



Qualitative Study



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DG COMPETITION STAKEHOLDER STUDY

Stakeholder Report – Economic Consultancies August 2010

Qualitative Study – TNS Qual+

This survey was requested by Directorate General for Competition and coordinated by Directorate General Press and Communication

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Qualitative Eurobarometer

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Stakeholder Report –
Economic Consultancies

Conducted by TNS Qual+ at the request of
Directorate General for Competition

Survey co-ordinated by Directorate General
Communication

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1 Background and Research Method

1.1 Background and objectives

The objective of this qualitative study was to obtain feedback on the perception of the quality of DG Competition's activities from its most important stakeholders. In particular:

- The legal and economic soundness of its activities
- Aspects of integrity (such as transparency, compliance with procedural rights, etc.)
- The economic effectiveness of its actions on the markets and for citizens
- The quality of its communications
- It is expected that the findings of the study will assist DG Competition in having a more targeted and dynamic communication and interaction with its professional stakeholders and with the general public
- Detecting areas of possible improvement in its cooperation and interrelations with stakeholders
- The management and prioritisation of its projects to achieve a greater impact on the markets.
- Measuring its performance in a number of fields related to the quality and impact of our work, thereby rendering it comparable over time.

The focus of the study is on the perceived quality of DG Competition's actions; enforcement work (antitrust and cartel, merger and state aid control) and policy and advocacy activities. The study targeted DG Competition's professional stakeholders who are knowledgeable about its work, either by concrete involvement in case work as part of DG Competition's enforcement activities or indirectly, by having influenced or benefitted from policy work. A separate study directly addressed citizen at large in all EU Member States.

This report focuses on the views of Economic Consultancies. Further reports cover the views of:

- Lawyers
- Business associations
- Consumer associations

- Companies
- National competition authorities
- Member state ministries

1.2 Methodology and sampling

The study consisted of in-depth interviews (IDIs) lasting 90 minutes. Interviews were conducted face to face wherever possible, at the respondent's place of work or another suitable location. Potential respondents were initially contacted by DG Competition and invited to participate in the study. Details of those organisations willing to take part were provided to TNS Qual+.

This report is based on five interviews with economic consultancies. The organisations interviewed are not specifically identified in this report in line with respondent requests that their comments be reported anonymously.

Interviews were conducted during January and February 2010.

The initial targets for the Economic Consultancy interviews were drawn by DG Competition from the Global Competition Review: the 2006 Handbook of Competition. The list was then narrowed down by reference to DG Competition's Chief Economists Teams' most frequent contacts.

Potential target organisations were carefully selected to provide, as far as possible, a balanced view on the quality of DG Competition's work.

The reader should note that this report is based on findings obtained through a qualitative research methodology. The interviews were structured around a consistent set of topics agreed with DG Competition but, within each topic area, they were open and discursive in nature. So, whilst we have striven to provide an indication of how widely the reported perceptions and views were held, such information should be treated with some caution. It is important to remember that the issues raised by each respondent will have been those that were of primary concern to them on the occasion of the interview and should not necessarily be taken as an indication that another issue was of no concern to them.

Verbatim quotations from respondents have been included in this report. They are written *in italics*. For anonymity's sake, they have not been attributed to particular individuals or consultancies.

A series of quantitative questions was included as part of the interview process, to provide an overall summary of respondent views on key aspects of DG Competition's performance. Not all respondents felt able to provide a rating for all the elements due to lack of immediate personal

knowledge. The data on raw scores plus an overall mean based on the number of respondents rating each aspect are included within the report.

1.3 Respondent context

The economists interviewed held senior positions and had significant experience. They tended to be responsible for teams of economists. All had extensive experience of working with DG Competition.

2 Soundness of Legal and Economic Analysis

2.1 Clarity and comprehensibility of decisions

- Commission decisions are felt to be clear and comprehensible despite the complexity of the subject matter -**

Decisions were generally praised for being as clear as possible and having improved considerably in clarity and comprehensibility. To improve further the decisions could be more succinct.

The preface to responding to this question was often to acknowledge that the decisions involved were complex and difficult to understand and that misunderstanding was sometimes unavoidable.

“Decisions are quite difficult to understand but that is what you expect. Some people don't understand but that's not DG COMP's fault.”

Almost all the respondents felt that the clarity of Commission decisions had 'improved significantly', especially over the last two years. The decision reports were deemed to be comprehensive with sufficient reasoning detailed within them. However, the downside to this, mentioned by one economist, was a lack of succinctness.

Variability in the quality of case teams was also noted by almost all respondents and felt to play a part in determining the clarity and comprehensibility of decisions overall.

“Talking about DG COMP as one solid body that is consistent is not correct. There is a lot of variance.”

A recurrent theme throughout all the interviews was the perception that case teams lacked sufficient support from senior staff. A few economists referred generally to junior staff working too independently on cases and producing poor economic analysis leading to 'incoherent' decisions.

2.2 Predictability of decisions

- The predictability of Commission decisions is felt to be high and to have been increased by the creation of the Chief Economist's Team -**

Commission decisions were generally considered to be predictable by almost all the economists.

The creation of the Chief Economist's Team (CET) has helped to increase predictability and to have raised the calibre of economists employed by

DG Competition. This has generated better ways of making and interpreting decisions (such as producing guidelines for those working in competition law on how decisions are made).

“One of the things they did a few years ago was they published guidelines about how to think about cases and those have assisted significantly.”

“I basically am very comfortable with the way the CET works.”

One economist referred positively to both a ‘framework’ that DG Competition had produced to help with the interpretation of decisions and a ‘reviewing exercise’ which summarised decisions and cases over a period of time (for example, a decade – the last one being The 90s).

It was, however, conceded by two respondents that due to the complexity of the cases decisions could never be totally predictable.

“In reality the cases they deal with are so complicated and difficult that predictability is unrealistic.”

The following suggestions were offered as to how DG Competition could increase the predictability of its decisions:

- Addressing the hierarchical structure of DG Competition and involving more senior staff in case teams. This was suggested by two respondents.
- Reducing or controlling the effect that variability in quality of case teams has on cases through general training and following up on outcomes from training courses. This was suggested by one economist.
- Investing in more communication earlier on in a case and informing parties about the issues being examined. This was suggested by one respondent.

2.3 Predictability of fines imposed

- The level of fines is felt to be more predictable than in the past but due to the complexity of cases they can still be unpredictable on occasion -

Not all the respondents felt they had sufficient knowledge to fully answer this question.

However, a change in the level of fines had been noted by almost all and the expectation now is that fines would be large, especially for cartels. One respondent referred to the fines as ‘starting to bite’, another respondent claimed that lawyers felt they were ‘too high’ and another

claimed that ‘they were starting to get people’s attention’. Overall, it appears, however, that the respondents felt that levels of fine were appropriate.

It was felt that it was still not always easy to predict the level of fines and one economist remarked on their surprise at the very high fine imposed on a very small company in an abuse of dominance case.

It was mentioned by one respondent that guidelines on fines lacked clarity, although he acknowledged the difficulty of the exercise.

“I don’t think there are good guidelines but it is very difficult to give guidelines.”

2.3.1 Rating: legal soundness of decisions

Mean score = 4.4

Commission decisions were not legally sound						Commission decisions were very legally sound
1	2	3	4	5	6	7
-	-	-	4	-	1	-

2.4 Understanding of the markets

- Market understanding is felt to have improved but to still vary both between sectors and between case teams -

DG Competition’s knowledge of the markets in which it operates was felt to be variable. However, there was a general empathy and understanding (expressed by almost all the economists) that DG Competition could not always be ‘expert’ in every market and case and that the learning curve was often steep for each new case. There was an acceptance that DG Competition had improved considerably in this area.

“By the end of the case I think they understand the market but that’s the same for the advisors as well. Early on during the case they go through a process and they learn.”

The following themes were common in almost all the interviews with economists:

- Case teams’ levels of market knowledge vary and movement between teams prevents the development of specialist market expertise.
- Junior staff are generally felt to be less knowledgeable and senior staff involvement is often felt to be insufficient.

- At the start of a case there tends to be (understandably) less knowledge about the market and its context.
- Knowledge is perceived to be unevenly distributed across sectors. One respondent referred specifically to telecommunications, retail and energy as strong areas and financial services as relatively weak.
- There is a sense that DG Competition is 'remote' from the actual markets and constrained by being in Brussels. A few accused DG Competition of being passive and holding back from seeing first hand how markets operate.

"It's very difficult to understand a market in a short time. As a consultant I have my own technique; you have to talk to the right person, e.g. sales person and the sales director and they tell me how it works... My sense is that the Commission doesn't do it and is constrained, sits in Brussels and companies come with their lawyers to tell them about the market and... that's not the way to do it."

"Go to the factory, find out why a product is made in different versions, somebody in the production line will reveal something to you and you need to get close to the sales person and the distribution guys who know the market."

The following improvements were all suggested by single respondents:

- DG Competition should be less 'afraid' of exposing ignorance early on in a case. One economist referred to a presentation by DG Competition where he felt its staff refrained from asking any questions for fear of seeming unknowledgeable.

"Last year there were lots of industry presentations but everyone just sat there.... It's important that if you disagree or don't understand that's the time to ask a question."

- Knowledge sharing, for example having a sector database of cases where those assigned to a case can go to learn about that sector before starting work.
- Training of staff approaching a new case in an unfamiliar sector by presenting previous related cases and their outcomes.
- More outreach work – visiting companies in order to gain better sector expertise.
- Utilising industry specialists and independent advisors to aid market understanding. This was mentioned specifically by one respondent and alluded to by others.

"We're working on a case now in the financial sector where we're talking with people who have no clue whatsoever about these

things. It's a pity because there are people within DG COMP who have lots of experience in the area so they should have consulted with them."

2.4.1 Rating: market knowledge

Mean score = 4.5

DG COMP do not know the markets at all						DG COMP know the markets very well
1	2	3	4	5	6	7
-	-	-	2	2	-	-

2.5 Technical quality of economic analysis

- The quality of economic analysis is felt to be high with particular praise for the Chief Economist's Team -

Almost all felt that the traditional over-reliance on legal argumentation in decisions had now been addressed and the economic reasoning in cases has improved. A few attributed this to the creation of the CET (Chief Economists Office), to the Chief Economist himself, to the deputy and to the talent recruited within this team.

"You can see the Commission trying to increase this."

"If their analysis was bad then I would frequently find myself in the position of writing to them and saying, 'you've got this completely wrong' and, with some national authorities, I find I am doing this with monotonous regularity. With DG COMP one doesn't find one doing that very often."

One respondent cited the specific example of the recent Kraft / Cadbury case which was described as 'clear and well written' with the economic analysis performed quickly and thoroughly.

2.6 Focus of enforcement activities

- DG Competition is broadly felt to focus its activities on the most appropriate sectors although some reservations were expressed -

In general terms, the respondents felt that DG Competition's sectoral focus was right. The following sectors were mentioned as being those on which DG Competition had placed the highest focus:

- Energy
- Pharmaceuticals and Intellectual Property
- Financial services

- Transport
- Telecoms

Despite the overall view of the economists, a few made specific criticisms of DG Competition's 'over-activity' in the high tech market. One respondent cited a group of cases in the IT sector where he suspected that the initiative came from American companies involved in disputes with other American companies wanting to bring cases in Europe to leverage their argument in the US. The relevance of such cases to the European market *per se* was felt to be questionable.

The view was expressed by another respondent that more work than was necessary was being done, with limited effect, in the pharmaceutical sector.

"Did they bite off more than they could chew with pharma?... The angle they are taking does make sense, but what I'm not clear on is [what they expected to achieve]... I'm pretty sure when they went into the enquiry they had these questions in their minds, they did a massive [costly] enquiry process and the questions they are coming up with... it makes you think did they really have to do that bit in the middle?"

2.6.1 Rating: quality of economic analysis

Mean score = 4.8

DG COMP's economic analysis is very poor						DG COMP's economic analysis is very good
1	2	3	4	5	6	7
-	-	1	1	1	2	-

3 Integrity

3.1 Transparency - listening and informing in a timely manner

- DG Competition is generally felt to inform stakeholders in a timely manner during cases but there is clearly room for improvement -

Economic Consultancies generally felt well-informed but it was suggested that there could be more of an equal distribution in the provision of information throughout the lifetime of a case.

However, it was acknowledged by a few that economists were rarely in the 'front line' and that this issue was more of a concern for lawyers

The point was raised by a few that there could be fairly long periods in between communications during a case, particularly towards the end of a case.

"Sometimes you go for more than a year and you don't hear from them; very little engagement."

DG Competition was described by one economist as being more communicative by those that had worked on the complainant side.

"When they want something from you they are always knocking on the door, particularly if you are working on the complainant side."

3.1.1 Rating: informing in a timely manner

Mean score = 5.8

DG COMP has not at all informed me in a timely manner						DG COMP has informed me in a very timely manner
1	2	3	4	5	6	7
-	-	-	-	2	1	1

3.2 Transparency - stakeholder consultation on new rules

- Stakeholder consultation is generally felt to be very good -

All the respondents expressed positive views about DG Competition's efforts to consult with their stakeholders. The following communication vehicles were mentioned and welcomed as appropriate:

- Invitations to meet with DG Competition (workshops and meetings) to discuss various economic topics.
- Informal conversations at conferences.
- Invitations to comment on legislative proposals (e.g. Green paper on Article 82 in 2005).

“They do hold fairly open consultations and we have responded to a number of those around economic questions.”

- Market research on the opinions of stakeholders (such as this stakeholder survey); the current stakeholder survey was welcomed as a vehicle for consultation allowing for honest and in-depth responses and there was much appreciation expressed by respondents that they had been involved.

“This is rather exceptional what we are doing now; it’s the first time.”

Suggestions were made that DG Competition could invest more time in structured meetings with organisations and business bodies and for communication to be more two way.

However, the view was expressed that, whilst DG Competition does consult, there is doubt over whether the views canvassed are always taken into account. One respondent provided a specific example of an occasion where their comments on a document were not read.

3.2.1 Rating: stakeholder consultation on new rules

Mean score = 4.8

DG COMP has not involved me at all in the creation of new rules						DG COMP has involved me very much in the creation of new rules
1	2	3	4	5	6	7
-	-	2	-	1	1	1

3.3 Observance of procedural rules

- DG Competition is felt to generally comply with procedural rules but some inconsistency was reported -

Some respondents felt unable to comment on this point, suggesting it was more of an issue on which legal professionals might comment.

Those who felt able to comment had the impression that the majority of individuals at DG Competition were very careful in observing the appropriate processes and rules.

“They are very conscious of the rules and they know what they have to do. It’s very clear and there are no doubts about that.”

The handling of confidential information and controlling of access to files were identified as areas where DG Competition performed well.

However, it was remarked, that some mistakes are made. In this respect, the issue of the perceived inconsistency in the quality of case teams was raised by almost all the economists.

“Some case teams don’t really comply with the procedures.”

A few respondents referred to concerns about certain procedural stages when considering this question. One respondent described the formal oral hearing as a ‘waste of time’, expressing the view that DG Competition has already reached its decision on cases before hearings.

Other comments suggested that the productiveness of other meetings during a case depended on the attitude of the case team and other attendees; it was not felt to always be clear whether the appropriate approach for a professional advisor in such meetings was a robust defence of the client’s case or to view the meeting as an open discussion of the issues.

The following suggestions were made:

- Introduce a set timetable for cases;
- Introduce new people at various times during the cases so that a fresh perspective could be brought to bear, or;
- Have an internal ‘police’ department to check that case handlers do not become too close to a particular point of view.

3.4 Burden on businesses

- DG Competition makes significant demands on businesses but this is felt to be largely justified -

All the respondents were broadly sympathetic towards DG Competition’s approach in making broad information requests as they acknowledged that the concrete target of the investigation is not always clearly defined at the beginning of the process.

“Their problem is when they are asking for information they don’t quite know what they are looking for so they tend to ask for information on quite a broad front... Only part of it turns out to be relevant but they only know this when they’ve got [the] information and, in advance, they couldn’t have narrowed it down.”

At the same time the respondents acknowledged that it was a contentious issue for companies and their lawyers, who often feel aggrieved that information is requested and then not used.

Despite their general sympathy for DG Competition's position, a minority contradicted their sympathy by also expressing the view that DG Competition can sometimes demonstrate a lack of understanding of corporate culture and the work and time required for those working in companies to extract the information requested.

"I have a case where massive amounts of information were requested. I think, because they don't work for companies, they think that companies have all this information readily available. They don't realize it's a massive amount of work."

The national competition authority in the UK was praised by one respondent for its practice of giving pre-warning and asking questions in draft form first. It was suggested that DG Competition could adopt a similar practice.

"They ask their questions in draft and they ask the company to feed back whether they are able to ask these questions realistically and how long it will take to get this feedback."

As already noted, suggestions for improvements also included more rationale as to why information was needed (where possible) and post-hoc analysis on the balance between the amount of information requested and the amount actually used, which could then be used to inform and rationalise future information requests.

4 Economic Effectiveness

4.1 Effectiveness of detection policy

- **DG Competition's detection work is perceived as being effective with improvements having been made in recent years -**

DG Competition was perceived by almost all the respondents to be generally effective in its detection policy, particularly bearing in mind the challenging nature of the work.

Improvements were felt to have been made during the last five years but DG Competition was criticised by a few for having a generally reactive stance when compared with local competition authorities, who were perceived as being very proactive in their detection policy and lines of investigation.

4.2 Impact on the markets

- **DG Competition's activities are felt to have a significant impact on the markets, in particular its work on cartel-**

DG Competition's activities, in particular its work on cartels, was felt to have made markets significantly more competitive. This view was shared by almost all the economists.

"On cartels they are really starting to have an impact."

"Work on cartels has been excellent and made markets significantly more competitive."

Although it was felt that actions by DG Competition and fear of potential consequences had also had an impact on mergers, the view was expressed by a few that DG Competition could do more to control certain mergers.

"My sense is that it has had a positive effect in merger control, but there aren't enough studies being done in merger effectiveness to know for sure."

4.2.1 Rating: impact on the markets

Mean score = 5

Not at all effective at creating better working competition in the markets						Very effective at creating better working competition in the markets
1	2	3	4	5	6	7
-	-	-	1	3	1	-

4.3 Timeliness of decisions

- Decisions are generally felt to be taken in a timely manner -

It was acknowledged by most that decisions involving mergers were relatively quick but that cartel and anti trust cases could take considerably more time but that this was often justifiable. On the whole, the economists were sympathetic towards DG Competition in this area, feeling that it received unjustifiable complaints about its speed from those with a lack of understanding about the process.

However, the view was also expressed by a few that some anti trust cases could take too long; one case taking twenty years was cited as an extreme example. One respondent suggested DG Competition should take on fewer antitrust cases, focusing on the more important ones in order to increase the speed of outcomes.

4.3.1 Rating: timeliness of decisions

Most of the respondents said they would have scored mergers at 6 or 7 and anti trust work at 3 or 4. As a result, only two respondents provided a score.

Mean score = 4.5

Commission decisions are not made in a timely manner						Commission decisions are made in a very timely manner
1	2	3	4	5	6	7
-	-	-	1	1	-	-

4.4 Ability to enforce decisions

- The Commission is able to enforce its decisions -

Only a few respondents felt able to comment on this aspect of DG Competition's performance and these respondents expressed the view that Commission decisions were always enforced. It was pointed out that when companies delayed paying a fine, they were fined further and heavily. The case of Microsoft being fined a huge additional sum was used as an example of this.

4.5 Deterrent effect of fines

- The high levels of fines at present is considered to be having a significant deterrent effect -

Fines were generally felt to be an appropriate and effective sanction. The current level of fines was felt to be having an impact; previous levels were seen to have been only 'a minor nuisance'.

"They are scaring the hell out of companies on cartels with the level of fines."

"The higher level fines we have seen in recent years are more impactful."

"There are fines for cartels and we see the fines have increased and increased and they are now starting to bite."

Almost all respondents were sceptical about sanctions beyond fines, especially criminalisation, on both pragmatic and moral grounds. For example, shareholders and senior management could put intolerable pressure on company executives to improve profitability which may cause them to take less than honest steps. Moreover, if the company is found guilty, an executive might be bribed to take the punishment on behalf of the company.

"I don't like those games. I'm not sure that the person who ends up in jail is the one responsible. Prison is prison and we can't joke with this kind of thing."

4.6 Response to the financial and economic crisis

- Views of DG Competition's response to the financial crisis were mixed -

Views were mixed regarding DG Competition's response to the recent global financial crisis. A few respondents were very positive about its response, others were luke-warm and one respondent was fairly critical. Those who felt DG Competition responded well referred to its 'speed', 'flexibility' and 'persistence'. These respondents also claimed that DG Competition set up a new framework for response which was far better than the 'old rules'.

A few commented that the Commission was 'too invisible' during the crisis, particularly in the area of state aid.

"I didn't see the Commission doing enough there."

5 External communication

5.1 Clarity and comprehensibility of external communications

It was generally felt that DG Competition communicates clearly. The language in press releases was praised for being neutral.

However, the point was raised that although clear to economic consultants, the wider audience (including some lawyers) could often interpret communications incorrectly and 'get the wrong end of the stick'.

5.2 Timeliness of communication

- Communications are considered to be prompt and clear -

DG Competition's communications were felt to be prompt and adequate.

"Once they have decided to tell you about things they are pretty quick in then telling you."

However, it was suggested that early market findings could be publicised more promptly through current channels.

5.3 Choice of communication and media channels

- Communications in general and the website in particular were felt to be good -

The DG Competition website, its press releases, newsletters and conferences were all mentioned and this range of channels was considered to be both good and appropriate. The website, in particular, was identified as the perfect vehicle for DG Competition to communicate to all audiences.

"The website is fantastic and you get everything you need, its clear and you know where to look. It's also in different languages and that's excellent."

Much value was placed on conferences for those with experience of getting access to senior individuals at DG Competition through informal networking.

"It's good insight into their thinking and minds."

5.4 Targeting of communications

- The website provides a flexible communications channel -

Very few respondents felt able to comment on this area but those who did identified the website as offering choice and flexibility and reducing the need for DG Competition to further target its communications.

“Putting it on the internet is making it available to anyone that wants it.”

5.5 Promotion of competition culture

- DG Competition could do more to promote competition culture through the wider media -

DG Competition’s efforts in this area were commended, but some felt that more could still be done. Comments were made that the national authorities in the Member States had responsibilities in this area and that DG Competition could look towards the UK as an example. *John Fingleton*, Chief Executive at the OFT was mentioned as a great advocate and someone who was helping to create a healthy competition culture through various speeches and TV appearances.

“He is on a mission; he will happily appear on TV saying, this is an outrage, this is anti competitive, I’m going to stop this.”

“The national authorities might be better placed to do that; [DG COMP] can’t do everything.”

5.5.1 Rating: promotion of competition culture

Mean score = 4.5

DG COMP's activities promoting competition culture are very poor quality						DG COMP's activities promoting competition culture are very good quality
1	2	3	4	5	6	7
-	1	-	-	2	1	-