, and increases in legal and economic expertise in the Turkish Competition Authority (TCA).

23. Another forum providing some external discussion of processes and standards is the International Competition Network (ICN). The ICN assists in developing informal cooperation and knowledge-sharing between agencies, and can further soft cooperation and harmonization and help provide useful peer insights into the workings of a country's competition regime.

5. Review of the competition law system by bodies outside Government

24. In the United States, the General Accounting Office (GAO) completed a study in 2004 on "Energy Markets: Effects of Mergers and Market Concentration in the U.S. Petroleum Industry". The report examined mergers in the US petroleum industry, amongst other things to determine how changes in industry structure have affected US wholesale gasoline prices. The report was based on detailed data and econometric analysis. Via an analysis of the effects of mergers within the industry, the report indirectly examines the effectiveness of the country's antitrust regime.

25. In November 2005, the National Audit Office in the UK released a report examining the effectiveness of the Office of Fair Trading (OFT).[14] The report makes various recommendations regarding the OFT's use of resources, case management, and measurement and communication of achievements.

[12] UNCTAD (2006, p. 209).
[13] OECD (2005, p. 180).
[14] NAO (2005).

The OFT perspective on the productivity debate:

In a report presented in January 2007, the UK Office of Fair Trading (OFT) analysed the link between competition and productivity. The Treasury has identified competition as one of several productivity drivers for a country's economy. This means that the effectiveness of a competition authority can also be measured in terms of productivity in the market. Similarly, low productivity can indicate a lack of competition, which implies that effective competition is equal to effective productivity. This has been borne out by the large amount of literature giving evidence for this theory that has been analysed in the report. (OFT, 2007, p. 16) The productivity analysis has been thought to help the OFT identify sectors where more input has to be provided in the form of prioritizing areas of concern in which the OFT must make an effort. The OFT then becomes an important actor in boosting productivity performance.

The impact that competition has on productivity has been divided into three areas: "within-firm effects", "between-firm effects" and "innovation". The first area explains the x-efficiency theory that can be assured through competition enforcement that pressures managers to concentrate on the company's internal efficiency. The second area deals with the productivity level of companies that compared to each other have as an effect the exit from the market of companies that are less efficient compared to others. The third area for consideration, even though it has been identified as complex, is the connection between competition and innovation. Innovation and technological improvements are often improved through a high level of competition within the relevant market.

26. In the Republic of Korea, the Office for Government Policy Coordination evaluates the adequacy of the Fair Trade Commission's assessment of competition law enforcement conducted as part of government performance management.

27. The State Supervision Council reviewed the activities of the Turkish Competition Authority, releasing a report in 2002[15] that advised various management process changes, urged greater coordination with sector regulators and recommended various legal amendments, amongst other things.

6. Internal review

28. The Swiss submission to this meeting reports that the data that Comco (the Swiss Competition Commission) has been collecting "is exclusively an internal ex post control of certain decisions and not intended for external use". Furthermore, the criteria developed for evaluating decisions are case-specific but could involve "the price, the quantity or access to goods or services". Exactly how specific cases are chosen is however not reported.

29. The EC submission to the OECD round-table on evaluation describes how, in the review of several of the Block Exemptions, different mixes of Commission staff and outside consultants and academics were employed, depending on need and convenience.[16]

[15] OECD (2005, p. 180).
[16] OECD (2005, p. 210).

Canada has reported that a "Merger Remedies Study" is under way. The purpose of this study is to evaluate the effectiveness of past remedies by studying, for example, the difference in competitiveness within the market and whether this has effectively improved as a result of the remedies imposed. Another matter to consider is whether the Canadian Competition Bureau has been able to predict correctly the competitive effects, the outcome and whether any relevant factors were left aside when the remedies were established. Finally, the aim is to evaluate the techniques used and to determine whether these can be improved through this internal self-evaluation.

VI. CRITERIA FOR EVALUATING THE EFFECTIVENESS OF COMPETITION AUTHORITIES

30. The first set of criteria on which one might choose to focus is “input” criteria: These refer to the set of managerial processes and systems by which a country implements its competition regime. In this respect, one might choose to focus on case selection or staff turnover, etc. or other sui generis measures of agency effectiveness the authority determines to be significant.

31. Trying to weight the various input criteria by their relative importance requires an understanding of how the various criteria relate to effects on economic outcomes. There is a small body of literature that attempts to devise means of measuring the institutional capacities of competition authorities. As noted in UNCTAD (2006), “Voigt (2006, p. 6) develops indicators measuring the de jure and de facto independence of competition agencies in his model relating competition law and agency characteristics to total factor productivity. De jure independence is a composite index combining information about government supervision, agency objectives, agency appointments, term length of agency officials, agency case allocation, the nature of executive instructions to the agency, and transparency. De facto independence is a composite combining the executive's “average term length”, competition officer incomes and competition decisions reversed by executive decisions, as well as other variables.”[17]

32. If it is the case (and it should be noted that Voigt’s results are not entirely conclusive) that greater de facto independence boosts productivity (and hence growth), then the evaluation of these components of de facto independence provide a means of evaluating the competition authority’s effectiveness in attaining the end of greater economic growth.

33. Alternatively, an agency might attempt to gain some insight into its effectiveness by examining various “output” criteria. The first set of “output” criteria that might be examined involve those that do not entail any attempt to quantify the success of the interventions in terms of, for instance, broader efficiency objectives, but focus instead on measures of bureaucratic success. Measures such as cases prosecuted successfully, turnover times for merger filings, etc. are closely related to the “input” criteria we have identified above.

34. In this category, we might also include various measures of stakeholder satisfaction. Changing perceptions of agency effectiveness and an increased general awareness of the competition act itself can be an indication of improvements in the conduct of agency enforcement and advocacy activities.

[17] UNCTAD (2006) http://www.unctad.org/en/docs/ditcclp20064_en.pdf

35. These sorts of output criteria can be quite crude.[18] Case complexity varies by jurisdiction. For example, differing merger *thresholds* can mean that different agencies deal with cases of varying degrees of complexity. Also important are differences in the nature of the merger *notification* regime. In these instances, cases per staff member or turnover times for merger filings etc. may not be a reliable measure of productivity. Cases prosecuted successfully, as a measure used to assess productivity, also feature various difficulties, since jurisdictions differ in their emphases on administrative and judicial measures.

36. Accordingly, an agency might instead choose to focus on "output" criteria, which contain some kind of attempt to include quantification of the success of the interventions such as, for example, an effort to quantify the cost savings arising from successful investigations and competition law infringements deterred.

37. The types of study an authority might undertake in this regard can vary from back-of-the-envelope calculation to detailed econometric analysis. The appropriate extent of quantification varies with the importance of the case and the capacity of the authority, but this does not undermine the fact that *some* measure of quantification is to be welcomed, if only because it gives the authority an understanding of the orders of magnitude involved. Even a brief calculation can feed into the authority's future enforcement priorities and strategic planning.

38. For example, the EC has reported in its "Merger Remedies Study"[19] that overall effectiveness can be observed by looking at the remedies imposed, as this can reflect the degree of efficiency in reaching the expected results. Here, effectiveness can be quantified in terms of the percentage of remedies that have attained their intended objectives. The study showed that 57 per cent of the remedies analysed were fully active, i.e. they had fulfilled their intended objective, 24 per cent were only partially active and seven per cent were ineffective, as the intended objective was not satisfied.

39. With this type of approach, one would try to estimate the benefit of the competition regime by summing the positive outcomes of individual cases. However, this excludes the deterrent benefits from the possession of competition law, which can be quite sizeable.[20] On the other hand, it also excludes the number of pro-competitive actions that were not undertaken out of fear of wrongful prosecution by means of the competition law. Hence, in jurisdictions where the application of the law is uneven and transparency of decision making with respect to competition is not clear, it can be very difficult to quantify the impact of competition by means of this "bottom-up" approach.

40. Similar difficulties arise when one tries to estimate the benefits of competition law enforcement at the country level. Again in this instance, it is difficult to isolate the impact of competition law and its enforcement. This is certainly extremely difficult to do at the level of the country competition authority, as many factors may affect the mark-up or level of manufacturing productivity, aside simply from the effectiveness of the competition regime. Nonetheless, there are interesting insights to be gained from the study of partial equilibria,

[18] The following discussion draws on OECD (2005, p. 174).
[19] http://ec.europa.eu/comm/competition/mergers/studies_reports/remedies_study.pdf
[20] Clarke and Evenett (2003) find that total overcharges from the practices of the vitamins cartel amounted to, at a minimum, some US$ 789.39 million and, importantly, "import bills rose more in those Latin American jurisdictions which did not have active cartel enforcement regimes".

and suggestive evidence can be adduced from such studies of specific interventions to support its positive impact on economic growth, if not quantify it exactly.

41. There is one sense in which a competition authority truly *has* to study its effectiveness and that is in terms of compliance. Undertakings must be monitored to determine if they indeed implement the required conditions and remedies. Most countries responding to our request for further information indicated that they also monitored undertakings found to have infringed the competition law in the past and the markets in which anti-competitive actions had been found in the past (e.g. Pakistan, Slovakia).

42. As the submission from Turkey illustrates, though, competition enforcement actions are self-monitoring in one sense: if the problem in the affected sector persists, we might expect this to be followed by another complaint (p. 1). However, the expected result should be focused on eliminating anti-competitive practices immediately and ending the negative impact on competition in the market.

43. The United States Federal Trade Commission (FTC) and Department of Justice (DOJ) report that agencies analyse completed litigation to assess the performance of participating agency staff, contracted consultants and expert witnesses; to evaluate the litigation tools and strategies employed; and to review "the legal and economic underpinnings of the case".[21]

44. It might be difficult to assess the effectiveness of certain competition authorities due to their recent establishment and the limited number of cases that have reached the execution stage. This is the case with Tunisia, for example, where the importance of objective evaluation of the work carried out by the authority was underscored. This objective evaluation should be linked to certain specific criteria such as, for example, the time frame in which the cases are handled and the number of undertakings that have been brought into conformity following an intervention by the competition authority.

45. If a competition authority has been able to make recommendations or submit proposals to the Government concerning competition policy issues that have had a positive impact on the economy, this is also an indication of effectiveness. The competition authority in Tunisia has, for example, played a proactive role and paved the way for various reforms connected to competition legislation.

46. One important criterion for evaluating the effectiveness of a competition policy authority is to compare the outputs it achieves with the stated goals of its competition policy regime. This is normally set out in the preamble of the legislation enacting the country's competition regime. Accordingly, one yardstick for evaluating the effectiveness of the competition agency would be to examine continuously whether the stated goals of the legislation are being met by the authority's enforcement activities. This idea was also taken into account in the case of Tunisia, which states that effectiveness can be measured by ascertaining to what extent the authority has been able to fulfil its mission. Consideration has to be given to the impact that the authority's existence actually has on the competitive situation in the country. If the mission is to improve competitiveness and the market is still dominated by a few companies, it would indeed be legitimate to question the authority's effectiveness.

[21] OECD (2005, p. 185).

47. Another potential criterion for determining whether the authority is effective, or is at least perceived to be so, is to consider the attitude of important stakeholders. It is important to note in this respect that determining the relevant "stakeholders" (or at least determining what weights one assigns to their relevant interests) is to some extent determined by the stated goals of the legislation – if the competition legislation gives precedence to consumer interests then this group may be the primary stakeholder. If promoting or protecting small businesses is the purpose of the legislation, then this group is given priority, and so forth.

7. Responding to stakeholder needs

48. A UK Competition Commission stakeholder survey final report (2006) was drafted to provide more details on performance than those found in international peer reviews. The methodology was to survey stakeholders – that is, those involved in the process of inquiries: respondent firms and their advisors, consumer groups and trade associations – as to the Commission's performance in relation to a set of indicators. Although the sample was small, this allowed the authors of the report to identify areas which respondents thought were important but where the performance of the Commission was not entirely satisfactory. Business and trade associations had a slight preference for "process" indicators, while advisors tended to favour results.[22] The report recommends "improved communication about the inquiry process" as a means of improving stakeholder perceptions of performance.[23]

49. Since 1994, an annual survey has been undertaken by the Swedish Competition Authority of parties randomly selected from "small and medium-sized companies, large companies, municipalities and county councils, commercial lawyers, journalists [and] trade associations".[24] The study is contracted out to a market research company, and is aimed at determining awareness of the Competition Act (and hence indirectly the competition culture) and providing some stakeholder feedback on the effectiveness of the authority.

8. Measuring changes in inputs

50. This can involve the evaluation of agency processes in terms of management practices, organizational structure and operational procedure.

51. Various indicators can be used in this respect such as, for instance, the cost of merger review. One example is the DOJ Merger Review Process Initiative,[25] which aimed to speed up the identification of the key legal and economic characteristics of a case and hence the relevant economic data, as well as the process of evaluating the evidence. There have also been other initiatives to attempt to streamline the notification and review processes.

52. One of the biggest changes in a variety of jurisdictions over recent years has been the creation of corporate leniency programmes. The revision of the amnesty process has been identified by US agencies as crucial to its increased use in that country.[26] Monitoring jail sentences imposed and fines levied enables the DOJ to assess the effectiveness of its criminal antitrust enforcement.[27]

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[22] Competition Commission (2005, pp. 17-18).
[23] Competition Commission (2005)
[24] OECD (2005, p. 175).
[25] OECD (2005, p. 188).
[26] OECD (2005, p. 189).
[27] OECD (2005, p. 189).

53. The UK Competition Commission reports[28] that it appointed economic consultants to study the analytical procedures employed by the staff during the initial two weeks of a merger inquiry with a view to comparing them with best practices and recommending potential areas for improvement. The internal process changes arising from such review might then feed into "resource allocation budgets".

54. Other important process changes that will improve the effectiveness of competition law enforcement involve those that increase enforcement cooperation with other jurisdictions. This is a topic addressed at length in other UNCTAD publications.[29]

9. Measuring changes in outputs

55. Some countries have written that while they do not specifically consider the effects of competition law on a case-by-case basis, there is a more general focus on the proper functioning of markets, as is the case with Finland,[30] for example via sector studies. However, there are a number of instances in which countries have pursued ex post evaluation, trying to get a handle on the precise effects of their competition law interventions (and non-interventions). We shall consider these in the next section. The largest number of studies relate to reviews of competition law and policy related to mergers.

VII. EX POST EVALUATION

56. We group the ex post evaluation activities into those relating to the impacts of sectoral studies, or sector inquiries, i.e. those that review advocacy initiatives and case selection; merger enforcement review; and those entailing a review of particular case interventions.

10. Impact of sectoral studies and sector inquiries

57. Agency staff or outside consultants might be appointed to conduct a study of a particular sector that has been identified as potentially problematic in terms of competition aspects, that is particularly important from a consumer standpoint, or that is significant in some other way. These studies have sometimes been conducted during the development phase of the law in determining the need for the competition law. In other jurisdictions that have a competition law and a competition authority, a sectoral study might include a review of relevant cases conducted by the authority. This could provide helpful insights into the effects of particular interventions in terms of broader sectoral changes. Sector inquiries, such as within the EC setting, can be used as an important information-gathering device, apart from being a precursor to actions under articles 81 and 82 or cross-jurisdiction harmonization or industry initiatives. Furthermore, the inquiry will entail the review of past cases conducted within the sector as well as an analysis of their impact on the subsequent development of the market. In other jurisdictions, such as the UK, the sector inquiry can lead to the imposition of remedies that may have major market implications.

[28] OECD (2005, p. 201)
[29] UNCTAD (2005, 2006).
[30] Submission by Finland.

11. Reviewing advocacy initiatives and improving case selection

58. UNCTAD (2006) reports that the authorities of the Brazilian Secretariat of Economic Law (SDE) treat the enforcement of competition law as a "portfolio management" problem. The cases selected feature the highest returns (i.e. they have the greatest economic impact or affect a large number of shareholders) and are likely to be ratified by the Council for Economic Defence - CADE. The OFT in the United Kingdom recently published a paper on productivity and competition, explicitly designed to add to the understanding of "how a competition authority can build productivity analysis into its prioritization".[31] One means of this is "horizon scanning", which entails identifying key productivity bottlenecks in the economy.

59. The FTC/DOJ submission reports that in a speech delivered in early 2005 by FTC Chairman Deborah Platt Majoras, she attempted to quantify the impact of the agencies' advocacy activities, concluding that those activities had indeed had a positive impact.[32]

12. Reviewing merger enforcement

60. The UK Competition Commission (CC) continuously monitors the application of remedies with a view to developing policy and practice in this area. It conducted a 2007 study in this regard with a methodology that consisted of examining four cases that cover all of the main types of remedies typically applied – "divestiture, remedies to restrict vertical behaviour, and remedies to control outcomes" (p. 2) – by means of desk research and interviews with those responsible for implementing the remedies. The report notes two major previous studies of remedies, namely one undertaken by the US FTC in 1999 examining its divestiture process and another completed by the DG Competition of the European Commission in 2005. The methodology of these two studies was mainly to interview purchasers and divesting parties. The CC report compares the findings of the three studies and offers potential reasons relating to the different merger regimes and experience of the three bodies as potential explanations for differences in findings.

61. In its submission to UNCTAD in preparation for the Eighth Session of the IGE, the Canadian Competition Bureau indicated that it was in the process of completing a study analysing the effectiveness of the merger remedies applied in the past with a view to gaining insight into "the processes, principles, terms, and conditions" where improvement could be effected.

62. The OFT, the Department of Trade and Industry and the Competition Commission in the United Kingdom also completed a study of the ex post effects of mergers in 2005.[33] The study covers 10 of the 29 cases referred by the OFT to the CC that were subsequently cleared without remedies, to determine whether the reasons posited by the CC for clearance were borne out, that is, there was an attempt to corroborate the most important reasons for the mergers' clearance (the outcomes predicted by the CC) with subsequent experience. The method of investigation mainly involved interviewing buyers of products from the affected markets and led to a host of insights into the determinants of buyer power.

[31] OFT (2007, p. 4).
[32] OECD (2005, p. 187).
[33] This report (OFT, 2005) was written by PricewaterhouseCoopers LLP for the OFT, DTI and CC.

63. There is thus an attempt to determine whether the competitive constraints identified by the CC that recommend merger without remedy do in fact prevail. In this respect, the authors of the study examined the paths of "e.g. prices, profits, entry/exit, new products, new technology, and changes in customer tastes and buying strategies".

64. The evidence from the report is that the CC has a good record of anticipating future market developments.[34] The report identifies the predicted main short- and long-run competitive constraints, comparing them to the ex post findings. It also recommends that, in the context of failing firms, the clues about the (target) firm's ability to survive can be found in "recent market share data or evidence of switching behaviour in (say) the six months prior to the announcement of the merger".[35] Moreover, it questions the implicit assumption by the CC that it was better that the "failing" firm survive.[36] In general, therefore, the report emphasizes the importance of assessing the appropriate counterfactual (p. 79). The report further finds that "buyer power" is a richer and more complex notion than the one that is often reflected in competition assessments" (p. 84). The report provides some useful preliminary investigation of this topic, for instance on the importance of dual-sourcing.[37]

65. An earlier paper (OFT, 1999) set out the theory of oligopolistic markets applied to 11 case studies and found the clearance decision in most of them to have been made correctly. This study again emphasizes the importance of buyer power and the development of the market following the structural changes arising from the merger. The case studies and review of the theory are then used as a basis for recommendations regarding the way in which future horizontal mergers are reviewed.

66. One of the means by which the UK Competition Commission aims to identify its effectiveness is by quantifying the effects of its interventions. One example is Competition Commission (CC) 2006, in which there is an attempt to quantify those mergers against which the CC took action and not those it cleared without remedy (the subject of the previous study). The study represents a prediction of what would have happened to, amongst other things, prices, had the "substantial lessening of competition" in fact occurred. The estimated cost for consumers is £31.4 million.

67. In an earlier report (2003), the UK CC commissioned academics to study various merger reports it had completed with a view to improving the analysis contained therein.

68. Following the issuing of the horizontal merger guidelines in 1992, the agencies responsible for competition policy enforcement in the US have continually sought to monitor the enforcement of the legislation governing mergers. This has included the publication in 2003 of Merger Challenges Data 1999-2003, Horizontal Merger Investigation Data for fiscal years 1996-2003, the merger review process, and the issuing in 2006 of commentary on the Horizontal Merger Guidelines (p. v). The purpose of this commentary was to enhance the transparency of the implementation of merger guidelines.[38]

69. In 2004, the US DOJ issued the *Antitrust Division Policy Guide to Merger remedies* with a view to studying the legal and economic principles guiding the imposition and

[34] OFT (2005, p. 71).
[35] Ibid., p. 77.
[36] Ibid.
[37] Ibid, p. 27.
[38] Commentary on the Horizontal Merger Guidelines March 2006 – FTC and DOJ.

construction of merger remedies.[39] In 2005, the FTC hosted a conference on *Estimating the Price Effects of Mergers and Concentration in the Petroleum Industry*, at which prominent academics were urged to compare the methodologies used to study oil industry mergers in different reports by the Government Accounting Office (GAO) and the FTC Bureau of Economics.

70. There has also been research on hospital industry mergers and various mergers that were not challenged by the DOJ in, for example, audit services and the airline industry.[40] Furthermore, the DOJ has conducted various studies of the performance of various regulated industries.

71. The Zimbabwe Competition Commission (ZCC) concluded an ex post evaluation of merger control in November 2006. A stakeholder conference was held following this review to discuss some of the findings with a view to considering recommendations. The study of mergers approved by the ZCC divided the cases considered into those approved with and without conditions. As this process had not been completed at the time of writing, it is too early to draw final conclusions. This exercise is to be followed by an investigation of enforcement against anti-competitive activities.

72. The US DOJ and FTC have also hosted joint hearings and workshops considering for instance industry and legal developments in terms of intellectual property, health care and mergers. This has enabled the agencies to gain access to a wide spectrum of views on these subjects, industry participants, academic experts and other interested parties.[41] Such hearings can provide a basis for future advocacy and investigation work.

73. The EC states that the "Merger Remedies Study" published in October 2005 has been “by far the most important ex post evaluation of its interventions in recent years". This was followed by a subsequent methodological study, also in the merger field, which was carried out by a private consultant and published in January 2007. The purpose of this study was to identify firstly, the problems arising in the design and implementation of merger remedies; secondly, how effective the Commission remedies had been during the period 1996-2000; and finally, potential areas of improvement in the design of future remedies. The study involved the consideration of 96 remedies used in 40 cases and surveyed many of the key individuals involved in the mergers. In many instances, divestitures were used as a component of a remedy package.

74. The study found that some of the key remaining problems in the design of divestiture remedies were “the failure to adequately define the scope of the divested business, […] the approval of an unsuitable purchaser, the incorrect carve-out of assets and the incomplete transfer of the divested business to the new owner.”[42]

75. The report highlights some of the components of a viable divested enterprise, the potential dependence of the remedy package on third parties, issues surrounding the carving-out of assets, questions relating to intellectual property rights, and the importance of improving the role of trustees monitoring the implementation of the remedies. It also looks at

[39] OECD (2005, p. 184).
[40] OECD (2005, p. 185).
[41] OECD (2005, p. 186).
[42] EC submission, p. 3.

other important components of remedying design and implementation, such as difficulties in selecting purchasers for the divested business.

76. The other kinds of remedies studied were those involving access commitments, which were found to be difficult to design (terms of access) and monitor.

77. The merger remedies study also investigated the effectiveness of the remedies in terms of their stated aim, namely "maintaining effective competition by preventing the creation or strengthening of a dominant market position". This was attempted through a mix of quantitative and qualitative evidence.

78. In a recent study on the impact of the Australian Competition and Consumer Commission (ACCC),[43] the authors conclude that the ACCC has had a significant impact on the business community in Australia and its compliance with competition law. They find that improved enforcement activities and higher penalties, for example, have led to increased compliance awareness.

79. They also report that this compliance awareness does not automatically translate into changed behaviour within the business community. Their case studies show that compliance commitment and programmes remain symbolic in certain cases, moreover, it is difficult to convince not just senior management but also middle management of the importance of effective compliance. According to the authors, the solution could be a "multi-strand regulatory mix" in which regulations are adopted to improve compliance and contextual factors are taken into account where "…enforcement action that changes the contexts for market behaviour in a variety of ways is more likely to be effective in improving compliance…".[44]

13. Reviewing particular case interventions

80. Competition authorities might commission legal or economic experts to study, evaluate and make recommendations on the court cases in which the agency has been involved. A 2004 study commissioned by the UK Department of Trade and Industry (DTI) examined the impacts of the implementation of competition policy in six "illustrative cases: retailers opticians' services, international telephone calls, the Net Book Agreement, passenger flights in Europe, new cars and replica football kits". These case studies all fall under the broad topic of *competition policy* more generally, even if not all pertain to the enforcement of competition law. The promotion of competition is found to lower prices; increase quantities sold, and promote wider variety of product choice.

81. The Korean Fair Trade Commission (KFTC) reports that consumer welfare is the basis for its assessments. Ideally, the investigation would be comprehensive, assessing "changes in price of goods and services, the extent of quality improvement, the scope of expansion in consumer choices".[45] In practice, the focus tends to be on "price changes in goods and services before and after the imposition of remedies on cartels".

82. The KFTC presents four cases by way of illustration. In the first, which concerns price fixing in the markets for winter and summer school uniforms, a comparison of ex ante

[43] Parker, Ainsworth and Stepanenko (2004).
[44] Ibid, p. 105
[45] KFTC submission

and ex post prices and volumes yields savings of some 15 billion won. In the second, which pertains to the abolition of service fee regulations in certified professions, the KFTC has regularly monitored prices on behalf of consumers. The KFTC believes that this will assist consumers in making a rational choice with respect to the purchase of professional services. With respect to bid-rigging on public construction, the KFTC reports that "an estimated four trillion won of government budget is saved every year as the average contract-awarding rate fell from 87% in 1997 to 75% by mid-2000". Finally, with respect to the graphite electrodes cartel, the KFTC reports the cartel's cost to the country (and by implication, the savings for the country from its disclosure). As the KFTC indicates, the usefulness of this exercise lies simply in terms of illustrating how the savings from enforcement exceed its cost.

83. The US DOJ and FTC annually prepare summaries of the magnitude of markets affected by their interventions, as well as estimations of the size of gains to consumers arising therefrom. They report that these values can be based on empirical merger simulation as well as other methods.[46]

84. It is noteworthy that many countries report that they have not conducted any exercise to evaluate the effectiveness of antitrust decisions.

VIII. DEVELOPING COUNTRY PRIORITIES FOR IMPACT EVALUATION

85. Developing countries are beset by a number of barriers to competition. There is an urgent need for an effective competition law and policy in these countries. However, owing to various market characteristics and legal and enforcement difficulties, it is much harder to implement competition law and policy in developing countries than in developed countries. Oliveira (2006), Oliveira and Paulo (2006) and Oliveira and Fujiwara (2006) discuss some of these factors, which include large informal sectors, problems relating to small size and large barriers to entry, difficulties in instilling a competition culture, and capacity and political economy constraints.[47] It is important for each country to tailor its implementation of evaluation initiatives to promote competition while operating within these constraints.

86. These features suggest that uncompetitive markets are an even greater problem in developing countries. The need for effective competition law enforcement is great, but there are serious constraints on effective policy implementation.

87. Evaluation can assist in addressing the more severe political economy problems, thereby helping provide legitimacy for the policy system. On the other hand, capacity constraints within developing countries hamper the proper performance of these evaluations. Nevertheless, when conducted appropriately in these contexts, evaluation can help to provide insights into the country-specific constraints to competition in these jurisdictions arising out of the characteristics listed above, as well as suggesting potential remedies.

[46] OECD (2005, p. 186).

[47] An OECD (2004) background secretariat note identifies four categories of difficulties: a general category, "lack of competition culture", to be understood as "political support for, and the use of, competition policy as 'default' or 'normal' way of organizing economic activity". The other three kinds of difficulty relate to (a) the particular problems faced by small developing economies, (b) problems related to informal sectors, and (c) "institutional adaptation to the introduction of pro-competition laws and policies". A submission by China to the Global Competition Forum adds to this list the problems of anti-competitive activity by local and regional governments, although this ties in to point (c) on institutional adaptation.

88. Consideration of the various above-mentioned criteria may be an important factor in developing country objectives. The priorities of developing countries may be quite different from those of developed countries. However, there is a risk of asking too much, when other policy instruments may be the most appropriate tools for achieving certain ends. This strengthens the case for evaluation. It is necessary to understand the effects of a country's programme of competition law enforcement in order to determine the potential and limitations of competition policy.

IX. CONCLUSIONS

89. This background note has introduced the topic of evaluation of the effectiveness of competition authorities. It has presented the rationale behind evaluation, the types of evaluation that have been conducted thus far, and who has conducted them. Finally, there has been a discussion of the evaluation initiatives that have been undertaken in terms of sector studies, advocacy initiatives, merger and cartel enforcement review, and particular case interventions into anti-competitive conduct.