



Qualitative Study



European  
Commission

## DG COMPETITION STAKEHOLDER STUDY

### Stakeholder Report - Lawyers 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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# 1 Background and Research Method

## 1.1 *Background and objectives*

The objective of this qualitative study is 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 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:

- Integrating better a wider institutional policy context into its daily activities
- Measuring its performance in a number of fields related to the quality and impact of its work, including the effectiveness of its advocacy and communication activities
- The management and prioritisation of its projects, contributing to a more dynamic communication and interaction with stakeholders allowing DG Competition's actions to achieve a greater impact

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.

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

- Economic consultancies
- 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 27 interviews, conducted and across the EU. The respondents were mainly senior partners from the law firms, specialising in competition law and included a number of notable experts in the field.

The law firms whose views are included in this report include the following. Unless indicated, all interviews were with lawyers from the Brussels offices of these firms:

Allen & Overy  
Baker & McKenzie  
Baker & McKenzie, UK  
Bird & Bird  
Bonelli Erede Pappalardo  
Bredin Prat  
Cleary Gottlieb Steen & Hamilton  
Clifford Chance  
Freshfields Bruckhaus Deringer  
Garrigues  
Gleiss Lutz  
Haver Mailaender  
Hengeler Mueller, Germany  
Howrey  
Hunton & Williams  
Linklaters  
Lovells  
Maqs, Denmark  
Redeker Sellner Dahs & Widmaier  
Schönherr, Austria  
Schuette Law  
Squire Sanders & Dempsey  
Vinge, Sweden  
Whire & Case  
Wilmer Hale  
Wolf-Theiss, Austria

One law firm asked not to be identified.

Interviews were conducted between December 2009 and February 2010.

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

The initial list of potential targets was established based on DG Competition's most frequent contacts with lawyers in cases. This list was narrowed down by inviting only one lawyer per company (the choice within law firm was based on the highest seniority of the named lawyers or the actual availability within the law firm). If one particular law firm was mentioned with offices in more than one Member State, the Brussels location was given priority, (presuming that they have the most comprehensive, instrument overarching knowledge).

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 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 the 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 law firms.

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**

All the respondents were experienced specialist competition lawyers, some with twenty years experience or more. All the respondents were partners in their firms and a number were senior partners and influential in the field of competition law.

The majority of our respondents were in frequent contact with DG Competition. Amongst those based in Brussels most respondents deal with case teams on at least a weekly basis. Some of the more senior partners had less frequent contact with DG Competition but usually at a senior management level. Those respondents from other parts of the EU tended to have less contact with DG Competition but levels of contact varied from as little as 'once or twice a year' to 'once or twice a week'.

Nearly a third of our respondents had more than fifteen years of experience of working with DG Competition.

The majority of respondents were broadly satisfied with their contacts with DG Competition. A significant minority of respondents referred spontaneously to DG Competition staff as accessible or approachable and a number expressed the view that accessibility had increased in recent years.

*"The mentality has dramatically changed, for the better."*

*"Relations have improved drastically; it's usually easy to get access."*

However, a similar number mentioned that ease of contact with the case teams varies from one team to another; a recurring theme throughout the interviews with lawyers.

## 2 Soundness of Legal and Economic Analysis

### 2.1 Clarity and comprehensibility of decisions

**- The Commission's decisions are felt to be clear but there is concern about a lack of clarity in the early stages of the process -**

Lawyers are generally very positive about the clarity and comprehensibility of Commission decisions. The legal explanations and the actual decisions themselves are generally commended.

*"DG Comp is recognised worldwide for the quality of its decisions."*

*"Unbeatable clarity, flawless, Premier League lawyers, exceptional individuals, capable of amazing subtlety of reasoning."*

Favourable comparisons were made between DG Competition today and in the past; decisions are felt to be well reasoned compared with the past. DG Competition also compares favourably with the US competition authorities and the various European national competition authorities.

*"Compared to the past they have improved significantly, it is easy to follow their line of reasoning. Compared with national authorities DG Competition is the best in class."*

The majority of lawyers had a generally high regard for the legal clarity of Commission decisions.

*"They have very good lawyers; we have huge respect for them."*

The rigour of DG Competition's legal analysis is felt to have improved during the time of the previous Commissioner and a minority of respondents expressed particular praise for the Commission's Legal Service in its support of DG Competition.

Against this background a number of suggestions were made about how the clarity of DG Competition's decisions could be improved.

About half of the respondents expressed the view that the clarity of legal analysis varies according to the area of competition policy involved.

In **cartels** it is felt that the legal analysis is less thorough than in cases concerning other instruments. This is felt to be because so much information is provided by leniency applicants and some lawyers feel this makes the case team consider the case less critically.

In those **anti-trust** cases when there is a settlement and DG Competition does not issue a fully argued decision, some lawyers find the resulting opaqueness and lack of clarity a source of frustration. Whilst the parties

involved might be happy with the arrangement, the lawyers would prefer to know whether their legal arguments were accepted by DG Competition.

In **mergers** the appeal court is felt to have served a good corrective function where cases were not clear. Although merger decisions are perceived to be more difficult because they involve both legal and economic aspects, making them more complex, the Commission is felt to deliver very clear decisions.

*"A very high quality in recent years, always very detailed."*

A large majority of respondents mentioned a perceived lack of clarity in the intermediate stages of some cases. In spite of the general respect for the legal support given to case teams, some respondents referred to the poor clarity of the statement of objections. In such cases it is thought that DG Competition will sometimes include arguments simply to test the parties' reactions.

Another issue, also mentioned by a minority of respondents, is the perceived shortage of explanation / rationale in a few cases. In these instances decisions are felt to lack background information as to how the decision was arrived at. It is assumed that extensive analysis is conducted but that the results of this analysis are not communicated in the decision. Such a shortage of information provision is also mentioned in discussions relating to the statement of objection. Another instance where there is a perceived lack of sufficient rationale is in DG Competition's responses to private parties' submissions, which can consist of just one sentence rejecting a 20-page argument.

However, a small number of respondents expressed the view that some of DG Competition's final decisions contain too much information; shorter decisions, they feel, would convey a clearer, crisper message. It was also felt that the language could sometimes benefit from being more straightforward, which would help third parties who are less aware of the details of a case.

*"I sometimes have difficulty with the text; if you don't know all the facts, it's not as clear as you would like."*

Another view, expressed by a small minority of lawyers, was that they had insufficient interaction with the Commission's Legal Service. Lawyers would appreciate it if the legal arguments were made clearer at each stage of a case or if the Legal Service were invited to meetings between DG Competition and law firms.

Two respondents expressed the view that the Legal Service may not always have the time or resources to improve the text of decisions 'beyond doubt'. The respondents base their view on the fact that 'good decisions' are sometimes annulled in court on the basis of legal weaknesses.

Several lawyers pointed out that they dislike what they see as the lack of legal clarity with commitment decisions. It is understood that companies can agree with DG Competition to make some commitment to avoid long proceedings and bad publicity. However the lawyers point out that, in such cases, the legal position is not always clear.

## **2.2 Predictability of decisions**

### **- Commission decisions are predictable in the majority of cases but lawyers would appreciate more clarity in the earlier stages of proceedings -**

Most of the respondents are agreed that the Commission's final decisions are predictable in the majority of cases.

*"By and large we feel very secure with the legal development on the Commission's side, it's quite predictable."*

There are two main areas of concern when considering the issue of predictability, all mentioned by a significant minority of respondents.

The first area of concern is the difficulty lawyers have in predicting final decisions during the early stages of cases. That is particularly true where parties spend a lot of time on pre-notification. In a 1<sup>st</sup> phase merger case, for example, the process is sometimes felt to be extended unnecessarily and it is felt that DG Competition could clarify earlier in the process where its primary concerns lie.

*"Predictability in the earlier stages is important when you are defending your client from accusation. If the accusation is not crystal clear you are shooting in the dark."*

The second issue relates to cases where DG Competition appears to change its position mid-case, making the final decisions unexpected. Respondents are unsure of the reasons behind such instances but it is assumed that, in some cases there is a political influence, which might account for DG Competition's apparent difficulty in explaining the rationale for the change of position. In other instances DG Competition appears to be aware that it is outside conventional practice and spends a lot of time explaining intermediate points along the way.

It is recognised that there will be occasions when new ideas will need to be considered as part of a case. The lawyers' request is that, when this occurs, they are given sufficient information on the thinking behind the position so that they can react accordingly.

About half of the respondents pointed out that the degree of predictability varies a lot by instrument. Decisions in mergers are felt to be the most predictable:

*"For mergers, the introduction of the state of play meetings has increased transparency and predictability."*

*"On some merger cases we can immediately see we have a problem."*

At the other extreme, cartel decisions are felt to be the most difficult to predict, particularly at the early stages of the process.

State aid decisions are felt to lie somewhere in between; not as readily predictable as merger cases but easier to predict than cartel decisions:

*"I advise clients they never know what they will get - the Commission has a lot of discretion, often used politically - it would be to their benefit to have the same legal (not economic) clarity as in mergers."*

In addition to the issues discussed above, a number of concerns were raised by one or two lawyers. Each of these is summarised below:

- The view was expressed that unexpected elements tend to appear when a case team is relatively inexperienced. To avoid such irregularities being carried through to the final decision, it is suggested that closer supervision of such teams might be appropriate.
- The increasing emphasis on economic analysis is felt to have led to more difficulties in predicting decisions.

### **2.3 Predictability of fines imposed**

**- Many lawyers find it difficult to predict the level of fines but appear to accept DG Competition's apparent refusal to be more explicit -**

There are conflicting opinions in this area. On the one hand, a minority of respondents say that fines are easier to predict than in the past, partly due to the new (2006<sup>1</sup>) fining guidelines. On the other hand, approximately half of the respondents consider that the size of fines has become disproportionately high and, with the possible range of fine levels now available, more difficult to predict.

Several respondents felt that DG Competition did not want to allow companies to make a calculation of fine level:

*"They don't want companies to be able to do a cost benefit analysis of breaking the law; they might decide on balance that it's better to*

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<sup>1</sup> [Guidelines on the method of setting fines](#) imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Official Journal C 210, 1.09.2006, p. 2-5

*break the law. That is the Commission's theory. It's a bit ivory tower."*

*"The Commission's philosophy is that they want to be transparent but not predictable. This leaves a grey area which goes beyond purely exercising their discretion."*

However, one lawyer said that his experience was that companies do not calculate in this way.

It would seem that many lawyers accept that the Commission should retain a certain degree of discretion in the setting of fines. Furthermore they acknowledge that there are a lot of variables involved, which make prediction very difficult.

Most respondents refer specifically to the 2006 guidelines although satisfaction with those guidelines is mixed. Each of the following three positions was expressed by a small but significant number of respondents.

- One group said they think the guidelines allow them to make a better job of predicting levels of fines:

*"10 times more predictable than in the past."*

*"More predictable than before, but still difficult."*

- Another group thinks that they have not make a significant difference:

*"The new guidelines didn't change much. I don't think the Commission wants to make it too clear. I find that strange."*

- The third group of respondents is more negative, expressing the view that the guidelines have not made it sufficiently easy to calculate the amount of fines:

*"The guidelines are rarely of any use. It's extremely difficult to calculate the amounts beforehand."*

*"They are inadequate - there are some tools for helping to estimate how much the fine will be but they're certainly not sufficient."*

Specific references were made by individual lawyers to the difficulties they experience in understanding how such issues as the duration of the infringement and the gravity of the case are factored into the calculation of fines.

It should be noted that a small number of respondents expressed doubts as to whether it would be feasible to make the guidelines on fines tighter or more transparent. They felt that making the guidelines too narrow might not achieve a better result or a fairer outcome for the company.

A number of other issues were each raised by one or two lawyers. These include:

- Not enough effort is felt to be made to evaluate the impact of a cartel in calculating the size of fines imposed. The level of fines appears to be based mainly on the size of the market, not necessarily on the effect of the cartel’s infringement on the market.
- One perceived effect of the current high level of fines is increased uncertainty for companies which can have a negative impact on their accounts, their share value, their image and their relationship with their creditors.
- It is felt that that the commission does not give due consideration to the risk of bankruptcy for a business as a result of a fine. A challenge in court can take three years, by which time it may be too late for a company in difficulties. This led to a suggestion that a mechanism be found for fines to be reviewed more rapidly and for the parties to have the ability to comment on the fine before it is adopted.
- One respondent asked for the factors taken into consideration to be laid out in the statement of objections, allowing the lawyers to discuss them with DG Competition.

**2.3.1 Rating: legal soundness of decisions**

Mean score = 5

Commission decisions were not legally sound						Commission decisions were very legally sound
1	2	3	4	5	6	7
-	-	-	5	16	4	-

**2.4 Technical quality of economic analysis**

**- The increased involvement of economists in recent years has been a significant improvement but it is felt that their analysis is sometimes too theoretical -**

A small minority of the lawyers felt unqualified to comment on economic analysis, with five respondents preferring not to give a score. However, amongst the majority of lawyers comments about the quality of DG Competition’s economic analysis were positive, with only a few expressing concerns or reservations.

*"Economic analysis has certainly improved... We sometimes use outside economists and they have a high regard for the economics team at DG Competition."*

In particular the Chief Economist's team was praised for improving the objectivity of DG Competition's work, improving the quality of economic analysis and making it easier for lawyers to discuss case issues with DG Competition.

*"It seems to be functioning well. In one case they showed that the picture was much more complicated than the case team indicated. They played an important role in making the report more objective."*

*"Economic analysis has significantly improved, particularly with the introduction of the Chief Economist's team, to which the case teams have access. In the past we had do-it-yourself economics."*

*"They have opened up our discussion with the Commission; the Commission is more flexible, more open to discussion. [They were] too conservative in the past with their legal tests."*

However, although none of the respondents expressed entirely negative views about DG Competition's economic analysis, a small minority of respondents raised issues of which they felt DG Competition should be aware. Most of these criticisms relate to the scale of economic analysis and its impact on both the length of cases and the demands for data from companies.

*"On a relatively simple merger case the economist made a meal of it; over-professional, perfectionist. It was madness. The economist was running wild."*

*"Sometimes [it is] very time consuming, very expensive and unfocused... Highly complex models, hugely data hungry; not proportionate to what they were meant to look at."*

*"In some merger cases the economics team requires more time. Sometimes one wonders if the delay is justified by the results."*

It should be stressed that these are isolated opinions and do not reflect the views of the majority. For instance, only a small number of respondents referred to economic analysis slowing down cases; other respondents had not had that experience.

The view was also expressed by a small number of lawyers that, in some instances, economic analysis is given too great a weight versus legal analysis.

*"We criticised them in some cases for trying to concentrate on the economic analysis and forgetting about the legal aspects. Economic analysis is just a tool of the legal analysis."*

It is felt by a small but significant number of respondents to be important that the economists should be involved in a case from an early stage. On the one hand this broadens the initial discussions. On the other hand it avoids the risk of the process being slowed down when they get involved in a case at a later stage.

Views on economic analysis in the field of State aid varied widely. Some respondents felt there was a lack of economic analysis in this area, others thought there was too much, or that what there was appeared to be too theoretical.

Some respondents expressed the view that the case team and the Chief Economist's team are sometimes not sufficiently integrated in their activities.

*"For a complicated merger case you will have an economist present but I don't think they are sufficiently integrated in the team. They go off looking at particular data that isn't significant to the rest of the team."*

Individual lawyers also raised a number of related issues:

- There was a request for clearer information as to where and how an economist's input had been made to a case.
- More information was requested about the identity of the individuals undertaking economic analysis on particular cases, facilitating more access to them by lawyers.
- Another lawyer felt that economic reasoning was not clearly communicated in final decisions.

## **2.5 Understanding of the markets**

**- DG Competition's market understanding has improved in recent years but many lawyers feel this is an area where further improvement is required -**

Overall the market understanding of DG Competition's case teams is felt to be reasonably good. Several respondents observed that the level of DG Competition's market understanding has improved in recent years and most think that the reorganisation of DG Competition into departments for different market sectors has had a beneficial effect.

However, bearing in mind the critical importance of market understanding in making decisions in competition cases, many lawyers feel that this is an area where further improvement would be beneficial. There do not appear to be any specific patterns of perceived weakness in particular sectors although some, like the Internet and e-commerce, are changing

so fast that it is felt to be difficult for everyone to be up to speed. The main issue appears to relate to the market knowledge of individual case teams and even team members.

*"It depends on the case team, on the prior experience of individuals, on the level of focus on the case, on the time available and interest in dealing with the issues. Some people are excellent."*

This issue of case team variability was identified by around half the lawyers interviewed. In general the teams are perceived to contain a mix of experienced staff, with a high level of competence, and less experienced individuals.

*"Some are experts but some are also beginners. The juniors rely on the seniors to know something about the market. I've had good and bad experiences."*

*"Typically in a case team of five people, two really know the market and three are slightly at a loss."*

In most instances such a mix is felt to be appropriate. Problems are felt to arise when a case team appears to have less experienced staff making key decisions. One respondent suggested that there should be a minimum of two team members with appropriate market experience in each case team to avoid this happening.

It was felt by about half the lawyers that a major factor in case team quality is the rotation policy at the Commission, which impacts on DG Competition.

*"The problem is the lack of continuity. It's like musical chairs. There was a sugar merger some years ago; they have had masses of sugar cases but for the handler this was his first sugar case."*

*"The main drawback is the rotation of the staff; staff moving on. In several cases of drawn-out mergers and cartels, when it came to the statement of objections or the final decision, there was not a single member on the case that was there at the beginning; those that were there had no idea what was going on."*

The view was expressed by a small number of lawyers that, with staff rotation, much of the very considerable knowledge and understanding of markets is often lost. Particular reference was made to recent sector enquiries (energy, pharmaceuticals and financial services).

*"They struggle in pharmaceuticals; the information built up over 18 months in their sector enquiry will soon be gone as staff move on. They should keep some people there longer, even if that is against the Commission's mobility policy."*

Such loss of market knowledge is even felt to be an issue in some longer-running cases, where case team composition changes during the process.

*"The historic memory leaves a lot to be desired. As the case develops they develop an understanding, then the team changes."*

However, set against this, one lawyer complemented DG Competition for the way it is able move people from one team to another. For an urgent merger case, for example, people are often taken from other teams with appropriate industry experience.

Several lawyers expressed the view that the young staff they encounter at DG Competition are highly intelligent and well qualified. However, a small minority of respondents felt that an over-academic outlook and a lack of appropriate business experience and understanding is a weakness among some new recruits.

*"Even more important than their lack of business experience is their lack of business understanding; how commercial developments take place, how contracts work. That makes them over-suspicious. More practical experience would help."*

Indeed, at an overall level, whilst DG Competition is thought to have a good general understanding of markets, it is sometimes felt to demonstrate a poor understanding of specific businesses; how business decisions are made.

One way in which several lawyers suggested DG Competition could address this limitation in its market understanding is to encourage staff to 'get out' into the market.

*"It always helps if the case team goes on the spot to understand how the process works. They often had a change of mind after visiting the company (and) better understanding how it all fits together."*

*"In mergers they have become obsessed with huge questionnaires and made too little effort in getting out into the market to understand it. For every major case they should get out. They should do that more consistently."*

Whilst many lawyers were critical of the Commission's staff rotation policy and its impact on case teams, a small number of respondents talked about the potential positive impact of change, both in terms of people bringing new ideas and making sure there is no stagnation.

*"There is the reverse side of the coin; if you come to the table with too much experience, you can have preconceived notions."*

### 2.5.1 Rating: market knowledge

Mean score = 4.6

DG COMP do not know the markets at all						DG COMP know the markets very well
1	2	3	4	5	6	7
-	1	1	9	10	3	1

### 2.6 Focus of enforcement activities

**- Most lawyers feel DG Competition’s sector focus has been appropriate but concerns were expressed about the way the pharmaceutical sector enquiry was handled -**

Overall, it was felt that DG Competition’s selection of sectors on which to focus its enquiries was appropriate. Most respondents were happy to comment on the issue and, in general, expressed approval of DG Competition’s choices.

*“I think they have a good balance.”*

The main sector enquiries referred to in the interviews were energy, insurance, banking, and pharmaceuticals. Of these the pharmaceutical sector enquiry attracted the most comments. None of the respondents objected to DG Competition having selected that sector for investigation. However, the method of enquiry and the outcome received considerable criticism.

*“I’m a supporter of the sectoral approach and pharmaceuticals warranted some investigation but I have reservations about the pharma investigation because of their [DG Competition’s] schizophrenia towards intellectual property rights.”*

*“The pharma sector enquiry was called the ‘Friday questionnaire’; badly formulated questionnaires sent out every Friday during the course of several months. It was murder. The industry suffered seriously from that analysis and it was not good for the Commission’s image.”*

It was pointed out by two respondents that the pharmaceuticals case was the first time that a dawn raid had been used in a sector enquiry and that a credible explanation for the use of such an approach had never been given. The only explanation provided (that DG Competition would get fuller and more satisfactory answers) was not felt to be acceptable. It was felt that the normal procedures, asking questions and further questions, should have been sufficient.

Two respondents expressed the view that DG Competition sometimes launches potentially far-reaching enquiries without sufficient resources being available to complete them. It was felt that to start an enquiry but not finish it damages DG Competition's reputation.

It was suggested by a small but significant minority of respondents that DG Competition should make use of the resources of other DG's in order to take into account market changes; more interaction with other DGs, would allow DG Competition to keep in touch with the latest thinking. When considering such interactions several lawyers made it clear that they believe DG Competition resists any pressure from other DG's. It is understood that, on occasion, some other DG's try to influence DG Competition, but the latter is felt to have a strong position within the Commission and had a clear reputation for independence.

Two respondents suggested areas that they felt should be considered for sector enquiries: airports and pay-TV. Another respondent thought that textiles, foodstuffs and financial consultancy would be appropriate markets for investigation.

### 2.6.1 Rating: quality of economic analysis

Mean score = 4.9

DG COMP's economic analysis is very poor						DG COMP's economic analysis is very good
1	2	3	4	5	6	7
-	-	<b>1</b>	<b>7</b>	<b>9</b>	<b>4</b>	<b>1</b>

### 3 Integrity

#### 3.1 Transparency - listening and informing in a timely manner

##### - Lawyers would like DG Competition to be more open about the internal timetable of cases -

The views of lawyers on DG Competition's performance concerning listening to and informing stakeholders in a timely manner were extremely mixed. We can distinguish three groups. The first group, those with primarily positive comments, represented a small minority of respondents. The second group, those expressing mixed opinions, accounted for about half of respondents. The third group, whose views were primarily negative represented about a third of respondents. We will take the views of each group in turn.

As noted, the views of the **first group** were **mainly positive**:

*"Excellent; they always tell you what they are going to do, it's never a complete surprise. They tell you as much as they can."*

*"We are occasionally surprised [but it is] much better than it was."*

The **second group** of respondents expressed **mixed opinions**. In some instances views were different for different instruments, with the view expressed that, for mergers, the process is clear and transparent and the schedule readily understandable whilst this is less the case with other instruments.

*"In mergers you know, in non-mergers it's a mystery. There is almost an institutionalised disinclination to be open about where cases stand and where they are going. In the past they might have been worried that we would go behind their backs. Today that caution serves little purpose. Things haven't improved."*

*"For merger procedures I know exactly when it starts, the state of play, the remedies, that's fine. For anti-trust it's different, there are rough guidelines for complainants, after four months they tell you if they want to instigate proceedings. They could do better."*

However, even in merger cases, DG Competition is sometimes felt to 'tweak' timings. Individual respondents also mentioned a number of other points in relation to mergers:

- One felt that, in 1<sup>st</sup> phase mergers there is sometimes a lack of clarity in the initial communications; DG Competition appears to know there is an issue but is not able to state clearly what it is.
- Another felt that the timing on mergers is not as good as it used to be. He feels that the effect of the prohibition decision in 2002 being

overturned by the court has resulted in DG Competition being much more thorough; asking for more information but slowing down procedures.

State of play meetings are generally seen in a positive light since they help lawyers to know where they stand and what their options are. Although such meetings do not appear to be offered automatically, it is appreciated that they always seem to be granted if requested. One respondent expressed the view that including state of play meetings for all instruments would be welcome.

*"There is a debate about the state of play meetings being extended beyond merger control, [that is] a good idea."*

One of the 'mixed' responses came from a lawyer who felt that, whilst the parties know what stage a case is at, they don't know what the overall timetable is. He suggested that DG Competition consider adopting the approach used by the UK competition authority which is said to provide a detailed framework for the case (document X due on a certain date, a standard number of weeks to respond etc.).

The **third group** of respondents was **mainly critical** about DG Competition's performance in this area. As in other areas, some feel the performance of DG Competition is too variable, with considerable differences from one case team to another. It is felt that all case teams should have a systematic approach and set a clear agenda, which is not always the case at present. One respondent felt that the head of the case team tended to influence the level of transparency.

*"Some are very transparent, others make several U-turns. It's a question of individual style."*

Beyond this general call for consistency the criticisms these respondents made about listening and informing are primarily concerned with the perceived lack of clarity within DG Competition about the process of cases. A number of respondents made the distinction between the 'official procedure' which is felt to be both clear and obvious and the reality (DG Competition's 'internal procedures') which appears to be far more opaque. For example, more transparency would be welcome about what happens between the parties' responses to the statement of objection and the moment the decision is adopted.

*"The lack of transparency is silly... It's a cat and mouse game; trying to get information from the team leader, when the next meeting will be, calling members of the Cabinet... Why can't the Commission advise us when the decision is going to be adopted? They will probably say they don't know but they could give us details of where the draft is. It's not good enough just saying, 'you will see it when you see it'."*

One effect of the lack of communication about the progress of cases is that requests can sometimes come unexpectedly and with unrealistically short deadlines.

*"I know cases where they took no action for four or five years and [then] sent the questionnaire about activities over several years and gave us two weeks [to complete it]."*

Several respondents also pointed out that such a problem is exacerbated when the request is sent out just before a holiday; particularly if the deadline for responses is also immediately before a holiday.

*"The Commission asked us for input by 21st December; no-one there is going to read that before 15th January."*

### 3.1.1 Rating: informing in a timely manner

Mean score = 4.3

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
1	2	3	8	6	2	2

### 3.2 Transparency - stakeholder consultation on new rules

**- Whilst lawyers are usually given every opportunity to voice their opinions, some feel those opinions are rarely taken into account -**

The general feeling amongst lawyers is that normally there is full public consultation on new rules and that the process is very transparent.

*"[It is] very transparent. Commission officials make themselves available to talk to practitioners."*

However, even some of the respondents who were generally satisfied with the consultation process felt that the input they provided (via the website or at public meetings) was not always taken into account. This issue was raised by nearly half the respondents.

*"It's lip service. The draft already has everything in it, as far as the Commission is concerned. They take note of what you say but the text remains the same. It's rare that a draft consultation changes."*

*"They are good at managing consultations but the question is: how do they react? At the conference they were not open to discussion, the director was even aggressive."*

The view was expressed that the consultation element tends to take place too late in the process, making it very difficult for DG Competition to take all stakeholder input fully into account.

*"All the stakeholder suggestions are shown but the text doesn't change."*

It is suggested that at least the main recurring themes suggested by stakeholders could be reflected in the final document.

A small number of lawyers expressed reservations about the way that the best practice guideline on procedural rights was 'rushed through' at the end of 2009. Discussions were perceived to have been limited to the 'Brussels elite' but even those who were part of the consultation felt the process was far from ideal.

*"Why should it have to be done before the end of the Commissioner's mandate? The important thing is to get it right."*

Two other points were made about the schedule of consultations:

- One respondent expressed the view that two months is insufficient time for stakeholder input on major consultations.
- Another suggested that there would be benefits in terms of clarity and openness if an extra stage were added to the consultation process after DG Competition receives the input from stakeholders

### 3.2.1 Rating: stakeholder consultation on new rules

Mean score = 5.7

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
-	-	1	1	6	14	3

### **3.3 Observance of procedural rules**

**- Observance of procedural rules is generally felt to be good although some minor points were raised about consistency and interpretation -**

When asked to consider DG Competition's observance of the current procedural rules most lawyers felt that, by and large, DG Competition does observe them. As with all the areas discussed, there were some clear issues raised but, overall, DG Competition's performance in this area is felt to be good.

However, about a third of our respondents commented on the procedures themselves. Although it is beyond the remit of this study to address this issue, we feel that a brief summary of the main concerns expressed is necessary to provide a context for the other responses we received to this question.

In general terms these lawyers feel that the Commission complies with the rules that exist but that the rules themselves are 'flawed and unfair'. The main issue appears to be the fact that no independent, external authority is involved in decisions about cases or the levels of fines imposed. A number of the lawyers who raised this issue characterised the situation as DG Competition acting as 'judge, jury and executioner'. The role of the hearing officer, for example, was singled out for comment:

*"The hearing officer made sure the coffee is served at the right time and that the interpreters aren't too tired. They have no real role. The US way seems good, with an administrative law judge hearing all the facts and producing a report."*

A number of other points raised about the procedures and procedural rules referred to the hearings:

- Comments included the view that hearings are perceived to be more about a third-party complainant creating publicity than addressing legal or economic questions.
- Oral hearings were also criticised because, in most instances, the person who will take the ultimate decision on the case is not present, meaning that some lawyers claim that they and their clients are questioning the value of attending.

Turning to lawyers comments about DG Competition's observance of procedural rules, a few respondents felt that there seems to be considerable leeway for DG Competition in how it handles statements of objection. The view was expressed that there appear to be no rules about applying pressure (two respondents used the word 'bullying' to describe DG Competition's behaviour) and no rules on how many questions can be asked on merger pre-notification.

Several references were made about access to file. Access being granted after the statement of objections is considered to be too late in the procedure. It is felt that the file, or at least part of it, should be available before the statement of objections. The huge volume of some files and the short time available can present difficulties.

Several respondents referred to off-the-record briefings which they believe are given to journalists. They understand that DG Competition may wish to have good contacts with journalists but feel that the evidence contradicts DG Competition's claims that off-the-record briefings do not happen. What many lawyers appear to find especially hard to accept is when journalists seem to have been told things before the affected parties are informed.

A wide range of additional points was raised during this section of the discussion, each by only one or two respondents. The main issues are summarised below:

- One respondent suggested that DG Competition could be more consistent in the area of informal procedures. He cited the example of State aid cases where some officials at DG Competition are felt to be more flexible than others, allowing lawyers to be involved in discussions, acting as 'counsel' for their clients, whilst other officials 'play by the book'. This inconsistency is felt to make life very difficult for lawyers.

*"It's like the dog waiting to be fed from the table; we get used to it, so approach the table but sometimes get a sharp rap on the nose and told to go away."*

- DG Competition is sometimes perceived to interpret procedural rules in a way that favours its own point of view. Sometimes it is perceived to start an investigation and then consider the case not sufficiently important from a political point of view and simply drop it. This is felt to be outside the rules.
- In the case of mergers, one respondent referred to the procedure of 'stopping the clock', which he felt is sometimes used inappropriately. He felt that, for instance, if only 5% of the required data were missing, which would make no difference to the outcome of the case, DG Competition should not put the clock back in order, as he saw it, to gain time to get more organised.
- Reference was made by one respondent to the introduction of the new simplified mergers procedure. The pre-notification consultation is not thought to speed the process up since, it is felt, the case team want to be so sure they meet all the criteria that it takes longer than the normal procedure.

- In abuse of dominant position (Article 102) it is felt that DG Competition does not investigate complaints and so is not implementing the rules.

### **3.4 Burden on businesses**

**- The volume of questions is sometimes felt to be disproportionate; greater consultation earlier in the process might help to address this -**

The majority of lawyers consider that the information requests made by DG Competition place a heavy burden on companies. However a few of them admitted that they understand and accept that DG Competition requires considerable amounts of data to carry out its work effectively.

*"I think there is too heavy a burden but I wish I knew how to make it better."*

*"In my experience the amount is not unreasonable, it is necessary."*

Despite these minority views, the majority express the desire that DG Competition could become more measured in its requests for information and, in particular, that case teams would make sure they need particular information before asking for it. However, the view was expressed by a small number of lawyers that the introduction of the Chief Economist and his team has led to an increase in the volume of data requested from companies.

Lawyers perceive that DG Competition case teams have a number of challenges at the beginning of cases: the need to focus quickly on the key issues; the difficulty of discussing openly with lawyers when the case team has not determined which position to adopt; limited market knowledge. However, the majority of lawyers are convinced that maximum transparency in the early stages of a case, despite issues such as these, could save a lot of time for all parties and reduce the burden on businesses.

It was suggested by some lawyers that early discussions with companies and their legal representatives could help DG Competition to limit itself to asking appropriate questions. It is suggested that the involvement of experienced case handlers at an early stage could also help avoid questions that have no relevance. It is felt that less experienced staff tend to be afraid of being criticised for not having asked certain questions and so tend to ask 'everything'.

*"No official ever got sacked for asking questions. Middle management should supervise more. This is important for maintaining the good reputation of the Commission."*

*"From their case experience they could say: 'in the past we asked A, B, C, D and E; in fact what we need is B and D'. But youngsters will ask for A - E, and also F."*

Apart from the volume of data requested there is felt to be a problem with the format in which DG Competition asks to receive data. The requested format often requires additional manual work by company staff. It is perceived that companies often have problems identifying staff who are both able to answer DG Competition questionnaires and are available to do so. It is suggested that DG Competition could examine how companies normally store information so that future requests could be made more in line with industry practice.

A number of other points were raised about requests for information, in each case by a relatively small number of respondents:

- As well as the data format issue mentioned above, there are sometimes problems with the technical language used; company employees have difficulty understanding what is required so that the lawyers sometimes have to act as interpreters.
- There was a plea from several respondents not to send out requests the day before a holiday period.
- Another respondent objected to DG Competition asking for information that is publicly available.
- A small number of lawyers raised concerns about DG Competition asking companies for opinions, for example what they think about a proposed merger; this is felt to lead to weighted evidence.
- If points covered in DG Competition questionnaires are not referred to in the final decision, it is felt to reinforce the view that such questions were not relevant and raises questions about whether the information was used.
- One respondent complained that DG Competition's requests are not always well coordinated. He expressed the view that requests, via fax, go to different people in the same company which can lead to confusion and loss of time as such requests need to be coordinated.

### **Pharmaceutical sector enquiry**

The pharmaceutical sector enquiry was mentioned by at least half of the lawyers interviewed so we include it here as a short case study.

This sector enquiry was perceived to have generated a heavier burden of information requests than any other enquiry or case. Some lawyers expressed very strong views on this subject; the strength of opinion can be gauged through some of the language used (for example, 'witch hunt'.)

The main points raised can be summarised as follows:

- The volume of data requested was viewed as disproportionate: respondents referred to long questionnaires being sent 'every Friday for about six months' and to '200 people working for five months' in order to meet DG Competition's information requests.
- Some of the respondents had reservations about the use of dawn raids. Lawyers struggle to find a justification for such an approach.

When discussing the pharmaceutical sector enquiry lawyers also raised some other issues which are included in this section for consistency:

- One respondent felt that, as a public authority, DG Competition's senior management (particularly the Commissioner) should 'show more restraint' and that negotiating should not be conducted as if DG Competition were operating in the private sector.

*"In a private negotiation, if you ask me something, I can tell you to get lost. If a public official, with the power of punishment that the Commission has, asks you to do something, you say: 'yes sir'."*

- Comments made by some DG Competition officials at the interim hearing were considered to be highly inappropriate (one official was said to have claimed it was 'a shocking situation; something must be done'). It is believed that both the industry and the patent office felt attacked by the language used. It was acknowledged that DG Competition published a toned down version 2 weeks later.

The fact that the final report, despite the enquiry apparently finding only a tiny number of cases of anti-competitive behaviour, 'persisted in the claim' that patenting dampens the innovation process was raised by a number of respondents. They felt this was evidence that DG Competition had decided the outcome of the enquiry in advance.

As a result of these issues a number of lawyers expressed the view that DG Competition had lost a lot of credibility over this particular sector enquiry.

## 4 Economic Effectiveness

### 4.1 Effectiveness of detection policy

**- DG Competition's detection policy, especially the leniency programme is seen as highly successful but some feel that DG Competition should conduct more ex officio investigations -**

Overall the lawyers interviewed felt that DG Competition's detection policy was effective. The vast majority of answers in response to this question related to the leniency programme.

A small minority of respondents expressed the view that DG Competition is currently over-reliant on the leniency programme. This perception came, in part, from reports which some lawyers had seen about the number of cartel cases that are triggered by leniency applications and the number that are ex officio and in part, it was claimed, from information from DG Competition itself.

Despite these reservations, a large minority of respondents expressed the view that the leniency programme is extremely effective.

A number of specific issues were raised about the leniency programme. These were relatively diverse in nature and most were mentioned by only one or two respondents:

- Two respondents expressed the view that the leniency programme had become 'a victim of its own success'.

*"Leniency was a great idea, even if the Commission has not been able to follow up on everything. Maybe it was over-effective. I'm not sure they could keep up with all the information that was put on the table but they are on the right track. The settlement procedure is a positive development, which may help to make it even more efficient."*

- Another respondent had the impression that there were also instances of 'insignificant cases' appearing through the leniency programme and welcomed the news that DG Competition was currently raising the requirements of what companies have to submit when applying for leniency.
- On the question of which cases are selected by DG Competition, it was feared by one lawyer that it depends more on how eager an applicant is, rather than the importance of the case.

*"There is an incentive to make up stories and exaggerate. It's an efficient instrument but the Commission should keep some distance."*

*It's like journalists and their sources. Objectivity is not the driving force."*

- A similar point was raised by another respondent who felt that some companies were getting into a situation where they felt they needed to provide more and more information in order to try and get an immunity letter from DG Competition and this was not necessarily a good thing.
- Finally, one respondent felt that, in spite of the efficiency of the leniency programme, not enough cases were being uncovered in certain industry sectors, for example in the high-tech and consumer goods markets. He felt that DG Competition is still only seeing the 'tip of the iceberg'. This view was echoed by another respondent who felt that DG Competition does not do enough proactive detection work.

There were relatively few comments or suggestions made about DG Competition's detection policy beyond the leniency programme. However, the following were raised by one or two respondents in each case:

- One respondent felt DG Competition could be clearer about its enforcement priorities, citing the OFT in the UK as an institution which clearly states its objectives.
- It was suggested that there should be more coordination with National Competition Authorities in the area of detection.
- DG Competition is felt to have been devoting a lot of resources to big players like Microsoft and Intel and there is a feeling that many smaller cases may have gone undetected as a result.

## **4.2 Impact on the markets**

- **The impact of DG Competition's work on the markets has been positive but some companies may be becoming fearful of DG Competition, hampering their business development -**

Most respondents felt that the impact of DG Competition's work on the competitiveness of markets has been positive in the last few years.

*"A big impact. Much more compliance. People know there is an authority they can complain to, which is willing to act."*

Concerning sector analyses, we saw in section 4.4 above the criticisms of the investigation into the pharmaceutical sector. However, the energy sector enquiry was generally perceived as having been effective. Leading players have been seen to make divestments so the consumer can see some move towards liberalisation.

A small minority of respondents expressed the view that the large fines being imposed are beginning to have some negative or counter-productive effects. One suggestion was that companies are starting to hesitate about taking risks. Since it can be argued that business is all about taking risks that lead to the development of new markets, which are in the interests of consumers, it is felt that, in some instances, DG Competition's impact on markets is harmful.

There were a number of comments from individual lawyers highlighting specific areas where it was felt DG Competition's impact on markets had been counter-productive:

- In some cases companies decide not to go to the merger stage because they anticipate that they will have problems with the competition authorities, potentially hampering viable business development.
- Another respondent felt that DG Competition's unwillingness to engage with companies at an early stage of possible merger planning stifles business.

*"If a company is considering a big investment, which may be borderline, they need an indication from the Commission whether they would get approval."*

- Another respondents feels it is the same with State aid: governments think before acting, which can be a good check on unsuitable cases but could also discourage valid cases.
- In well-publicised cases like Microsoft, it is felt that DG Competition does not differentiate sufficiently between general principles which would apply to all companies and specific points which apply only to the specific case. This is felt to mean that some companies, who are not clear about the specific competition issues, are 'afraid' of the competition authorities, which may 'dampen' their plans to develop their businesses.
- There have not been enough decisions in anti-trust cases, with many decisions turning into compromises, resulting in a lack of clarity.

One respondent applauded the fact that the outgoing director-general in a speech in September '09 admitted that DG Competition should give more guidance to business on what is and what isn't acceptable. It was hoped that the same attitude would be held by the incoming team.

Many of the questions in the study are interrelated and particularly so the question on market impact. When asked about the impact on the market, some respondents refer to the effect of deterrents; these comments are covered in section 5.6. Others return to the issue of high fines, already covered in section 3.4. A few respondents also raised the question of compliance programmes, covered in section 5.6.

DG Competition's handling of the economic crisis is covered fully in section 5.7 but is worth noting here that many lawyers are convinced that DG Competition's decisions had a positive effect on the general reputation of the organisation; the perception of the role of DG Competition, its function and its efficiency in taking decisions have all been enhanced.

**4.2.1 Rating: impact on the markets**

Mean score = 4.9

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
-	-	-	9	10	4	1

**4.3 Timeliness of decisions**

**- Timing for mergers is considered good but unacceptably long for most other areas, particularly cartels -**

The speed of its decision-making was the most criticised aspect of DG Competition's work. However, before examining the areas raised as problems we should note that a small number of examples were quoted where DG Competition had made a particular effort to speed up procedures because of the particular circumstances in which a company found itself and this is welcomed.

Lawyers realise that DG Competition has limited resources available but still raise a number of issues related to its personnel and the impact they can have on case timings. A significant minority of respondents mentioned cases where proceedings 'came to a halt' when a member of the case team went on maternity leave and only picked up again when the person came back to work.

Other related issues were each raised by only one or two lawyers:

- Because of the Commission's staff rotation policy case handlers move on and cases are put in abeyance.
- Another consequence of the rotation policy is that it is not always the person who asked questions who analyses the answers, slowing the process down.

The issues of speed and timeliness are felt to differ significantly between the different instruments:

## **Mergers**

In general the timing on mergers is felt to be much better than in other areas, due to the strict regulations.

*"Mergers are OK, due to the regulatory framework."*

However there is some dissatisfaction with the timing of mergers, albeit expressed by only small numbers of respondents:

- Mergers can take a lot longer than originally envisaged.
- Phase 2 procedures are said to take too long.

*"On mergers it works well. More time is spent up-front. But in some cases, where there is no competition problem, the case team still takes its time, which is unfortunate."*

## **Cartels**

There is general agreement that the main instrument where timing is an issue is cartels.

*"Some cartel cases take forever, creating huge commercial uncertainty in the companies concerned. That uncertainty, dragging on for five or six years, is a real problem."*

Since cartel cases are perceived to 'usually' last at least two years from the starting point to the statement of objections, a small minority of lawyers expressed frustration that, during that time, they can only answer questions from DG Competition and not make any other points. Only after receiving the statement of objections do certain procedural rights (access to file, right to hearings etc.) 'kick in'. In the majority of cases the final decision follows the same direction as the statement of objections, so lawyers would like to have more opportunity for dialogue during the period preceding the statement of objections and see this period shortened.

*"For some two years, the sword of Damocles is hovering over this publicly listed company. That is very detrimental in terms of stock value. It's a very long period to be left in the dark with no right of defence."*

Two respondents discussed a recent reorganisation of DG Competition's 'mergers unit' which they understood had been intended to help meet strict timing requirements. They wonder why similar procedures cannot be applied to cartels.

**Anti-trust**

Cases of abuse of dominant position should, one respondent suggested, be quicker since they only involve one company. It is suggested that having distinct phases and a clear time period for each phase would be an improvement on the current situation. It was suggested by another respondent that the decision in an abuse case lasting several years may be devalued because the market is likely to have changed substantially during the period of the case.

**State aid**

On State aid DG Competition is felt to be too ready to grant timing extensions to Member States, making the process overly protracted.

*“Apart from the mergers, the timing is disastrous. On State aid the recommended period of investigation is 18 months.”*

It is suggested that work on State aid could be quicker, since it is not perceived to be very different from merger control.

Views of the impact of the settlement procedure were mixed: One respondent felt that it had helped DG Competition to adopt decisions faster. However, another expressed the view that the procedure is a ‘total failure’; suggesting that the maximum discount of 10% is not a big enough incentive.

Nearly half the respondents spontaneously referred to the admirable speed with which DG Competition tackled State aid issues during the financial crisis. Some of them added that they would welcome seeing DG Competition working with equal speed on more routine cases.

**4.3.1 Rating: timeliness of decisions**

Mean score = 3.8

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	9	10	5	-	-

#### **4.4 Ability to enforce decisions**

**- The Commission is felt to be able to enforce its decisions well in all areas except State aid -**

In general the respondents are satisfied with the way in which the Commission enforces compliance.

*"I'm sure parties comply with the conditions imposed by the Commission. Anyone who is really determined to cross swords with the Commission is going to have a tough time. The showdown would be in the public arena, he couldn't afford to do that."*

Enforcing compliance is also said to have improved.

*"In the past, when people got a negative decision, they just put their feet up. There were many examples where companies avoided payment. That has really improved, compliance is effective."*

The way in which follow-up work on Microsoft and Intel was undertaken is felt to show that DG Competition takes compliance seriously. This has sent a clear message to other companies.

However, a large minority of respondents point to a variation in compliance between the different areas of competition, particularly in State aid.

*"With companies [it is] very good. With Member States, in the field of State aid, the record is very poor. There is a huge amount of aid that is declared incompatible but not recovered."*

*"Effective in mergers; pretty ineffective in State aid."*

*"Apart from State aid, I never heard of people getting away with it."*

The main perceived problem is in the recovery of State aid, in cases where DG Competition prohibits aid that has already been paid by Member States to companies. Member States are perceived to be reluctant to repay it and, as a result, they take too long recovering the money from the companies. However, DG Competition is said to be addressing this issue, putting more pressure on the Member States.

On mergers it was felt that recommendations are generally complied with, although sometimes DG Competition is viewed as being a 'bit inflexible'.

#### **4.5 Deterrent effect of fines**

**- Lawyers approve of the principle of fines but many of them feel the level of fines imposed is now too high -**

Overall lawyers felt that fines are an effective deterrent. On cartels the high fines imposed are thought to make companies aware of the dangers of getting involved in such illegal activities. As a result a number of respondents feel that there has been much more compliance in the last 10 years.

*"15 years ago none of our companies took competition legislation seriously but now, due to the big fines and increased awareness, they respect it a lot more."*

As we have already discussed in section 3.4, a significant minority of respondents felt that the current levels of fines is excessive and that their deterrent effect is not increasing proportionately.

*"I think the fines are too high. They were already a deterrent when they were much lower. There is a point beyond which you don't deter people any more; you can only execute somebody once."*

*"At some point in time you reach the limit. The principle that double the fine is double the deterrent is not true."*

In addition, a small but significant minority feel that such high levels of fines may lead companies to be a lot more cautious in uncovering things, going to DG Competition and cooperating with its investigations.

One respondent came back to the question of transparency on the level of fines. He felt that companies would come forward more often if they were able to make a real calculation of the probable fine, which is too difficult to make today.

There were mixed views about DG Competition's apparent attitude that, if a company has a compliance programme but still makes a cartel, it should be fined even more than a company without a compliance programme. A small number of respondents saw this as over-simplistic; maintaining that there can be situations where senior management are unaware of anti-competitive activity within their businesses and a compliance programme exists in good faith. However, a similar number feel that DG Competition has a valid point; the company might have a compliance programme but has not applied it effectively and is responsible for its employees, so it should be fined.

The provision for companies in financial difficulties, which are unlikely to be able to pay a fine, is felt to be a good safeguard by the small minority of lawyers who raised the issue. However, it was pointed out that the

wording states that the company has to be 'on the brink of bankruptcy' before it can make the appeal, which is felt to be too stringent.

One respondent made positive mention of the new guidelines 'coming down heavily' on repeat offenders, which are thought to be effective; he quoted the example of a company which, after being caught once, went to a lot of trouble to set up a compliance programme to avoid a second conviction.

Rather than just enforcing competition by deterrents, it is suggested that DG Competition might be more proactive, encouraging companies to include competition as part of their corporate policy.

A significant minority of the lawyers raised the issue of personal liability and several would like to see the introduction of this in some form.

*"There could be an additional sanction on individuals; with very little effort that would increase the deterrence greatly."*

Some form of financial penalty or disqualification from being a director was suggested. It was pointed out that, under the current regulations, not even the directors of a company are disadvantaged; it is basically the shareholders that pay. It was acknowledged that there would be challenges in introducing such an approach but, nonetheless, some feel that DG Competition should be investigating the possibilities of introducing criminal actions and opening a dialogue with the Member States on the issue.

Another suggestion is to publicise individual companies' wrongdoings.

*"As soon as the company has been found guilty of foul play, DG Competition ought to shout it from the rooftops."*

#### **4.6 Response to the financial and economic crisis**

##### **- There is wide praise for the speed, firmness and flexibility with which DG Competition reacted to the financial crisis -**

All the lawyers were impressed with the speed with which DG Competition reacted to the financial crisis, showing appropriate levels of both speed and flexibility.

*"The overall handling of the crisis was a remarkable success for the European Commission."*

*"They reacted quickly enough to keep the system intact."*

Particular praise was given in regard to the amount of time and effort that was put in by staff.

*"They were able to deal with things over a weekend, which normally take weeks. It's cool that they can do it."*

*"They put in enormous resources at the time, with people from different units. They did a terrific job under time and political pressure. They made sure there was some level playing field between the different Member States."*

In terms of the decisions that were taken the lawyers generally expressed approval; DG Competition was felt to have maintained competition rules whilst, at the same time, being responsive to the market's needs.

*"At a very high level they kept strong on substance and where you can have procedural flexibility they did so."*

A significant minority of respondents suggested that DG Competition could show this sense of urgency in other circumstances; it should show more appreciation of the effect on companies of having a procedure outstanding for months, even years.

It was pointed out that there had been pressure from some governments for DG Competition not to interfere, for fear its involvement might contribute to making a grave situation even worse. DG Competition was, therefore, praised by lawyers for its appropriate involvement.

The Commissioner was praised for her leadership in the crisis; saying that DG Competition was part of the solution, not the problem. The Director General was also praised for his intervention.

*"At one point people said they should suspend all competition laws. It was Mrs Kroes' finest hour. She said no banks should fail but the price will have to be paid. She spotted that early on and was consistently following it up. They were at all the banking meetings, saying, 'you can do this but will have to restructure in six months'."*

Several respondents felt that only part of the work had been done; they are interested to see how DG Competition handles the exit strategy.

*"They did what was necessary to maintain the credibility of the law, but there is a lot of work to do now, to try to work out what to do now that this has happened."*

*"I think they are still in the battle as far as the crisis is concerned. I don't see an exit strategy."*

## 5 External communication

### 5.1 *Clarity and comprehensibility of external communications*

**- The clarity of DG Competition's external communications is acknowledged but the tone is sometimes felt to be too strong -**

It was felt by the majority of respondents that DG Competition has improved and enhanced general awareness of its existence and role. A few respondents also expressed their appreciation for the huge efforts made in terms of communications.

Much of the credit for this is given to the previous Commissioner.

*"They have created a well-known brand. The Commissioner is as well known as the President of the Commission because she goes to the press all the time."*

The particular aspect of communications that was mentioned most frequently was press releases but respondents also referred to press conferences, DG Competition's media style, the spokesman and the MLex agency (acknowledging that the latter is not part of DG Competition but seeing its work as a valuable part of competition communication).

DG Competition's press releases are thought by most respondents to be normally clear, well reasoned and well communicated. However, a minority of lawyers expressed criticism about a perceived lack of clarity in press releases, partly due to their brevity. There was also criticism about the huge discrepancy between the amount of information provided in press releases and in final decisions.

*"Some decisions disclose all information, others nothing at all. They should be more consistent, harmonised to the maximum common denominator, not the minimum."*

A small minority of respondents feel that the language used in press releases is difficult to understand if you are not directly involved in the case. It is felt that, if the Commission is trying to encourage the general public to take a more active interest in competition policy, the texts need to be broken up into 'bite-sized pieces'.

Another criticism of press releases is that lawyers want to see how fines are calculated but have to wait for the decision before seeing this.

A few further reservations were expressed about DG Competition's press releases by one lawyer. He felt that they are too wordy and should just be informative and descriptive. The two key paragraphs should just contain the facts (and the level of the fine) and, he feels, should exclude 'political comments'.

A small number of lawyers complained about the time it takes for a full decision to become public. One noted that it sometimes takes more than two years to make public a non-confidential version of a decision.

When considering the press conferences that form a key part of DG Competition's communications a small minority of respondents expressed the view that the language sometimes used by DG Competition's representatives in public comments was too 'blunt and emotive'.

*"Communications over the last five years have been shrill, sabre-rattling. Hopefully we will now see a more measured and moderate approach."*

Many lawyers feel that DG Competition has become more media conscious over the course of the last two or three mandates, in line with the need for increased transparency. However, a small minority of respondents felt that the trend under the last mandate towards 'media speak' had gone too far; claiming that every case is vital to consumers is seen as over-statement, as is talking about directors needing to be 'shamed.'

It is recognised that companies have been 'playing the media game' for many years and the majority of lawyers accept that DG Competition needs to get involved 'in the same game'. However, they also feel that DG Competition should know when to remain 'above the fray' and should show restraint when briefing journalists 'against' companies. It is recognised that DG Competition wishes to publicize its side of debates but the delicate balance is felt to have been overstepped on some occasions.

Frequent positive references were made to the MLex information service.

*"We are amazed at the speed with which they get information. I took a taxi back from an oral hearing to find that the details of that hearing were already online."*

However, some of the views expressed were more cautious:

*"I think the Commission is concerned about MLex information [but] it's wonderful when you're not involved in the case."*

Sometimes lawyers feel MLex oversteps the mark. One law firm had complained to DG Competition, threatening to go to court, about leaks.

*"MLex often knows more than you think they should, but they do a good job."*

## **5.2 Timeliness of communication**

**- Most are happy with the timeliness of DG Competition's communications but some would appreciate advance notice of decisions -**

The timeliness of DG Competition's communications is acceptable for the majority of respondents and many of them had little to say on this topic.

However, a small number of the lawyers requested that DG Competition give them a few hours advance warning when announcements are going to be made, so that their clients are not caught unprepared and can draft statements.

*"Any business lawyer will tell you, if my client is going to be fined tomorrow, it will be nice to have two hours advance notice."*

*"They should give the parties the time to read the decision and prepare a reaction. I think the interests of the public are still served if you give the parties six hours advance notice."*

Apart from this, the main issue identified with the timing of DG Competition's communications is that there are sometimes leaks before a decision is adopted.

*"You can read on a Friday what the Commission will decide on the following Wednesday. That is entirely unacceptable."*

It was felt that this practice is deliberate and needed to be addressed.

We referred in the previous section to the long delays in publishing final decisions. When considering the issue of timeliness of communications a small minority of lawyers expressed the view that publishing decisions several months after they have been adopted is unacceptably slow.

## **5.3 Choice of communication and media channels**

**- Most lawyers find DG Competition's website satisfactory, although the search engine is criticised -**

DG Competition's choice of media channels appears to be appropriate; the primary combination of press releases, press conferences and a website appears to meet most lawyers' needs.

There were many comments about DG Competition's website, the majority of them being favourable and characterising it as helpful, user-friendly and relatively well structured. It was felt to be constantly improving and to compare favourably with the websites of other competition authorities.

*"It is for professionals. You can find all the legislation, but for State aid it's not always relevant. It's better than the other parts of the Commission."*

One respondent requested that even very old decisions be made available on the website; some that are 10 or 15 years old are still considered important and useful.

A small minority of respondents felt that the search function needed to be improved and that the separate portals for cartels, mergers and State aid should be integrated, creating a full database. It was also suggested that the website could indicate the national cases which apply EU law.

An equally small minority of respondents described the website as a 'bit dusty' but acknowledged that it was fine for the legal community. There were also a few comments relating to the overall design of the website being complex and the structure hard to navigate. However, such comments appeared to come from respondents who made relatively infrequent personal use of the website, tending to leave it to colleagues.

The outgoing Commissioner was praised for her use of public speaking opportunities and the availability of speeches online is welcomed. However, one respondent pointed out that, in recent years, not all speeches have been made available and that he would find it very helpful to have access to them all, making it easier to track policy movements.

DG Competition's use of 'Europe by satellite' and other video channels was mentioned by two respondents. Their views on the value of this channel were mixed but it was appreciated that using it demonstrated DG Competition's efforts to be more transparent.

*"Apart from 'Europe by satellite' there is EU-Tube as well. You can see part of the weekly meeting with the Commissioners. There are some interesting clips before the meeting starts. They are making huge efforts towards transparency. You see them as human beings."*

DG Competition's newsletter was only mentioned by two respondents, one of whom described it as helpful, whilst the other suggested adding best practice guidelines and other advice.

Lawyers' comments on press releases and press conferences are covered in section 5.2.

## 5.4 Targeting of communications

### **- Most of DG Competition's communications are perceived as being aimed at the business community. Views are mixed on communicating to the general public -**

Most speeches and other communications are perceived to be targeted at lawyers and the business community.

DG Competition is considered to be doing a good job of communicating with the business community. The Commissioner, Director General, and Spokesperson get good coverage in the leading business press. They are said to be readily available to participate in radio and TV programmes.

A majority of respondents acknowledge that the targeting of communications is a difficult issue. Law firms, companies and the general public will have different needs. Press releases are not read by the general public, just by the parties concerned and journalists. It is thought that most journalists, apart from those in the specialised / business press, struggle to understand the details of the cases but this is not something about which the lawyers show much concern.

*"I have less sympathy for the journalists. It's their job to make something out of what they probably don't understand in the first place."*

The general feeling is that DG Competition gets its message across well in the business press, particularly the FT, Handelsblatt, Les Echos, Wirtschaftswoche and Focus.

There were some suggestions made about how DG Competition could be communicating better to the general public. However, the majority of lawyers think that there is only a limited interest amongst this audience.

*"Most of what they do is on the side of the consumer, but very little is presented in a way that captures Daily Mail readers. It should be all about reducing prices; DG Comp get the story in the FT but not in the popular press."*

A number of lawyers expressed specific views about communication to the general public:

- One felt that there was a lack of comprehensible communication to the general public about the function, benefits and advantages to consumers of DG Competition's activities and that more should be done.
- Another expressed the view that press releases are currently aimed at the public, meaning that, in his view, they communicate too

much about cases. He felt that DG Competition should distinguish between communicating about policy and individual cases.

*"I preferred it in the past, before they started communicating about everything."*

## **5.5 Promotion of competition culture**

**- DG Competition is generally perceived as doing a good job in promoting competition culture but opinions vary about promoting to the general public -**

Views on both DG Competition's role in promoting competition culture and the ways in which it undertakes this work were very varied. Many respondents expressed views but there was only limited consensus. The following points made by individual respondents demonstrate the variety of opinions:

- One respondent expressed the view that DG Competition was good at promoting competition culture through particular cases but that general compliance culture is promoted less. For example, guidelines for companies to set up and implement compliance programmes would be helpful.

*"They are very good at competition advocacy in relation to particular issues, less good about competition itself. They should take a step back and explain what they are trying to achieve."*

- Competition Days were identified by one respondent as a good initiative aimed at consumers but it was felt that more could be done.

*"They already have the competition day, the consumers' day. They should do a bit more on those lines, maybe a few more features here and there."*

- Another was more sceptical about competition days, claiming that such activity would be more appropriate at the national level. Indeed a number of respondents felt that the whole task of promoting competition culture to the general public was more relevant for national authorities than the European Commission. One suggestion was that DG Competition could encourage, assist and support national authorities in conducting campaigns.
- One lawyer felt strongly that DG Competition should be talking more to complainants and potential victims, not just to the lawyers and the press.

*"They should create awareness of the effects of negative competition on society. The general public knows it's not a good"*

*idea to tip toxic waste into rivers but they are less aware of the harmful effects of competition infringements."*

- It was suggested that DG Competition could screen the press, like some national authorities do, in order to identify issues in the public eye. It was felt that addressing such issues would raise DG Competition's profile amongst a wider, non-specialist audience.
- It was suggested that visitors to the Commission in Brussels (students etc.) who already get a talk about agriculture, transport or energy could be told about competition policy.
- It was suggested that a separate website be launched or a general public section added to the main website, giving the basic details of competition policy in a format adapted to the general public.

*"It might be useful to have a button on the website for the consumer, who wants to know or communicate something. It could show the simple publications that DG Comp produces, plus a contact. The OFT in the UK already does that."*

A few respondents expressed the view that DG Competition could give more consideration to its relationship with ECN, the European Competition Network.

*"There is a culture between the Commission and national competition authorities not to criticise each other in public, to keep it quietly under wraps. That's not the healthiest environment. During a coffee break at one hearing somebody from a national authority asked me to ask the Commission to clarify a question. They didn't want to be seen to be contradicting. That's going too far."*

When considering the promotion of competition culture mention was made by a small minority of respondents of the extra-European dimension. It was suggested that any publicised clash with the US authorities may have consequences in countries like Korea and China, where competition culture is still young. China and Korea are felt to be likely to take a tougher stance, so companies operating there have to be extremely compliant.

Several lawyers expressed their appreciation of the willingness of DG Competition staff to speak at conferences.

*"Any time we ask them to come and talk they are always extremely willing. They see that as part of their job. Even heads of units are available. They will come out to speak in the evenings. That's a great commitment, fantastic."*

**5.5.1 Rating: promotion of competition culture**

Mean score = 4.9

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
<b>1</b>	<b>1</b>	<b>-</b>	<b>3</b>	<b>12</b>	<b>8</b>	<b>-</b>