

Lessons Learned in the Delivery of Technical Assistance: The United States Experience

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Thank you, Kirti. It is a pleasure and a privilege to be here this afternoon. I would like to use the time allotted to me to offer a few comments based on the experience the two United States antitrust agencies have jointly gained in twelve years of delivering technical assistance.²

I will not go into the workings of the U.S. program in detail this afternoon. The details have been laid out in a paper the United States submitted to the OECD, which is available on the OECD website.³ For today's purposes, it is enough to say that the U.S. program is a flexible one that is intended to share the accumulated experience and expertise of career enforcement staff from the Federal Trade Commission and the Department of Justice – including both attorneys and economists – with developing competition authorities. Our technical assistance activities are funded by the United States Agency for International Development and, occasionally, other U.S. Government agencies. They are not funded from our own budgets, which are reserved for domestic law enforcement purposes. We employ an array of methodologies, which depend on the needs of the recipient and available resources. The most important of these include placing our career staff as long-term advisors in the offices of recipient nation competition agencies. We also use regional or national seminars designed to transfer practical investigational skills through interactive exercises that simulate the investigation of hypothetical cases typical of those that might be encountered in real life. In addition, we sometimes use carefully targeted short-term missions in support of efforts to draft competition laws, design effective institutions, build support and understanding among key constituencies for the idea of a competition law, and provide specialized support or follow-up to the work of our long-term advisors.

I would like to add a personal perspective before I continue. Several years ago, I had the opportunity to serve as a long-term advisor to the Romanian competition authorities, especially the Competition Council. I had done the same in the Baltic countries several years before that. While I was in Romania, I worked very closely with Dr. Gheorghe Oprescu, who was then one of the Vice Presidents

¹ The views expressed herein are those of the author, and do not necessarily represent those of the United States Government, the Federal Trade Commission, or any individual Commissioner.

² The U.S. technical assistance program has been a team effort by a group of dedicated individuals at both the Federal Trade Commission and the Antitrust Division of the Department of Justice. These comments and the experience that lies behind them benefitted from the helpful guidance of a number of those team members, including Craig Conrath, senior attorney at DOJ and former long-term advisor to Poland; Karen Mills, my colleague in the Bureau of Competition and a former long-term advisor to Slovakia and Ukraine; Russell Pittman, senior economist at DOJ; Timothy Hughes, an attorney in the Office of General Counsel at the FTC and a former long-term advisor to Romania; Anne Purcell, Acting Chief of the Foreign Commerce Section at DOJ and a former long-term advisor to Argentina; James Hamill, who coordinates the program at the FTC; FTC General Counsel Bill Kovacic, and others too numerous to mention.

³ *The United States Experience in Competition Law Technical Assistance, a Ten Year Retrospective* (OECD Document CCNM/GF/COMP/WD(2002)20, available at <http://www.oecd.org/pdf/M00025000/M00025781.pdf>).

of the Council, as well as with Dr. Theodor Purcarea, who is now its President. I am privileged to be on this panel with Dr. Oprescu today. His presence, however, requires me to offer an important qualification to what I have to say: Many of us who deliver technical assistance take a lot of pride in what we do – but what we say about our own efforts must be evaluated in light of what someone like Dr. Oprescu has to say about them. The measure of success of a technical assistance program is not the intentions, the efforts, or the amount of money spent by the providers. What matters is whether a technical assistance program helps a country like Romania make its markets work better for its consumers. So I am very pleased to share this panel with Dr. Oprescu. But since I know more about what we put into our program than what Romania got out of it, I am more than a little interested in – and nervous about – what he’s going to say!

We’ve learned a great deal about what works and what doesn’t in the last 12 years, and we’re still learning. In the style of a well-known American late night TV comedian, I’d like to offer a “top ten” list representing some of what I think we’ve learned:

1. *Keep the Larger Context in Mind.* One cannot deliver technical assistance without paying close attention to the larger context within which the competition law and agency will function. I would like to draw your attention to David Lewis’ excellent discussion of those issues which can be found within Chapter 2 of the Working Group report. If we limit our focus to helping to build capable and effective competition agencies, which is what we like to think that’s what we do best, we will miss the boat. Those agencies must function within individual legal, economic, political, and social realities, and we ignore them at our peril. For example:

- C What if the judiciary is not capable of effectively reviewing the agency’s decisions and enforcing its orders, either because of lack of training or inadequate powers, and as a consequence the agency’s information demands and rulings can be ignored?
- C What if the agency is so lacking in independence that politics, not evidence and the application of sound legal and economic principles, guides the decisions?
- C Can an agency effectively fulfill its mission if the government has not allocated it the financial resources and qualified staff to do the job?
- C What will the agency be able to accomplish if the basic legal building blocks of a market economy are not in place, such as laws on privatization, bankruptcy, banking, capital formation, and corporations?
- C Most importantly, what can be expected if the oft-touted culture of competition has not been developed. If the society at large is not committed towards removal of any structural or legal barriers to competition, if the top leadership of the country doesn’t really believe in competition and (perhaps most significantly) the average consumer and business person doesn’t believe it either, it’s hard to believe that a competition authority is going to accomplish very much.

Consequently, an effective technical assistance program should either include the necessary components to address these issues, or it should operate in coordination with a larger capacity building strategy designed to address them. This may be a bigger challenge than a program focused on strengthening a

competition agency can take on by itself. But if we don't pay attention to this, it might turn out that the institutions we are seeking to build will sit on foundations of sand.

2. *Consider the Other Nation's Perspective.* Effective technical assistance must be structured so that the provider and the recipient of assistance can look at the world from the same point of view. Technical assistance providers need to be sensitive to ways that the environment is different from what they are used to. In a country where per capita income is less than 100 dollars per month, a phrase like "consumer choice" might not have the same inherent ring to it as it does in Washington. A lawyer from a common law country (such as mine) must be sensitive to how civil law traditions differ. There may be vestiges of state control that function as entry barriers.⁴ Privatization may be incomplete, with the result that some market sectors may not respond to normal market forces. And of course, the reality of corruption must be taken into account in some countries.

3. *Long-Term Advisors Work Best.* From our perspective, by far the most effective form of technical assistance that can be provided to a functioning competition agency is to provide a long-term advisor to work within the competition authority. By long-term, we ideally think of around six months or so; but it can be more or less depending on the circumstances.

A long-term resident advisor becomes familiar with the economic context, the legal structure, the personalities, and the points of view of the various players in the process. By living there, one understands more about the local economy. By being present on a daily basis, an advisor can observe where the weak points are and can adapt and customize assistance to fit the needs. I used to think that my job description consisted of two elements: figure out what needs to be done, and do it. The ability to be flexible is important. Opportunities to make a difference come up on short notice, and it is important to be able to react to them quickly and effectively.

A long-term advisor is more likely to be able to suggest approaches that will work in the local context. Otherwise, there is a tendency to offer solutions that might have worked in Washington, Brussels, or London but that might be completely unworkable in Bucharest, Jakarta, or Pretoria. I remember one case, for example, that had characteristics of a natural monopoly and might have been an appropriate candidate for regulation. However, we understood that there were no models for institutionalized regulatory agencies in this country at the time, and it seemed likely that regulation might have been a very messy business. So we looked for other solutions.

Perhaps most significantly, a long-term advisor can take advantage of what educators refer to as "the teachable moment." It is one thing to be told what a relevant market is in the artificial and controlled environment of a seminar room. It is quite another when you have a real case on your desk and you've got 30 days to decide what is in the same product market as cola drinks. That is when you are truly ready to benefit from the experience of an agency that has already been around this block before.

4. *The Value of Assistance Provided by Competition Authorities.* There are real advantages when it is possible for experienced competition authorities to deliver technical assistance. The day-to-day work of competition law enforcement is an inherently governmental function. While there are

⁴ I was surprised to discover, for example, that in one country it is necessary to obtain judicial approval of the soundness of a company's business plan before a firm may be incorporated.

many people who understand and can explain fundamental legal and economic principles in the abstract, it is competition officials who have institutional expertise in the nuts and bolts of detecting, investigating, analyzing, and devising remedies for anticompetitive practices. Moreover, advice from a fellow competition enforcement professional is more likely to be accepted, and it certainly helps to develop the kind of rapport that is necessary to make assistance effective.⁵

5. *Don't Forget Competition Advocacy.* Competition advocacy is even more important in a developing country than it is in a developed country. Most of us would agree that the most pernicious impediments to competition are those that are imposed by governments, typically at the behest of favored competitors. In transitional economies, where the ties between ministries and enterprises run deep, these kinds of barriers are typically more formidable than some of us in developed economies might imagine. Confronting them requires a certain degree of courage and political resolve. Recognizing opportunities for competition advocacy – especially in those cases where the competition agency moves on its own initiative – requires a great deal of focus. In some countries, a big part of what we try to do is to equip our counterpart agencies to be effective advocates within government.

6. *Institution-Building Should be Part of the Picture.* We should not overlook the importance of building strong institutions. In our country, we developed our own internal processes through an active process of trial and error. Thus, while we might not necessarily suggest replicating the structure of the FTC Evaluation Committee or DOJ's Office of Operations (or for that matter, having two separate agencies), institutions in transition and developing countries can benefit from the idea that someone with authority and a broad view should take an early look at matters to judge whether the theory is sound and the investigative plan is sensible. One does not have to import the exact structure, but knowing "how things get done" in functioning competition agencies can help newer competition authorities choose structures and functions that work in their own situation.

7. *Make Sure that Someone is Listening.* The planning process should pay attention to whether the assistance will actually reach the agency staff that needs it. It is one thing to put a program of technical assistance in place, but this does not automatically mean that agency staff will take advantage of the expertise that is made available. In my experience, some staff came to me regularly, some never had anything to do with me, and others needed to be convinced that it was in their own best interest to talk to me. I am even aware of cases of mid-level managers (who may have been threatened by the idea that the advisors might have different ideas than they had) who forbade their case handlers from talking to advisors! Case handlers may have to be actively encouraged to seek out help, and making sure that this happens requires both planning and a conscious and ongoing commitment at the highest level. There is an old saying that "you can lead a horse to water but you can't make him drink," so perhaps the challenge is to find a way to make the horse thirsty.

8. *The Benefits Go Both Ways.* We have discovered that the program provides real benefits to us as well. As anyone who has ever been a teacher will understand, there is nothing to help you understand a subject better than to have to explain it to someone else. There are some things about what we do that we tend to take for granted, and having to explain and justify our long-held ideas forces

⁵ I hasten to point out that I am not suggesting that competition authorities get into the business of trying to monopolize the technical assistance field. There are well qualified providers in the private sector, especially experienced former competition authority officials.

us to consider what assumptions are behind them. This is useful both abroad and at home when there may be situations where the assumptions do not apply. It increases the pool of people at the working level that truly understand the global implications of what we do. It goes a long way to further understandings and strengthen contacts between antitrust enforcers among agencies at different levels of development. It improves the prospects for cooperation and convergence when we have gotten to know each other better.

9. *Technical Assistance is a Long-Term Proposition.* Technical assistance involves more than just helping to write a law and provide some initial training. It takes ongoing additional assistance as the agency develops maturity. The need for technical assistance is thus likely to be a long term proposition, and it often takes longer than funding agencies appreciate. It took us in the United States a good many years before we got to what we think is the right place. And it takes a long time for our own people to accumulate the training and experience that is necessary to do the job right. It should not be surprising that the same would be true in a country whose experience with market economics goes back only for a dozen or so years.

10. *How can we Measure Success?* One area that we still need to explore is how to measure the success of a program. It is easy to measure the dollars or euros that have been spent, the number of advisors sent, the number of people trained, and so forth. None of this is very important in its own right, however. What really matters is whether the assistance ultimately leads the competition authority to do things that make markets work better. We have much to learn about how to assess this. How do we say whether a particular case improved consumer welfare? Even if we could, how could we measure the effect of a well-reasoned decision not to bring a case and to allow market forces to solve the problem? And even if we could do that, how would we measure the effect a particular program of technical assistance had on the decision? My own guess is that these questions defy quantitative answers. There may be some qualitative answers, however. For example, we can observe, if not quantify, the level of sophistication applied to analyzing cases and competition issues that arise in the context of advocacy within the government. It is my strong sense, and I hope you will agree, that this sophistication is growing. The challenge is a real one, and we are going to need to find some way to measure the success of what we are doing. Resources are tight, and funding agencies want to know that it is worth spending money on technical assistance programs. We are going to have to know what to tell them.

Thank you very much for your attention, and I look forward to hearing from the rest of the panel.