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PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on “Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings” held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in February and June 2010.

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

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

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur « l’Equité procédurale : les questions de transparence dans les procédures d’exécution civiles et administratives » qui s'est tenue en février et juin 2010 dans le cadre du Comité de la concurrence (Groupe de Travail No. 3 sur la coopération et l’application de la loi).

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

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

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EXECUTIVE SUMMARY

By the Secretariat

(1) The roundtable discussion highlighted the importance of transparency and procedural fairness for the parties involved in competition proceedings, as well as for efficient and effective case management by the competition authority. Delegates observed that an established and predictable decision-making process benefits from procedural transparency and fairness.

It is widely recognised that in order to ensure citizens' confidence and belief in a fair legal system and in those applying the law, it is important that procedures regulating the relationship between the public sector and citizens are, and are generally perceived as, fair and transparent. The concepts of transparency and fairness have been identified as part of the basis of sound public administration both at national and international level.

Fairness and transparency are essential for the success of antitrust enforcement, and regardless of the substantive outcome of a government investigation it is fundamental that the parties involved know that the process used to reach a competition decision was just. Many delegations agreed that transparency and fairness are not only essential requirements for the parties involved in a competition proceeding, but are also a key part of efficient and effective case management by the competition authority.

Transparency and fairness ensure a better understanding of the facts underpinning the investigation and help improve the quality of evidence and reasoning on which the agency bases its enforcement actions. They also assist agencies in allocating their resources more efficiently, focussing on cases really worth pursuing. Consistency, predictability, and fairness in decision-making processes, can be fostered by transparency with respect to: the substantive legal standards; agency policies, practices, and procedures; the identity of and form of access to the agency decision-maker(s); the order and likely timetable of key proceedings; and the judicial review process.

(2) Many agencies consider it valuable to hold meetings with subjects of competition enforcement proceedings at key points in the investigation, at both the staff and decision-maker levels. Meaningful communication with subjects to enforcement proceedings may be enhanced by parties' submissions and other substantive written materials, and participation when appropriate of knowledgeable experts and business executives.

Many agencies consider a dialogue with the parties to a proceeding as enhancing the knowledge of the facts underpinning the investigation and as offering opportunities for the parties to present arguments and new facts. However, the degree to which agencies allow interaction with the parties during the proceeding varies across countries. In some countries there are formal proceedings in place for meeting with officials, such as state of play meetings, which allow for parties to meet with the case team and senior managers within the competition agency at predetermined moments of the procedure. In other jurisdictions, informal meetings are a key tool in the investigation. A number of jurisdictions agreed the use of discretionary powers and a flexible approach by competition agencies was important to encourage an ongoing dialogue with the parties.

The business community also encouraged the use of discretionary powers to ensure early engagement with parties, as formal charges may come at a late stage of the process. However, safeguards are important to ensure there is no perceived lack of proper accountability and transparency vis-à-vis third parties, or allegations of bias, discrimination and favouritism. While informal contacts may work in some countries, this could be part of the transparency problem in others.

(3) In a number of jurisdictions, the subjects of competition enforcement proceedings are informed of the allegations against them through a written document. This document serves as a procedural instrument aimed at protecting the parties' rights of defence.

The business community emphasised that it is important for subjects of enforcement proceedings to have reasonable and timely notice of the factual basis for decisions, the relevant economic theory of harm and evidence related to that theory, and applicable legal doctrines related to the investigation. In some jurisdictions, the importance of informing the parties of the allegations against them takes the form of a legal obligation under national competition law to communicate the facts of the case to the parties concerned. One commonly adopted method is the use of a written document such as a Statement of Objections, Statement of Issues, an Examination Report or a Complaint.

In a number of jurisdictions this written document is the official correspondence from the agency informing subjects of the allegations against them, and in theory details of the case would not be revealed during the earlier investigation phase. However, in practice subjects may be informed of the alleged act of infringement and the relevant legal provisions earlier as a result of onsite inspections or information requests.

(4) Many agencies offer the parties an opportunity to examine the evidence–subject to legitimate confidentiality concerns–forming the basis for the agency's conclusion that a violation of the competition laws has occurred. This is particularly the case where sanctions or remedies may be imposed.

Once subjects have been informed of the allegations against them, many agencies offer the parties under investigation an opportunity to examine the case file and the evidence contained within it, subject to confidentiality concerns. In many jurisdictions, competition authorities have an obligation to act fairly in the collection and disclosure of relevant evidence, including exculpatory evidence.

A right to access the evidence used to support the allegations against them ensures that parties to an antitrust proceeding have full knowledge of the case and details concerning the alleged violations against them, allowing them to substantially respond before a decision is taken. The points at which subjects can access these files vary. Some jurisdictions allow access throughout the investigation stage, i.e. after the formal opening of an antitrust procedure. In other jurisdictions access rights are triggered only after a certain stage in proceedings. This is commonly after the main investigation has taken place and the written document setting out the allegations has been issued.

(5) Jurisdictions reported allowing the subjects of competition enforcement proceedings to respond orally or in writing to the allegations against them before a decision is taken. These opportunities allow the subjects of the proceeding to present evidence and rebut opposing claims and arguments.

Once competition agencies have notified subjects of enforcement proceedings of the relevant economic and legal theories of harm and related evidence, the parties are usually given an opportunity to respond within a reasonable timeframe to the concerns identified by the agency and to submit exculpatory evidence. The majority of jurisdictions allow the parties to submit written responses to the written document setting out the allegations against them. Some jurisdictions also allow parties to review and comment on key submissions by third parties contained in the case file, or submit memoranda or observations at any point during the investigation stage.

Parties suspected of infringing competition law are often granted a right to be heard and an oral hearing usually forms part of the proceedings. Any hearing provided by the competition agency as part of an enforcement proceeding is often conducted by a qualified hearing officer independent of the investigative process and pursuant to established rules and procedures. A number of jurisdictions also use formal oral hearings, presided over by a hearing officer, as part of the initial investigation process. Some jurisdictions allow parties to submit counter evidence and question any witnesses that have been called. Where oral hearings are not mandatory, other procedures are put in place to ensure the parties rights of defence are respected i.e. through the use of written responses, or more informal discussions between the parties and the agency.

(6) Some jurisdictions have statutory deadlines setting out the timeframe within which an investigation should be concluded. Others reported the use of rules, guidance or best practices to indicate the expected length. Jurisdictions emphasised the importance of having enough time to carry out a full and thorough investigation, while preserving the parties' interest in a speedy resolution of the case.

To ensure that investigations are conducted within a reasonable time, some jurisdictions have statutory deadlines setting out the duration and timing of the entire investigation, or some of its phases. This is particularly the case in merger control where timing and extensions are strictly regulated. In non-merger proceedings agencies are often afforded a relatively wide discretion as to how to organise the proceeding and its duration. However, in the interests of fairness for the parties and efficient use of competition agency resources, the discussion emphasised that investigations should not last for an unreasonable length of time. Therefore agencies will commonly publish rules, guidance or best practices setting out the expected length of proceedings. Those countries without any express rules on length of investigations may still make allowances for parties to challenge the length of the administrative enforcement before a competent court.

Ensuring a relative degree of certainty in the time scale reassures parties that the investigation will be concluded within a certain time frame, while also allowing companies to manage their internal resources efficiently. A transparent timeframe also benefits enforcement actions as it helps the agency to focus its resources and conclude the investigation in a timely fashion. However, where a case is particularly difficult, involves a large number of parties, spans a number of years, or requires complex legal or economic assessment, competition agencies should be afforded sufficient time to fully develop and investigate the case, before reaching a decision. The degree of cooperation that the agency receives from the parties to the investigation and from third parties also effects the duration of the investigation.

(7) While there is no accepted statutory definition of confidential information, business secrets, trade secrets and sensitive personal information are commonly classified as confidential in most

jurisdictions. The business community emphasised that the protection of confidential information needs to be balanced against the rights of defence of parties under investigation.

Competition agencies need to foster a reputation for respecting confidentiality to ensure the continued supply of information from parties to antitrust proceedings and third parties. At the same time the discussion emphasised the importance of a defendant being able to access all the evidence gathered against it. A fine balance must therefore be struck in which competing interests are carefully weighed up against each other to arrive at a workable solution. Few jurisdictions have a clear statutory definition of 'confidential information' and the concept has been given meaning through agency practice and case law. Business secrets, trade secrets or commercially sensitive information are universally recognised by competition agencies as constituting confidential information. This will generally cover price information, commercial know-how, production quantities, market shares and commercial strategies of undertakings. Other types of recognised confidential information include sensitive personal information, such as private telephone numbers and addresses, medical or employment records, or information that would place the provider under considerable economic or commercial pressure from competitors.

The risk of parties submitting over inclusive confidentiality claims can be prevented through earlier bilateral discussions at a senior level, both within the agency and company, and through a quicker agreement on what is genuinely confidential. Informal mechanisms for resolving disputes regarding confidential information, for example telephone calls and emails with agency staff, have been found to be effective as they often result in a quicker decision.

Different jurisdictions adopt different techniques and in some situations this may include disclosing highly confidential information in order to verify the true facts of a case.

(8) A number of methods are adopted by competition agencies to provide evidence containing confidential information to parties while respecting confidentiality. These include 'conventional' methods such as redaction or summaries, and 'innovative' methods such as confidentiality rings and data rooms.

Competition agencies adopt a variety of methods to protect confidential information contained in documents that are provided to parties as evidence. The widely used conventional methods involve removing or redacting the confidential information and/or figures, providing non-confidential summaries or using 'in camera' sessions in court proceedings.

'Innovative' methods include the use of a confidentiality ring, which involves full disclosure of all information but limiting the persons to who it is made available, for example legal and economic advisors. A second innovative method involves the use of data rooms, in which again full disclosure of all information is made, but access is only given to external advisors under limited circumstances, and under the supervision of the agency officials. Both these methods may be employed for the protection of extremely sensitive confidential information, where limiting disclosure to the defendant may be necessary.

However, disclosing documents to a defendant's counsel can only work in those jurisdictions where counsel do not have a duty to disclose all information in their possession to their clients.

(9) Competition authorities reported the use of different institutional structures for the internal review of competition cases. The institutional design of competition authorities can be important to ensure the operations and decision making processes are perceived to be transparent by the parties involved in the enforcement proceedings and by the public at large.

A transparent and fair enforcement process requires a combination of effective institutional design, sound administrative practice and open legal culture. Various procedures have been set up to encourage the

interaction between the investigating team, the decision-maker and the parties to an investigation, and there is no uniform structure adopted by competition authorities. A variety of methods are adopted by competition agencies to ensure transparency and fairness in the process, including:

- establishing a clear separation between the role of the investigators and those making enforcement decisions;
- the use of independent advisors (e.g. economists, lawyers, business advisors and financial experts) to provide an objective review of the case with 'fresh eyes';
- separation of the investigating and legal teams using a 'firewall';
- procedures to assess the likely success of an investigation at an early stage;
- frequent meetings between the parties, case teams and senior decision makers; and
- publication of commitments related to transparency in competition enforcement cases.

(10) A wide range of practices have been adopted regarding requests for information, with some jurisdictions following very well developed rules and others using a more discretionary approach. In general jurisdictions tend to favour a consultative and flexible approach to ensure the information requests contain as much relevant information as possible.

Requests for Information (RFIs) may be informal and voluntary or they may be formal and mandatory. While some jurisdictions have well developed procedures in place for dealing with RFIs, a number of jurisdictions reported the adoption of a more discretionary approach with either no formal rules or a very flexible procedure in place. It is common in many jurisdictions for case handlers to discuss the content of the RFI with the parties, and in some cases discussions may even take place before the RFI has been issued. From the agency side, discussions will be targeted at understanding how a business and market works, what information the company already possesses and the information that can be obtained without any extra burden. From the companies perspective, these opportunities for consultation allow a better understanding of the background, reasoning and context of the RFI. They also provide an opportunity to clarify any technical language, for example in energy and telecoms cases, and ensure the same wording is being used by both parties.

The degree of flexibility given by the competition authority will usually depend on the case, and some jurisdictions will allow initial RFI deadlines to be extended where necessary. Measures may also be put in place to allow the parties to contest the RFIs, although strong justifications for non-compliance are usually required. Parties tend to have a stronger incentive to comply with RFIs in merger cases, where they have a vested interest in the merger being cleared quickly, than in abuse of dominance or cartel cases.

(11) All jurisdictions allow for competition authority decisions to be reviewed by an independent judicial body. The review may consider issues such as adherence to procedural rules, misuse of power, and factual, legal and economic assessment. Some jurisdictions will accord deference to competition authority decisions due to the 'expert skills' required in the consideration of competition law cases.

In addition to the procedures put in place internally to ensure procedural fairness, decisions by competition agencies are usually subject to review by an independent judicial body. This is particularly important when competition agencies are an administrative body. Judicial review serves as a comprehensive assessment of whether or not the conditions for the application of the competition rules are

met. In some jurisdictions specialist competition tribunals exist to review the competition agency's decision. In other jurisdictions the review is carried out by an ordinary court. The judicial body will decide if the relevant procedural rules have been adhered to, whether the facts have been accurately found and whether there is any evidence of misuse of powers, or manifest error of assessment. Impartial judges should then come to their own appraisal of the law and facts, including the appropriateness of the imposed penalty or remedy. In certain jurisdictions, where the competition agency itself has no power to make binding factual and legal decisions, it is the independent judicial body which has the power to grant the relief.

In some jurisdictions the judicial body may accord a certain degree of deference towards the competition agency's decision, to reflect the 'expert skills' required for the complex legal and economic analysis involved in competition cases. However, in other countries the scope and focus of the judicial review may be wider and therefore encompass a careful review of the economic and legal assessment carried out by the competition authority. In addition to judicial review, parties in some jurisdictions can apply for interim relief, i.e. measures suspending the operation of an agency decision pending an appeal.

(12) Some jurisdictions publish details and justifications when a case is closed or a resolution/settlement is reached. These communications, especially when prepared in plain non-technical language, advance the advocacy efforts of the agency by educating the public, the business community and its advisors.

There are benefits to final agency enforcement decisions to be made public. Some investigations are closed without an enforcement action or by means of an agreed resolution. Agreed resolutions of enforcement proceedings, also referred to as settlements or consent decrees, occur when parties to an antitrust investigation cooperate with investigating authorities by admitting their participation in the competition violation of which they are suspected. Resolving the case in this way frees up resources to concentrate on other cases, in addition to simplifying the agency's administrative procedure. However, concerns have been raised regarding the lack of transparency in and guidelines about the settlement process.

Some jurisdictions do publish details of all decisions regarding closure of investigations and settlements reached, including those with third parties. This is commonly done via a short press release and may refer to decisions bought by the competition agency on the substance of a case, or other decisions closing a case, for example commitment decisions or orders terminating the proceedings. In some cases a full press release with more detailed justifications for the closure or settlement are released. Other jurisdictions do not currently, or publish very few, press releases when a case is closed or settled but have put in place measures to provide additional information to the public about the competition agency actions and decisions, such as statutory and voluntary public registers. Some jurisdictions indicated that using more closing statements would be a useful tool in educating third parties and others as to how the agency carries out its work. However, the discussion emphasised the need to strike a careful balance between providing more insight into how agencies evaluate evidence and make decisions, while at the same time ensuring the protection of internal decision making processes, trade secrets and confidentiality.

More generally, transparency can be enhanced through the publication of guidelines, regulations, and practice manuals; speeches, articles and publications; amicus curiae briefs and advocacy filings; substantive agency opinions and court jurisprudence; and adherence to antitrust best practices of multilateral bodies (i.e., OECD, ICN).

SYNTHÈSE

Par le Secrétariat

(1) Les discussions qui ont eu lieu lors des tables rondes ont mis en évidence l'importance de la transparence et de l'équité procédurale non seulement pour les parties à une procédure relevant du droit de la concurrence, mais aussi pour une gestion efficiente et efficace des affaires par l'autorité de la concurrence. Les délégués ont observé que l'existence d'un processus de décision établi et prévisible servait utilement la transparence et l'équité des procédures.

Il est généralement admis que pour assurer la confiance des citoyens dans l'équité du système juridique et dans les organes chargés d'appliquer la loi, il importe que les procédures régissant la relation entre le secteur public et les citoyens soient équitables et transparentes et soient en général perçues comme telles. Comme on l'a vu lors des discussions, les notions d'équité et de transparence font partie des fondements d'une administration publique saine, tant à l'échelon national qu'international.

L'équité et la transparence sont essentielles pour assurer la réussite de l'application du droit de la concurrence. Quelle que soit l'issue d'une enquête publique sur le fond, il est fondamental que les parties concernées sachent que le processus à l'œuvre pour parvenir à une décision dans une affaire de concurrence est juste. De nombreuses délégations conviennent que la transparence et l'équité ne sont pas seulement des exigences essentielles pour les parties à une procédure relevant du droit de la concurrence, mais sont aussi un aspect fondamental pour que l'autorité de la concurrence puisse assurer une gestion efficiente et efficace des affaires.

La transparence et l'équité permettent de mieux comprendre les faits donnant lieu à enquête et d'améliorer la qualité des preuves et des motifs fondant les mesures d'application du droit de l'autorité de la concurrence. Elles aident aussi les autorités de la concurrence à déployer plus efficacement leurs ressources en ciblant les affaires qui justifient véritablement une action de leur part. La transparence quant aux normes juridiques de fond, aux principes, pratiques et procédures de l'autorité de la concurrence, à l'identité des personnes chargées de rendre les décisions et aux modalités prévues pour les consulter, au déroulement et au calendrier probable des principales procédures, ainsi qu'au processus de contrôle juridictionnel peut favoriser la cohérence, la prévisibilité et l'équité des processus de décision.

(2) Nombre d'autorités considèrent qu'il est appréciable d'organiser, aux principaux stades d'une enquête, des réunions avec les entités visées par une procédure d'application du droit de la concurrence, tant au niveau de l'équipe chargée de l'affaire que des personnes rendant les décisions. Le dialogue constructif avec les entités visées par une telle procédure peut être enrichi par les contributions des parties et autres documents de fond écrits et le cas échéant, par la participation d'experts et de dirigeants d'entreprise qualifiés.

Nombre d'autorités considèrent que le dialogue avec les parties permet de mieux comprendre les faits donnant lieu à enquête et offre à celles-ci l'occasion de faire valoir leurs arguments et de présenter de nouveaux éléments. Cela étant, l'interaction avec les parties, permise par les autorités au cours de la procédure, est variable d'un pays à l'autre. Certains pays ont mis en place des procédures officielles pour les réunions avec des agents de l'autorité de la concurrence, prenant par exemple la forme de réunions-bilans qui permettent aux parties de rencontrer l'équipe chargée de l'affaire et les hauts responsables de

l'autorité de la concurrence à certains moments prédéfinis de la procédure. Dans d'autres, les réunions informelles sont une composante importante de l'enquête. Un certain nombre de pays conviennent que l'utilisation de pouvoirs discrétionnaires et d'une approche souple par les autorités de la concurrence était importante pour favoriser un dialogue constant avec les parties.

Les milieux d'affaires encouragent également l'utilisation de pouvoirs discrétionnaires pour assurer un dialogue précoce avec les parties, car la communication formelle des accusations peut intervenir très tardivement dans la procédure. Cela étant, il importe que des mesures de sauvegarde soient en place pour que l'obligation de rendre des comptes et la transparence vis-à-vis des tiers ne soient pas perçues comme insuffisantes ou que l'autorité ne puisse être accusée de manquer d'objectivité, d'agir de manière discriminatoire ou de se livrer à du favoritisme. Les contacts informels peuvent fonctionner dans certains pays mais, dans d'autres, constituer un élément du problème de transparence.

(3) Dans un certain nombre de pays, les entités visées par une procédure d'application du droit de la concurrence sont informées des allégations portées à leur encontre au moyen d'un document écrit. Ce document sert d'instrument de procédure visant à protéger les droits de la défense.

Les milieux d'affaires préconisent de porter à la connaissance des entités visées par une procédure d'application, dans un délai raisonnable et au moment opportun, des éléments factuels fondant les décisions, des griefs économiques retenus contre elles et des éléments qui les corroborent, ainsi que des doctrines juridiques applicables dans le cadre de l'enquête. Dans certains pays, l'importance de la divulgation aux parties des allégations portées à leur encontre se matérialise, en droit de la concurrence, par une obligation juridique de communication des éléments factuels. Une méthode couramment utilisée consiste à leur remettre un document écrit, par exemple une communication des griefs, un récapitulatif des problèmes, un rapport d'examen ou une plainte.

Dans un certain nombre de pays, ce document écrit constitue le courrier officiel que l'autorité de la concurrence adresse aux entités visées par la procédure pour les informer des allégations portées à leur encontre et, en théorie, les détails de l'affaire ne leur sont pas révélés aux premiers stades de l'enquête. Cependant, dans la pratique, les entités visées peuvent être informées très tôt, par suite de contrôles sur site ou de demandes de renseignements, de l'infraction alléguée et des dispositions juridiques les concernant.

(4) Bon nombre d'autorités de la concurrence donnent aux parties la possibilité d'examiner – tout en tenant compte du souci légitime de confidentialité – les éléments de preuve fondant la conclusion de l'autorité sur le fait qu'une infraction au droit de la concurrence a été commise. C'est particulièrement le cas lorsque les entités visées sont passibles de sanctions ou de mesures correctives.

Une fois que les entités visées ont été informées des allégations portées à leur encontre, bon nombres d'autorités de la concurrence donnent aux parties faisant l'objet d'une enquête la possibilité d'examiner le dossier de l'affaire ainsi que les éléments de preuve qui y sont contenus, tout en tenant compte du souci de confidentialité. Dans de nombreux pays, les autorités de la concurrence sont tenues à une obligation d'agir avec équité lors de la collecte et de la divulgation des éléments de preuve pertinents, y compris des éléments à décharge.

La faculté donnée aux parties à une procédure d'application du droit de la concurrence d'accéder aux éléments servant à étayer les allégations portées à leur encontre assure que lesdites parties ont une connaissance complète de l'affaire et des détails relatifs aux allégations portées à leur encontre. Elles peuvent ainsi répondre sur l'essentiel avant qu'une décision ne soit rendue. Le moment où les entités visées peuvent avoir accès à ce dossier est très variable. Dans certains pays, elles peuvent y accéder pendant toute la durée de l'enquête, autrement dit après l'ouverture officielle d'une procédure d'application du droit de la

concurrence. Dans d'autres, ce droit d'accès ne leur est consenti qu'après un certain stade de la procédure, le plus souvent une fois que l'enquête principale a été finalisée et que le document écrit exposant les allégations portées à leur encontre leur a été remis.

(5) Les pays ont fait savoir qu'ils autorisent les entités visées par une procédure d'application du droit de la concurrence à répondre oralement ou par écrit aux allégations portées à leur encontre avant qu'une décision ne soit rendue, ce qui leur permet de présenter des éléments de preuve et de réfuter les allégations et les arguments qui leur sont opposés.

Une fois que les autorités de la concurrence ont notifié aux entités visées par une procédure les griefs économiques et juridiques retenus contre elles et les éléments de preuve qui les corroborent, les parties ont généralement la possibilité de contester, dans un délai raisonnable, les problèmes soulevés par l'autorité de la concurrence et de présenter des éléments à décharge. La majorité des pays permettent aux parties de répondre par écrit au document exposant les allégations portées à leur encontre. Certains d'entre eux leur permettent en outre d'examiner et de commenter les principales contributions soumises par des tiers et qui sont contenues dans le dossier de l'affaire ou de soumettre des notes ou des observations à tout moment de l'enquête.

Les parties suspectées d'infraction au droit de la concurrence se voient souvent accorder le droit à être entendues. Une audience fait alors généralement partie de la procédure. Toute audience organisée par l'autorité de la concurrence dans cadre d'une procédure est souvent menée par un conseiller-auditeur qualifié, qui intervient indépendamment du processus d'enquête et conformément à des règles et procédures définies. Un certain nombre de pays recourent aussi à des audiences formelles, présidées par un conseiller-auditeur, qui font partie intégrante de la première phase d'enquête. Certains pays permettent aux parties de soumettre des preuves contraires et de poser des questions à tous les témoins cités à comparaître. Dans les pays où les audiences ne sont pas obligatoires, d'autres procédures, comme des réponses écrites ou des discussions plus informelles entre les parties et l'autorité de la concurrence, sont mises en place pour assurer le respect des droits de la défense des parties.

(6) Dans certains pays, les délais impartis par la loi imposent un calendrier pour le déroulement de l'enquête. D'autres pays ont déclaré recourir à des règlements ou des directives ou encore recommander des pratiques exemplaires pour indiquer la durée attendue de l'enquête. Des pays ont préconisé que les autorités disposent de suffisamment de temps pour mener à bien une enquête complète et minutieuse, sans préjudice pour autant de l'intérêt des parties à une résolution rapide de l'affaire.

Dans certains pays, afin d'assurer que les enquêtes sont menées dans un délai raisonnable, des délais impartis par la loi imposent la durée et le calendrier du déroulement de l'enquête dans son ensemble ou de certaines de ses phases. Cela est particulièrement le cas dans le cadre du contrôle des fusions, domaine dans lequel le calendrier et sa prolongation éventuelle sont strictement réglementés. Lors des procédures ne traitant pas des fusions, les autorités bénéficient généralement d'une grande latitude pour organiser la procédure et en déterminer la durée. Cela étant, pas souci d'équité entre les parties et d'utilisation efficiente des ressources de l'autorité de la concurrence, la durée des enquêtes ne doit en aucun cas être déraisonnable, comme l'a montré la discussion. Les autorités rendent donc souvent publics des règlements, directives ou pratiques exemplaires déterminant la durée attendue de la procédure. Les pays n'imposant pas de règles explicites concernant la durée des enquêtes peuvent néanmoins accorder aux parties la possibilité de contester la durée de la procédure administrative d'application de la loi devant un tribunal compétent.

Donner aux parties une certitude relative concernant les délais les rassure sur le fait que l'enquête sera close dans un certain laps de temps et permet aussi aux entreprises de gérer efficacement leurs ressources internes. L'existence d'un calendrier transparent est aussi un avantage sur le plan des actions d'application

du droit car cela permet à l'autorité de la concurrence de concentrer ses ressources et de clore l'enquête dans un délai raisonnable. Cela étant, en présence d'une affaire particulièrement compliquée, impliquant un grand nombre de parties, couvrant plusieurs années ou nécessitant un examen juridique et économique complexe, les autorités de la concurrence doivent disposer de suffisamment de temps pour examiner l'affaire dans ses moindres détails et mener l'enquête à son terme avant de rendre une décision. Par ailleurs, le degré de coopération des parties impliquées dans l'enquête ou de tiers avec l'autorité de la concurrence a aussi une incidence sur la durée de celle-ci.

(7) Même s'il n'existe pas de définition juridique communément admise de la notion d'informations confidentielles, les secrets d'affaires, les secrets commerciaux et les informations personnelles sensibles sont généralement réputés confidentiels dans la plupart des pays. Les milieux d'affaires ont souligné qu'il convient de mettre en balance la protection des informations confidentielles et les droits de la défense des parties visées par une enquête.

Les autorités ont à défendre une réputation de respect de la confidentialité pour assurer que les parties à une procédure d'application du droit de la concurrence et des tiers continuent à leur fournir des informations. Il importe dans le même temps, comme la discussion l'a mis en évidence, que le défendeur puisse avoir accès à tous les éléments de preuve réunis contre lui. Il s'agit donc de trouver un juste équilibre entre ces intérêts concurrents afin de parvenir à une solution viable. Dans un petit nombre de pays, la notion d'« informations confidentielles » est clairement définie par la loi et quand tel n'est pas le cas, cette définition ressort de la pratique des autorités de la concurrence et de la jurisprudence. Les autorités de la concurrence considèrent toutes sans exception que les secrets d'affaires, les secrets commerciaux et les informations commercialement sensibles constituent des informations confidentielles et recouvrent les informations sur les prix, le savoir-faire commercial, les volumes de production, les parts de marché et les stratégies commerciales des entreprises. Parmi les autres types d'informations confidentielles reconnues comme telles, on retiendra les informations personnelles sensibles, comme les numéros de téléphone et adresses privés, les dossiers médicaux ou professionnels ou encore les informations qui permettraient aux concurrents de la personne qui les a communiquées d'exercer sur elle une pression économique et commerciale considérable.

On peut prévenir le risque de voir les parties demander une protection trop générale de la confidentialité en organisant très tôt des discussions bilatérales entre les responsables de haut niveau de l'autorité de la concurrence et de l'entreprise de sorte qu'ils puissent s'entendre plus rapidement sur le type d'informations revêtant vraiment ou non un caractère confidentiel. Des mécanismes informels de règlement des différends concernant les informations confidentielles, qui peuvent prendre la forme de conversations téléphoniques ou de messages électroniques échangés avec le personnel de l'autorité de la concurrence, se sont avérés efficaces car ils permettent généralement d'accélérer les décisions.

Les techniques diffèrent selon les pays et dans certains cas, les autorités peuvent aller jusqu'à divulguer des informations très confidentielles afin de vérifier l'authenticité des faits constitutifs du dossier.

(8) Les autorités de la concurrence adoptent un certain nombre de méthodes pour fournir aux parties des éléments de preuve contenant des informations confidentielles tout en respectant l'obligation de confidentialité. Il peut s'agir de méthodes « classiques », comme la rédaction de synthèses, ou de méthodes « innovantes » comme « les cercles de confidentialité » et les « locaux de sauvegarde de données ».

Les autorités de la concurrence adoptent toutes sortes de méthodes pour protéger les informations confidentielles contenues dans les documents remis aux parties en tant qu'éléments de preuve. Les méthodes classiques largement utilisées consistent à supprimer ou à remanier les informations et/ou les

chiffres confidentiels, à produire des synthèses ne contenant pas d'éléments confidentiels ou à tenir des sessions à huis clos dans le cadre des procédures.

Il existe en outre des méthodes « innovantes » comme le recours à un cercle de confidentialité, qui consiste à divulguer l'intégralité des informations, tout en restreignant le cercle des personnes auxquelles ces informations sont communiquées – par exemple aux conseillers juridiques ou financiers. Une deuxième méthode consiste à se servir d'un local de sauvegarde de données dans lequel l'intégralité des informations est, là encore, divulguée, sachant que seuls les conseillers extérieurs y ont accès à certaines conditions précises et sous la surveillance d'agents de l'autorité de la concurrence. Ces deux méthodes peuvent être utilisées pour protéger des informations confidentielles très sensibles auxquelles l'accès du défendeur doit être limité.

Cela étant, la communication de documents aux conseillers du défendeur ne peut s'effectuer que dans les pays où ceux-ci ne sont pas tenus de divulguer à leurs clients toutes les informations en leur possession.

(9) Les autorités de la concurrence ont fait savoir qu'elles utilisent différentes structures institutionnelles pour l'examen interne des affaires de concurrence. L'organisation institutionnelle des autorités peut être importante si l'on veut que leur action et leur processus de décision soient perçus comme transparents par les parties à la procédure d'application du droit et par le public en général.

Une procédure transparente et équitable d'application du droit exige à la fois une organisation institutionnelle efficace, de saines pratiques administratives et une culture juridique ouverte. Diverses procédures ont été mises en place pour favoriser l'interaction entre l'équipe chargée de l'enquête, les personnes qui rendent les décisions et les parties impliquées dans l'enquête et il n'existe pas de structure uniforme adoptée par l'ensemble des autorités de la concurrence. Celles-ci ont adopté des méthodes variées pour assurer la transparence et l'équité du processus et notamment :

(i) la mise en place d'une séparation claire entre la mission des enquêteurs et celle des personnes qui rendent les décisions,

(ii) le recours à des conseillers indépendants (économistes, juristes, conseillers d'entreprise, experts financiers, etc.) qui procèdent à un examen objectif de l'affaire en portant dessus un regard neuf,

(iii) la séparation de l'équipe chargée de l'enquête et de l'équipe juridique à l'aide d'un « pare-feu »,

(iv) des procédures permettant d'évaluer la réussite probable d'une enquête dès ses tout premiers stades,

(v) la tenue de réunions fréquentes entre les parties, les équipes chargées de l'affaire et les responsables de haut niveau qui rendent les décisions, et

(vi) la publication d'engagements en matière de transparence dans les affaires relevant de l'application du droit de la concurrence.

(10) Les pays adoptent les pratiques les plus diverses concernant les demandes de renseignements : certains observent des règles très précises tandis que d'autres ont recours à une approche plus discrétionnaire. En général, les pays tendent à favoriser une approche consultative et souple pour assurer que les demandes de renseignements contiennent autant d'informations utiles que possible.

Les demandes de renseignements peuvent être informelles et spontanées ou formelles et obligatoires. Si certains pays observent des procédures bien établies pour traiter les demandes de renseignements, un certain nombre d'autres pays ont déclaré avoir adopté une approche plus discrétionnaire, soit dénuée de règles formelles, soit fondée sur une procédure très souple. Dans nombre de pays, il est courant que les responsables du dossier examinent avec les parties le contenu de la demande de renseignements et il peut même arriver qu'ils en discutent ensemble avant même l'envoi de la demande. Pour l'autorité, c'est l'occasion de comprendre comment l'entreprise et le marché fonctionnent, le type d'informations que la société détient déjà et les informations que les parties sont à même de fournir, sans faire peser sur elles davantage de charges. Pour les entreprises, c'est l'occasion de mieux comprendre l'arrière-plan, les motifs et le contexte de la demande. Ces discussions offrent aussi la possibilité de clarifier la terminologie technique, par exemple dans des affaires se rapportant à l'énergie et aux télécommunications, et d'assurer que les deux parties utilisent bien le même langage.

La souplesse accordée par l'autorité de la concurrence dépend généralement de l'affaire concernée et, dans certains pays, les premiers délais de réponse aux demandes de renseignements peuvent être prolongés en tant que de besoin. Des mesures peuvent également être mises en place pour permettre aux parties de s'opposer aux demandes de renseignements, même si elles doivent généralement produire de solides justifications si elles refusent de s'y conformer. Les parties sont généralement davantage incitées à répondre aux demandes de renseignements dans les affaires de fusion – ayant tout intérêt à ce que l'opération soit rapidement autorisée – que dans les affaires d'abus de position dominante ou d'entente.

(11) Tous les pays permettent que les décisions rendues par l'autorité de la concurrence soient contrôlées par une instance judiciaire indépendante. Ce contrôle peut porter sur des questions telles que l'observation des règles de procédure, l'abus de pouvoir et sur les évaluations factuelles, juridiques et économiques effectuées. Dans certains pays, l'autorité de la concurrence jouit de certains égards, pour les décisions qu'elle rend, en raison de ses compétences d'expert, qui sont indispensables à l'examen des affaires relevant du droit de la concurrence.

Outre les procédures internes mises en place pour assurer l'équité de la procédure, les décisions rendues par les autorités sont généralement contrôlées par une instance judiciaire indépendante. C'est particulièrement important lorsque l'autorité de la concurrence est une instance administrative. Ce contrôle juridictionnel consiste en un examen complet destiné à déterminer si les conditions d'application des règles de concurrence ont été réunies. Dans certains pays, il existe des tribunaux de la concurrence spécialisés qui contrôlent les décisions de l'autorité. Dans d'autres, c'est un tribunal ordinaire qui en est chargé. L'instance judiciaire décide si les règles de procédure appropriées ont été respectées, si les faits ont été établis avec exactitude, s'il existe la moindre preuve d'abus de pouvoir ou s'il y a eu erreur manifeste d'appréciation. Des juges impartiaux doivent donc donner leur propre appréciation du droit et des faits, notamment du bien fondé de la sanction ou de la mesure corrective imposée. Dans certains pays, l'autorité de la concurrence ne peut rendre elle-même, sur des points factuels ou juridiques, des décisions contraignantes et il appartient alors à une instance judiciaire indépendante de prendre les mesures qui s'imposent.

Dans certains pays, l'autorité de la concurrence jouit de certains égards de la part de l'instance judiciaire en raison de ses « compétences d'expert », indispensables aux analyses juridiques et économiques complexes que nécessitent les affaires de concurrence. En revanche, dans d'autres pays, le périmètre et l'objet du contrôle juridictionnel peuvent être plus étendus. Ce contrôle peut dès lors comporter un examen des évaluations économiques et factuelles complexes qu'a effectuées l'autorité de la concurrence. Outre le contrôle juridictionnel, les parties peuvent, dans certains pays, saisir une instance judiciaire en vue d'obtenir des mesures conservatoires, c'est-à-dire des mesures ayant pour effet de suspendre l'exécution d'une décision rendue par l'autorité, en attendant l'issue d'un recours.

(12) Dans certains pays, les autorités rendent publics les détails et les motifs de leurs décisions au moment de la clôture d'une affaire ou de la conclusion d'un règlement. Ces communications, surtout lorsqu'elles sont rédigées en termes simples et non techniques, font progresser les efforts de promotion du droit de la concurrence déployés par l'autorité, en éduquant le public, les milieux d'affaires et leurs conseillers.

Il est judicieux de rendre publiques les décisions définitives relatives à l'application du droit de la concurrence. Certaines enquêtes sont closes sans qu'aucune mesure répressive ait été prise ou encore par voie de règlement transactionnel. Il y a règlement transactionnel – aussi appelé « règlement à l'amiable » ou « jugement d'expédient » – d'une procédure d'application du droit, lorsque les parties à une enquête en matière de droit de la concurrence coopèrent avec les autorités chargées de l'enquête en admettant leur participation à l'infraction dont elles sont suspectées. Ce type de règlement permet à l'autorité de la concurrence – en plus de simplifier ses procédures administratives – de libérer des ressources et donc de se concentrer sur d'autres affaires. Cela étant, on a pu parfois s'inquiéter du manque de transparence de la procédure de règlement transactionnel et des principes qui s'y appliquent.

Dans certains pays, les autorités publient les détails de toutes les décisions ayant entrainé la clôture des enquêtes et la conclusion de règlements, y compris avec des tiers. Elles le font généralement dans un communiqué de presse succinct qui peut faire état des décisions qu'elles ont rendues sur le fond de l'affaire ou d'autres décisions ayant entrainé le classement d'une affaire, comme les décisions relatives aux engagements proposés par les parties ou les ordonnances mettant fin à une procédure. Dans certains cas, un communiqué de presse complet expliquant plus en détail pourquoi l'enquête a été close ou le règlement conclu est publié. Certains pays ne publient, pour l'heure, aucun communiqué de presse, ou seulement un très petit nombre, en cas de classement ou de règlement d'une affaire, mais ont pris des dispositions afin de fournir au public un supplément d'information sur les actions et décisions de l'autorité de la concurrence, comme la mise en place, obligatoire ou volontaire, de registres publics. Certains pays ont fait savoir qu'il serait utile de recourir davantage à des déclarations finales pour sensibiliser les tiers et les autres personnes à la manière dont l'autorité accomplit son travail. Cela étant, comme l'a souligné la discussion, il faut trouver un juste équilibre entre le fait de mieux faire comprendre la manière dont les autorités évaluent les éléments de preuve et rendent leurs décisions et, dans le même temps, la protection des processus de décision internes, des secrets commerciaux et de la confidentialité.

Plus généralement, la transparence peut être renforcée par la publication de lignes directrices, de règlements et de manuels sur les bonnes pratiques, par des allocutions, des articles et des publications, par des interventions à titre d'*amicus curiae* et des documents présentés pour défendre les principes du droit de la concurrence, par des avis circonstanciés des autorités et par la jurisprudence, ainsi que par l'adhésion aux pratiques exemplaires d'organismes multilatéraux (OCDE, RIC).

I.

PROCEDURAL FAIRNESS: ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT PROCEEDINGS -- FEBRUARY 2010 MEETING

ISSUES PAPER

1. Introduction

In October 2009, the Working Party n. 3 (WP3) of the Competition Committee agreed to hold a roundtable discussion on "*Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings*". The WP3 Chair asked the Secretariat to identify in a short Issues Paper the main questions related to the topic for discussion that could be addressed in the WP3 roundtable discussion on 16 February 2010. In her letter of 17 November 2009 (COMP/2009.100), the Chair invited the OECD member and observer countries to submit written contributions to the Secretariat by no later than 17 January 2010.

The roundtable will discuss transparency issues in civil and administrative enforcement proceedings related to both merger review and other antitrust proceedings. The discussion will focus on transparency relating to the law and agency procedures and practice, party contacts with the agency involved, notice and opportunities to be heard, hearings, publication and timing of decisions and closing statements.

Other issues related to procedural fairness, such as confidentiality rules and public disclosure of proceedings, avoidance of unreasonable evidentiary requests to subjects of investigations, use of "devil's advocate" panels and specialized economists, availability of consensus settlement procedures, and judicial review and interim relief, will not be part of this roundtable discussion as they may become the subject of a separate roundtable to be held by WP3 in June 2010 (see the letter of the Chair of 17 November 2009).

2. The right to due process, the principle of procedural fairness and transparency

Procedural fairness derives from the right of individuals and legal persons to "due process". Due process regulates the relationship between citizens and the state, particularly the executive and judicial branches, but also the legislative branch, and ensures that the state respects the rights that are owed to individuals according to the law. A right to due process, which can be traced back to the XIIIth century and the Magna Carta,[1] is today recognised in many national legal systems[2] and is included in many national constitutions or applied under customary international law. The term 'due process' in competition proceedings does not have a clearly defined meaning and is generally understood in terms of 'procedural fairness'.

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1 In Chapter 39 of the Magna Carta, King John of England promised as follows: "No free man shall be taken or imprisoned or disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed, nor will we go upon him nor send upon him, except by the lawful judgement of his peers or by the law of the land." The phrase due process of law first appeared in a statutory rendition of Magna Carta in A.D. 1354 during the reign of Edward III of England, as follows: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law."

2 In the Constitution of the United States, for example, the Fifth Amendment guarantees due process vis-à-vis the actions of the Federal Government. The Fourteenth Amendment contains virtually the same rights, but expressly applied to the States.

2.1 The notion and scope of procedural fairness and transparency

It is widely recognised that in order to ensure citizens' confidence and belief in a fair legal system and in those applying the law, it is imperative that procedures regulating the relationship between the public sector and citizens are, and are generally perceived as, fair and transparent. The concepts of transparency and fairness have been identified as part of the basis of sound public administration both at national and international level.[3]

Fairness and transparency are essential for the success of antitrust enforcement, and regardless of the substantive outcome of a government investigation it is fundamental that the parties involved know that the process used to reach a competition decision was just.[4] Transparency and fairness are not only essential requirements for the parties involved in a competition proceeding, but are also a key part of efficient and effective case management by the competition authority. Transparency and fairness ensure a better understanding of the facts underpinning the investigation and help improve the quality of evidence and reasoning on which the agency bases its enforcement actions. They also assist agencies in allocating their resources more efficiently, focussing on cases really worth pursuing.

The notion of a right to fair process is generally construed broadly. It applies to all proceedings of a criminal or civil nature and aims to protect individuals from statutes, regulations, and enforcement actions that could deprive them of fundamental rights without a fair opportunity to affect the judgment or result. Courts have construed the notion of procedural fairness to include generally (i) the rights of individuals to be adequately notified of charges or proceedings, (ii) the opportunity to be heard at these proceedings, and (iii) the making of any final decision over the proceedings by an impartial person or panel.

Procedural fairness can be regarded as based on three central concepts:[5]

- that governmental measures of general application be published and that this be done, as a general rule, before they are applied;
- that such measures be administered in a uniform, impartial and reasonable manner or in a fair and equitable way; and
- there exist possibilities for appeal or review of decisions on the application of such measures.

Transparency refers to an environment in which the objectives of policy, its legal, institutional, and economic framework, policy decisions and their rationale and the terms of agencies' accountability, are provided to the public in a comprehensible, accessible, and timely manner. In a broad sense transparency means the degree to which public policies and practices, and the process by which they are established, are open and predictable. Transparency is a basic requirement for enforcement of competition law as competition laws are often written in general framework form and are applied in a technical manner on a case-by-case basis.

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3 See, for example, the consensus expressed in the General Assembly of the United Nations resolutions on Public Administration and Development: A/RES/49/136 of 1994, A/RES/50/225 of 1996, A/RES/53/201 of 1999, A/RES/56/213 of 2002, A/RES/57/277 of 2002 and A/RES/58/231 of 2004. See also OECD Recommendation on Enhancing Integrity in Public Procurement (2008).

4 'Procedural Fairness', Christine Varney, Assistant Attorney General, US DoJ at 13th Annual Competition Conference of the International Bar Association, Fiesole, Italy, September 12, 2009.

5 See SICE, Dictionary of Trade Terms.

Under the Free Trade Area of the America's (FTAA) Chapter on Competition Policy, for example, transparency refers to each party undertaking to publish or make available any laws, regulations, procedural rules, implementing guidelines, final judicial or quasi judicial decisions or administrative rulings of general application respecting competition matters. In the European Union, the concept of transparency refers to the openness and clear functioning of the Community institutions. This also includes citizens' demands for wider access to information and EU documents, and for greater involvement in the decision-making process of the European Union.

2.2 Procedural fairness under the European Convention on Human Rights

The European Convention on Human Rights (ECHR), which has been signed by the 23 European OECD member countries, sets out a number of fundamental rights. Several of these might be applicable to the enforcement of competition law, including (i) Article 8, on the right to respect for private and family life, (ii) Article 4 of protocol 7, on the right not to be tried or punished twice, and (iii) Article 7, on the principle of no punishment without law.

However, it is Article 6 of the Convention, which applies to criminal offenses, that may be particularly pertinent to procedural fairness concerns. It establishes a right to a fair trial in criminal matters. This includes the right to a public hearing before an independent and impartial tribunal within a reasonable time, the presumption of innocence, and other minimum rights for those charged with a criminal offence. The concept of 'criminal charge' under Article 6 has been widely interpreted by the European Court of Human Rights, with emphasis placed on the nature of the provision or offence in question rather than its mere classification. To the extent that some competition law enforcement proceedings were accepted as 'criminal' in nature, due process requirements could be imported into administrative law.

The third paragraph of Article 6 lists a number of minimum rights to which everyone charged with a criminal offence should be entitled. These minimum rights of an accused, which may be relevant for competition proceedings, are the following:

- The right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

- The right to have adequate time and the facilities for the preparation of his defence;

- The right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay, to be provided legal assistance free when the interests of justice so require;

- The right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- The right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

2.3 Examples of national provisions on procedural fairness in competition proceedings

Competition law cases are generally complex in nature. This increases the risk of complications and misunderstandings during the procedure. It is therefore crucial that the investigation process be as transparent as possible to ensure the procedure is conducted efficiently, and with a clear focus on the key issues in dispute. The concept that openness and transparency create strategic disadvantages for enforcers

is no longer an accepted proposition,[6] and it is clear that competition agencies should be seeking to adopt measures to ensure clarity of understanding in the enforcement process. If agencies are aware they will be subject to closer scrutiny, this will encourage better investigation and preparation of cases. For this reason attempts have been made in a number of jurisdictions to ensure the accountability and transparency of competition agencies.

However, the importance of the parties' right to a fair and transparent process must be assessed against the importance of an effective and efficient enforcement process. Competition proceedings are very peculiar in that they require a degree of confidentiality on the side of the investigating agency in order to safeguard the effectiveness of the enforcement action. Determining the appropriate level of transparency and fairness is a difficult exercise. Increased transparency has significant benefits, including better relationships with businesses, their advisers and representatives, better accountability, and improved clarity about the agency's processes, timescales and workloads. However, it should not come at the cost of harm to investigations.

2.3.1 The United States

In competition cases brought by the U.S. Department of Justice (DOJ), there is no formal hearing before the DOJ's decision to file an enforcement action in court (only the courts have the power to make a determination on liability and impose sanctions or remedies in DOJ cases; the DOJ itself has no such powers). Once a complaint has been filed in court, proceedings are governed by the Federal Rules of Civil Procedure and of Evidence applicable to all civil proceedings in federal court (*e.g.*, right to call witnesses and offer evidence, cross examine government witnesses, etc.).

With respect to the Federal Trade Commission (FTC), the 1946 Administrative Procedure Act (APA) adopted a quasi-judicial model of decision making which was implemented by the FTC. The mandate of the APA was to ensure that formal agency adjudication conforms with detailed standards of fairness and impartiality, and includes rules such as:

- the decision maker must be independent from the investigators and prosecutors within the agency,
- the decision maker must act in an impartial manner,
- the decision must not be effected by any *ex-parte* contact with the prosecutor or parties,
- employees presiding at hearings may administer oaths, subpoenas, hold conferences and deal with procedural matters such as ruling on evidence and taking depositions.

The FTC has detailed internal rules for ensuring compliance with the APA. The principal tool to achieve this is the appointment of an Administrative Law Judge (ALJ) to deal with disputed complaints. The ALJ assigned to handle a complaint issued by the FTC holds pre-hearing conferences, resolves discovery disputes, evidentiary disputes and procedural disputes, and conducts the full adversarial evidentiary hearing on the record. The ALJ issues an initial decision which sets out relevant and material findings of fact with record citations, explains the correct legal standard, applies the law to the facts, and, where appropriate, issues an order on remedy. ALJs are independent decision makers, and considered to be impartial by the Supreme Court even though they are employed by the FTC.

6 See Varney above.

2.3.2 The European Union

In the European Union (EU), the applicable procedural rights and guarantees granted to the parties which are subject to an antitrust proceeding can be found under Regulations 1/2003[7] and Regulation No. 773/2004[8] and the case law of the Community Courts. For merger proceedings, the parties' procedural rights are included in Regulation 139/2004[9] and the implementing Regulation 802/2004.[10] Under these Regulations, for example, the parties to a competition proceeding of the European Commission are entitled *inter alia*:

- To be informed of the opening of a proceeding, of the parties involved and of the scope of the investigation;
- To be informed in writing of the objections raised against them and of the evidence on which such objections are based;
- To have access to the Commission's file, subject to the legitimate protection of business secrets;
- To reply in writing to the objections raised and to develop their arguments at an oral hearing before a decision is taken;
- To receive a motivated decision, which is subject to a full judicial review before the European courts.

On 6 January 2010, the European Commission published three documents including detailed explanations concerning how EC antitrust procedures work. The stated aim of these documents is to further improve procedures by enhancing transparency, while at the same time ensuring the efficiency of the Commission's investigations. The three documents released by DG Competition and the Hearing Officers are: (i) Best Practices for antitrust proceedings, (ii) Best Practices for the submission of economic evidence (both in antitrust and merger proceedings) and (iii) Guidance on the role of the Hearing Officers in the context of antitrust proceedings.[11] These documents are applicable provisionally as from their publication, but DG Competition invited interested parties to submit comments on the documents with a view to adjusting them.

Important areas where the Commission has amended its procedures include:

- earlier opening of formal proceedings, as soon as the initial assessment phase has been concluded;

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7 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, in Official Journal L 1, 4.1.2003, p. 1–25.

8 Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27/04/2004 P. 18 – 24.

9 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal L 24, 29.01.2004, p. 1-22.

10 Commission Regulation (EC) No. 802/2004 implementing Council Regulation (EC) No. 139/2004 (The "Implementing Regulation") and its annexes (Form CO, Short Form CO and Form RS) in Official Journal L 133, 30.04.2004, p. 1-39. This Regulation was amended by Commission Regulation (EC) No 1033/2008, Official Journal L 279, 22.10.2008, p. 3-12.

11 The three documents are available on the website of the Directorate General for Competition.

- offering state of play meetings to the parties at key points of the proceedings;

- disclosing key submissions, including giving early access to the complaint, so that parties can already express their views in the investigative phase;

- publicly announcing the opening and closure of procedures, as well as when Statements of Objections have been sent;

- providing guidance on how the new instrument of commitment procedures is used in practice.

2.3.3 Korea

Since 2004, the Korea Fair Trade Commission (KFTC) has made intensive efforts to enhance procedural rights through amending the competition law (Monopoly Regulation and Fair Trade Act) and the procedural regulation (Regulation on the Operation of KFTC Meetings and Case Handling Procedures). Major changes include:

- Allowing informal written and oral dialogue between the parties to clarify facts and legal issues prior to formal proceedings.

- Allowing parties the right to apply for a moratorium in proceedings to collect additional concrete evidence for their defence, and then resuming proceedings.

- Taking appropriate measures to ensure business secrets and the identities of cooperative parties during the investigation are kept confidential.

- Ensuring simultaneous interpretation booths are available in the trial room to allow foreign companies to plead their defence in their own language.

2.3.4 Australia

In 2001-2003 an extensive review of the Australian competition law, known as the "Dawson Review", was undertaken to reflect concerns in the business community that the Australian Competition and Consumer Commission (ACCC) was not adhering to sufficient due process requirements. The issues raised included transparency and accountability concerns in the merger review process. As the merger process was a wholly informal review there were concerns that there was no adequate means to ensure accountability, transparency and predictability of process. In addition, the ACCC was entitled to conduct a dawn raid without obtaining a warrant.

The ACCC accepted that improvements could be made to the merger process and before the Dawson Review was complete, it published new process guidelines[12] to set out clearly the "regulatory contract" for informal merger clearance. (These guidelines were slightly revised in 2006.) The Committee considered that the process was largely adequate but that some specific concerns in respect of transparency and accountability were still missing. Recommendations were therefore made, and the 1974 Trade Practices Act was amended to include (i) a requirement for the ACCC to obtain a warrant for a dawn raid and (ii) a formal voluntary merger review process for ordinary mergers (in addition to the long standing formal process for authorisation of anti-competitive mergers).

12 Merger Review Process Guidelines 2006 available here: http://www.accc.gov.au/content/item.phtml?itemId=740765&nodeId=adee5751a81b9e6c76a961d245588330&fn=Merger%20review%20process%20guidelines%202006.pdf

Box 1. Questions and Issues for Discussion

1. Does your jurisdiction recognise due process rights? If yes, are these rights recognised at constitutional level?
2. How is due process defined in your country?
3. Does your antitrust regime ensure procedural transparency and fairness? How does your antitrust regime handle transparency with respect to the substantive legal standards, agency policies, practices, and procedures?
4. Are these principles encoded in a legal act? Or are they simply applied on a customary basis?
5. Are rules and procedures on fairness and transparency in antitrust proceedings publicly available?
6. Can you describe the scope of fairness and transparency rules in your jurisdiction?

3. Rights of defence of parties to an antitrust proceeding

Procedural fairness and transparency translate into a series of rights granted to the parties to ensure that their arguments are duly heard during the proceeding and that they have access to the investigating team and to the decision maker to ensure their right of defence is properly exercised. The following sections include a non-exhaustive discussion of some procedural rights that parties may be granted during an investigation.

3.1 Contacts and meetings with the agency

One important way to ensure transparency when bringing an enforcement action is to establish an effective working relationship between the parties subject to the investigation and the investigating authority. Such contacts both allow parties to interact with the agency during the proceeding and improve the efficiency of the investigation. Appointing a contact person within the agency to arrange meetings with the companies under investigation is one way to ensure improved communication and transparency. Regular meetings enable both sides to interact, facilitate a constructive dialogue and assist in speeding up the process. These meetings may take the form of informal gatherings to discuss general aspects of the case, or more formal case management hearings designed to set out a time table and discuss specificities. Regular updates on the development of the investigation could also improve the transparency of the process.

Meetings could take place between each party to an investigation and the agency, or they could be extended to include all the parties to the investigation and interested third parties. Bilateral meetings can be offered at various stages in the procedure and allow parties subject to the proceedings to have open and frank discussions with the investigating team, and make their points of view known. Multilateral meetings will include other parties involved in the proceedings, and possibly interested third parties. Under certain circumstances, e.g. the need to safeguard confidential information, the effectiveness of these contacts and meetings could be enhanced if the parties have prior access to key evidence and documents in the agency's file, which may later form the main substance of the allegations.

Box 2. Questions and Issues for Discussion

1. Do you usually appoint a person who is responsible for the investigation that the parties can contact during the proceeding?

2. To what extent do companies under investigation have the opportunity to meet with the agency? At what level? In what circumstances?

3. At what stage of the proceedings do these meetings take place? In what circumstances?

4. Does the company under investigation have the opportunity to request further *ad hoc* meetings? Do informal telephone conversations/email exchanges take place between case handlers and companies and/or their lawyers?

5. Is there a right of access to the agency's file? If yes, at what stage of the investigation is the right of access granted? Under which conditions?

3.2 Agencies' notices and parties' responding submissions

Companies involved in a competition proceeding are generally informed in writing when a proceeding has been opened against them. This initial written document usually describes the scope of the investigation, setting out the parties implicated, the behaviour constituting the alleged infringement, and the relevant territories and sectors. This document is particularly important as it often represents the start of a formal proceeding and the parties' rights of defence are usually exercised as of that moment.

The document informing the parties of the initial opening of proceedings may be followed, after an investigation period, by one or more substantive documents. These documents will: (i) clarify the scope of the investigation by restricting or extending it in relation to both the conduct and the subjects under investigation and (ii) clearly state the allegations against the parties and the evidence on which such allegations are based. This latter document, which generally represents the end of the formal investigation, is meant to inform the parties in more detail of the objections raised against them, including the main matters of fact and law, the evidence that the competition agency will consider in coming to a final decision, and any intended fines.

Notices on the status of the investigation and on the allegations that agencies intend to bring against companies enable the parties to exercise their rights of defence against the allegations, both in writing and orally. These exchanges offer the opportunity to the parties involved to respond and clarify the factual basis of the investigation and to contribute to the discussion on the appropriate legal and economic standard that should be applied. The defences also offer an opportunity for the parties to provide exculpatory evidence in support of their case. In order for the right of defence to be effective, the parties should be given sufficient time to prepare their briefs, which can vary depending on the type of response and on the stage of the proceeding.

Box 3. Questions and Issues for Discussion

1. How and when are companies subject to competition enforcement proceedings informed of the factual basis, economic theories, and legal doctrines relevant to the allegations against them?

2. What opportunities do companies have to respond to the agency's enforcement concerns?

3. What opportunities do companies have to make arguments and offer evidence, and what time constraints apply to these opportunities?

4. What procedures are in place for counter-arguments and production of evidence by companies under investigation?

5. What time frames are given for production of these documents? Can extensions be granted?

3.3 Oral hearings

Firms suspected of infringing competition law are often granted a right to be heard and an oral hearing usually forms part of the proceeding. Oral hearings allow the parties to submit and develop orally arguments which have already been submitted in writing and to supplement, where appropriate, the written evidence, or to inform of other matters that may be relevant. Generally, the hearing is held before an independent entity, who will ultimately adjudicate the case. In countries where antitrust cases are brought before a court, the hearing is held before the competent judge and hearings ordinarily are public.

In jurisdictions which have an administrative enforcement system of competition law, the hearing is held either (i) before an adjudicating board which hears the case brought by the investigating team and the arguments of the parties, or (ii) before the investigative team which then takes into account the arguments and evidence brought by the parties when reporting to the adjudicating board the outcome of the investigation. This is the case, for example, in the EU, where the parties argue their case before the investigating team. In order to ensure that the hearing is conducted impartially and in the full respect of the parties' rights of defence, the hearing is organised and conducted by an impartial and independent hearing officer. In administrative enforcement systems, oral hearings are not generally open to the public, and transcripts are not usually freely available. In contrast to court-based enforcement systems, in administrative enforcement systems witnesses may be questioned but they are not compelled to appear and cross examination is not used.

Box 4. Questions and Issues for Discussion

1. Is there the opportunity for an oral hearing during the procedure? Who is invited to attend?
2. What are the rules governing this hearing, and who oversees the hearing? What rights does the subject of the enforcement proceeding enjoy during the hearing?
3. How long will the hearing last and how is the time split between the agency and the company(s) under investigation?
4. If a dedicated hearing officer presides, to what extent is he/she independent from the competition agency? Does he/she have decision-making powers?
5. Is the hearing recorded and is a transcript available? Is the hearing public and/or are the transcripts publically available?
6. Is there a system in place for examining witnesses?

3.4 Duration and timing of investigations

Competition laws may include statutory deadlines on the duration and timing of the entire investigation or of some of its phases. This is particularly the case for merger control proceedings, in which timing and possible extensions are strictly regulated. Agencies may specify in their internal rules the timeframe which the investigation should follow. In non-merger proceedings, agencies are often afforded a relatively wider discretion as to how to organise the proceeding and its duration. In this case, parties may be given an opportunity to be consulted on the timing and duration of the procedure and/or of some of its investigatory phases.

A reasonable degree of certainty on the timescale of the work that the agency is planning to undertake during the investigation can provide the necessary comfort to the parties that the investigation will be concluded within a certain time period. This helps companies managing the internal resources devoted to assisting the agencies with the investigation and to manage better the internal disruptions that such investigation could create. More clarity regarding the investigation timeframe limits the external impact that competition investigations may have on the parties' reputation and share prices. A transparent timeframe benefits the enforcement action as it helps the agency to focus its resource and to conclude the investigation in a timely fashion. There are, however, a number of considerations that have to be taken into account when agencies consider timing. These include the size and complexity of the case, and the degree of cooperation that the agency receives from the parties to the investigation and from third parties.

Box 5. Questions and Issues for Discussion

1. Who sets the order of proceedings and the likely timetable?

2. Are there any prescribed limits on the length of a competition investigation? Do you have different systems for merger and non-merger investigations?

3. Does the degree of transparency on the timeframe of the investigation differ between merger and non-merger investigations?

4. Does you agency inform the parties of internal deadlines for specific activities or of any revised timescale for such activity? Do you provide an explanation for changes in the timescale?

5. To what extent are the parties consulted when the agency sets deadlines for specific activities?

3.5 Decisions: publication and public announcements

Decisions finding an infringement of competition rules provide explanatory material in order to give the addressees of the decision the possibility to exercise their right of appeal before the competent court. Decisions generally include a description of the infringement and of its duration, the identification of the parties involved in the infringement, and all substantive legal, economic and factual findings on which the decision relies. Decisions also include the amounts of fines and/or any relevant commitments or remedies. In some jurisdictions, the competition authority adopts the practice (or sometimes has the obligation) to issue motivated decisions in cases where an infringement could not be found. Such practice has proven useful in providing clarity to the business community on the legal standard applied by the agency in such cases.

Unless it is likely to harm the investigation, competition agencies may consider making public announcements (issuing, for example, a press release) on the key aspects of the investigation. This could be the case, for example, in the opening of a competition investigation, in the extension of its scope and in the final determination of the case. Once a final decision has been adopted, a press release describing the scope and findings of the case, and if relevant any fines, may be issued. If an investigation is closed without a formal decision having been taken, the competition agency may also decide to make this public.

Box 6. Questions and Issues for Discussion

1. What rules delineate the publication and content of an agency's enforcement decision?

2. At what point will the agency make a public announcement that a decision has been taken in an investigation? Where will the announcement be published?

3. If the investigation is closed without any affirmative enforcement decision is the agency still required to make a public announcement? Are details provided on why an enforcement action was not taken?

4. Are there any prescribed rules on the content of these announcements? If a fine has been given will the amount be made public?

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NOTE POUR DISCUSSION

1. Introduction

En octobre 2009, le Groupe de travail n° 3 (WP3) du Comité de la concurrence a décidé de tenir une table ronde sur « *L'équité des procédures : questions relatives à la transparence des procédures d'application de la loi en matière civile et administrative* ». La Présidente du WP3 a demandé au Secrétariat d'établir à ce sujet un document succinct précisant les principaux points qui pourraient être abordés lors de la table ronde du 16 février 2009. Dans sa lettre du 17 novembre 2009 (COMP/2009.100), la Présidente a invité les pays membres et observateurs de l'OCDE à soumettre leurs contributions écrites au Secrétariat au plus tard le 17 janvier 2010.

La table ronde portera sur les questions de transparence dans les procédures d'application de la loi en matière civile et administrative, à la fois dans le cadre du contrôle des fusions et d'autres procédures de droit de la concurrence. La discussion sera essentiellement axée sur la transparence des procédures et des pratiques prévues par la loi et appliquées par les autorités, les contacts entre les parties et les autorités impliquées, les notifications et les possibilités d'être entendu, les audiences ainsi que la publication et les délais de communication des décisions et des déclarations finales.

Certaines questions qui ont également trait à l'équité procédurale ne seront pas abordées lors de cette table ronde car elles pourraient faire l'objet d'une autre table ronde que le WP3 tiendrait en juin 2010 (voir la lettre de la Présidente en date du 17 novembre 2009). Il s'agit notamment des règles de confidentialité et de la divulgation des procédures au public, des mesures évitant les demandes de preuves excessives aux personnes visées par une enquête, du recours à des jurys jouant le rôle d'« avocat du diable » et à des économistes spécialisés, de l'existence de procédures transactionnelles, du contrôle judiciaire et des demandes en référé.

2. Droit à une procédure régulière, principe d'équité procédurale et transparence

Le principe d'équité procédurale découle du droit des personnes physiques et des personnes morales à bénéficier de la « garantie d'une procédure régulière » (« due process »). Cette garantie régit les relations entre les citoyens et l'État, notamment avec les branches exécutive et judicaire, mais aussi législative, et vise à ce que l'État respecte les droits des individus tels qu'ils sont inscrits dans la loi. Le droit à une procédure régulière, qui trouve son origine au XIII[e] siècle dans la Grande Charte[1], est aujourd'hui reconnu

[1] Dans le chapitre 39 de la Grande Charte, Jean sans Terre, Roi d'Angleterre promettait ce qui suit : « Aucun homme libre ne sera arrêté ni emprisonné ou dépouillé ou mis hors la loi ou exilé, et il ne lui sera fait aucun dommage si ce n'est en vertu du jugement légal de ses pairs ou en vertu de la loi du pays ». L'expression « due process » est apparue pour la première fois en 1354, pendant le règne d'Édouard III d'Angleterre, dans une interprétation officielle de la Grande Charte qui précisait : « Aucun homme, quels que soient son état ou sa condition, ne saurait être expulsé de ses terres ou de son tènement, ni dépossédé, ni déshérité, ni exécuté sans avoir la possibilité de s'expliquer, dans le respect des garanties de procédure prévues par la loi ».

dans le système juridique de nombre de pays[2] et est inscrite dans la constitution de nombreux pays ou est appliqué dans le cadre du droit international coutumier. Dans les procédures de droit de la concurrence, le sens de l'expression « garantie de procédure régulière » n'est pas clairement défini et est interprété de manière générale en termes d'« équité procédurale ».

2.1 Transparence et équité procédurale : notion et portée

Il est largement admis que pour que les citoyens aient confiance et foi dans un système juridique équitable et dans les personnes chargées de faire appliquer la loi, il est impératif que les procédures régissant les relations entre le secteur public et les citoyens soient équitables et transparentes et qu'elles soient, de manière générale, perçues comme telles. Les notions de transparence et d'équité comptent parmi les composantes de base d'une administration publique de qualité aussi bien au plan national qu'international[3].

Équité et transparence sont indispensables à une application correcte du droit de la concurrence, et quel que soit le résultat sur le fond d'une enquête conduite par les autorités, il est fondamental que les parties concernées aient la certitude que la décision arrêtée est bien le fruit d'un traitement équitable[4]. Transparence et équité sont non seulement des règles essentielles pour les parties en cause dans une affaire de concurrence, mais elles garantissent également en grande partie une gestion efficace et efficiente de l'affaire par l'autorité de la concurrence. Transparence et équité permettent en effet une meilleure compréhension des faits sur lesquels porte l'enquête et aident à améliorer la qualité des éléments de preuve et des raisonnements sur lesquels l'autorité fonde ses mesures d'exécution. Elles permettent également aux autorités d'affecter leurs ressources plus efficacement en se concentrant sur les affaires qui en valent vraiment la peine.

La notion de droit à un procès équitable est en général interprétée au sens large. Elle s'applique à toutes les procédures civiles et pénales et a pour objectif de protéger les individus vis-à-vis de lois, de réglementations et de mesures d'exécution susceptibles de les priver de droits fondamentaux sans qu'il leur soit équitablement offert la possibilité d'influer sur le jugement ou le résultat de la procédure. Les tribunaux ont interprété la notion d'équité procédurale comme incluant en général (1) le droit de se voir notifier de manière adéquate les charges retenues ou les procédures engagées, (ii) la possibilité d'être entendu dans le cadre de telles procédures et (iii) la prise de décision finale sur l'affaire par une personne ou un jury impartial.

On peut considérer que l'équité procédurale repose sur trois concepts centraux[5]. Elle exige :

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2 Par exemple, le cinquième amendement de la Constitution des États-Unis d'Amérique prévoit des garanties de procédure régulière s'agissant des actes du gouvernement fédéral. Le quatorzième amendement prévoit quasiment les mêmes droits, mais expressément pour ce qui est des États.

3 Voir, par exemple, le consensus qui a émergé à ce propos dans les résolutions de l'Assemblée générale des Nations Unies en matière d'administration publique et de développement : A/RES/49/136 de 1994, A/RES/50/225 de 1996, A/RES/53/201 de 1999, A/RES/56/213 de 2002, A/RES/57/277 de 2002 et A/RES/58/231 de 2004. Voir également la Recommandation de l'OCDE sur le renforcement de l'intégrité dans les marchés publics (2008).

4 « Procedural Fairness », Christine Varney, Procureur général adjoint, Département américain de la Justice lors de la 13th Annual Competition Conference of the International Bar Association, à Fiesole, en Italie, le 12 septembre 2009.

5 Voir Système d'information sur le commerce extérieur (SICE), Dictionnaire des termes commerciaux.

- que les mesures gouvernementales d'application générale soient publiées et que ceci se fasse, en général, avant qu'elles soient appliquées ;

- que de telles mesures soient administrées de façon uniforme, impartiale et raisonnable ou de manière juste et équitable ; et

- qu'il existe des possibilités de recours ou de réexamen des décisions concernant l'application de ces mesures.

L'exigence de transparence fait référence à un environnement dans lequel les objectifs des politiques publiques, leur cadre légal, institutionnel et économique, les décisions des pouvoirs publics et leurs motivations, de même que les modalités des responsabilités confiées aux différentes autorités, sont communiqués en temps voulu au public de manière intelligible et accessible. La notion de transparence renvoie, au sens large, au degré d'ouverture et de prévisibilité des politiques publiques et des pratiques des pouvoirs publics, ainsi que de leur processus d'élaboration. La transparence est une règle fondamentale pour l'application du droit de la concurrence du fait que les lois en la matière sont souvent rédigées en des termes généraux et sont appliquées de façon technique au cas par cas.

Dans son chapitre sur la politique de la concurrence, par exemple, la Zone de libre-échange des Amériques (ZLEA) établit qu'en vertu du principe de transparence, chaque partie s'engage à publier ou à permettre la consultation de toutes lois, réglementations, règles de procédure, lignes directrices de mise en œuvre, de toutes décisions finales, qu'elles soient judiciaires ou quasi judiciaires, ou encore de tout jugement administratif d'application générale dans le domaine de la concurrence. Dans l'Union européenne, le concept de transparence fait référence à la clarté du fonctionnement des institutions communautaires et à leur ouverture. Cela englobe également les demandes des citoyens concernant, d'une part, un plus large accès aux informations et aux documents de l'UE et, d'autre part, une plus grande participation au processus de prise de décision de l'Union européenne.

2.2 L'équité procédurale au sens de la Convention européenne des droits de l'homme

La Convention européenne des droits de l'homme (CEDH), qui a été signée par les 23 pays européens membres de l'OCDE, établit un certain nombre de droits fondamentaux. Plusieurs de ces droits peuvent être applicables à la mise en œuvre du droit de la concurrence, et notamment (i) l'article 8 sur le droit au respect de la vie privée et familiale, (ii) l'article 4 du protocole 7 sur le droit à ne pas être jugé ou puni deux fois et (iii) l'article 7 sur le principe « pas de peine sans loi ».

Cela étant, l'article 6 de la Convention, qui s'applique aux infractions pénales, est peut-être le plus pertinent en matière d'équité procédurale. Il établit en effet le droit à un procès équitable dans les affaires pénales. Cela inclut le droit à être entendu publiquement dans un délai raisonnable par un tribunal indépendant et impartial, la présomption d'innocence, ainsi que d'autres droits minimaux pour les personnes accusées d'une infraction. La Cour européenne des droits de l'homme a interprété à maintes reprises la notion d'« accusation en matière pénale » visée à l'article 6 en accordant plus d'importance à la nature de la disposition ou de l'infraction en question qu'à leur simple classification. Dans la mesure où le caractère « pénal » de certaines procédures d'exécution du droit de la concurrence a été reconnu, les normes en matière de procédure régulière ont pu être importées dans le droit administratif.

Le troisième paragraphe de l'article 6 énumère un certain nombre de droits minimaux dont doit jouir toute personne accusée d'une infraction. Ces droits minimaux de l'accusé, qui peuvent être applicables dans le cadre de procédures de droit de la concurrence, sont les suivants :

- être informé, dans le plus court délai, dans une langue qu'il comprend et d'une manière détaillée, de la nature et de la cause de l'accusation portée contre lui ;

- disposer du temps et des facilités nécessaires à la préparation de sa défense ;

- se défendre lui-même ou avoir l'assistance d'un défenseur de son choix et, s'il n'a pas les moyens de rémunérer un défenseur, pouvoir être assisté gratuitement par un avocat commis d'office, lorsque les intérêts de la justice l'exigent ;

- interroger ou faire interroger les témoins à charge et obtenir la convocation et l'interrogation des témoins à décharge dans les mêmes conditions que les témoins à charge ;

- se faire assister gratuitement d'un interprète, s'il ne comprend pas ou ne parle pas la langue employée à l'audience.

2.3 Exemples de dispositions nationales relatives à l'équité procédurale dans les affaires de concurrence

Les affaires relevant du droit de la concurrence sont généralement de nature complexe, ce qui accroît le risque de complications et de divergences au cours de la procédure. Il est donc crucial que le processus d'investigation soit aussi transparent que possible afin que la procédure soit conduite de manière efficiente et qu'elle se concentre clairement sur les principaux points litigieux. Si, par le passé, il était communément admis que l'ouverture et la transparence désavantageaient de manière stratégique les instances en charge de l'application de la loi[6], il apparaît aujourd'hui incontestablement que les autorités de la concurrence devraient s'efforcer d'adopter des mesures visant à garantir la clarté de la compréhension au cours du processus d'application de la loi. Si les autorités de la concurrence prennent conscience du fait qu'elles vont être soumises à un contrôle plus minutieux, cela les encouragera à mieux conduire leurs enquêtes et à mieux préparer leurs argumentations. C'est pour cette raison que des initiatives ont été prises dans un certain nombre de juridictions pour tenter de garantir l'obligation de rendre compte et la transparence des autorités de la concurrence.

Cela étant, l'importance du droit des parties à un traitement équitable et transparent doit être mise en balance avec celle d'un processus d'application de la loi efficace et efficient. Les procédures en matière de concurrence sont très particulières en ce qu'elles exigent de l'autorité chargée de l'enquête un certain niveau de confidentialité afin de garantir l'efficacité de son action. Déterminer le niveau de transparence et d'équité approprié n'est pas aisé. Une plus grande transparence apporte des avantages considérables, et notamment de meilleures relations avec les entreprises, leurs conseillers et leurs représentants, une plus grande responsabilisation de l'autorité et davantage de clarté concernant ses processus, ses délais et sa charge de travail. Cependant, la transparence ne saurait être favorisée au détriment de la qualité des investigations.

2.3.1 États-Unis

S'agissant des affaires de concurrence déférées aux tribunaux par le Département américain de la Justice (DOJ), aucune audience formelle n'est prévue avant la décision du DOJ de porter l'affaire devant les tribunaux (ces derniers sont, en effet, les seuls habilités à statuer en matière de responsabilité et à prononcer des sanctions ou des mesures correctrices dans les affaires dont ils sont saisis par le DOJ, qui n'a pas ce pouvoir). Une fois qu'un tribunal a été saisi, la procédure est régie par les règles fédérales de procédure civile et de preuve applicables à toutes les procédures civiles que connaissent les tribunaux

6 Voir Varney ci-dessus.

fédéraux (par exemple, le droit d'appeler des témoins à comparaître, de verser des preuves, de soumettre les témoins des autorités à un contre-interrogatoire, etc.).

Pour ce qui est de la Commission fédérale du commerce (FTC), la loi sur la procédure administrative (APA) de 1946 a retenu un modèle de prise de décision quasi judiciaire qui a été mis en œuvre par la FTC. L'APA a été adoptée pour garantir que les décisions formelles rendues par les autorités soient prises dans le respect de normes précises d'équité et d'impartialité, et elle prévoit notamment les règles suivantes :

- au sein de l'autorité, le décideur doit être indépendant des enquêteurs et de l'accusation,
- le décideur doit agir avec impartialité,
- la décision doit être prise sans contact ex parte avec l'accusation ou avec toute autre partie,
- les agents présidant les auditions sont habilités à déférer des serments, à notifier des assignations et citations, à conférer avec les parties et à régler tout point de procédure tel que statuer sur les preuves qui leur sont soumises et recueillir des dépositions.

La FTC dispose de règles internes détaillées visant à garantir la conformité de ses procédures à l'APA. Son principal mécanisme à cet effet est la nomination d'un juge administratif chargé de traiter les plaintes contestées. Lorsqu'il est saisi d'une plainte émise par la FTC, le juge administratif organise des conférences préalables aux audiences, règle les litiges relatifs à la production d'éléments de preuve, à l'administration de la preuve et à la procédure, et mène publiquement l'intégralité de l'enquête contradictoire préliminaire. Il rend une décision initiale qui reprend les principales constatations de fait pertinentes accompagnées de références aux documents de procédure, il explique la norme légale correcte, applique le droit aux faits et, le cas échéant, il ordonne des mesures correctrices. Les juges administratifs sont des décideurs indépendants et, bien qu'ils soient employés par la FTC, la Cour suprême les considère comme impartiaux.

2.3.2 L'Union européenne

Dans l'Union européenne (UE), les droits et garanties procéduraux applicables aux parties visées par une procédure de droit de la concurrence sont ceux prévus par les règlements 1/2003[7] et 773/2004[8], ainsi que ceux résultant de la jurisprudence des tribunaux communautaires. Pour les procédures concernant les fusions, les droits procéduraux des parties sont ceux prévus dans le règlement 139/2004[9] et le règlement relatif à la mise en œuvre du règlement 802/2004[10]. En application de ces règlements, par exemple, les

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7 Règlement (CE) n° 1/2003 du Conseil du 16 décembre 2002 relatif à la mise en œuvre des règles de concurrence prévues aux articles 81 et 82 du traité, Journal officiel des Communautés européennes. 04.01.2003, n° L 1, p. 1–21.

8 Règlement (CE) n° 773/2004 de la Commission du 7 avril 2004 relatif aux procédures mises en œuvre par la Commission en application des articles 81 et 82 du traité CE, Journal officiel des Communautés européennes. 27/04/2004, n° L 123, p. 18 – 24.

9 Règlement (CE) n° 139/2004 du Conseil du 20 janvier 2004 relatif au contrôle des concentrations entre entreprises, Journal officiel des Communautés européennes. 29.01.2004, n° L 24, p. 1-22.

10 Règlement (CE) n° 802/2004 de la Commission du 7 avril 2004 concernant la mise en œuvre du règlement (CE) n° 139/2004 du Conseil (le « règlement d'application ») et de ses annexes (formulaire CO, formulaire CO simplifié et formulaire RS), Journal officiel n° L 133 du 30.04.2004, p. 1-39. Ce règlement a été modifié par le règlement (CE) n° 1033/2008 de la Commission, Journal officiel des Communautés européennes n° L 279 du 22.10.2008, p. 3-12.

parties visées par une procédure de la Commission européenne en matière de concurrence ont droit, entre autres :

- à être informées de l'ouverture d'une procédure, du nom des parties concernées et de la portée de l'enquête ;
- à être informées par écrit des griefs qui sont invoqués à leur encontre et des éléments de preuve sur lesquels se fondent ces griefs ;
- à avoir accès au dossier de la Commission, sous réserve de la protection légitime des secrets industriels ;
- à répondre par écrit aux griefs signifiés et soumettre leurs arguments lors d'une audience avant qu'une décision soit prise ;
- à la notification d'une décision dûment motivée pouvant faire l'objet d'un recours devant les tribunaux européens.

Le 6 janvier 2010, la Commission européenne a publié trois documents comportant des explications détaillées sur le fonctionnement des procédures de la CE en matière d'ententes et de positions dominantes. L'objectif affiché de ces documents est d'améliorer les procédures en accroissant la transparence tout en garantissant l'efficacité des enquêtes de la Commission. Les trois documents publiés par la Direction générale de la concurrence de la Commission européenne et les conseillers-auditeurs sont les suivants : les « bonnes pratiques relatives aux procédures en matière d'ententes et d'abus de position dominante », les « bonnes pratiques relatives à la communication de données économiques » (à la fois pour les procédures en matière d'ententes et d'abus de position dominante et pour les procédures en matière de concentrations) et les « lignes directrices relatives au rôle des conseillers-auditeurs dans le cadre des procédures en matière d'ententes et d'abus de position dominante »[11]. Ces documents seront applicables provisoirement à compter de leur date de publication, mais la DG concurrence a invité les parties prenantes à présenter leurs observations sur ces documents pour qu'elle puisse y apporter d'éventuelles modifications.

La Commission a modifié certains aspects importants de ses procédures, notamment :

- en ouvrant plus rapidement ses enquêtes formelles, dès la fin de la phase initiale d'appréciation ;
- en proposant aux parties la tenue de réunions-bilans à des moments clés de la procédure ;
- en divulguant des contributions clés, notamment par un accès rapide à la plainte, permettant ainsi aux parties de soumettre leurs observations dès la phase d'enquête ;
- en annonçant publiquement l'ouverture et la clôture des procédures, ainsi que l'envoi des communications des griefs ;
- en fournissant des orientations sur l'utilisation pratique du nouvel instrument concernant les procédures d'engagement.

11 Les trois documents peuvent être consultés sur le site Internet de la Direction générale de la concurrence.

2.3.3 Corée

Depuis 2004, la Commission coréenne des pratiques commerciales équitables (KFTC) a déployé d'importants efforts pour améliorer les droits procéduraux en modifiant son droit de la concurrence (loi sur la réglementation des monopoles et sur l'équité des pratiques commerciales) et sa réglementation relative aux procédures (réglementation relative au fonctionnement des réunions et des procédures de gestion des affaires de la KFTC). Les principaux changements sont les suivants :

- Permettre un dialogue informel oral et écrit entre les parties afin de clarifier les points de fait et de droit avant l'ouverture de la procédure formelle.

- Autoriser les parties à demander une suspension de la procédure afin de rassembler des éléments concrets de preuve supplémentaires pour leur défense.

- Prendre les mesures adéquates de nature à garantir que les secrets industriels et les identités des parties coopérantes soient tenus secrets pendant l'enquête.

- Veiller à ce que les salles d'audience soient équipées de cabines d'interprètes de sorte que les entreprises étrangères puissent assurer leur défense dans leur propre langue.

2.3.4 Australie

En 2001-2003, un réexamen complet du droit australien de la concurrence, le « Réexamen Dawson », a été entrepris face aux inquiétudes des milieux d'affaires, pour qui la Commission australienne de la concurrence et des consommateurs (ACCC) n'était pas suffisamment respectueuse des droits de la défense. Les problèmes concernaient notamment la transparence et l'obligation de rendre des comptes dans le cadre de la procédure de contrôle des fusions. Du fait que la procédure applicable aux fusions consistait en un examen entièrement informel, on pouvait déplorer que rien ne soit prévu pour garantir l'obligation de rendre compte de l'ACCC, ainsi que la transparence et la prévisibilité de la procédure. Par ailleurs, l'ACCC était habilitée à mener des perquisitions sans mandat.

L'ACCC a reconnu que des améliorations pourraient être apportées à la procédure applicable aux fusions et a publié avant le terme du Réexamen Dawson de nouvelles lignes directrices de procédure[12] visant à établir clairement le « contrat réglementaire » applicable aux autorisations informelles de fusion (ces lignes directrices ont été légèrement révisées en 2006). La Commission a estimé que la procédure était en grande partie adéquate mais que certains points spécifiques restaient à préciser en matière de transparence et d'obligation de rendre compte. Des recommandations ont alors été formulées et la loi de 1974 sur les pratiques commerciales a été modifiée de façon à prévoir (i) l'obligation pour l'ACCC d'obtenir un mandat pour effectuer une perquisition et (ii) une procédure formelle pour le contrôle des fusions ordinaires, sur la base du volontariat (en plus de la procédure formelle qui existe depuis longtemps pour l'autorisation des fusions anticoncurrentielles).

12 Lignes directrices de 2006 pour les procédures de contrôle des fusions, consultables à l'adresse suivante : http://www.accc.gov.au/content/item.phtml?itemId=740765&nodeId=adee5751a81b9e6c76a961d245588330&fn=Merger%20review%20process%20guidelines%202006.pdf

Encadré 1. Questions et points à examiner

5. Votre juridiction reconnaît-elle le droit à bénéficier d'une garantie de procédure régulière ? Si oui, ces droits sont-ils reconnus au niveau constitutionnel ?

6. Comment le droit à bénéficier d'une procédure régulière est-il défini dans votre pays ?

7. Votre régime en matière d'ententes et d'abus de position dominante prévoit-il l'équité et la transparence des procédures ? Comment traite-t-il la question de la transparence vis-à-vis des normes de droit substantiel et des politiques, des pratiques et des procédures des autorités de la concurrence ?

8. Ces principes sont-ils inscrits dans des actes juridiques ou sont-ils simplement appliqués à titre coutumier ?

9. Les règles et procédures relatives à l'équité et à la transparence des procédures en matière de concurrence sont-elles librement accessibles au public ?

10. Pouvez-vous décrire la portée des règles relatives à l'équité et à la transparence dans votre juridiction ?

3. Droits de la défense des parties visées par une procédure de droit de la concurrence

Les principes de transparence et d'équité des procédures se traduisent par un éventail de droits octroyés aux parties pour s'assurer que leurs arguments soient entendus en bonne et due forme au cours de la procédure et qu'elles puissent communiquer avec les personnes en charge de l'enquête et avec le décideur pour que leurs droits de la défense soient dûment exercés. Les sections suivantes proposent un examen non exhaustif de certains droits procéduraux que les parties peuvent se voir accorder au cours d'une enquête.

3.1 Contacts et réunions avec l'autorité

Pour garantir la transparence d'une mesure d'application de la loi, il est important de mettre en place, dès le début, une relation de travail effective entre les parties visées par l'enquête et l'autorité enquêtrice. Ces contacts permettent à la fois aux parties d'interagir avec l'autorité tout au long de la procédure et d'accroître l'efficience de l'enquête. Désigner au sein de l'autorité une personne de contact qui sera chargée d'organiser des réunions avec les entreprises faisant l'objet d'une enquête est une façon de d'améliorer la communication et la transparence. Des réunions régulières permettent aux deux parties d'interagir, facilitent un dialogue constructif et aident à accélérer la procédure. Ces réunions peuvent prendre la forme de rencontres informelles où les participants discutent de certains aspects d'ordre général concernant l'affaire ou d'audiences plus formelles de mise en état visant à établir un calendrier et à régler certains points. La communication régulière des éléments nouveaux sur la progression de l'enquête pourrait aussi accroître la transparence de la procédure.

Des réunions pourraient avoir lieu entre chaque partie visée par une enquête et l'autorité ou pourraient être élargies à l'ensemble des parties visées par l'enquête ainsi qu'aux tiers parties prenantes. Des réunions bilatérales peuvent être proposées à différents stades de la procédure. Elles permettent aux parties visées par la procédure d'avoir des discussions ouvertes et franches avec les enquêteurs et de faire part de leur point de vue. Les réunions multilatérales rassembleront quant à elles les autres parties à la procédure et éventuellement les tiers parties prenantes. Dans certaines circonstances, par exemple s'il convient de protéger des informations confidentielles, ces contacts et réunions pourraient s'avérer plus efficaces si les parties ont au préalable la possibilité d'accéder au dossier de l'autorité qui renferme les données et les documents clés sur lesquels seront ensuite fondées les principales allégations.

Encadré 2. Questions et points à examiner

11. Avez-vous l'habitude de désigner un enquêteur que les parties peuvent contacter pendant la procédure ?

12. Dans quelle mesure les entreprises faisant l'objet d'une enquête ont-elles la possibilité de rencontrer l'autorité ? À quel niveau ? Selon quelles modalités ?

13. À quel stade de la procédure ces réunions ont-elles lieu ? Selon quelles modalités?

14. L'entreprise qui fait l'objet d'une enquête a-t-elle la possibilité de demander en plus des réunions ad hoc ? Des conversations téléphoniques/échanges de courriels informels ont-ils lieu entre les personnes chargées des dossiers et les entreprises et/ou leurs avocats ?

15. Existe-t-il un droit d'accès au dossier de l'autorité ? Si oui, à quel stade de l'enquête ce droit d'accès est-il accordé ? Sous quelles conditions ?

3.2 Notifications des autorités et mémoires des parties

Les entreprises visées par une procédure de droit de la concurrence sont en règle générale informées par écrit de l'ouverture d'une procédure à leur encontre. Ce document écrit initial précise habituellement la portée de l'enquête, les parties en cause, le comportement constituant la violation présumée, ainsi que les territoires et les secteurs concernés. Il est particulièrement important car il marque en général le début d'une procédure formelle et c'est habituellement à partir de ce moment que les parties exercent leurs droits de la défense.

Le document notifiant aux parties l'ouverture d'une procédure peut être suivi, au terme d'une période d'investigation, d'un ou plusieurs documents portant sur le fond de l'affaire. Ces derniers viseront à (i) clarifier la portée de l'enquête soit en la restreignant, soit en l'élargissant aussi bien en ce qui concerne les comportements que les personnes visés et (ii) à préciser quelles sont les allégations contre les parties ainsi que les éléments de preuve sous-tendant ces allégations. Ce dernier document, qui marque en général le terme de l'enquête formelle, a pour objet d'informer les parties de manière plus détaillée sur les griefs invoqués à leur encontre et récapitule notamment les principaux points de fait et de droit, les éléments de preuve que l'autorité de la concurrence prendra en compte dans sa décision finale, ainsi que toute sanction qu'elle envisage d'infliger.

Les notifications sur l'état d'avancement de l'enquête et sur les allégations que les autorités ont l'intention d'invoquer à l'encontre des entreprises permettent aux parties de faire valoir leurs droits de la défense face à ces allégations, à la fois oralement et par écrit. Ces échanges sont pour les parties autant d'occasions de répondre, de clarifier les données factuelles sur lesquelles se base l'enquête et de contribuer à la discussion concernant la norme économique et légale qui devrait s'appliquer. Les moyens de défense permettent aussi aux parties de fournir des éléments de preuve à décharge venant soutenir leur thèse. Pour que les droits de la défense soient effectifs, les parties devraient pouvoir disposer de suffisamment de temps pour préparer leurs mémoires, étant entendu que la notion de temps suffisant peut varier en fonction du type de réponse et du stade de la procédure.

Encadré 3. Questions et points à examiner

16. Comment et quand les entreprises visées par des procédures d'application du droit de la concurrence sont-elles informées des données factuelles, des théories économiques et des doctrines juridiques sur lesquelles s'appuient les allégations portées contre elles ?

17. De quelles possibilités les entreprises disposent-elles pour répondre aux préoccupations de l'autorité vis-à-vis de l'application de la loi.

18. Quelles possibilités les entreprises ont-elles pour formuler des arguments et fournir des éléments de preuve, et à quelles contraintes de temps sont-elles soumises pour ce faire ?

19. Quelles procédures sont en place pour encadrer la communication de contre-arguments et la production de preuves par les entreprises faisant l'objet d'une enquête ?

20. Quels délais sont accordés pour la production de ces documents ? Des prorogations de délai peuvent-elles être accordées ?

3.3 Audiences

Les entreprises suspectées d'infraction au droit de la concurrence se voient souvent accorder le droit d'être entendues, et la procédure prévoit en général une audience. Les audiences permettent aux parties de soumettre et de développer oralement des arguments d'ores et déjà soumis par écrit et de les étayer, le cas échéant, avec les éléments de preuve correspondants ou de porter à la connaissance de l'autorité d'autres éléments pouvant être pertinents. En règle générale, l'audience a lieu devant une instance indépendante qui sera finalement chargée de statuer sur l'affaire. Dans les pays où les affaires relevant du droit de la concurrence sont soumises à un tribunal, l'audience a lieu par-devant le juge compétent et est d'ordinaire ouverte au public.

Dans les juridictions où l'application du droit de la concurrence se fait par la voie administrative, cette audience a lieu soit (i) devant une formation chargée de statuer, qui entend la thèse soutenue par les enquêteurs ainsi que les arguments des parties ou (ii) devant les enquêteurs qui, ensuite, tiennent compte des arguments et des éléments fournis par les parties lorsqu'ils communiquent les conclusions de l'enquête à la formation chargée de statuer. C'est le cas, par exemple, de l'UE où les parties défendent leur argumentation devant les enquêteurs. Afin que l'audience soit impartiale et respecte les droits de la défense des parties, elle est conduite par un conseiller-auditeur impartial et indépendant. Dans les systèmes d'application de la loi par la voie administrative, les audiences ne sont en général pas publiques et leurs procès-verbaux ne sont habituellement pas librement consultables. Par ailleurs, dans ces systèmes, contrairement aux systèmes d'application de la loi par la voie judiciaire, des témoins peuvent être interrogés, mais ils ne sont pas tenus de comparaître, et il n'est procédé à aucun contre-interrogatoire.

Encadré 4. Questions et points à examiner

21. La procédure prévoit-elle une audience ? Qui est invité à y participer ?

22. Quelles sont les règles régissant cette audience et qui la supervise ? Pendant l'audience, quels sont les droits des individus visés par la procédure d'application de la loi ?

23. Quelle sera la durée de l'audience et comment le temps est-il réparti entre l'autorité et le(s) entreprise(s) faisant l'objet de l'enquête ?

24. Si l'audience est présidée par un conseiller-auditeur, dans quelle mesure est-il indépendant de l'autorité de la concurrence ? Est-il investi d'un pouvoir de décision ?

25. L'audience est-elle enregistrée et un procès-verbal est-il disponible ? L'audience est-elle publique et/ou son procès-verbal est-il accessible au public ?

26. Existe-il un dispositif pour l'interrogation des témoins ?

3.4 Durée et calendrier des enquêtes

Les lois sur la concurrence peuvent prévoir des délais légaux concernant la durée et le calendrier de l'ensemble de l'enquête ou de certaines de ses étapes. C'est notamment le cas pour les procédures de contrôle des fusions, dont le calendrier et les éventuelles prorogations de délai sont strictement réglementés. Les autorités peuvent préciser dans leur règlement intérieur les délais que l'enquête devrait respecter. Dans les procédures autres que celle relatives aux fusions, les autorités bénéficient souvent d'un peu plus de liberté quant au déroulement de la procédure et à sa durée. Dans ce cas, les parties peuvent être consultées sur le calendrier et la durée de la procédure et/ou de certaines étapes de l'enquête.

Un degré raisonnable de certitude concernant le calendrier du travail que l'autorité prévoit d'accomplir au cours de l'enquête peut être l'assurance pour les parties que l'enquête sera achevée dans un certain délai. Les entreprises peuvent ainsi mieux gérer les ressources internes mobilisées pour prêter assistance à l'autorité dans la conduite de son enquête, et mieux faire face aux perturbations internes qui pourraient en découler. Une plus grande clarté concernant les délais des enquêtes limite l'impact externe que celles-ci peuvent avoir sur la réputation des parties et sur le cours des actions de la société concernée. Des délais transparents sont un atout pour les mesures d'application de la loi car ils aident l'autorité à concentrer ses ressources et à conclure l'enquête dans les délais impartis. Un certain nombre de considérations doivent néanmoins être prises en compte par les autorités lorsqu'elles arrêtent leur calendrier de travail. On citera par exemple la dimension et la complexité de l'affaire, ainsi que le degré de coopération des parties visées par l'enquête et des tiers avec l'autorité.

Encadré 5. Questions et points à examiner

27. Qui établit l'ordre des procédures et leur calendrier probable ?

28. Certaines dispositions limitent-elles la durée d'une enquête de concurrence ? Disposez-vous de systèmes distincts pour les enquêtes portant sur les fusions et pour les autres enquêtes de concurrence ?

29. Le niveau de transparence des délais prévus pour les enquêtes est-il différent pour les affaires de fusion et pour les autres affaires ?

30. Votre autorité de la concurrence informe-t-elle les parties des délais internes applicables à telle ou telle activité spécifique et les avertit-elle de toute modification des délais applicables à ces activités ? Fournissez-vous des explications en cas de modification des délais ?

31. Dans quelle mesure les parties sont-elles consultées lorsque l'autorité fixe des délais pour des activités spécifiques ?

3.5 Décisions : publication et annonces publiques

Les décisions faisant état d'une infraction aux règles de la concurrence sont motivées pour permettre à leur destinataire d'exercer son droit de recours devant le tribunal compétent. Elles comportent en général une description de l'infraction et de sa durée, l'identification des parties impliquées, ainsi que l'ensemble des éléments substantiels juridiques, économiques et factuels sur lesquels elles se fondent. Elles précisent également le montant des amendes et/ou tout engagement ou toute mesure correctrice. Dans certaines juridictions, l'autorité de la concurrence a pour pratique (ou est parfois tenue) de rendre des décisions motivées dans les affaires où aucune infraction n'a été constatée. Cette pratique s'est avérée utile en ce qu'elle apporte aux entreprises des éclaircissements concernant la norme légale appliquée par l'autorité dans ces affaires.

À moins que cela ne risque de porter préjudice à l'enquête, les autorités de la concurrence peuvent envisager de procéder à des annonces publiques (par exemple via la publication d'un communiqué de presse) sur les aspects clés de l'enquête. Ces annonces pourraient intervenir, par exemple, lors de l'ouverture d'une enquête, lors de l'élargissement de son champ d'application ou encore lors de la décision finale sur l'affaire. Une fois qu'une décision finale a été arrêtée, un communiqué de presse peut être publié, décrivant la portée et les conclusions de l'affaire, ainsi que les amendes infligées. Si une enquête est close sans qu'aucune décision formelle n'ait été prise, l'autorité de la concurrence peut aussi rendre publique cette décision.

Encadré 6. Questions et points à examiner

32. Quelles règles régissent la publication et le contenu des décisions prises par l'autorité pour l'application des lois ?

33. À quel stade l'autorité annonce-t-elle publiquement qu'une décision a été arrêtée dans une enquête ? Où cette annonce sera-t-elle publiée ?

34. Si l'enquête est close sans aucune décision d'exécution positive, l'autorité est-elle néanmoins tenue d'en faire état publiquement ? L'autorité explique-t-elle en détail pourquoi aucune mesure n'a été prise ?

35. Le contenu de ces annonces est-il régi par des règles établies ? Si une amende a été infligée, son montant sera-t-il rendu public ?

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AUSTRALIA

The purpose of this paper is to provide an overview of some of the principles of procedural fairness which apply to the Australian Competition and Consumer Commission (ACCC) in exercising its powers and functions under the *Trade Practices Act 1974* (the Act). This paper also provides information on a number of internal procedures and policies which the ACCC has developed to ensure that the principles of procedural fairness are upheld.

The ACCC is Australia's independent competition regulator, charged with administering the Act, the object of which is to enhance the welfare of all Australians through the promotion of competition and fair trading and provision for consumer protection. In exercising its powers and functions, the ACCC may make decisions which impact the rights and obligations of Australian business and consumers.

The Act, and other administrative laws of general application, impose certain obligations upon the ACCC and create specific avenues for review of actions taken, and decisions made, by the ACCC under the Act. These avenues include internal and external review and, where the lawfulness of the action or decision is in question, judicial review. Further, the Commonwealth Ombudsman is able to review conduct of the ACCC in the performance of its duties. Also Freedom of Information legislation imposes a duty on the ACCC to provide members of the public with access to information and documents relevant to its decisions.[1]

To ensure accountability, the ACCC has established a number of internal mechanisms to allow its actions and decisions to be publicly scrutinised.

1. Australia's administrative law framework

Under Australia's administrative law system, there are three ways in which a person can seek a review or a reconsideration of a decision made by a federal government agency.[2] These avenues are:

- internal review
- external review, and
- judicial review.

Internal or external review of decisions enables all aspects of a decision to be reconsidered on its merits:

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1 Unless the information or documents fall within defined classes of exempt documents. See the *Freedom of Information Act 1982* available at: http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/5E8E4A80A030A2C3CA2574FE0012C050.

2 Not all avenues are available in all cases.

- *Internal review* occurs where a decision made by a member or officer of an agency is reviewed by another person in the agency. Internal review can be sought by requesting reconsideration of a decision or by following set procedures where more formal mechanisms exist.

  Internal review is relevant to some decisions of ACCC staff in the enforcement context; such as whether to investigate alleged conduct. It is not available in relation to decisions taken by the Commission as a whole.

- *External review,* that is review of a decision by a person or body outside the agency which made the decision, is a more formal system which provides review of the merits of a decision.

  There are various bodies established within Australia's legal system to deal with (external) review of administrative actions and decisions taken by government officials. The specialist tribunal invested with power to review certain decisions made by the ACCC is the Australian Competition Tribunal (the ACT). A review by the ACT is a re-hearing or a re-consideration of a matter on the merits. Generally speaking, the ACT may perform all the functions and exercise all the powers of the ACCC (the original decision-maker) and can affirm, set aside or vary the original decision.

  In addition to reviewing ACCC decisions for authorisation and certain merger transactions, the ACT hears applications for review of certain decisions of the Minister or the ACCC in third party access matters.

Only courts can provide *judicial review* of administrative decisions and their role is limited to deciding whether or not the decision was lawfully, fairly and rationally made.

Judicial review may be sought under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) by a "person who is aggrieved" by the decision, conduct or failure to make a decision. Any person whose "interests are or would be adversely affected" by the decision is a person "aggrieved" by that decision. The grounds for review include failure to comply with the specific requirements of legislation under which the decision is made, and general administrative law principles. These include:

- A decision-maker must take into account all relevant considerations and not be guided by irrelevant considerations.

- If legislation gives a designated person the power to decide something, no one else may require that person to make that decision in a particular way. The person can have regard to relevant rules or policies.

- Persons affected by a decision are usually entitled to procedural fairness, also known as natural justice, in relation to the decision. The actual procedure required will vary with the circumstances of the case. In general, the minimum requirements of procedural fairness are satisfied if the decision-maker is not biased and if the person affected by the decision is given a reasonable opportunity to comment on any relevant material adverse to the person.

Additional grounds upon which the Courts can consider whether a decision has been properly made are set out in the ADJR Act and include:

- a denial of natural justice

- a lack of evidence

- unreasonableness
- improper purpose, and
- bad faith.

It is not settled whether judicial review applies to decisions by the ACCC to commence legal proceedings for a contravention of the Act. However, the ACCC will always need to prove the merits of such a case to the court.

2. ACCC decision-making processes and committees

The ACCC is an independent statutory authority. The ACCC has a chairman, deputy chairs, full-time members, ex officio and associate members. Appointments to the ACCC involve participation by Commonwealth, state and territory governments.

The ACCC's members are collectively referred to as "the Commission" and meet regularly, usually weekly, to make decisions on matters being investigated by the ACCC. Matters upon which the Commission makes decisions include mergers, authorisations and notifications, whether to begin court proceedings, and decisions about access to infrastructure facilities.

The ACCC has five committees, effectively sub-committees, to help streamline the Commission's decision making:

- The enforcement committee meets weekly and oversees the enforcement program. Its recommendations are referred to the Commission for decision.
- The mergers committee meets weekly and considers most mergers matters. It refers major matters to the Commission for decision, and provides status reports on the progress of ongoing investigations.
- The communications committee meets as required and oversees the exercise of the ACCC's telecommunications functions, including matters arising under Parts XIB and XIC of the Act and authorisations. It coordinates with the enforcement committee.
- The regulated access and price monitoring committee meets as required and oversees access and price monitoring issues.
- The adjudication committee meets weekly and considers authorisations and notifications; it reports to the Commission.

The ACCC's approach to administering and enforcing the Act is open, transparent and consultative. To this end, the ACCC has a number of informal and formal mechanisms in place to allow the parties to investigations (and other interested parties, where appropriate) to raise issues of concern directly with senior staff. For example, the parties to a merger or authorisation can request a meeting with an ACCC representative at any time throughout the ACCC's consideration of the matter. In most cases these requests are granted. Such informal approaches are extremely useful for the ACCC and the parties, not least because they ensure a direct and open line of communication from the start of a matter. These informal mechanisms complement the ACCC's formal decision-making procedures.

3. Guiding internal principles

ACCC Chairman, Graeme Samuel, has identified the five guiding principles which govern the manner in which the ACCC exercises its powers and functions. These are:

- *Transparency* – the ACCC must be transparent in its dealings and such transparency carries with it appropriate accountability to the Australian public
- *Confidentiality* – the ACCC must maintain confidentiality in accordance with the Act, and where requested by parties. Parties that deal with the ACCC must have confidence in the integrity of its processes
- *Timeliness* – investigative processes, and decisions on all matters before the ACCC, should be undertaken in an efficient manner to avoid delays and uncertainty, and to ensure maximum enforcement impact
- *Predictability* – the ACCC must set clear directions as to its priorities in order to give businesses and consumers certainty about its actions
- *Fairness* – the ACCC must treat all matters in the same way and not publicly discuss investigations and matters which are before the courts.

4. ACCC guidance and reporting

4.1 Guidelines

The ACCC issues a number of technical and procedural guides which outline the ACCC's priorities, procedures in conducting investigations and the statutory basis for exercising its powers and functions under the Act. These include:

- Formal merger review process guidelines 2008[3]
- Guide to authorisation (May 2007)[4]
- Resolution of telecommunications access disputes (March 2004)[5]
- Compliance and Enforcement Policy[6]
- Section 155 of the Trade Practices Act (March 2008)[7]

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3 Available at http://www.accc.gov.au/content/index.phtml/itemId/776055.

4 Available at http://www.accc.gov.au/content/index.phtml/itemId/788405.

5 Available at http://www.accc.gov.au/content/index.phtml/itemId/753591.

6 Available at http://www.accc.gov.au/content/index.phtml/itemId/867964.

7 This guide explains how the Commission exercises its compulsory information-gathering powers and the rights and obligations of persons subject to such powers. It is available at http://www.accc.gov.au/content/index.phtml/itemId/263816.

- ACCC–AER information policy: the collection, use and disclosure of information (October 2008),[8] and

- Section 87B of the Trade Practices Act (September 2009).[9]

4.2 Public Registers

Under the Act the ACCC is required to create and maintain several public registers. The ACCC also maintains voluntary public registers, which it uses to provide additional information to the public about its actions and decisions.

Currently the ACCC maintains 27 statutory and voluntary registers.[10] These include: legally enforceable undertakings; authorisations; notifications; mergers and acquisitions; access to services; product safety conferences; and telecommunications.

Other accountability mechanisms include the requirement for the ACCC to prepare an annual report and appear before parliamentary committees upon request.

5. Merger Review

The assessment of mergers and acquisitions is a core function of the ACCC. Australia's merger regime is primarily an informal system, however there are mechanisms under the Act which allow for formal clearance[11] of a merger by the ACCC.

The ACCC's informal merger clearance process involves extensive consultation with the parties to the merger.

As part of the ACCC process, a (voluntary) public register is maintained for mergers which are currently under review. The public register contains a range of information relating to the merger, including details about: the parties to the transaction; the relevant markets; issues under consideration; status of the review; and an indicative timeframe for completion of the matter.

Before the introduction of the current informal merger clearance process[12] there were concerns from the Australian business community about the timeliness of the ACCC's decision making, the consistency of decisions and the transparency of the ACCC's deliberations.

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8 Available at http://www.accc.gov.au/content/index.phtml/itemId/846791.

9 This guide outlines the ACCC's current approach to administering section 87B in connection with its enforcement activities. The guide is available at http://www.accc.gov.au/content/index.phtml/itemId/263958.

10 A list of registers is available at http://www.accc.gov.au/content/index.phtml/itemId/3673.

11 See Part VII, Division 3 of the Act. The ACCC's formal merger clearance regime commenced on 1 January 2008. At the time of this paper, there have been no applications received by the ACCC for formal merger clearance. Information about the formal merger clearance process is available at: http://www.accc.gov.au/content/index.phtml/itemId/774410.

12 The ACCC introduced new merger review processes in 2006 following the *Report of the Trade Practices Act Review Committee (the Dawson Committee)*. This Report is available at: http://tpareview.treasury.gov.au/content/home.asp.

In order to provide greater transparency and accountability in its informal review of mergers, the ACCC adopted a new set of merger review process guidelines[13]. The guidelines provide a reliable, comprehensive and detailed guide to merger applicants and third parties to predict the processes that will be applied by the ACCC to merger reviews.

The guidelines established more definitive, indicative timelines for the clearance process, created a new public register, and allowed for the publication, where applicable, of a *Statement of Issues* (when competition issues require further information and consideration) and *Public Competition Assessments* (providing comprehensive reasons for decisions in significant or contentious matters).

The use of a Statement of Issues is an important tool used by the ACCC to publicly communicate its preliminary views. A Statement of Issues gives the merger parties and the market an opportunity to provide the ACCC with more information about the transaction, including its likely effect on competition in the relevant markets.

Public Competition Assessments are designed to provide a growing body of precedent on how the ACCC analyses markets and the competition effects of mergers. The body of precedent that results from Public Competition Assessments also enables the market to better understand how the ACCC applies the law, thus providing greater consistency in, and predictability of, decision making. Historically, very few of the ACCC's decisions under the informal merger clearance process are tested in court. The increased transparency inherent in the informal process ensures that the ACCC's actions and decisions are subject to extensive public scrutiny.

The Statement of Issues and Public Competition Assessment provide substantial transparency and accountability around the ACCC's merger analysis and decisions in complex matters. Increased communication with the market has often led to the ACCC having more information about market behaviour before it, thereby enabling the ACCC to make more informed decisions.

The ACCC regards confidentiality as essential to the integrity of the informal merger clearance process. However, the ACCC also recognises that a balance must be struck between the need for confidentiality and the need for transparency and accountability of its actions and decisions. One way this balance is achieved is by offering merger parties the option of seeking a confidential review. An important caveat applying to this process is that the ACCC must be able to gather sufficient information about the merger and the relevant markets to make an informed decision on whether the merger has resulted, or is likely to result, in a substantial lessening of competition.

6. Adjudication

While the competition provisions of the Act prohibit anti-competitive arrangements and conduct, there are also mechanisms for businesses to obtain protection from most of these provisions on public interest grounds.

The "authorisation process" is an important safety valve to ensure that arrangements or conduct that would otherwise deliver benefits to Australia are not prohibited by the Act. The ACCC may grant an authorisation when it is satisfied that the public benefit from the conduct outweighs any public detriment. To determine this, the Act requires the ACCC to conduct a public consultation process and assess whether the anti-competitive detriment is outweighed by a public benefit. The ACCC is required to issue a draft determination before making a decision to grant or deny authorisation.

13 *Merger review process guidelines July 2006* available at: http://www.accc.gov.au/content/index.phtml/itemId/740765.

Granting authorisation to allow anti-competitive arrangements or conduct to occur removes the right of third parties to enforce their rights under the Act. As such, it is necessary that the processes and procedures followed allow for full consultation with interested parties.

After an application is received, the authorisation process involves the ACCC:

- inviting interested parties to lodge written (or oral) submissions commenting on the application and supporting submission
- meeting with the applicant and interested parties as appropriate
- inviting the applicant to lodge a written submission in response to interested party submissions
- conducting its own market inquiries and research while consulting with interested parties
- issuing a draft determination
- inviting written submissions in response to the draft determination, and inviting the applicant or interested parties to call a conference so that oral submissions can be made to a commission member
- holding a Conference, if one is called, and
- issuing a final determination.

The authorisation process has a mechanism for the parties to discuss a decision directly with the ACCC by holding a Conference. Conferences are chaired by a commission member. They may be attended by the applicant, interested parties and any other person whose attendance is considered appropriate by the ACCC.

In addition, the ACCC consults interested parties throughout the process and, through the issuing of a draft determinations, provides an additional mechanism for the parties and interested third parties to put forward their views and information to the ACCC to assist in the making of a decision.

Any party affected by a determination granting or revoking authorisations can seek review of the ACCC's decision in the Australian Competition Tribunal (the ACT). The ACT hears applications for review and has the same powers as the ACCC and may, if it considers it appropriate, affirm, vary or substitute its own decision for the original decision.

7. Enforcement

The ACCC's Compliance and Enforcement Policy[14] sets out the principles adopted by the ACCC to achieve compliance and outlines the ACCC's enforcement priorities and strategies.

In enforcing the provisions of the Act, the ACCC's primary aims are to:

- stop the unlawful conduct
- deter future offending conduct

[14] Available at http://www.accc.gov.au/content/index.phtml/itemId/867964.

- undo the harm caused by the contravening conduct (for example, by corrective advertising or restitution for consumers and businesses adversely affected)

- encourage the effective use of compliance systems, and

- where warranted, punish the wrongdoer by the imposition of penalties or fines.

The ACCC cannot pursue all complaints it receives, or all allegations of contraventions of the Act. While all complaints are carefully considered, the ACCC exercises its discretion to direct resources to the investigation and resolution of matters that provide the greatest overall benefit for consumers and businesses.

The ACCC's Compliance and Enforcement Policy provides guidance on how this discretion is exercised and indicates that enforcement priority will be given to matters that demonstrate factors such as:

- conduct of significant public interest or concern

- conduct resulting in a significant consumer detriment

- conduct demonstrating a blatant disregard for the law

- conduct detrimentally affecting disadvantaged or vulnerable consumer groups

- conduct involving a significant new or emerging market issue

- conduct that is industry-wide or is likely to become widespread if the ACCC does not intervene

- the person, business or industry has a history of previous contraventions of trade practices law.

The ACCC has the discretion to resolve a potential breach of the Act administratively. In some circumstances, where the consequences of the conduct may be trivial, the ACCC may take no action, in other cases the ACCC may issue a warning or accept an undertaking pursuant to section 87B of the Act[15]. Administrative solutions will not always be appropriate.

When the ACCC decides not to pursue enforcement action in relation to complaints it receives, it may nevertheless:

- provide information to the parties to help them deal with the matter and gain a better understanding of the Act even where a possible contravention of the Act is unlikely

- postpone or cease investigations where insufficient information is available to it, with a view to later investigation should further information become available

- draw the possible contravention to relevant parties' attention and provide information to encourage rectification and future compliance where the possible contravention appears accidental, of limited detriment to consumers and of limited gain to the business concerned, and

15 Section 87B gives the ACCC the ability to accept written undertakings in the exercise of its powers under the Act (other than Part X).

- deal with the matter informally where a business has promptly and effectively corrected a possible contravention and has implemented measures to prevent recurrence.

The ACCC has no power to impose fines or penalty notices if it believes a breach of the law has occurred. Rather, the ACCC becomes the applicant in civil or (through the Commonwealth Director of Public Prosecutions) criminal proceedings (usually) in the Federal Court of Australia, and must prove its case before the Court.

Ultimately, as only the Court can impose penalties, in order to seek penalties the options for the ACCC are to prove its case either as a result of:

- a fully contested trial, or

- a negotiated settlement with the proposed respondents/defendants, which includes submissions about the elements of the offence (markets, conduct, agreements etc.) sufficient to enable the Court to find that prohibited conduct took place.

7.1 Discussions with parties

The ACCC has a limited role in making administrative decisions for breaches of the anti-competitive conduct provisions of the Act. It can however seek formal undertakings from the parties, under section 87B of the Act. In negotiating undertakings, the ACCC consults directly with the parties who are alleged to have breached the Act. These undertakings are published on the ACCC's public section 87B undertakings register.[16]

In recent years there has been a general increase in corporations and their advisers seeking to reach agreement with the ACCC upon penalty through settlement negotiations and joint submissions to the Court. It has advantages of predictability, which corporate clients appreciate, and it saves both the ACCC and the contravener the cost and uncertainty of contested litigation.

As stated previously, throughout an investigation and litigation the ACCC is open to discussions with the parties who have allegedly breached the Act. The ACCC will not however negotiate a civil remedy if there is a case to commence criminal proceedings.

7.2 Immunity for cartel conduct

The ACCC can grant a corporation or an individual immunity from legal proceedings and penalty if the corporation or individual involved in a cartel is the first person to disclose its existence and does so at a time when the ACCC is not already equipped with sufficient evidence to commence proceedings against those alleged to be involved in the cartel.

To qualify for immunity, the person or corporation must also admit that their conduct may constitute a contravention of the Act, cooperate fully with the ACCC, must not have coerced others to participate in the cartel or have been the clear leader of the cartel. They must also stop, or indicate their intention to stop, their involvement in the cartel. In certain circumstances the ACCC may also decide to revoke immunity. All of the ACCC's decision in this regard are made in accordance with the ACCC's published guidelines.[17]

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16 This is available at: http://www.accc.gov.au/content/index.phtml/itemId/6029.

17 These guidelines include: ACCC immunity policy for cartel conduct and ACCC immunity policy interpretation guidelines, available at: http://www.accc.gov.au/content/index.phtml/itemId/708758.

8. Role of the model litigant policy

To the extent that the ACCC's enforcement of the Act involves litigation, the ACCC's powers are also oversighted by the Attorney- General through the Legal Services Directions[18]. The Legal Service Directions provide the rules under which the Australian Government conducts litigation and outsources legal services. The Directions offer important tools to manage, in a whole-of-government manner, legal, financial and reputational risks to the Commonwealth Government's interests.

The obligation to act as a model litigant requires that the Commonwealth Government and its agencies act honestly and fairly in handling claims and litigation brought by an agency. Some of the obligations which demonstrate the aspects of procedural fairness include:

- act consistently in the handling of claims and litigation
- endeavour to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate
- where it is not possible to avoid litigation, keep the costs of litigation to a minimum
- monitor the progress of the litigation and the agency should take appropriate action to resolve the litigation, including settlement offers or alternative dispute resolution,
- ensure that arrangements are made so that a person participating in any settlement negotiations on behalf of the Commonwealth or an agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations
- not take advantage of a claimant who lacks the resources to litigate a legitimate claim, and
- not undertake and pursue appeals unless the Commonwealth or the agency has been advised that it has reasonable prospects for success or the appeal is otherwise justified in the public interest.

9. Conclusion

The ACCC affords procedural fairness in its administration of the Act, through a variety of informal and formal mechanisms. Australia's administrative law system provides the framework within which the ACCC's actions and decisions are subject to review, both external and judicial.

In the past few years, the ACCC has significantly improved its internal procedures to ensure that there is increased transparency, fairness and consistency in its decision-making. In particular, through the development of a number of guidelines the ACCC has helped to ensure that the public, and especially the parties whose interests are affected, understand their rights and obligations under the TPA as well as the ACCC's approach and procedures in exercising its statutory powers.

[18] *Legal Services Directions 2005.*

BELGIUM

1. How does your antitrust regime handle transparency with respect to the substantive legal standards; agency policies, practices, and procedures; identity of the decision-maker(s); and the order and likely timetable of key proceedings?

The substantive standards are mentioned in the competition act (articles 1, 2, and 3 WBEM/LPCE in respect of restrictive practices and article 6 WBEM/LPCE in respect of concentrations.

The competition rules, procedures and the identity of decision makers are published on the website of the authority (available in Dutch, French and English and to made available in German). Decisions are available on the website in the language of the procedure.

Agency policies are discussed in quarterly stakeholder lunch forums, the meetings of the Competition Commission (an advisory body in which the major sector and consumer organisation are represented) and in the Directorate's General Annual Report.

The average duration of infringement procedures is published in the Annual Report.

We consider the list of pending cases and the order in which cases are taken as strictly confidential.

2. Do the subjects of antitrust investigations have opportunities to meet with the agency at key points in the investigation? At what level? In what circumstances?

Subjects can meet with the prosecutor in charge of the case and the case team during the investigation.

When the prosecutor has, after the investigation, decided to proceed with the case, he submits his report (to be compared with a statement of objections in EU Commission proceedings) to the Competition Council (an administrative tribunal that is one of the components of the agency). The parties have access to the file after the filing of the report.

The Council will receive their written observations and hear the case in accordance with the rules applicable to contradictory court proceedings.

3. How and when are subjects of enforcement proceedings informed about the factual basis, economic theories, and legal doctrines relevant to the allegations against them?

In the report referred to in the answer to question (2).

4. What opportunities do subjects of enforcement proceedings have to respond to the agency's enforcement concerns? What opportunities do they have to make arguments and offer evidence, and what time constraints apply to these opportunities?

The defendants, and where relevant the complainants and intervening parties, can develop their arguments and offer evidence at any time during the investigation. They have the formal opportunity to

develop their arguments and offer evidence to the Council in the written observations and oral presentations referred t in the answer to question (2).

5. Is there an opportunity for a hearing prior to an agency decision? What rules apply to the hearing and hearing officer, and what rights does the subject of the enforcement proceeding enjoy?

As indicated in the answer to question 2, there is formal hearing prior to the agency decision. The hearing and the rights of the subject of the enforcement proceeding are governed by the Code on Civil Procedure.

There is no hearing officer, because the hearing and decision making process is conducted by the Competition Council which is fully independent from the investigating and prosecuting branches of the agency.

6. Are there any limits on the length of an agency's investigation? Are there rules on the publication and content of the agency's adverse enforcement decisions, and on consideration of evidence offered by the subject of the investigation?

There are no other limits on the length of an investigation in respect of restrictive practices than the statute of limitations (5years). Merger control procedures must be concluded within the time periods defined in the competition act.

7. Is the agency required to make any public announcement when an investigation is closed without taking an affirmative enforcement decision, or when an investigation is concluded by a settlement or consent decree? Are there rules on the content of any such announcements.

The competition act only requires the publication of decisions, i.e. of formal decisions of the Council establishing an infringement, or accepting a settlement, or deciding that there was no infringement. No publication is required of decision of the prosecutor to close a case without prosecution.

CANADA

1. Introduction

As an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act*[1] (the "Act"), transparency and procedural fairness are key priorities for the Canadian Competition Bureau (the "Bureau"). The Bureau, headed by the Commissioner of Competition (the "Commissioner"), recognizes that it is essential for the Bureau to conduct investigations in a fair, transparent and principled manner to ensure the legitimacy of investigation decisions. The Bureau welcomes the opportunity to discuss procedural fairness issues in enforcement proceedings.

This paper outlines the procedural fairness protections afforded during the investigative process and touches on those available during the adjudicative process, with a particular focus on civil competition law cases. This submission also examines the Bureau's general approach to transparency, including the Bureau's governing principles and the issuance of guidance documents.

2. Overview of Canada's competition law regime

The Act is a federal law that governs most business conduct in Canada. To maintain and promote competition in Canadian markets, the Act contains both civil and criminal provisions aimed at preventing anti-competitive conduct. The core criminal provisions are designed to deter cartels, bid-rigging and criminal deceptive marketing practices. The civil provisions address abuse of dominance and other restrictive trade practices,[2] civil deceptive marketing practices and merger review. Section 29 of the Act set outs confidentiality protections for information obtained for the purposes of enforcing the Act.

As the agency responsible for the enforcement of the Act, the Bureau's mandate is strictly investigative; the Bureau has no adjudicative function. The courts and the Competition Tribunal (the "Tribunal"), a specialized body comprised of judicial members[3] and non-judicial members with expertise in economics and business, have the authority to make the final determination as to whether there has been an infringement of the Act and to issue remedies.

Within the investigative context, the Bureau is authorized to make certain decisions, such as issuing supplementary information requests in merger cases, and negotiating and signing consent agreements to resolve disputes. The Bureau also has discretion in deciding whether to engage in enforcement efforts on any given matter.

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1 R.S. 1985, c. C-34.

2 Other restrictive trade practices include tied selling, exclusive dealing, market restriction, refusal to deal and price maintenance.

3 Judges from the Federal Court.

2.1 Criminal enforcement of the Act

Canada has a bifurcated approach to criminal enforcement under the Act. The Bureau is responsible for investigating potential criminal violations of the Act, while the Public Prosecution Service of Canada ("PPSC") is responsible for the prosecution of criminal offences.

There is a significant degree of cooperation between the Bureau and the PPSC throughout the enforcement process. The Bureau refers matters to the PPSC with recommendations, including the Bureau's view as to an appropriate sentence in light of the circumstances of the case. After referral, the PPSC has independent carriage of the matter and the sole authority to engage in plea and sentencing discussions with counsel for an accused. It is ultimately the PPSC who decides whether and how to proceed with these prosecutions; however, the Bureau remains an active partner in supporting the prosecution, including in plea and sentencing discussions.

Neither the Bureau nor the PPSC has the power to directly sanction conduct in contravention of the Act. Instead, interim and final relief must be sought from a court. The adjudicative body from which relief is sought depends on the circumstances of the case.

Criminal competition law trials in Canada are subject to extensive fundamental procedural and evidentiary protections, including: the right to be presumed innocent until proven guilty beyond a reasonable doubt; the right to have a fair and public hearing; the right to be judged by an independent and impartial tribunal; the right to remain silent; the right not to be compelled to testify at one's own trial; and the right to make full answer and defence.

2.2 Civil enforcement of the Act

During a civil investigation, if the Commissioner believes that there are sufficient grounds to initiate proceedings under the civil provisions of the Act, she can bring an application to the Tribunal.[4] The Tribunal has exclusive jurisdiction over matters in Part VIII of the Act, which include restrictive trade practices and merger review. Civil deceptive marketing cases can be heard by the Tribunal or by a court. The Tribunal's decisions are subject to appeal to the Federal Court of Appeal.

The Tribunal has its own procedural rules,[5] which are similar to the procedural rules that apply in civil cases in Canadian courts. They include procedural protections, such as the right to be heard, to submit evidence and to respond to the other party's arguments and evidence. While the Tribunal's hearings and decisions are public, the procedures also contain mechanisms to protect confidential information, where information is sufficiently sensitive that competitive harm could result from disclosure. The Tribunal's decisions are available to the public on its website.[6]

The Tribunal was created in 1986 within a broad package of competition law reforms. At the time, Parliament's intent was to create an independent and impartial tribunal that would have the expertise to deal with the complexity of competition law cases. Also, as contemplated in subsection 9(2) of the *Competition Tribunal Act,*[7] which states that "all proceedings before the Tribunal shall be dealt with as

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4 Note that the Bureau is represented in such proceedings by lawyers from (or retained by) the Department of Justice.

5 *Competition Tribunal Rules*, SOR/2008-141.

6 Competition Tribunal's website: http://www.ct-tc.gc.ca.

7 R.C.S. 1985, c.19 (2nd Supp.).

informally and expeditiously as the circumstances and considerations of fairness permit",[8] the Tribunal's procedures would be less formal and more expeditious.

3. Bureau Investigations

This section provides an overview of how the Bureau conducts its investigations under the Act with respect to four main elements: (1) the initiation of a formal inquiry; (2) the opportunity for targets to meet with Bureau officials; (3) time limits on Bureau investigations; and (4) public announcements.

3.1 Formal inquiry

The Act does not define a detailed procedure according to which the Bureau should conduct investigations. Pursuant to subsection 10(1) of the Act, the Commissioner initiates a formal inquiry when:

- she has reason to believe that: a person has contravened an order made under specified sections of the Act; grounds exist for the making of an order by the Tribunal under Part VII.1 or VIII of the Act; or an offence under Part VI or VII of the Act has been or is about to be committed;
- she receives a formal application from six Canadian residents to commence an inquiry; or
- the Minister of Industry directs that a formal inquiry be initiated.

Having commenced an inquiry, the Commissioner can apply, in appropriate circumstances, for formal information-gathering powers, such as search warrants and orders compelling the production of documents and information.

3.2 Meetings between targets of investigations and Bureau officials

The Bureau typically provides targets of investigations with an overview of the allegations against them and an opportunity to respond to them as early as possible during the investigative process. The Bureau regularly engages in formal and informal discussions and exchanges of information with targets and their counsel. The nature and timing of these information exchanges and dialogues depend, to some extent, on the particular conduct at issue and the provision(s) of the Act under which the conduct is being investigated.

3.2.1 Formal exchanges of information

Once the investigation becomes a formal inquiry under the Act, disclosure is required under certain circumstances; in particular, subsection 10(2) of the Act provides that, in response to a written request by a person whose conduct is being inquired into, the Commissioner shall inform that person as to the progress of the inquiry. Further, in order to obtain a production order or a search warrant, the Commissioner is required to disclose sufficient information to satisfy a judge that the order should be issued. The target is typically entitled to obtain this disclosure from the court file, although access to some confidential information may be restricted by a sealing order.

If charges are laid under the criminal provisions of the Act, or a contested application is made for an order from the Tribunal under the civil provisions of the Act, the Bureau is required to disclose the allegations against the target and to identify all documents in its possession that are relevant to any matter

[8] *Competition Tribunal Act*, R.C.S.1985, c.19 (2nd Supp.), subsection 9(2).

in issue, subject to the confidentiality rules of the Tribunal and the courts which aim to prevent harm resulting from the disclosure of competitively sensitive information.

3.2.2 Informal discussions/exchanges of information

In appropriate circumstances, the Bureau will attempt to engage in pre-application dialogue with proposed respondents prior to filing an application for a court order requesting information relevant to an inquiry.

Similarly, the Bureau's new *Merger Review Process Guidelines* (the "Guidelines"), which outline the Bureau's approach to the administration of its new, two-stage merger review process,[9] promote early dialogue and cooperation between the parties and have established an internal mechanism for merging parties wishing to challenge Bureau decisions. The Guidelines encourage the parties to enter into discussions with the Bureau prior to or soon after the submission of a merger notification. The purpose of these early discussions is to assist Bureau officers in identifying issues that could require further examination and dispense expeditiously with those that do not. The Guidelines also confirm that Bureau officers will communicate their preliminary views on potential competition issues as early as possible within the initial 30-day review period.

The Guidelines state that, prior to issuing a supplementary information request ("SIR"), the Bureau will generally engage in pre-issuance dialogue with the parties. The Bureau may issue a SIR, during the initial waiting period of 30 days, to obtain additional relevant information to complete its review of a proposed merger that poses a real risk of substantial anti-competitive effects. As part of the pre-issuance dialogue, the Bureau will generally provide a draft of the SIR to the party and enter into a discussion with the party's counsel to discuss the information requests. The purpose of this dialogue is, among other things: to ensure that the party understands the information request; to identify confidentiality concerns; and to discuss whether the party maintains data in a manner consistent with the form required by the Bureau.

The Guidelines have also introduced an internal appeal procedure for parties who wish to contest the scope of a SIR or to contest the Bureau's decision that a party's response to a SIR is incomplete.[10]

3.2.3 Meetings with senior Bureau decision-makers

The Bureau provides parties who are the subject of a formal inquiry with an opportunity to present arguments and evidence to senior Bureau decisions-makers, including, in most cases, the Commissioner,

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[9] The Act establishes a two-stage merger review process. The Act establishes a first stage which is a waiting period of up to 30 days during which parties cannot close their transaction. It is during this first waiting period that the vast majority of mergers are cleared. In the few cases that pose a real risk of substantial anti-competitive effects, the Bureau may issue a supplementary information request (or "SIR") for more information. Once the requested information is received, the Bureau has up to an additional 30 days to complete its assessment before a transaction can close.

[10] The party is first invited to communicate with the responsible Assistant Deputy Commissioner. If, after reasonable efforts, the Assistant Deputy Commissioner and the party have failed to reach an agreement, the party is invited to submit a written notice of appeal to the Senior Deputy Commissioner of the Mergers Branch. The Senior Deputy Commissioner then forwards the notice of appeal to a reviewer, who is a Senior Deputy Commissioner or Deputy Commissioner of another Bureau branch, to examine the appeal. The reviewer communicates with the responsible Mergers Branch Assistant Deputy Commissioner, seeks additional information from the party and offers the party the opportunity to make submissions. The reviewer has seven days to render his or her decision after the party has provided all requested information.

prior to the filing of a formal application with the Tribunal or the courts to obtain a remedy for the alleged anti-competitive conduct.

These senior-level meetings generally include counsel for the parties, senior officials representing the parties (if a corporate entity) and often the economists retained to conduct an economic impact analysis of the alleged conduct. Bureau officials also present their views of the evidence to the parties, including the Bureau's economic analysis.

While these meetings do not always end in a resolution to the particular case, they do assist in understanding the other side's position and help to narrow areas of contention likely to be litigated before the Tribunal or the courts.

3.3 Time Limits on Bureau Investigations

The Bureau is dedicated to conducting all of its investigations in a timely manner. While there are no statutory time constraints on many types of cases, merger reviews are subject to time limits under the Act. Specifically, the Bureau must complete its review of a proposed merger within the initial 30-day waiting period if no SIR is issued; if no challenge is brought; and if no injunction against closing is outstanding. If none of these possibilities occur within the initial 30-day waiting period, the parties may close. If a SIR is issued, the parties may close the transaction after the end of the second waiting period (30 days), which begins when a complete response to the SIR has been received. If the Bureau requires additional time to conduct its investigation, it can make an application to the Tribunal to further delay closing.[11] If such an application is not made or is unsuccessful, the Bureau may not apply to the Tribunal under section 92 to remedy an anti-competitive merger more than one year after the merger has been completed.

Furthermore, the Bureau has established standards, in accordance with Treasury Board of Canada requirements associated with all fee-related services (such as merger notifications and written opinions), to ensure that they are performed in an effective and timely manner. Service standards are listed in the Bureau's *Competition Bureau Fee and Service Standards Handbook,*[12] which is expected to be updated in 2010 to reflect the 2009 amendments to the Act.[13] The standards for performing the identified services vary depending on the relevant section of the Act and the complexity of the issue.[14]

3.4 Public Announcements

Subsection 10(3) of the Act provides that inquiries must be conducted in private. In addition, section 29 of the Act protects the confidentiality of information provided to, or obtained by, the Bureau. To comply with these requirements, the Bureau will not generally comment publicly on an investigation

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11 Under section 100, 104 or 123.1 of the Act, depending on the circumstances.

12 Available online at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01338.html.

13 The specific amendments are set out in Bill C-10, the *Budget Implementation Act*, *2009*. Further details regarding Bill C-10 are available online at: Parliament of Canada http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=5697&Session=22&List=toc.

14 For example, the standard for completing a written opinion involving the abuse of dominance provisions is six weeks if the issue is determined to be not complex and 10 weeks if the issue is determined to be complex. The standard for completing a written opinion involving a civil provision dealing with false or misleading representations is two weeks if the issue is determined not complex and six weeks if the issue is determined complex.

unless it has been made public through another source, or the parties consent to the Bureau making a public statement.[15]

The Bureau believes it is important to provide meaningful guidance to the public by way of technical backgrounders, which is are documents explaining the Bureau's analysis with respect to a particular investigation and the reasons underlying its final conclusions, but it recognizes the importance of limiting the disclosure of confidential information. While there is no obligation for the Bureau to issue a technical backgrounder following the end of an investigation, the issuance of the *Policy Statement for the Publication of Technical Backgrounders,*[16] in April 2005, demonstrates the Bureau's willingness to increase the publication of technical backgrounders for greater transparency. That said, technical backgrounders are not the only way to disclose the appropriate public aspects of a particular investigation or review. Other ways to announce the Bureau's findings with respect to a particular case or to disclose a negotiated resolution (e.g. consent agreement or commitment letter) include public statements (e.g. news releases) that are available on the Bureau's website[17].

4. The Bureau's General Approach to Transparency in Civil Competition Law Cases

The Bureau strongly believes that transparency is desirable and necessary to maintain public confidence in the enforcement and administration of competition law in Canada. At the same time, the Bureau's commitment to transparency can, at times, conflict with its commitment to maintain the confidentiality of information communicated to it under the Act. The Bureau recognizes that maintaining confidentiality is fundamental to the Bureau's ability to enforce and administer the legislation for which it is responsible, and to maintaining its integrity as a law enforcement agency. Consistent with that recognition, the general policy of the Bureau is to minimize the extent to which confidential information is communicated to other parties.

Nonetheless, as demonstrated by the initiatives described below and in keeping with its confidentiality obligations, the Bureau has engaged in significant efforts in recent years to increase transparency.

The importance of transparency and confidentiality is reflected in the *Conformity Continuum Information Bulletin,*[18] which describes the Bureau's general approach to the administration and enforcement of the statutes under its responsibility and lists five governing principles:

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15 Examples of other sources include an application to the Tribunal or a merger review that has been referenced by the parties in a press release or public securities filing.

16 *Policy Statement for the Publication of Technical Backgrounders*, available online at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01301.html. The Bureau's Policy Statement assists in determining when a technical backgrounder should be issued. The Policy Statement mentions the following criteria: "the release of more comprehensive information will provide useful insight or education to the public and business community, thereby encouraging greater compliance with the law; the issues are sufficiently important or complex; there is a need to clarify a point of law or policy (for example, where the Bureau has taken a new approach); the matter in question has received substantial publicity in the press; or the practice in question has a significant impact on consumers." Furthermore, the Bureau must always consider section 29 of the Act, which deals with the protection of confidential information. To ensure that no commercially sensitive information is inadvertently communicated, the Bureau allows the parties to review backgrounders prior to publication. While the Bureau takes the parties' comments into consideration, it has final authority over backgrounder content. However, it should also be noted that in certain cases, the information is so highly confidential that a technical backgrounder simply cannot be issued.

17 Bureau's website: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home.

18 Available online at: http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/01750.html.

> *The first, transparency, means that the Bureau will be as open as the law and confidentiality requirements permit. The second, fairness, refers to striking the right balance between voluntary compliance and enforcement, while responding to many competing interests. The third, timeliness, demands that decisions be made as quickly as possible to avoid costly delays. The fourth, predictability, involves providing appropriate background material on Bureau positions and important issues to assist the business community in conducting its affairs in a manner that complies with the law. Finally, the fifth principle, confidentiality, requires that the Bureau use all available means appropriate to the circumstances to protect confidential or commercially sensitive information provided to it by the business and legal communities or any other source.*[19]

This commitment to transparency is also embodied in the large number of Bureau publications, including information bulletins and enforcement guidelines.[20] These publications explain how the Bureau enforces specific provisions of the Act, thereby providing transparency and predictability to consumers and businesses. For example, the Bureau recently published two enforcement guidelines to address the 2009 amendments to the Act. The *Merger Review Process Guidelines* outline the Bureau's approach to the administration of the new two-stage merger review process, and the *Competitor Collaboration Guidelines* describe the Bureau's enforcement policy approach in applying the new competitor collaboration provisions. The Bureau is also in the process of finalizing another central enforcement document, the *Updated Enforcement Guidelines on the Abuse of Dominance Provisions*, which will be released shortly.

The Bureau is required to report annually to Parliament through the Minister of Industry on the operation of the statutes under its jurisdiction, including the Act. The Bureau's Annual Report describes its activities throughout the fiscal year, including enforcement activities, advocacy efforts and communications with consumers and businesses.[21] The Bureau also submits an annual report to the Competition Committee of the Organization for Economic Co-operation and Development.

The Bureau regularly reviews how it communicates its enforcement decisions with a view to increasing transparency for both the general public and the business community.

5. Conclusion

Procedural fairness and transparency are key priorities for the Bureau. Consistent with the Bureau's ongoing commitment to those guiding principles, the Bureau is always open to receiving concerns expressed by stakeholders and, where possible and appropriate, will consider whether measures can be taken to address such concerns. In addition, and a specific interest of the current commissioner, the Bureau is examining whether there are ways in which, while always jealously safeguarding competitively sensitive information, more information – particularly in respect of the fact of and timing of reviews – could be made public. In addition, the Bureau is always interested and watchful of how agencies in other jurisdictions implement policies and initiatives to maintain and increase public credibility and confidence in the enforcement of their competition legislation. If there is a policy or practice which is appropriate to the Canadian context, the Bureau will seriously consider the advisability of adopting or adapting it.

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19 *Conformity Continuum Information Bulletin*, p. 3.

20 Bureau publications are available online at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00139.html.

21 Annual reports since fiscal year 2000-2001 are available on the Bureau's website at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00169.html.

CHILE

1. Introduction

The Fiscalía Nacional Económica (hereinafter, the "FNE" or the "Agency") is an independent government competition agency in charge of detection, investigation and prosecution of competition law infringements, issuing also technical reports and performing competition advocacy activities. The Competition Tribunal ("Tribunal de Defensa de la Libre Competencia", hereinafter, the "TDLC" or "Competition Tribunal") is the decisional body having exclusive jurisdiction over competition law and adjudicating in both adversarial procedures (such as cartels or dominance abuses) and non-adversarial ones (such as mergers). The TDLC's rulings are subject to appeal before the Supreme Court. The Competition Act is Decree Law N° 211, enacted in 1973 and its amendments[1].

2. Q&A

2.1 How does your antitrust regime handle transparency with respect to the substantive legal standards; agency policies, practices, and procedures; identity of the decision-maker(s); and the order and likely timetable of key proceedings?

Both the Competition Tribunal and the Agency have self imposed transparency policies of the highest level in regard to legal standards, policies, practices and procedures, even before the transparency amendments were incorporated into our legislation[2]. The Competition Tribunal's web page (www.tdlc.cl) publishes all of the Tribunal's work, including final decisions, intermediate decisions, and guidelines regarding procedures of general application. These documents are all available online and are updated on a regular basis. The Agency also publishes in its web site (www.fne.gob.cl) all relevant actions, such as submission of charges, decisions not to continue investigations, speeches and interviews of the head of the Agency, decisions by the Competition Tribunal and the Supreme Court, internal guidelines, and other useful information to the public.

As it was stated above, under Chilean Law, the Competition Tribunal is the adjudicatory body. On every final decision it issues, the name of the members of the Tribunal which concurred is public. Dissenting votes are individualized.

In regard to order and likely timetable of key proceedings, Chilean law does not establish a maximum period of time for the proceedings once of the submissions of charges has been presented before the Competition Tribunal. Nevertheless, the Competition Tribunal publishes statistics from which parties can draw likely time frames. Currently, adversarial procedures take approximately 2 years including the review by the Supreme Court. Non adversarial procedures take approximately 1 year and three months, including review by the Supreme Court.

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1 The main amendments of the Competition Act in recent years have been Law N° 19.911/2003 which established the TDLC and Law N° 20.361/2009 which reinforced the law against cartels.

2 In 2005, an amendment to article 8 of the Constitution established the publicity of all public acts and decisions, with very limited exceptions. Law 20.285 of 2008 regulates how public offices should comply with article 8 of the Constitution.

2.2 Do the subjects of antitrust investigations have opportunities to meet with the agency at key points in the investigation? At what level? In what circumstances?

Subjects of antitrust investigations can meet with the agency during the investigation. They can formally request a meeting with the Head of the Agency or the team in charge of the investigation. Meetings with the Head of the Agency are made public in the institutional web site, in order to prevent abusive lobbying. This does not apply when the matter requires confidentiality (e.g. protection of witnesses, leniency applicants, etc.)

Subjects of investigations can access the content of the Agency's investigation. Nevertheless, parts of a certain investigation can be declared confidential by the Head of the Agency, if such publicity may jeopardize the effectiveness of the investigation.

Also, a complete investigation can be declared restricted by the Head of the Agency, who must notify this decision to the Tribunal and to the affected party.

2.3 How and when are subjects of enforcement proceedings informed about the factual basis, economic theories, and legal doctrines relevant to the allegations against them?

As a general rule, subjects of enforcement proceedings are notified that an investigation is being conducted, but at that moment only a general overview of factual basis of the case is exposed to them. Exceptionally, some investigations may be restricted, and not notified to the investigated party, prior authorization by the Competition Tribunal.

A full description of the factual basis, the economic theories and legal doctrines relevant to the allegations against subjects of enforcement proceedings is informed at the time the Agency submits charges before the Tribunal. Nevertheless, the Agency can present or reveal further evidence throughout the trial.[3]

2.4 What opportunities do subjects of enforcement proceedings have to respond to the agency's enforcement concerns? What opportunities do they have to make arguments and offer evidence, and what time constraints apply to these opportunities?

Subjects of investigations can respond the agency submission of chargesduring the formal proceedings before the Competition Tribunal. This is a procedure regulated by the Competition Law. There is a 15 to 30 day period to respond to the submission of charges, a 20 day period to submit evidence and a 10 day period to observe the other party's evidence. After these stages, the Tribunal calls the parties to orally defend their cases. Any additional written evidence such as expert reports can only be presented up to 10 days prior to the hearings mentioned before.

2.5 Is there opportunity for a hearing prior to an agency decision? What rules apply to the hearing and hearing officer, and what rights does the subject of the enforcement proceeding enjoy?

As it was explained before, under Chilean Law, the adjudicatory body is the Competition Tribunal. Before the Competition Tribunal makes a decision, subjects of investigation and the Agency have the opportunity to orally present their main arguments and contradict those of the opponent. Parties have an

[3] In March 26, 2009, a party in a very famous case presented a claim before the Constitutional Tribunal arguing that the Agency had infringed substantive constitutional due process provisions by submitting charges, but not the grounding evidence, and thus tried to force the agency to show the evidence before the period provided by law for the submission of evidence. The Constitutional Tribunal did not agree and declared the claim inadmissible. Case number 1344-2009.

equal maximum period of time to present their cases and may request the inability of a member of the Tribunal if there is a risk of impartiality. For these purposes, the Law establishes a strict catalogue of inabilities and incompatibilities that may affect members of the Tribunal.

2.6 Are there any limits on the length of an agency's investigation? Are there rules on the publication and content of the agency's adverse enforcement decisions, and on consideration of evidence offered by the subject of the investigation?

The Competition Act does not establish a time limit for the agency's investigation. Nevertheless, there is an implicit time limit given by the statute of limitations set by the Law. This statute of limitations is of five years for hard core cartel conducts, counted from the moment the cartels effects are no longer present in the market, and of three years for all other competition law infringements, counted from the moment the anticompetitive act is executed.

There are no explicit rules regarding the content of the Tribunal decisions that are adverse to the agency´s claims. Notwithstanding the above the Tribunal publish all final decisions, including those in which the Agency´s claims are dismissed.

As a general rule, decisions state which evidence served as a basis for its conviction, but the Tribunal does not have a legal obligation to analyze each piece of evidence offered by the parties.

2.7 Is the agency required to make any public announcement when an investigation is closed without taking an affirmative enforcement decision, or when an investigation is concluded by a settlement or consent decree? Are there rules on the content of any such announcements?

The agency is not legally required to make a public announcement when an investigation is closed without taking an affirmative enforcement decision. Nevertheless, the Agency does publish decisions to close investigations on its web site, although the full content of the grounds of the decision is not included.

Settlements, consent decrees and withdrawals are published both in the Tribunal and the Agency's website.

CZECH REPUBLIC

1. Introduction

The Office for the Protection of Competition ("the Office") submits the following observations with respect to the transparency issues in the Czech administrative enforcement and procedure.

The Office recognizes the importance of being transparent with those the Office deals with. Better relationships with businesses, their advisers, improved clarity about the Office procedures and timescales as well as publishing information about the Office work in the annual report represent the core principles the Office follows.

2. How does your antitrust regime handle transparency with respect to the substantive legal standards; agency policies, practices, and procedures; identity of the decision-maker(s); and the order and likely timetable of key proceedings?

2.1 Institutional framework of the administrative enforcement and procedure

The Office is the central agency of the state administration, a non-ministerial authority established by statute in 1996. The mission of the Office is to protect competition in order to ensure that competition in the market is not distorted, thereby contributing to the welfare of consumers. In addition, the Office supervises procedures of awarding public procurement and concessions, thus ensuring better transparency in public spending. Finally, the Office provides guidance and monitors state aid in the Czech Republic to ensure that provision of state aid is in compliance with applicable European Community rules.

The Office is entirely independent from the Government of the Czech Republic in its decision-making practice as well as in setting out the Office priorities. The Office is headed by a Chairman appointed by the Czech President on the proposal of the Government. The Chairman of the Office must not be a member of any political party.

The Czech Competition Act ("the Act")[1], the Czech Administrative Code as well as the statutory decree, notices and guidelines[2] establish the basic administrative procedural legal framework. As described below, the specificity of the Czech administrative enforcement procedure is that it is a two-instance procedure. It means that any decision taken by the first instances of the Office can be appealed, *i.e.* challenged, and reviewed by the second instances of the Office. The first-instance decision is signed by the Vice-Chairman of the Office (or his/her deputy) unlike the second-instance decision which can only be signed by the Chairman of the Office. The Czech administrative system is purely hierarchical and the decision-making process is monocratic. Therefore, there are certain safeguards within the system such as creation of the "Devils advocate" panels (please see below), which provide for an objectivity of the decision-making process.

1 http://www.compet.cz/fileadmin/user_upload/Legislativa/HS/CR/Act_143_2001_consolidated.pdf.

2 http://www.compet.cz/en/competition/guidelines-and-documents/.

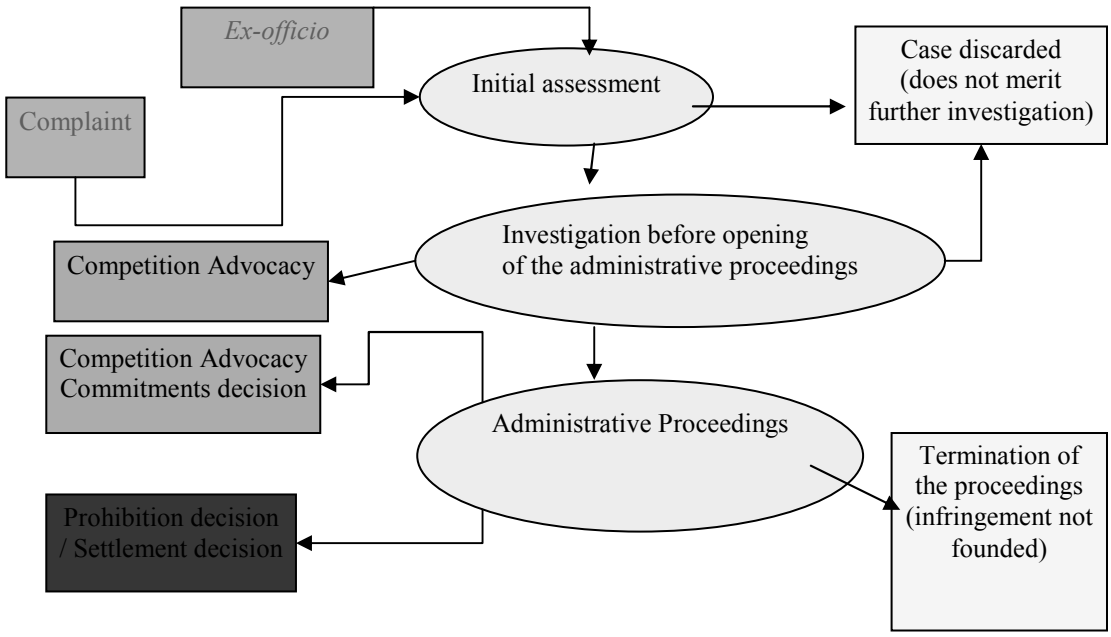
As stated above, for the purposes of a discussion of individual antitrust/merger cases, the Office established i) the "Devil's advocate" panels on the first-instance level and ii) an administrative committee on the second-instance level. While the creation of the Devil's advocate panel has been the Office own initiative, the administrative committee has been established by statute. In addition, while the Devil's advocate panel is composed of the senior officials of the Office, the administrative committee is composed of independent expert advisers (please see below). In general, the consultation at these panels provides a valuable opportunity for the Office to discuss its draft decisions with officials/experts (*i.e.* "the fresh pair of eye"). To ensure that the members of these panels have full knowledge of the facts and law of the draft decision on which they are consulted, they receive, and have access to, the most important documents and other existing documents necessary for the assessment of a case. Finally, the opinions given by the above panels constitute only a recommendation to the officials responsible for the decision-making (*i.e.* Vice-Chairman/deputy or Chairman).

The Czech administrative enforcement is further characterized by the absence of a procedural framework for administrative sentencing. Therefore, the Czech administrative procedure is based on applicable principles of criminal sentencing as repeatedly held by the Czech courts.

2.2 Order and likely timetable of key proceedings (please see below in Section 5)

The Czech administrative procedure is based on *ex officio* principle, *i.e.* the Office has an obligation to open a case on its own initiative when certain facts have been brought to its attention, or further to information gathered in the context of market inquiry, informal meetings with industry or the monitoring of markets.

In addition, the draft amendment of the Act, however, proposes a principle of opportunity, *i.e.* the Office will be able to prioritize and terminate the proceedings or discard the case which does not merit further investigation based on the principle of public interest.



3. Do the subjects of antitrust investigations have opportunities to meet with the agency at key points in the investigation? At what level? In what circumstances?

Yes, the parties to the administrative proceedings have a variety of opportunities to meet with the Office case handlers/management at different stages of the procedure. In addition, it has been an established practice that even in the stage prior to the initial assessment phase, undertakings and their advisers may contact the Office with a request for a meeting to initiate discussions about potential competition infringements.

In addition, the parties to the proceedings have for example the following means to meet the Office officials:

- *Access to file*: parties to the proceedings are granted access to the Office's investigation file at any stage of the proceedings so that they can be briefed on the Office evidence as well as express their views effectively on the (preliminary) conclusions reached by the Office on the alleged infringement;

- *Evidence*: it is the Office obligation to ask the parties to the proceedings to get acquainted with the gathered evidence before the Office is to issue a decision.

- *Oral hearings*: a forum where all of the undertakings concerned by an alleged infringement of the antitrust rules or a proposed merger are given the opportunity to present their views to the Office case team responsible for the investigation. Moreover, the Office endeavors to give, on its own initiative or upon request, parties to the proceedings an opportunity for open discussions about the status of the proceedings. The objective of the meetings (which are voluntary in nature) is to ensure transparency and communication between the Office and the parties;

- *Examination of experts (witnesses)*: an expert is required to give independent and impartial expert opinion to the Office.

- Provision of evidence by the parties to the proceedings[3];

- *Pre-notification discussions before notifying a proposed concentration*: parties to a proposed concentration may request the Office for informal and confidential consultation with the case team regarding a planned concentration. The aim of the pre-notification discussions is to speed up the subsequent proceedings and thereby to minimize any delays in the merger review process.

4. How and when are subjects of enforcement proceedings informed about the factual basis, economic theories, and legal doctrines relevant to the allegations against them?

The parties to the administrative proceedings are informed about the factual basis of the alleged infringements of the Act and/or the TFEU by the following means:

- *Initiation of the administrative procedure*: written notice identifies the parties to the proceedings and briefly describes the scope of the investigation. In particular, it sets out the behavior constituting the alleged infringement of the Act and/or the TFEU. It has to be stressed that the initiation of the proceedings, does not prejudge in any way the existence of an infringement;

- *Statement of objections*: sets out the preliminary position of the Office regarding the alleged infringement of the Act and/or the TFEU. Its purpose is to inform the parties to the administrative proceedings of the objections raised against them with a view to enabling them to exercise their rights of defence. The Statement of Objections shall also clearly indicate the essential facts and matters of law and the duration and gravity of the infringement. Furthermore, it shall also describe any economic analysis used in the course of the investigation;

- Access to the Office investigation file (please see above);

- *Decisions*: in general, decisions provide to the full extent possible all facts regarding the infringements of the Act and/or the TFEU, legal assessment, objections raised against the parties, parties' response to the objections raised, use of economic analysis (when applicable), the duration and the gravity of the infringements, amount of the fine and the facts that gave rise to aggravating and/or mitigating circumstances.

5. What opportunities do subjects of enforcement proceedings have to respond to the agency's enforcement concerns? What opportunities do they have to make arguments and offer evidence, and what time constraints apply to these opportunities?

The opportunities of the parties of enforcement proceedings vary depending on the stage of the procedure.

5.1 The stage prior to the initiation of the administrative proceedings (for agreements distorting competition and for abuse of dominant position)

The parties which have been alleged by the Office of the suspicion of having committed an anticompetitive infringement may propose the Office the measures to eliminate the identified competition infringement. At first, the Office requests the undertaking to provide a written statement (to be provided in

[3] The Office is not bound by the proposed evidence of the parties to the proceedings. In this respect two principles apply. First, it is the Office obligation to decide which evidence is needed to sufficiently prove the infringement. Second, the parties to the proceedings have to provide evidence in the time-limit set by the Office otherwise the Office will not take the evidence into account.

10 calendar days) that the undertaking is to eliminate the identified competition infringement. Then, the Office invites the undertaking to propose a measure within a period of one month and to suggest a timeline for implementation of the measure which shall ultimately lead to a full elimination of the competition infringement. It is for the Office to assess the proposed measure and to decide whether the measure is to sufficiently eliminate the identified competition infringement. If the measure is to sufficiently eliminate the identified infringement and the undertakings implement these measures, the Office will not open an administrative proceeding. These principles have been in details summarized in the Notice of the Office for the Protection of Competition on the alternative solution of certain competition issues[4].

5.2 Investigation (i.e. administrative proceeding) stage

In the course of the investigation stage (for agreements distorting competition and for abuse of dominant position) the parties to the administrative proceedings may propose the Office commitments to eliminate the identified competition infringements within a statutory time-limit of 15 calendar days in writing from the day when the party to the proceedings was notified by the Office of the alleged infringement and of the gathered evidence. If the proposed commitments are found sufficient, the Office imposes fulfillment of such commitments and terminates the proceedings (no infringement declared in the decision). These principles have been in details summarized in the Notice of the Office for the Protection of Competition on the alternative solution of certain competition issues. If the proposed commitments are not found sufficient, the Office continues with the proceedings and issues the Statement of Objections.

Following an administrative proceeding under the Act (please see above in Section I), the Office may make a decision establishing the Act and/or Articles 101,102 TFEU have been infringed. In such cases, the Office may impose fines on the undertakings committing the infringement, prohibit the anticompetitive conduct for the future and impose remedial measures to bring the infringement to an end.

5.3 Merger cases

The undertakings concerned may propose the Office commitments within a statutory time-limit of 15 calendar days from the day the statement of objections was received by the undertakings concerned.

5.4 Second instance stage

The parties to the administrative proceedings (for agreements distorting competition, abuse of dominant position as well as in merger cases) may challenge the first-instance decisions to be reviewed by the second instances of the Office within a statutory time-limit of 15 calendar days from the day the decision is received. The second instance is represented by the Chairman of the Office who has for the purposes of the review of the first-instance decisions established (by the Czech Administrative Code) a body of independent expert advisers (private sector practitioners, professors etc.) - an administrative commission which provides opinions on cases to the Chairman of the Office who ultimately either i) confirms the first-instance decision, ii) changes the first-instance decision or iii) returns to the first instances. The first instances are then bound by the Chairman's decision.

5.5 Judicial Review

The parties to the proceedings have the right and the opportunity for a judicial review by the Regional court in Brno and the Supreme Administrative Court of the Czech Republic.

4 http://www.compet.cz/en/competition/antitrust/competition-advocacy/#c262.

6. Is there an opportunity for a hearing prior to an agency decision? What rules apply to the hearing and hearing officer, and what rights does the subject of the enforcement proceeding enjoy?

In general, an oral hearing allows the parties to the proceedings to develop orally their arguments which have already been submitted in writing and to supplement, where appropriate, the written evidence, or to inform the Office of other matters that may be relevant. As a constitutional guarantee of due process of law, the oral hearing is held with all parties to the proceedings. Only under specific circumstances (such as discussing confidential information) the hearing may be held only with one party to the proceedings without a presence of the other party to the proceedings.

The Office is committed to ensuring that the effective exercise of the right to be heard is respected in its proceedings. The parties have an opportunity for a hearing prior to the Office decisions and throughout the proceedings upon request or on the Office initiative. The position of the hearing officer is not established in the Czech administrative procedure. The oral hearing is lead by the case team's head of unit.

As stated above, the parties to the proceedings may request an oral hearing and it is the Office discretion (given the Office obligation to decide which evidence is needed to sufficiently prove the infringement) to decide whether a hearing will take place. In practice, however, the Office so far allowed for all oral hearings requested by the parties to the proceedings. The parties to the proceedings also have the right to receive a copy of a protocol (minutes of the meeting). In addition, the parties may also request for a copy of an audio record of the hearing. Finally, all undertakings providing information in the context of a particular case enjoy the right of protection of business secrets and other confidential information.

7. Are there any limits on the length of an agency's investigation? Are there rules on the publication and content of the agency's adverse enforcement decisions, and on consideration of evidence offered by the subject of the investigation?

All cases are subject to an initial assessment phase (*i.e.* prior to the initiation of an administrative proceeding). During this phase the Office examines whether the case merits further investigation. In practice, the system of initial assessment means that a number of cases will be discarded at a very early stage of the procedure because they are not deemed to merit further investigation. Generally, there are no limits on the length of the Office initial assessment phase, however principles of efficiency and procedural economy apply. In addition, circumstances of the individual case and in particular whether the Office has received sufficient information from the complainant or third parties, notably in response to its requests for information, have to be taken into account in order for it to decide whether or not it intends to investigate its case further. Also, there are no time-limits on the length of the Office investigation phase or time-limits for the decision to be issued[5].

Moreover, the parties to the proceedings have the right to challenge the length of the administrative enforcement at the court. According to a recent Czech jurisprudence of the Czech Regional court in Brno, the Office was obliged to adopt a decision in an additional sixty days time-limit running from the court's judgement (the administrative proceedings in the two cases in question lasted more than a year).

The general rule is that the Office has an obligation to publish all final decisions (including prohibition decisions and no grounds for action decisions).

The Czech Administrative Act sets out minimal formal requirements on the contents of the decisions issued by the Office. It is the Office practice that the decisions provide to the full extent possible all facts

[5] However for merger cases, the Act provides for statutory time-limits (e.g. phase I and phase II review).

regarding the infringements, legal assessment, objections raised against the parties, parties' response to the objections raised, use of economic analysis (when applicable), the duration and the gravity of the infringements, amount of the fine and the facts that gave rise to aggravating and/or attenuating circumstances.

8. Is the agency required to make any public announcement when an investigation is closed without taking an affirmative enforcement decision, or when an investigation is concluded by a settlement or consent decree? Are there rules on the content of any such announcements?

No, the Office is not required by law to publish any public announcement when an investigation is closed without taking an affirmative enforcement decision or when an investigation is concluded by a competition advocacy without opening an administrative proceeding. However, in order to enhance transparency of the proceedings the Office will publish a press release that the investigation was closed.

9. Conclusion

The Office has consistently given high priority to due process and fairness in antitrust proceedings. In order to provide companies with further certainty and transparency the Office will endeavor to provide more guidance to describe the Office procedures.

The parties to the proceedings are granted access to the Office's investigation file at any stage of the proceedings; the parties may fully exercise their rights of defence.

In order to maintain objectivity of the decision-making process, the Office will use the (*ad hoc* or statutory) safeguards of the decision – making process, such as creation of the Devil’s advocate panels or the administrative committee, composed of independent expert advisers.

FINLAND

The examination of the transparency issues pertaining to the agency procedures is divided into three sections in the following[1]:

- Issues relating to jurisdiction, strategy, operative goals, priorities and procedures, on the basis of which subjects of enforcement proceedings can draw conclusions on the relation of their activities to competition legislation and the agency's enforcement activities in general.

- The opportunities of the subjects to find out whether cases relating to them are pending at the FCA and what their substance is.

- Issues relating to the rights of defence of the subjects.

The demands of transparency and rights of defence relating to the agency procedures are different depending on whether the agency makes a first-instance decision or whether it presents its case in court. With few exceptions, the latter procedure is followed in Finland.

1. The transparency of the FCA's enforcement activities on a general level

The Finnish government authorities shall promote the transparency of their activities and to this end (among others) compile guidelines, statistics and other publications and informative materials on their services and case law (Act on the Openness of Government Activities, Article 20).

According to this principle, the FCA e.g. publishes on its web pages its

- strategic goals

- performance agreement documents

- medium-term planning documents

- other planning and follow-up documents

- budgets

- performance reports

- the reports of the National Audit Office of Finland on the activities of the agency

[1] As a rule, this examination excludes the viewpoint of complainants and third parties. The important issues of transparency in the internal procedures of the agency will not be discussed either. Since the procedures in Finnish merger control largely resemble those of the EU Commission and extensive guidelines have been published both on the evaluation criteria of mergers and the related procedure, the topic will not be examined in more detail here.

The most important planning and reporting documents are also published on the web pages of the Netra reporting service of the State Treasury spanning the entire Finnish state administration.

In practice, publishing only the above-mentioned materials has not been considered sufficient for the interest groups' needs for information. For example, in the evaluation report of the FCA's enforcement activities (pertaining to their impact, in particular), which was completed in 2009 on the commission of the Ministry of Employment and the Economy, e.g. the following recommendations were proposed:

- focusing even more strongly on issues which have relevance to the national economy (so as that complaints would not steer the operations in a major way) incl. the related information policy

- procedural instructions containing the phases of the investigations and their deadlines should be written which would (among other things) assist the subjects of enforcement proceedings to obtain information on the progress of the proceedings

Both recommendations are in the process of being carried out.

1.1 Recommendation on focusing even more strongly on relevant issues

The intention is to increase the impact of the agency's work. The goal is difficult to achieve, however, if there is a conflict between the interest groups' (particularly complainants) expectations and the agency's day-to-day work. This conflict is sought to be alleviated by transparent prioritisation principles, which have been published.

According to the above principles the FCA divides its antitrust investigations (excl. mergers) into three classes:

- Impact class 1: Naked violations, large volume of operations, big impact in principle

- Impact class 2: So-called grey area; potentially restrictive of competition, related to significant economic activities, widely applied procedure

- Impact class 3. No naked or otherwise significant violation, small volume, no big impact in principle

These prioritisation principles have a connection to the agency's performance agreement (public) and internal instructions so as that

- performance goals have been set on the number of decisions in impact classes 1 and 2

- in impact classes 1 and 2, the subject of the enforcement activities will be informed within six months after the receipt of the complaint which measures will be taken in the case (unless this jeopardises the investigation)

- in impact classes 1 and 2, the primary lines of investigation will be decided by the management board in six months from the lodging of the complaint

- in impact classes 1 and 2, a plan of investigation will be made and deadlines defined for the envisaged proceedings

- the parties concerned will be provided with information on the stage of the proceedings on the FCA's own initiative

- cases which will not be investigated any further (impact class 3) will be closed in a maximum of four months

- average processing times of complaints: impact class 1: 730 days, impact class 2: 630 days and impact class 3: 30 days

1.2 Procedural instructions (preparation underway)

A flow chart containing the procedural description of the investigation of a competition restraint, related to the definition of the impact classes, has been drafted in the agency. The instructions cover the main points of the following issues:

- Opening the file

- Preliminary investigation

- Conclusions of the preliminary investigation

  - Lack of jurisdiction

  - Of minor importance

  - Insufficient evidence

  - Violation falls within impact classes 1 or 2 (see above), review by management board

- Investigating the competition violation

- Discussion of the team's conclusions in the research unit

- Discussion of the draft decision by the agency's management board

- Finalising the decision

These main sections and their sub-sections describe the FCA's usual measures pertaining to each section or which the civil servant shall see to in relation to the complainant or the suspected company. In its present form, the flow chart is for the agency's internal use only. The intention is to revise the chart and to make a public version that responds to the customers' needs for information.

The flow chart describing the investigation process also contains the above-mentioned deadlines for the proceedings.

Some additional points on the transparency of the proceedings from the viewpoint of a suspected company:

- In competition restraints cases where an unannounced inspection is carried out, the initiation of proceedings shall naturally remain undisclosed to the suspect

- In matters of clear minor significance (de minimis), the initiation of proceedings is not generally announced to the subject and the subject will not necessarily be informed even during the preliminary investigation

- If actual investigations are commenced following the preliminary investigation, the interested parties shall be informed of this, unless it jeopardises the investigation

- All the investigatory measures directed at the suspected companies (information and document requests, inspections) entail that the company will be informed of its alleged offence as well as which statutes the company's obligation to provide information and documents is based on

- At the end of the investigatory stage the agency's draft decision is delivered to the parties (comment usually in 1-2 months) and the company will be provided with the opportunity to see the file; in practice this means that the company will receive copies of the documents relating to the case (business secrets excluded)

2. The opportunities of the subjects of enforcement proceedings to find out whether cases relating to them are pending at the FCA and what their substance is

From the point of view of the company (or citizen) requesting information or documents, the width of the right to obtain information depends on whether it requests the information in its own case (the right of access to file by parties involved) or as an outsider (public to third parties). If a company (or citizen) requests information in its own case, the right to obtain it is wider than if a third party is involved. It should be pointed out that lodging a complaint with an agency does not necessarily guarantee that information will be obtained on the basis of the provisions on access to file by parties involved.

According to the Act on the Openness of Government Activities, official documents are usually public. Thus, a company has the opportunity at any time to request to see e.g. all the documents concerning it, incl. the diary entries. Companies hence have good opportunities to obtain information regarding them. When serious antitrust violations are involved, there are obvious problems in extensive transparency.

In the above-mentioned Act, there are several exceptions to the primary rule on openness, for example to safeguard professional secrets, international obligations and preliminary investigation in instances of crime. There are no provisions on secrecy pertaining to competition issues in the Act. In practice, a sufficient level of secrecy of documents can be achieved but the procedure could be more transparent.

There is a provision on publicity relating to third parties in the Act, according to which documents which contain information on inspections or other supervisory tasks of the authorities are secret, if access would compromise the inspection or the achievement of its objectives. The provision does not concern an interested party (a company suspected of a competition violation).

The Act contains special provisions on the right of access to file by parties concerned, under which they have a right of access to the contents of a document, if it may influence or may have influenced the consideration of their matter (the business secrets of third parties are eliminated as a rule). Under the Act, an interested party does not have the right of access if this would be contrary to a very important public interest.

There are uncertainties of interpretation involved in the practical application of both provisions (how to assess 'compromising the inspection' or what is a 'very important' public interest). The uncertainties also give rise to unnecessary complaints about the agency's decisions on publicity and hence prolong the antitrust investigations.

It should be added that in the decision on the access to file by parties concerned relating to the documents of the timber cartel (12.4.2006), the Supreme Administrative Court approved the concept of "privacy of the investigation", according to which the agency was not obligated to submit the leniency documents to another suspect before the agency's investigations had come to an end. This was based on the above-mentioned special provision of parties concerned to obtain information (very important public interest as an obstacle to access).

3. Issues relating to the right of subjects to defend themselves

The Administrative Procedure Act concerning the entire Finnish public administration sets the general principles and obligations on public administration, the purpose of which is to promote good administration. In addition to the general principles, the Act provides in great detail on the issues of legal protection.

On the rights of defence, reference may be made e.g. to the following provisions of the Administrative Procedure Act: the authority's obligation to provide advice (Article 8), right to use an attorney or counsel (Article 12), the provisions on the delivery of documents and the institution of proceedings (Chapter 4), procedure without needless delay (Article 23), the duty of clarification (burden of proof) (Article 31), request for information (Articles 32, 33), hearing of a party (Article 34), inspection (Article 39), decision in a matter incl. the form of the decision, the statement of reasons and instructions for appeal (Chapter 7) and serving of the decision (Chapters 9 and 10).

If the procedural provisions of the Administrative Procedure Act are not followed, this may lead to the annulment of a decision in the appeal court and to sanctions pertaining to the legislation on civil servants.

Due to the fairly extensive regulation contained in Administrative Procedure Act, it has been mostly unnecessary to provide instructions on the competition enforcement procedure. This is now changing, however. Provisions to clarify the rights of defence are planned in the new Competition Act, which is under preparation (these will not add anything to the prevailing practice, however): According to the draft bill, the agency shall

- inform the subject of enforcement activities what it is suspected of as soon as this does not harm the investigation
- when requested, provide information on the phase of the investigation and copies of the case documents unless provisions on confidentiality prevent it
- only use the information gained in an inspection for the purpose for which they have been obtained
- refrain from demanding the correspondence between a customer and an outside legal counsel
- refrain from questions leading to self-incrimination
- hear the interested party prior to decision-making and to provide in writing the claims made against it and the arguments thereof

The latter point raises the issue of to what extent the FCA may present new evidence or new claims during a trial. This would seem to be possible to a certain extent (cf. the Supreme Administrative Court in the asphalt decision 29.9.2009, section 997): the FCA presented a new claim during the trial. According to

the SAC, the company was able to defend itself in the oral hearing of the Market Court and it had the opportunity to render its comments in writing. Hence, it had been able to properly defend itself.

The FCA does not use a specific oral hearing which would be open for all interested parties. The hearing of interested parties takes place in writing, but it is common that discussions are conducted with the parties to investigate the matter, whereas in a trial, which is public, interested parties and when necessary, third parties, may be heard in the same oral hearing.

There is no time limit imposed on the duration of the proceedings in the law (excluding merger control). But the Administrative Procedure Act entails that proceedings shall be carried out without delay and the officials monitoring the lawfulness of the actions (the Parliamentary Ombudsman and the Chancellor of Justice) may intervene when proceedings take too long (as has happened in practice). Additionally, there is a time limit (5 years) imposed on the imposition of the infringement fine and goals concerning processing times have been set in the agency's performance agreement with the Ministry. Under Article 53 a of the Administrative Procedure Act (effective from 1 January 2010), the infringement fine may be reduced if ”proceedings have been delayed and violate the rights of the interested party to a trial within a reasonable time period”.

The requirement of speedy proceedings also concerns issues in which the agency does not take action. The same formal provisions apply to these decisions in other respects as well (hearing obligation, obligation to state reasons for the decision etc.).

The FCA is competent to order that a company follow the commitments provided to terminate any restrictive activities. The approval of the subjects of the restraint is not a precondition for issuing a decision.

GERMANY

1. Introduction

Procedural fairness is a fundamental constitutional principle in the German legal system and therefore plays a key role in German administrative law and in the German competition law regime. Consequently, specific rules that deal with procedural fairness have also been included in the German Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter "ARC"). This submission seeks to give an overview of the principle of procedural fairness in German competition law. In doing so, it will focus on transparency issues in administrative enforcement proceedings. For this purpose, it will in a first part treat the publication of the Bundeskartellamt's enforcement decisions, before it turns to procedural fairness in the enforcement process.

2. Publication of the Bundeskartellamt's enforcement decisions

The German ARC contains several rules that deal with the publication of the Bundeskartellamt's enforcement decisions. While some of these rules cover transparency issues in a more general way, others relate to specific forms of enforcement proceedings (e.g., merger and non-merger proceedings). Against this background, the following section starts with an overview of general issues (a.), before turning to specific rules regarding ongoing investigations (b. and c.). As different rules apply, it will differentiate between merger and non-merger investigations.

2.1 General issues

Section 53 (1) sentence 1 ARC states that the Bundeskartellamt shall publish a biennial report on its activities and on the situation and development in its field of responsibilities. This Activity Report is published in the official series of the German Bundestag (*Bundestagsdrucksache*) and can also be downloaded from the official website of the Bundeskartellamt.[1] It provides the specialized as well as the general public with valuable information on the Bundeskartellamt's enforcement practice, as it contains information not only on cases in which a formal decision was issued (and published) but also on cases in which no formal decision was made.[2]

Moreover, Section 53 (1) sentence 2 ARC states that the Bundeskartellamt shall regularly publish its administrative principles.[3] In this context, the Bundeskartellamt has in the past published its "Principles of Interpretation of Market Dominance in German Merger Control" (*Auslegungsgrundsätze zur Prüfung von*

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1 See http://www.bundeskartellamt.de/wDeutsch/publikationen/Taetigkeitsbericht.php. A short English version is available at http://www.bundeskartellamt.de/wEnglisch/Publications/Report.php.

2 See – from a lawyer's perspective –, e.g., *Bechtold*, GWB, 5th edition, 2008, § 53, para. 2.

3 Section 81 (7) ARC further states that the Bundeskartellamt may publish general administrative principles on the calculation of fines. In this context, the Bundeskartellamt has published the „Notice No. 38/2006 on the imposition of fines under Section 81 (4) sentence 2 of the German Act against Restraints of Competition (GWB) against undertakings and associations of undertakings" (English text available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E_Logo.pdf).

Marktbeherrschung in der deutschen Fusionskontrolle")[4] and its Leniency Programme, to name but two. These principles provide transparency and predictability in the Bundeskartellamt's enforcement process, as they generally commit the relevant Decision Divisions to comply.[5] They are also published on the Bundeskartellamt's website.

In addition to publishing the Activity Report and developing administrative principles, the Bundeskartellamt may – based on general statutory law – also conduct an independent information policy and thereby further increase the transparency of its enforcement practice. For example, the President of the Bundeskartellamt regularly participates in national and international conferences, workshops and other forums. Speeches held by the President – some of them in English – can be downloaded from the Bundeskartellamt's website.[6] Furthermore, the Bundeskartellamt frequently issues press releases on its enforcement practice.[7] The press policy of the Bundeskartellamt aims to satisfy the public's legitimate interest in being informed, while at the same time respecting the justified interests of confidentiality (esp. business secrets) of parties.

Transparency for third parties and the general public is further enhanced by the provisions of the Freedom of Information Act (*Informationsfreiheitsgesetz*), which gives every citizen the right to request information about proceedings of public authorities, including the Bundeskartellamt's proceedings. The right to information is subject to restrictions, however, among them interests of confidentiality.

2.2 Merger investigations

The degree of transparency in merger investigations depends on whether an investigation can be completed within the initial one-month review period (so-called "first phase") or whether it requires an in-depth review (so-called "main examination proceedings" (*Hauptprüfverfahren*)). Whereas there are no statutory transparency requirements with regard to the first kind of investigations, Section 43 (1) ARC sets forth certain requirements for the latter kind.

In particular, Section 43 (1) ARC states that the initiation of the main examination proceedings must be published without undue delay in either the paper or the electronic version of the Federal Gazette. Furthermore, Section 43 (3) stipulates that the announcement must – among information on the legal nature of the merger – include the name and the place of business of the relevant undertakings as well as the type of business they are active in. The publication in the Federal Gazette primarily serves to inform third parties that may – under certain circumstances – upon their request be admitted to the proceedings (*Beiladung*).[8]

Other information that has to be announced in the Federal Gazette includes the issuance of clearances or prohibition decisions in the course of main examination proceedings, Section 43 (2) no. 1 ARC.

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4 Please note that these Principles are currently under review and have been taken from the Bundeskartellamt's website.

5 See, e.g., *Klaue*, in: Immenga/Mestmäcker, GWB, 4th edition, 2007, § 53, para. 4. This, of course, does not influence the independence of the Bundeskartellamt's Decision Divisions, as the administrative principles are published only with their consent.

6 See http://www.bundeskartellamt.de/wDeutsch/publikationen/Diskussionsbeitraege/Vortrag.php.

7 Press releases can be downloaded from the Bundeskartellamt's website at http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/PresseW3DnavidW2617.php. Most of them are also available in English (see http://www.bundeskartellamt.de/wEnglisch/News/press/press10W3DnavidW2612.php).

8 See the official rationale for Section 43 ARC, BT-Drucks. 15/3640, page 59.

However, the announcement of these decisions need not necessarily include their full text, but only their operative provisions (*Tenor*).[9] Further information that has to be announced includes: Ministerial authorizations, their refusal and modification; the withdrawal or revocation (*Rücknahme oder Widerruf*) of clearances or of ministerial authorizations, and the dissolution of a concentration (Section 43 (2) ARC numbers 2-4).

Although not required by law, the Bundeskartellamt has at its own discretion decided to publish certain additional information.[10] This policy of informing the public has gained considerable significance, and the Bundeskartellamt's publications on its internet site have become a key source of information on the authority's proceedings for the general and the specialized public. An important case in point are the merger notifications that are posted on the Bundeskartellamt's website.[11] The announcement includes the date the notification is received, the names of the relevant undertakings as well as information on the possibly relevant markets. Furthermore, the Bundeskartellamt publishes – shortly after the relevant decisions have been taken[12] – the full text of clearances and of prohibition decisions on its website, as long as these decisions have been taken during the main examination proceedings.[13] Of course, the published decisions are cleared of any business secrets they may contain.

In contrast, clearance decisions that are taken within the initial one-month review period are not posted on the Bundeskartellamt's website. These decisions – that account for roughly 95 percent of all merger control decisions[14] – may, however, contain valuable information, e.g. on market definition and substantive analysis. Therefore, the Bundeskartellamt has decided to make information on selected cases publicly available in a timely fashion, namely by posting case summaries (*Fallberichterstattung*) on its website.[15] Most of these summaries are available in English.[16]

2.3 Non-merger investigations

Transparency in non-merger investigations (cartels and single firm conduct) is governed by Section 62 ARC which states that certain decisions shall be published in either the paper or the electronic version of the Federal Gazette. Section 62 ARC is limited to decisions that are taken in administrative proceedings (*Verwaltungsverfahren*) and does not include decisions that are taken in administrative *fine* proceedings

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9 See *Ruppelt*, in: Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, Band 1, 10th edition, 2006, § 43, para. 5.

10 On the discretionary nature of these publications see *Ruppelt* (footnote 9), para. 5.

11 See http://www.bundeskartellamt.de/wDeutsch/zusammenschluesse/zusammenschluesse.php.

12 The decisions are published, even if the parties decide to challenge them in court. For a decision that has been published recently see, e.g. http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion10/B9-84-09.pdf?navid=49.

13 See http://www.bundeskartellamt.de/wDeutsch/Fusionskontrolle/fusionskontrolleW3DnavidW2645.php.

14 In 2008, 1.588 out of a total of 1.675 merger cases were cleared in the initial one-month period (see *Bundeskartellamt*, Tätigkeitsbericht 2007/2008 (*Report on its Activities*), page 178).

15 Please note that some information on these cases will also be contained in the Bundeskartellamt's Tätigkeitsbericht (*Activity Report*) mentioned in Section 2. above; for case summaries (German) see: http://www.bundeskartellamt.de/wDeutsch/Fusionskontrolle/fusionskontrolleW3DnavidW2645.php.

16 See http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivKurzberFus2009/KurzberichteFusion_eW3DnavidW2639.php.

(*Bußgeldverfahren*).[17] It primarily extends to injunctive relief and to commitment decisions (*Abstellungsverfügungen und Verpflichtungszusagen*). Again, the announcement of these decisions need not necessarily include the full text of the decision, solely the operative provisions (*Tenor*).[18]

Although not required by law, the Bundeskartellamt has – as in the merger area – at its own discretion decided to publish certain additional information.[19] In administrative proceedings, the Bundeskartellamt regularly posts the relevant decisions on its website.[20] Of course, the published decisions are cleared of any business secrets they may contain. By contrast, decisions that are taken in administrative *fine* proceedings are generally not posted on the website. Nevertheless, should the Bundeskartellamt decide to publish an individual decision, the names of the relevant undertakings and persons – as well as business secrets – are deleted.[21]

As decisions issued in administrative fine proceedings are generally not published, the Bundeskartellamt has – in an effort to increase the transparency and predictability of its enforcement practice – decided to post case summaries of selected cases on its website in a timely fashion.[22] Most summaries are available in English.[23] These summaries generally contain background information on the facts of the case, on the substantive analysis and possibly also on the level of the fines imposed. The names of the relevant undertakings are usually revealed in the case summary, whereas the names of individual persons are typically not mentioned.

Should a non-merger investigation be closed without an enforcement decision being taken, the Bundeskartellamt may issue a formal non-infringement decision in accordance with Section 32c ARC (*kein Anlass zum Tätigwerden*) or mention the case in its biennial report. Further, it may decide at its own discretion on whether to post a case summary on its website. A case summary may also be posted should an investigation be concluded by a settlement.[24]

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17 See, e.g., *Becker*, in: Loewenheim/Meessen/Riesenkampff, Kartellrecht, 2nd edition, 2009, § 62, para. 3 and *Kiecker*, in: Langen/Bunte (footnote 9), § 62.

18 See, e.g. *Becker* (footnote 17) and *Kiecker* (footnote 17).

19 On the discretionary nature of these publications see *Kiecker* (footnote 17).

20 For a recent decision see, e.g. http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell08/B2-100-08.pdf?navid=43 and http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell08/B10-21-08_32b_RheinEnergie.pdf?navid=43 (both available in German only).

21 For decisions in administrative fine proceedings that have been posted on the website see, e.g., http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/B3-69-08.pdf?navid=37 and http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/B3-123-08.pdf?navid=37 (both available in German only).

22 For a recent case summary concerning administrative fine proceedings see, e.g., http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/Fallberichte/B11-018-08-Fallbeschreibung.pdf (available in German only).

23 See, e.g., http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B1-200-06-E.pdf?navid=30.

24 For a case summary describing a case in which a settlement was concluded see, e.g. http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/Fallberichte/B11-018-08-Fallbeschreibung.pdf (available in German only).

3. Procedural fairness in the enforcement process

The central provision regarding procedural fairness in German competition law enforcement is Section 56 ARC that governs the procedure for all types of investigations, i.e. for merger investigations as well as for non-merger investigations (cartels and single-firm conduct).[25] Section 56 (1) ARC stipulates that the Bundeskartellamt shall grant any party with the right to be heard (*Stellungnahmerecht*). According to Section 56 (3) sentence 1 ARC the Bundeskartellamt may, acting ex officio or upon the request of a party, hold a public hearing.

The right to be heard does, as a necessary precondition, include the right to be informed about details of the ongoing investigation.[26] The parties to the investigation must in particular be informed about the relevant facts of the case, but the information must also include the economic theories and legal doctrines relevant to the allegations.[27] Consequently, the Bundeskartellamt will, before issuing an (adverse) decision, regularly inform the parties to the respective investigation by submitting a so-called "statement of objections" ("*Abmahnschreiben*").

This statement will usually contain the anticipated reasons for the decision and set a certain time frame for comments. The particular circumstances of the information provided by the Bundeskartellamt – as well as the length of the time period granted for comments – will generally depend upon the complexity as well as the timing of the case at hand. Of course, it must always be ensured that the extent of the information provided and the length of the time frame granted do not preclude the notifying parties from submitting substantial comments. In addition to submitting a written statement of objections, the Bundeskartellamt and the notifying parties will usually also be engaged in an ongoing dialogue.

The right to be heard is closely linked to the right of access to the files of the Bundeskartellamt (*Akteneinsichtsrecht*) as the subjects of enforcement proceedings can only substantially respond to the Bundeskartellamt's enforcement concerns if they have full knowledge of the case. The right of access to the file is stipulated by Section 29 of the German Administrative Procedures Act (*Verwaltungsverfahrensgesetz*) which states in Section 29 (1) that any agency must grant the parties of a particular investigation access to a file, as long as knowledge of the file at hand is required to assert and defend the parties' legal interests. However, the right of access to the file does not include access to third parties' business secrets (*Geschäftsgeheimnisse*). The Bundeskartellamt has to delete these from the file before access is granted.

As far as the format for the response to the statement of objections is concerned, the ARC does not make any particular specifications. Consequently, parties to an investigation may not only submit written responses, but may also choose to respond orally (in hearings or informal meetings), by telephone or not respond at all. For the purpose of responding to and discussing the case, they may also request a hearing – either public or non-public – or an informal meeting, a request with which the Bundeskartellamt is not legally obliged to comply. Rather, the decision on whether to hold a hearing (or an informal discussion) or

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25 Additional rules apply for administrative fine proceedings (see Sec. 81 ARC, the Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*) and the Code of Criminal Procedure (*Strafprozessordung*)). These rules contain specific rules on transparency to be granted to third parties concerned which go beyond the transparency to be granted in administrative proceedings (however, vis-à-vis third parties, transparency in administrative fine proceedings is more restricted to protect the interests of the parties that are, potentially, subject to a fine). Please note that these rules are not covered by this submission.

26 See e.g., *Schmidt/Bach*, in: Immenga/Mestmäcker (footnote 5), § 56, para. 5 and *Kiecker*, in: Langen/Bunte (footnote 9), § 56, para. 1.

27 See e.g., *Kiecker* (footnote 26), para. 1, *Becker* (footnote 17), § 56, para. 1 and *Bechtold* (footnote 2), § 56, para. 2.

not falls within the full discretionary powers of the Bundeskartellamt.[28] This decision will generally depend upon the complexity of the case at hand.

In practice, the Bundeskartellamt will – at least in complex cases – usually decide to hold non-public or informal meetings. These meetings are usually attended by the decisional body (consisting of the Chairman of the relevant Decision Division as well as two Rapporteurs) which represents the Bundeskartellamt. Case Officers may also be present. In contrast, the leadership of the Bundeskartellamt (President, Vice President) will – in order to preserve the independence of the Decision Divisions – not hold talks on ongoing cases with the parties concerned. As mentioned above, the Bundeskartellamt and the notifying parties will usually also be engaged in an ongoing dialogue.

The timing of a particular investigation greatly depends on whether it is a merger or a non-merger investigation. Whereas merger investigations by statutory law follow a strict time schedule, this does not hold true for non-merger proceedings. For merger proceedings, an initial one-month review period applies, Section 40 (1) sentence 1 ARC. In complex cases, the Bundeskartellamt may decide to open a four-month in-depth investigation (main examination proceedings), Section 40 (2) sentence 2 ARC. This four-month review period may be extended if the notifying parties have given their consent, Section 40 (2) sentence 3 no. 1 ARC.

4. Conclusion

As described at the outset, procedural fairness plays a crucial role in the German competition law regime. Consequently, several rules that deal with procedural fairness have been integrated into the German ARC. As far as transparency issues in administrative enforcement proceedings are concerned, the most important ones are Sections 43, 53 (1), 56 (1) and 62 ARC. Moreover, on its own initiative and by using its discretionary powers, the Bundeskartellamt has initiated certain measures to further increase transparency in enforcement proceedings. In particular, it has recently begun to publish case summaries on investigations in which no formal decisions are published. These measures will help to further enhance the overall legitimacy and predictability of the German competition law regime.

[28] See, e.g. *Becker* (footnote 17), para. 19 and *Schmidt/Bach* (footnote 26), § 56, para. 15.

GREECE

1. Introduction

The rules pertaining to proceedings and procedural rights before the Hellenic Competition Commission ("HCC") are laid down in Law 703/1977 "On control of monopolies and oligopolies and protection of free competition"[1] as well as in the Regulation on the Functioning and Management of the Hellenic Competition Commission ("Procedural Regulation").[2]

The HCC is an independent administrative authority and its decisions are administrative acts that can be challenged before the Athens Administrative Court of Appeals. The HCC consists of two separate bodies: the Directorate General for Competition ("Directorate General") which is the body responsible for investigations, and the Board which is the decision-making body. The Board of the HCC consists of the President, four full-time Commissioners - Rapporteurs and four part-time members. Article 8(1) of Law 703/77 specifies that its members shall "*enjoy personal and operational independence*" and are to be "*bound in the exercise of their duties only by the law and their conscience*". The independence of its part-time members is further guaranteed by the fact that they are prohibited from engaging in any professional activity relating to matters which arise before it.[3]

Although the European Court of Justice in its landmark *Syfait* ruling declined to receive a preliminary reference from the HCC because it considered that the latter was not technically speaking "a court or tribunal", in the Article 267 TFEU (former 234 EC) sense,[4] important aspects of the HCC's decision–making process, such as the hearing proceedings, the consideration of evidence and the extensive reasoning of its decisions, meet the respective judicial standards. Both complainants and respondents may be legally represented before the Board of the HCC and are accorded procedural rights similar to those enjoyed by parties to ordinary court proceedings.[5] The fact that the HCC decisions are appealed directly to

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1 Law 703/1977, i.e. the Greek Competition Act, was recently amended by way of Law 3784/2009 (Official Journal Issue A΄ 137/07.8.2009), which entered into force in September 2009.

2 It takes the form of a Joint Ministerial Decree that is issued following an opinion by the HCC.

3 The participation of representatives of chambers of commerce and other collective interests in the Board of the HCC has been recently abolished; thus the impartiality and the independence of the Authority has been significantly strengthened.

4 Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) et al. v. GlaxoSmithKline plc. and GlaxoSmithKline AEBE*, Judgment of 31.5.2005, [2005] ECR I-4609. See also Opinion of Advocate General Jacobs delivered on 28.10.2004, paragraphs 31 -32: " *... the status of the Greek Competition Commission is in my view finely balanced. That body appears to me to be situated very close to the border line between a judicial authority and an administrative authority having certain judicial characteristics. 32. On balance, however, I consider that it is sufficiently judicial in character to qualify as a court or tribunal for the purposes of Article 234 EC*". See further A.P. Komninos, "Article 234 EC and National Competition Authorities in the Era of Decentralisation", 29 *European Law Review* 106 (2004).

5 See Opinion of Advocate General Jacobs, op.cit., paragraph 21: "*More distinctive of a court or tribunal is the hearing before the Competition Commission, at which both complainants and respondents may be legally represented and are accorded procedural rights similar to those enjoyed by parties to ordinary*

the Athens Administrative Court of Appeals, rather than to the Athens Administrative Court of First Instance, is also indicative of the HCC's judicial or quasi-judicial status.

This qualification has not changed due to the recent amendment of the Greek Competition Act (in August 2009 with Law 3784/2009), which introduced the Commissioners – Rapporteurs. The latter are not just members of the decision-making body, the Board, but also supervise the investigations of the Directorate General during the Investigation Phase II and are also responsible for the final drafting of the Statement of Objections (see below).[6]

2. Procedural stages and timetable of key proceedings

Procedural due process is safeguarded under Law 703/1977 and the Procedural Regulation, which provide for the sequence, stages and timetable of the proceedings, as well as for the defence rights of the persons that are subject to the HCC proceedings.[7] In brief, the procedural stages before the HCC can be summarised as follows:

- *Investigation Phase I*: The Directorate General launches an investigation following a complaint or on its own initiative (see section 3 below). The law, as recently amended, doesn't contain specific time limits as to the length of the General Directorate's investigations at this stage.[8]

- *Investigation Phase II*: The case is introduced to the Board of the HCC by the President and the Board decides about its degree of priority. If the Board gives priority to a case, it assigns a Commissioner – Rapporteur to the case following a draw. The Commissioner – Rapporteur is responsible for finalising the investigations and for supervising the final drafting of a Statement of Objections or of a proposal to reject a complaint. This stage is concluded with the notification of the Statement of Objections or of the proposal to reject the complaint to the parties within 90 (or in exceptional circumstances 120) days from the assignment of the case to the Commissioner - Rapporteur.

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court proceedings. Such guarantees go some way to supplying the necessary inter partes element to the Competition Commission's decision-making process".

6 Prior to the August 2009 amendment of the Competition Act, the Directorate General submitted the Statement of Objections directly to the HCC Board, without prior intervention of the members of Board in any stage of the investigation phase (with the exception of the HCC President who may order *ex officio* investigations and functions as a link between the Directorate General and the Board). Thus, the operational separation between the investigation body, i.e. the Directorate General and the decision-making body was clearer.

7 The Code of Administrative Proceedings which establishes general procedural rules for administrative bodies is also applicable to the HCC proceedings, but in a supplementary way.

8 According to Article 24(4) of Law 703/1977 "*4. The Hellenic Competition Commission shall deliver a decision within six (6) months from the date of submission of the complaint or the request of the Minister of Development. In exceptional circumstances and where the case requires further investigation, the Hellenic Competition Commission may extend this time-limit by a maximum of two (2) months*". Although Law 3784/2009, which recently amended law 703/77, retained the abovementioned provision, it introduced new time-limits concerning the length of HCC's investigation and decision-making stages and proceedings, that tacitly amend this provision. In any case, the six-month deadline for the treatment of complaints by decision is totally unrealistic and obsolete, as it contradicts the HCC's procedural system as a whole. The duration of the investigations conducted by the Directorate General depends on the difficulty and the complexity of each case and should not exceed the reasonably expected time for their conclusion.

- *Hearing proceedings before the HCC Board*: The oral hearing takes place within 60 days from the serving of the Statement of Objections (or of the proposal to reject the complaint) to the parties. At the point of the issuing of the Statement of Objections, the persons that are the subjects of the investigation and the complainants exercise their rights of access to the file. They may also submit a written memorandum in response to the Statement of Objections no later than 30 days before the date of the hearing. A rebuttal of other parties' memoranda can be submitted no later than 15 days before the hearing. At the hearing the parties may cross-examine each other and their respective expert witnesses and may also submit, with the permission of the President, post-hearing written memoranda (see sections 4 and 5 below).

- *Issuing of HCC's decision*: Final decisions have to be issued within six to maximum eight months from the assignment of the case to a Commissioner - Rapporteur. The decisions are published in the Official Journal of the Government (see section 6 below).

Finally, the parties subject to the investigation may consider offering commitments suitable to address the competition concerns arising from the investigation; in that case, the HCC may decide to engage in a procedure leading to a commitment decision.[9]

3. Investigation phases I and II

Under the HCC Procedural Regulation, during the investigation phases I and II and prior to the notification of the Statement of Objections, the persons that are subject to the investigation enjoy considerable access to file rights and always have the opportunity to supply exculpatory evidence and data.

More precisely, in the early phases, the undertakings under investigation are informed about the alleged infringements of competition law either from the content of the inspection mandate and/or from the HCC's letters requesting information (see below).

In practice, the inspection mandates, as well the letters for request of information, expressly state whether a complaint has been filed. Thus, the persons concerned are alerted and may exercise their right to have access to a copy of the non-confidential version of the complaint and to attempt to rebut the complaint prior to the notification of the Statement of Objections. In addition, they may be formally summoned to testify, but they also have the opportunity to meet with the case handlers of the case and submit their views in writing.

3.1 Inspections

The investigation powers of the HCC include the power to conduct inspections at the premises of an undertaking or in some circumstances at private premises, provided there are reasonable grounds to suspect that books or other documents relating to the undertaking and to the object of the investigation are kept there.[10]

For the purposes of conducting an inspection, the HCC officials are vested with the powers of a fiscal auditor and must observe the national constitutional provisions on the sanctuary of domicile.[11] In the latter context an inspection in private premises can only be carried out in the presence of a judge.

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9 The commitments' procedure is currently under amendment.

10 See Article 26 of Law 703/1977.

11 See Article 9 of the Constitution.

The persons concerned actively participate in the procedure of storage and processing of electronic files and correspondence, collected for the purposes of enforcing the competition rules. A report on the inspection conducted is drafted by the inspectors and a copy is sent to the undertakings concerned.

3.1.1 Inspection mandate

The mandate is issued in writing by the HCC President, the Director General or the competent Director of the Directorate General. The mandate specifies the subject matter of the investigation and the consequences of the obstruction or hindrance thereof or of the refusal to present the requested books, records and other documents or to provide copies or excerpts thereof. This is in accordance with the criteria set by the relevant EU case law.[12] The mandate states expressly whether the investigation is conducted on the HCC's own initiative or following a complaint.

3.1.2 Collection and processing of electronic files

During inspections the HCC inspectors may make copies of any document, which is considered relevant to the investigation and does not contain information of a personal nature. In this case they must compile a detailed list of all documents copied.[13] A set of copies, as well as the list signed by the inspectors and the representatives of the undertakings, remains with the undertaking inspected.

Following its recent amendment, Law 703/77 empowers the HCC to issue a decision determining the procedure for the collection, storage and processing of electronic files and correspondence collected for the purposes of applying the provisions of the Competition Act.[14] According to the procedure followed so far, where the Directorate General inspectors identify electronic files of undertakings, which are considered relevant to the case under investigation, these are copied on an external unit of a hard drive, which is placed in a sealed envelope signed by the inspectors and the representatives of the undertaking.[15] A list of the electronic devices, from which files have been copied, as well as an exact copy of the content of the hard drive unit is left with the undertaking. A date is then set, on which the envelope is opened by the case handlers at the HCC premises and the contents of the hard drive unit are copied, so that they obtain a format, which may be processed by the HCC officials. The representatives of the undertaking inspected are invited to attend this procedure and go over the electronic files obtained, so that they may indicate any files that contain information of a personal nature or that are irrelevant to the case under investigation, in order for these to be deleted. Undertakings considering that files collected fall under the Legal Professional Privilege, may request in writing that these be disregarded and returned to them. Finally a copy of the electronic data is conveyed to the undertaking concerned.

3.2 Requests for information

In order to determine whether an infringement of competition law has taken place, the HCC may request by letter information from undertakings, associations of undertakings, other natural or legal entities, public or other authorities.

The letter cites the provisions of the Competition Act or of the TFEU, on which the request is based and sets a time limit for the provision of the information, while mentioning the sanctions in case of non-

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12 Joined Cases 46/87 and 227/88, *Hoechst AG v. Commission*, Judgment of 21.9.1989, [1989] ECR 2859; Case 85/87, *Dow Benelux NV v. Commission*, Judgment of 17.10.1989, [1989] ECR 3137.

13 The details specified on the list are the exact location of the document, its date, its author and its subject.

14 See Article 26 (2) of Law 703/77. The HCC is currently in the process of issuing this decision.

15 If the number of electronic files with relevance to the case is small, they are printed out into hard copies.

compliance. The time limit for the provision of information is at least 5 days in interim measures cases or decisions concerning derogation applications in merger control proceedings, 10 days in merger cases, and 20 days in all other cases, i.e. in cases concerning anti-competitive agreements or abuses of dominant position. In practice, there is a possibility of extension of these time limits following a written request by the parties.

The letter requesting information expressly states whether the investigation is conducted on the HCC's own initiative or following a complaint.

3.3 Access to complaints

Under the Procedural Regulation, parties may obtain non-confidential copies[16] of the complaint filed against them prior to the notification of the Statement of Objections.[17] Access is granted solely to the complaint and to the documents attached thereto; no other case file document is therefore accessible at this phase of the procedure.

Apart from constituting an important safeguard, as it contributes to the equality of arms of all parties and enables them to better prepare their defence, such a development is also beneficial for the investigation process. More precisely, the Directorate General becomes informed of the arguments of the undertakings under investigation at a fairly early stage; this enables it to often reassess its investigation strategy and to obtain a holistic and more objective picture of the factual basis of the case. Thus, the Directorate General is better placed to prepare either its Statement of Objections or its proposal to reject the complaint. At the same time, this right granted by Greek law can be beneficial for the economy of the whole process because it gives an early possibility to the undertakings under investigation possibly to offer commitments responding to the competition concerns of the HCC.

3.4 Informal meetings - Testimonies and depositions

Informal meetings with the undertakings that are the subjects of the investigation usually take place following the receipt of a request for information or of the non-confidential copy of the complaint (see sections 3.2 and 3.3 above), either at the request of the undertakings or on the authority's own initiative. Informal meetings with complainants may also take place during that period. The parties are invited by the HCC officials after the meeting to substantiate their statements or presentations in writing within a certain time limit. These memoranda form part of the case file.

In the investigation phase, formal meetings with the parties may take place following an HCC notice summoning certain of their representatives or employees to testify.[18] The notice states the legal basis of the alleged infringement and the relevant market under investigation (see section 3.1.1. above). Testimonies and depositions (i.e. testimonies under oath) form part of the case file. Confessions contained in these

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16 Under Article 19 of the Procedural Regulation the complainant may by reasoned request apply for confidential treatment of parts of his complaint, in which case he is responsible for submitting a non-confidential thereof.

17 See Article 19(4) of the Procedural Regulation.

18 According to Article 26(2)(vii) of Law 703/77 the authorised officials of the Directorate General may take sworn or unsworn depositions, as deemed appropriate according to their Judgment, without prejudice to the provisions of Article 212 of the Code of Criminal Procedure and request any representative or personnel member of the undertaking or association of undertakings for clarifications on facts or documents relating to the subject matter and purpose of the investigation and record the respective answers.

testimonies/ depositions may be used as inculpatory evidence in the Statement of Objections.[19] For this reason, the subjects of investigation are entitled to the presence of a lawyer during the testimony.

3.5 Conclusion of the investigation - Notification of the Statement of Objections

3.5.1 Purpose and content of the Statement of Objections

The Statement of Objections (or the proposal to reject a complaint) contains an analysis of the facts of the case, a legal assessment and recommendations.[20] It is signed by the Commissioner – Rapporteur and by the team of the Directorate General officials that have been working on the case. The purpose of the document is to inform the subjects of the investigation (or the complainant) of the preliminary position of the HCC that affects their legal position with a view to enabling them to exercise their rights of defence in writing and orally at a hearing. It sets out in a detailed manner the results of the in-depth investigation, i.e. the factual, economic and legal analysis of the Directorate General and the Commissioner - Rapporteur, concerning the alleged application (or non-application) of the competition rules. The Statement of Objections clearly indicates whether a fine should be imposed and explains the matters of fact and of law which justify the imposition of a fine, i.e. the duration and gravity of the infringement. It also mentions the facts that may give rise to aggravating and attenuating circumstances.[21] The Statement of Objections is not binding on the Board of the HCC (see section 6 below).

3.5.2 Summons to the hearing

The investigation is concluded with the notification of the Statement of Objections (or of the proposal to reject the complaint) to the parties, i.e. to the complainants and to the accused undertakings. In practice, the summons before the HCC's Board is served with the notification of the Statement of Objections at least 60 days prior to the scheduled hearing[22].

4. Exercise of rights of defence after the notification of the Statement of Objections

4.1 Access to the file

Undertakings under investigation or that have notified a merger have a right of access to the non-confidential data of the file following the notification of the Statement of Objections and the summons to attend the hearing before the HCC Board.[23]

Provided that access to documents containing confidential information or business secrets is indispensable, in order for the subject of the investigation, to exercise its right of defence, the HCC President may by reasoned decision, at the request of the party concerned, grant access in whole or

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19 Of course, the HCC is prevented from compelling an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which is incumbent upon the HCC to prove (Case C-374/87, *Orkem v. Commission*, Judgment of 18.10.1989, [1989] ECR 3283, para. 35).

20 See Article 20(3) of the Procedural Regulation.

21 In some cases, a separate Statement of Objections on the calculation of the exact amount of the proposed fine has been notified to the accused undertakings. The latter were invited to reply to this Statement of Objections and an oral hearing was conducted before the issuing of HCC's final decision which imposed the fines (see in the "Super Market" cases, HCC decisions 277/IV/2005 and 284/IV/2005). These decisions were upheld by the Athens Administrative Court of Appeals.

22 In merger control proceedings, different deadlines apply (see section 7 below).

23 See Article 8(12) of Law 703/1977.

partially to the documents in question. In this case, the HCC President exercises powers similar to those of the European Commission's Hearing Officer;[24] this constitutes an additional procedural safeguard.

4.2 Reply to the Statement of Objections - Memoranda

A time limit of 30 days prior to the hearing has been set for the parties to submit a written memorandum,[25] which shall contain their views, a statement of whether they wish to exercise their right to an oral hearing, the name of their legal representative, the number of witnesses they wish to call and the topics, on which the latter will be questioned, including a specific justification of the need for their examination. The number of witnesses may not exceed 3 for each party. The HCC Board may limit the number of witnesses at its discretion by decision reached during the hearing. Within the same time limit, the parties must, upon penalty of inadmissibility, submit all evidence and procedural documents to be invoked.

Rebuttals[26] are made by way of a supplement to the memorandum and may be submitted at the latest 15 days prior to the hearing.[27]

5. Hearing proceedings before the HCC Board

5.1 Oral hearing procedure

It is not mandatory for an oral hearing to be conducted, in the case where all parties state in their written memoranda that they will not be attending the hearing on the date set, as indicated in the summons, however, the HCC Board may in any case decide at its discretion whether an oral hearing will be held.[28]

At the hearing, following a presentation of the Statement of Objections by the Commissioner - Rapporteur, the parties are heard in the order determined by the President.[29] The parties may present their arguments and rebut the arguments of the other parties.[30] The party, against which the procedure before the HCC has been launched, is entitled to be heard last.

The HCC Board Members and the Commissioner - Rapporteur may with the permission of the President examine the parties or their legal representative and their witnesses and experts.[31] Contrary to the EU system, under Greek law each party is entitled to cross-examine the legal representatives and the

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24 Commission Decision 2001/462 of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, OJ [2001] L 162/24.

25 See Article 11(2) of the Procedural Regulation.

26 See Article 11(4) of the Procedural Regulation.

27 In cases of interim measures (Article 9(5) of Law 703/1977) or requests for derogation from merger notification obligations (Article 4e(3) of Law 703/1977), the time limit for the submission of memoranda is set on an ad hoc basis by the HCC President (Article 11(5) of the Procedural Regulation).

28 See Article 11(2) of the Procedural Regulation.

29 See Article 20(4) of the Procedural Regulation.

30 For the benefit of parties and/or witnesses, who do not speak the Greek language the HCC shall engage an interpreter, who will be sworn before the HCC according to the provisions of the Code of Civil Procedure to perform his/her duties meticulously and accurately. The interpreter shall be appointed by the HCC President and the expenses incurred shall burden the party concerned (Article 17(1) of the Procedural Regulation).

31 See Article 20(5) of the Procedural Regulation.

witnesses and experts of the other parties with the President's permission; this is an important tool for the defendant, which plays a crucial role in its defence strategy.

The Commission may require the submission by the parties of sworn affidavits or new evidence on a certain matter.[32] The parties have a right to access all documents submitted according to this procedure. The Board of the HCC may also decide to suspend the hearing, if it deems that the examination of essential witnesses or other persons is required.

A contentious issue that has recently surfaced is the involvement of the Commissioners – Rapporteurs, an institution that was introduced for the first time in August 2009, in the investigation of specific cases assigned to them and conducted by the Directorate General. The Commissioner – Rapporteur who is assigned with a case and signs the final version of the Statement of Objections, also participates with full voting rights in the decision-making process, as a member of the Plenary or of the Chamber of the Board that will decide the case.[33] The criticism is that this is a deficiency of the system affecting the impartiality of the decision-making body.

Without entering into the debate, it is clear that the Greek legislator made in August 2009 a clear policy choice and proceeded to a balancing exercise between efficiency and justice. The participation of the Commissioners in the investigation phase II renders investigations better-oriented and more effective and results in speeding up the decision-making process as a whole. Their identity is not kept secret from the parties if a case has been assigned to them, and their intervention can be seen as another set of eyes that looks at the conduct in question (fresh look), before the finalisation of the Statement of Objections. Besides, even before the latest amendment of the Competition Act, the Directorate General officials were in most cases present during the deliberations of the decision-making body and could respond to questions and clarify matters, if asked by the Members, so there is no dramatic deterioration in terms of procedural fairness.

5.2 Submission of final memoranda

According to Article 23 of the Procedural Regulation, the President may grant a time limit for the submission of a final memorandum after the hearing at the parties' request.

5.3 Access to the oral hearing's minutes

Following the recent amendment of Law 703/77[34] minutes of the hearing are kept in electronic means throughout the procedure and especially during the examination of witnesses. The minutes are then transcribed and the transcripts are handed over to the parties within 10 days from the end of the hearing. The time limit for the submission of the final memorandum by the participants in the hearing begins after the receipt of the transcripts (see 5.2 above).

This procedure is quite useful for the parties in the preparation of their arguments for their final memorandum. In also enables parties to begin preparing for an appeal before the Athens Administrative Court of Appeals even prior to the issuing of the HCC decision in question.[35]

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32 See Article 20(6) of the Procedural Regulation.

33 With the exception of cases of major importance, which are decided by the Plenary, the majority of the cases are decided by 3-member Chambers of the Board.

34 See Article 8(13) of Law 703/1977 and Article 27(1) of the Procedural Regulation.

35 Following the transcription and signature of the minutes, all electronic recording data are destroyed (Article 27(2) of the Procedural Regulation).

6. Issuing and publication of decisions

Taking into account the evidence that was presented at the hearing, i.e. the explanations and memoranda of the parties, the testimonies of witnesses, the experts' opinions and the data and documents that have been submitted, the Board takes its decision. As the Statement of Objections is not binding on the HCC Board, the latter may come to a different conclusion. It has also the discretion to issue a preliminary ruling and refer the case back to the Directorate General for further investigations.[36]

HCC decisions have to be specifically reasoned. The decision includes any dissenting opinions and the names of the dissenting members are also mentioned. This increases transparency. The HCC decisions are published in non-confidential version in the Official Journal of the Government and at the HCC website (http://www.epant.gr).

After the issuing of the decision, the parties can also have access to the HCC Board deliberation minutes, which are kept in summary and contain the general points arisen during the hearing, the matters discussed and the outcome of the deliberation.[37]

7. Merger control proceedings

The Competition Act sets out strict deadlines as to the approval or prohibition of notified concentrations.[38] Concentrations that do not raise serious doubts as to their ability to seriously restrict competition are approved, within 1 month from the date of the duly-made notification (phase I concentrations).

If the notified concentration raises serious doubts as to its compatibility with the functioning of competition in the individual markets concerned, the HCC President, by a decision issued within 1 month from the notification, initiates the proceedings of full investigation of the concentration and informs accordingly, without delay, the undertakings concerned (phase II concentrations). Within 15 days from the notification to the parties that the full investigation of the concentration has been initiated, the latter may jointly propose amendments to the concentration with a view to render it compatible with the requirements of the functioning of competition.

The Statement of Objections in cases of phase II concentrations is submitted to the HCC Board within 60 days at the latest from the notification of the concentration. The HCC decision in phase II concentrations is issued within 90 days from the notification date. The expiration of the 90 days time limit without a decision prohibiting the concentration having been issued, is considered as an approval of the notified concentration. In this case the HCC is obliged to issue the relevant declaratory act.

The time limits provided for the issuing of the HCC decisions in both phase I and II concentrations, may be extended a) upon agreement between the undertakings participating to the concentration; b) where the notification form is incomplete resulting in the HCC Board not being able to proceed to the evaluation of the notified concentration, provided that the notifying parties shall be informed accordingly in an exclusive time limit of 7 days from the notification of the concentration.

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36 See Article 22(1) of the Procedural Regulation. Nevertheless, the likelihood of such a referral for re-examination to the Directorate General is significantly decreased, following the introduction of the institution of Commissioners – Rapporteurs and their active participation in the investigation phase.

37 See Article 27(3) of the Procedural Regulation.

38 See Articles 4d and 8(8) of Law 703/77.

Finally, as to the oral hearing and the rights of the notifying parties, the situation is the same as in antitrust enforcement (see chapters 4 and 5).

8. Conclusion

The unambiguous wording and content of the legal provisions pertaining to proceedings and procedural rights, promotes legal certainty and transparency, as the subjects of the investigations are better placed to organise their defence strategy. The HCC's procedural rules are prescribed in a clear and elaborate manner in the existing legislation and regulations and grant the undertakings that are subject to the investigation extensive defence rights.

As illustrated above, undertakings enjoy in practice considerable access to the file and hearing rights even prior to the notification of the Statement of Objections. In addition, at any procedural stage following the notification of the Statement of Objections, i.e. before, during and after the oral hearing, they are given the opportunity to present any type of exculpatory proof. All types of evidence including oral testimony of witnesses, experts' opinions, documents and depositions, are freely considered by the decision-making body. Nevertheless, there is still scope of amelioration of the current administrative enforcement system. To this end, a new Procedural Regulation is currently being drafted, where certain procedural issues will be re-examined and re-formulated, taking into account the latest legislative, regulatory and case law developments at Community and at other Member States' level. In addition, the HCC has been recently empowered by law to issue a decision concerning the conditions and procedure of accepting remedies offered by the subjects of an investigation. Finally, on 12 January 2010, the HCC issued a Notice on its enforcement priorities, with a view to improving the efficiency of its enforcement action, while also increasing transparency and accountability.[39]

[39] http://www.epant.gr/news_details.php?Lang=en&id=89&nid=222.

HUNGARY

This contribution discusses procedural fairness aspects of the competition law enforcement activity of the Hungarian Competition Authority (Gazdasági Versenyhivatal, GVH). It follows the structure of the questionnaire of the OECD Secretariat by touching some additional, related issues, such as deadlines. For better understanding its main part and complementing it, the contribution starts with the brief description of some features of GVH procedures that are relevant in a procedural fairness context.

GVH law enforcement proceedings are administrative procedures and – adjusted to the organisational structure of the agency – consist of two phases: first the phase of the case handler and then the phase of the Competition Council. The case handler (or a team of case handlers) is responsible for initiating the proceedings in case of suspected infringements, and for taking the necessary investigative measures to clarify the facts of the case. After completing the investigation, the investigator prepares a report, summarising the facts established and the supporting evidence, and submits the report, together with the files, to the Competition Council. Investigators are organised in sector- or case-type specific units. All the investigatory units are supervised by one of the vice presidents of the GVH whose consent is required to launch a case. Formally, the investigation is initiated by an order which specifies the suspicion (with reference to the competition law provision(s) involved), the circumstances and practices that have triggered the proceedings. In the course of the proceedings the investigation can be extended by an order (similar to the initiating one), to further relating conducts or to further competition law provisions.

After the phase of the case handler, the Competition Council receives the case for decision making. (The Competition Council may return the case for further investigation if it finds the files and the report of the case handler inadequate.) The Competition Council is a separate decision-making body within the authority, led by the other vice president of the GVH (who is the chair of the Competition Council). When bringing a case, the Competition Council is made up of three or five members, appointed by the chair of the Competition Council, and one of them acts as the *rapporteur* of the case. Pursuant to the provisions of the Hungarian Competition Act (Competition Act)[1], the members of the Competition Council are independent in their competition supervision proceedings: when they adopt the decision, they are subject only to law, no instructions can be given to them. The decisions of the Competition Council – both on substance and on the procedural aspects, including the fairness of the procedure – may be subject to judicial review.

Both the investigator and the Competition Council can terminate the proceedings if the circumstances that have triggered the case turn to be non-existent, or if the evidence collected in the course of the proceedings is insufficient to prove the infringement and further investigation is not expected to produce any results. A decision on the substance of the case can only be made by the Competition Council.

1 Act LVII of 1996 on The Prohibition of Unfair and Restrictive Market Practices.

1. Transparency relating to the law and agency procedures and practice

1.1 Substantive legal standards

Concerning the substantive legal standards, the GVH contributes to transparency by elaborating some public, non-binding documents, such as notices and position statements. Before going into details about the notices and position statements issued by the GVH, it is worth mentioning that there has been conflicting views on the function and admissibility of such pieces of soft law (and soft law in general) in Hungary. On the one hand, soft law instruments can ensure transparency and predictability of the practice of law enforcers, therefore legal certainty. This is exactly the objective of the GVH when designing and issuing pieces of soft law. On the other hand there is a school of thought in the legal profession in Hungary (including the Constitutional Court) claiming that pieces of soft law tend to derogate legal certainty by disguising the law-making activity of law enforcers and therefore are considered undesirable. (This latter approach is probably partly rooted in the strongly negative experience about excessive discretionality of authorites, gained before the rule of law was restored in the early 1990s.) An in between view holds that admissibility of soft law depends on the authorisation of the law enforcer to elaborate such documents as well as on their content whether they simply compile the existing (past) law enforcement practice, or involve law interpretation in abstract, the practice to be followed in the future or policy statements.

Regarding the legal ground on which the concerning GVH documents have been issued, the Competition Act explicitly empowers the GVH to issue notices, while the publication of position statements has no explicit statutory grounds. Both types of documents are non-binding, technically not even on the GVH, and by no means on administrative or civil courts.

1.1.1 Notices

The notices of the GVH describe the basic principles of the law enforcement practice of the authority in specific questions. These notices, in the sense of their function and legal status, are quite similar to notices applied under EU law. Their function is to draw up how the law enforcer will apply the legal provisions, to summarise the experience of the GVH (based on the experiences resulting from the adopted decisions) and to outline the expected enforcement policy in general.

So far, notices have been issued in several topics:

- the criteria of distinction between mergers authorised in simplified and full procedures[2],
- the principles relating to the calculation of the fine, in antitrust cases[3] and in consumer protection cases[4],
- leniency policy[5], or

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2 Notice No 1/2009 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on criteria of distinction between concentrations authorised in simplified and full procedures.

3 Notice No 2/2003 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the method of setting fines in antitrust cases (amended by Notice No 2/2005).

4 Notice No 1/2007 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the method of setting fines in consumer protection cases.

- the application of remedies[6].

These notices can be modified or revoked owing to the changes in legislation, case law of the courts, enforcement policy or other circumstances.

The notice on leniency policy was repealed after the details of the application of leniency had been incorporated in the Competition Act. The reason behind this legislative amendment was – above all – to increase legal certainty and transparency both for potential applicants and parties to proceedings (parties). Though in practice the GVH faced no particular problems or discrepancies deriving from the fact that its leniency policy had been regulated only in a notice, and not in the Competition Act, reflections primarily from business stakeholders implied that a higher – statutory – level of regulation would mean more credible commitment on the side of the authority. Moreover, the terms laid down in the Competition Act cannot be overruled by the court, contrary to the provisions of notices of non-binding nature. Furthermore, settling statutory guarantees is also in line with EU law developments, namely the adoption of the European Competition Network's Model Leniency Programme.

Another notice of the GVH, the one relating to the calculation of fines in antitrust cases, was revoked after certain principles laid down in the notice- and in this sense the law interpretation and enforcement practice of the GVH - had been criticised by the Court of Appeal in its judgements. Moreover, in a decision this court gave a detailed reasoning (like a "notice" of its own) what aspects should be taken into consideration when setting the amount of fine for infringements. Later certain conclusions of this judgement were overruled by the Supreme Court, which confirmed that the GVH was allowed to manifest and refer to its own jurisprudence, as the Competition Act explicitly entitles and at the same time requires the authority to issue notices summarising its practice. The Supreme Court also ruled that in case the GVH undertook to issue a notice on a specific matter, the authority should abide by its principles in individual cases. On the other hand, the existence of a notice does not relieve the GVH of giving thorough and case-specific reasoning for each decision.

1.1.2 Position statements

Among the documents issued by the GVH relating to substantive standards should be mentioned the position statements of the Competition Council, which reflect the law interpretation and practice of the GVH's decision-making body with regard to the Competition Act. By publishing the statements, the Competition Council intends to give guidance for market players highlighting those parts of decisions, which interpret the sections of the Competition Act (including the procedural provisions, beside the substantive ones). Contrary to the notices, the position statements do not focus on a specific matter, but collect and in essence quote the points of fundamental importance from the decisions for each section of the Act. The statements are reviewed and completed on a yearly basis, though a disclaimer warns the readers that it is recommended to check the validity of the relevant statements, as practice may develop over time.

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5 Notice No 3/2003 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on leniency policy assisting cartel detection (amended by Notice No 1/2006 and Notice No 2/2009).

6 Notice No 1/2008 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on imposition of conditions and obligations by decision authorising concentrations.

1.2 Procedural standards

Concerning the procedural standards, the procedural rules to be followed in the course of the proceedings are defined primarily by the Competition Act, and as a background legislation, the Public Administrative Procedures Act.[7] These laws incorporate fundamental legal principles like procedural fairness or legal certainty, and regulate GVH proceedings in a relatively detailed way, leaving little discretion for the authority in procedural issues.

Within the legislative frames, internal regulations issued by the president of the authority govern the internal operational questions concerning the proceedings. The Organisational and Operational Rules of the GVH, and the Organisational and Operational Rules of the Competition Council[8] are relevant in this respect by defining the competences and responsibilities of each actor (e.g. that the investigator makes a proposal to open an investigation, with the consent of the head of unit, and the vice president is to decide on the proposal). Both are public documents. The Manual of the GVH describes the internal procedure, with internal deadlines and other requirements (e.g. rules for in-house consultation). This regulation contains the rules for share of labour between the investigator and the Competition Council (e.g. division of time limits, involvement of the Competition Council in the preparation of a case). The Manual is not available for the public.

1.2.1 Deadlines

Antitrust cases are started ex officio, except for mergers, which are usually initiated on notification. Both the Competition Act and the Public Administrative Procedures Act generally require the GVH to close its proceedings within a reasonable period of the time. The Competition Act sets the time limit for the proceedings: ex officio cases must be finished within six months, in merger cases the GVH has 35 working days (four months in more complicated cases raising competition concerns) to conclude its decision. The time limit can be extended. In ex officio cases, the time limit can be prolonged two times, by six months each, while in merger cases an additional 15 working days (in Phase II mergers, 45 working days) may be used, by extension. Parties have to be notified of the extension before the expiry of the original time limit. Though the proceedings of the GVH – in principal – consist of two phases, the Competition Act settles one uniform deadline for the final decision, the time limits to complete the investigation (first phase) are governed by internal regulation (the Manual). The likely timetable of the proceedings is not communicated to the clients, the official documents – as well as the public announcements – mention only the statutory time limits.

Both the Competition Act and the Public Administrative Procedures Act provide that the time demand of certain procedural measures (like data requests, expert assistance, or when the legal successor or the appropriate party have to be called into the proceedings) need not be taken into account when calculating the deadline of the final decision. This possibility to put off the time limit is not subject to any restrictions in the two acts mentioned, neither in frequency, nor in duration, nor in respect to when it can be invoked. In practice the GVH does not make use of this opportunity frequently, though it can play an important role in completing information requests in merger cases, where the authorisation is deemed to have been granted if the agency fails to make a decision within the due time limit.

In ex officio cases if the authority closes the proceedings beyond the statutory time limit, the consequences are different – compared to merger proceedings initiated on notification – as the Acts

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7 Act CXL of 2004 on Public Administrative Procedures.

8 While the Organisational and Operational Rules of the GVH are issued by the President of GVH, the Organisational and Operational Rules of the Competition Council is established and issued by the Chair of the Competition Council, after being approved by the President.

governing the procedures of the GVH apply no sanctions for the expiration of time limit. Moreover, the courts confirmed that though it constitutes a serious infringement of procedural rules if the authority does not finish the case in time, the delay does not affect the substance of its decision, and does not eliminate the responsibility of the authority to complete the investigation and to bring a decision on the alleged infringement and sanction it if necessary.

1.2.2 Identity of the persons involved in the case

The parties become aware of the identity of investigator(s) when they receive the order initiating the proceedings, which includes the case handlers' names. If the investigation is preceded by a complaint procedure, the identity of the investigators is already revealed, as in GVH practice the same person acts as case handler in investigating the complaint and in conducting the following proceedings. The identity of the members of the Competition Council assigned for the case becomes known for the parties when they receive the first document from the Competition Council, typically the "statement of objections".

The Competition Act provides the possibility for the parties to make an objection against the person dealing with the case (for reasons of conflict of interest issues or alleged prejudice). Such objections can be put forward by a party at any phase of the proceedings. However, in the course of the procedure of the Competition Council, together with the announcement, the parties have to make it probable that they have just acquired knowledge of the fact, which serves as basis for exclusion. (Exclusion has effect on the time limits of the proceedings, in case the investigator is excluded, the deadlines are counted from the appointment of the new investigator, while in case a member of the Competition Council is excluded, the period of time used for the exclusion procedure need not be taken into account when reckoning the time limit.)

2. Party contacts with the agency

Parties get in contact with the investigators in the course of hearings and through information requests. Access to the files is only provided for the parties after completion of the investigation, but the Competition Council may give its consent to have access before this date (providingthat it cannot jeopardize the effectiveness of the proceedings). There are other limitations to access to files, applicable in the whole course of proceedings, concerning the internal documents and correspondence between the GVH and other authorities, unless those documents are used as evidence when establishing the facts of the case. Limitations also cover the access to confidential information like business secrects and other privileged information, personal data.

The first document, which demonstrates for the parties in its entirety the authority's knowledge of the facts and assessment on the case, is the "statement of objections" of the Competition Council. Before the "statement of objections" is submitted to the parties, they may estimate the directions of the investigation through the investigative measures taken (questions set forth in a data request or a hearing to clarify the circumstances of the alleged infringement), there is no special form, except for the informal ones, for the investigators to express their competition concerns.

This "statement of objections" includes the facts of the case, the evidence in support of them, the economic and legal assessment and conclusions of the Competition Council. On request of the party or in case the Competition Council considers it necessary, preceding the final decision one or occasionally more hearings are held before the Competition Council with the participation of the parties, the investigators and the relevant members of the Competition Council. Hearings before the Competition Council are held in public. The pPublic can be excluded from the hearings before the Competition Council (or a part thereof), on request or ex officio, in case it is considered necessary for the protection of state secrets, business secrets and other confidential data, or the interests of the national economy. The date of the hearing before

the Competition Council must be set in time to allow the party to prepare its defence, but the time provided for the party between the receipt of the "statement of objections" and the hearing before the Competition Council is discretionary. The length of time provided cannot infringe the parties' right to defence. In practice, if the party requests to postpone the hearing before the Competition Council with reference to lack of enough time to prepare its defence, the Competition Council tends to accept it.

In responding to the authority's enforcement concerns, the parties have the possibility to submit their opinion on the allegations and to offer evidences, especially when responding to the data requests or on hearings. Concerning the hearings, all the parties (and their – legal – representatives) are invited to the hearing of witnesses, but not to the hearing of another party. As the "statement of objections" of the Competition Council is intended to summarise the agency's enforcement concerns, the response on this document plays an important role in the parties' defence. Evidences and arguments can be presented till the hearing before the Competition Council is closed to make the decision, or in case no hearing is held before the Competition Council, till the decision is brought. In case the parties present a relevant piece of evidence shortly before the decision is planned to be taken, the Competition Council tends to postpone the decision to have the necessary time to assess, even if they exceed the time limit settled for the proceedings (see also above).

As regards the burden of proof, the agency is obliged to ascertain the relevant facts of the case in the decision-making process, where any evidence are admissible if suitable to facilitate the ascertaining of the relevant facts of the case. Apart from this responsibility, the courts confirmed that parties should act cooperatively with the agency in finding the relevant facts of the case. According to the Competition Act, parties are obliged, at request, to supply the data which are necessary to decide on the substance of the case. This obligation does not cover the admittance of an infringement of the law, the parties may however not refuse to supply incriminating evidence of any other kind. In the course of the proceedings the parties can offer evidence or propose the collection of evidence, but the agency is entitled to select the evidence it deems admissible at its own discretion, including that it decides what facts are considered relevant and what evidence or investigative measures are needed to support them. The authority assesses each piece of evidence separately and on the aggregate, and establishes the facts according to its persuasion based on this assessment.

Parties can offer the agency commitments[9] or remedies[10] to eliminate the possible competition problem, thus avoiding the prohibition decision (and fines). Though it is the Competition Council that can accept and decide on the terms of the undertakings concerned, the discussion on the undertakings may be started anytime in the course of the investigation. The investigators may test the parties' willingness to undertake commitments or remedies, and may take steps to clear the details, however, the parties typically submit their undertakings following the receipt of the "statement of objections" of the Competition Council. In case of commitment decisions, it results from the wording of the Competition Act that the parties, not the agency, propose the undertaikings the GVH may – and sometimes does – informally suggest this solution for the parties.

9 Where, in the course of competition supervision proceedings started ex officio, parties offer commitments to ensure, in a specified manner, compliance of their practices with the provisions of the Hungarian Competition Act or of (former) Article 81 or 82 of the EC Treaty and if effective safeguarding of public interest can be ensured in this manner, the Competition Council proceeding in the case may by order make those commitments binding on the parties, terminating at the same time the proceeding, without establishing an infringement of the Act.

10 In order to reduce the detrimental effects of a concentration, the GVH may attach to its decision pre- or post-conditions and obligations. It may, in particular, demand by its decision the divestiture of certain parts of the firms or certain assets or the relinquishment of control over an indirect participant, setting an appropriate time limit for the carrying out of these requirements.

Proceedings concerning mergers have certain specialities to non-merger antitrust cases. According to the Competition Act, mergers fall under mandatory notification if they meet the turnover threshold. In the pre-notification period, there is no statutory basis for consultation, but the GVH can be approached informally by the merging parties. The merger has to be notified by fulfilling the notification form of the authority,. If the parties do not complete the form properly, it is returned to them and the proceedings only starts when they file in the complete form. The Competition Act requires the GVH to inform the parties within a certain time limit if the transaction requires a full investigation (similar to the distinction between Phase I and Phase II mergers in other jurisdictions).

3. Hearing officer

The Competition Act does not involve the institution of hearing officer as it exists e.g. in the DG Competition in the EU, but in certain cases it seem to replicate it in other ways.

Where this is authorised by the Competition Act, separate appeals may be sought against certain procedural orders made by the investigator or the Competition Council (e.g.: procedural fines or costs, termination of proceedings for the lack of evidence or public interest). The appeal may be submitted by the party, the person in respect of whom the order contains provisions and the person required by the Competition Act to be informed of the order. The appeal is assessed by a member of the Competition Council, or the court (depending on whether the investigator or the Competition Council has passed the contested order).

Apart from the procedural orders that can be challenged by a separate appeal, in case the parties allege to suffer any irregular measure in the proceedings, they may file an objection, and the investigator or the Competition Council have to give reasons in the report or the final decision if they ignore the objection. The possibility to raise an objection is restricted by a relatively short time limit, after this deadline the party has no grounds to challenge the measure.

There can be special situations in an investigation, where the court is involved to guarantee the lawfulness of a measure. For example, in a dawn raid inspection, which itself must be authorised by the court previously, the investigators are entitled to make copies of, or seize means of proof which are not relating to the subject of the investigation and are not covered by the authorisation of the court, but which are indicative of the competition law infringement. However, in respect of such pieces of evidence, the authorisation of the court must be obtained subsequently, in a statutory time limit,; without this subsequent approval the evidence cannot be used.

The role of the court can be regarded even more important for the parties when the investigator of the agency and the client disagree whether a document revealed is qualified as legally privileged. According to the Competition Act, documents covered by legal privilege[11] may not be used in evidence, examined or seized in the course of the proceedings, and the owners of such documents may not be obliged to present those documents, or the persons concerned can refuse such obligation. However, the investigator is entitled, without prejudice to the right to legal privilege, to have access to the document in order to establish whether the reference to that document is protected by legal privilege, is obviously unfounded. If the person concerned and the investigator assess the status of the document differently, it will be put in a

[11] "Legal privilige" for the purposes of the Competition Act refers to documents prepared for the purposes of, or during, the exercise of the rights of defence of the parties or prepared in the course, or for the purposes, of communication between the parties and the lawyers appointed by them, furthermore documents containing statements made in the course of such communication, provided in each of these cases that this character is directly manifested by the document concerned and are in possession of the party (or its legal representative) or of a lawyer authorised by the party, unless the person concerned shows they have come out of his possession in an illegal manner.

storing device suitable to preclude access to the document, and be submitted to the court to decide whether the document falls under protection of legal privilege. In cases where the content of the document in question is only partly covered by legal privilege, the two parts have to be separated if this does not adversely affect the probative force. In the latter case, the document cannot be separated, and the court is entitled to define which parts thereof fall under legal privilege. The storing device, containing the document, is given to the authority, but the device may be opened and the part of the document to which the authority can have access according to the ruling of the court, may be examined only in the presence of the party. If the forensic image of a data carrier contains the priviliged information to be separated, the separation is carried out by using a copy of the forensic image, and later the copy (or the relevant part thereof) is used in evidence.

4. General attitude – openness

Firms / law firms turn to the GVH for informal consultation mostly in merger cases, but it may occur in relation to agreements as well. Originally GVH used to be averse from any informal contacts, but recently it became more open towards them when formal proceedings is not in progress. These informal consultations tend to be useful in general as well as instrumental in improving the effectiveness and efficiency of subsequent case handling for both sides, especially in pre-merger notification phase. Nevertheless, the GVH is careful, especially when there is a prospect for subsequent formal proceedings.

When a formal proceedings is already in progress, the GVH inclines to be rather cautious regarding informal contacts. In the course of the investigation, the informal contacts are limited to "putting oil on the mechanics" of the procedure, e.g. to clarify certain technical details of formal data request (sometimes case handlers prepare notes even about these conversations), occasionally the likely timetable of the proceedings, or the application of commitments or remedies. As the burden to ascertain the facts of the case properly is on the authority, the direction of the investigation, the measures to be taken – including their content and sequence – are designed by the agency even if considerations of the parties may be taken on board when they are thought to be relevant and contribute to the effectiveness and efficiency of the proceedings. Besides, the GVH does not comment or make public statements on pending cases other than the facts of the case and in certain cases the broad reasons why the case was launched.

5. Publication of decisions and closing statements

The Competition Act requires the publication of resolutions, which are the decisions brought by the Competition Council on the substance of the case. The resolutions have to be published irrespective of the pending court review (but in the public disclosure the GVH must indicate whether the decision is final or under court review). The disclosure of other decisions closing a case (these can be commitment decisions or orders terminating the proceedings), either by the investigator or the Competition Council, is also possible under the Act. In case the information on the opening of an investigation was published, the result must also be published.

In practice, the GVH is open to the public in this respect and makes announcement both on the starting and on the closing of its proceedings, irrespective whether it is an enforcement or a commitment decision, or a decision establishing that the investigation is closed owing to lack of evidence or public interest. Besides the public announcement, the decisions themselves – together with the final judgement of the court if a decision of the GVH has been contested –are published on the website. Before publication, the decisions should be cleared from all business secrets and other confidential data, and be anonimised to protect personal data.

ITALY

1. Introduction

The Italian Competition Authority (ICA) is an independent administrative body and the only agency in charge of enforcing competition rules. Italy's judicial regime is based on a civil law system and so the ICA is subject to full administrative judicial review by both a first-instance court (the regional administrative court of Lazio – Rome region) and a second-instance court (the Supreme Administrative Court). The Italian Constitution, reformed in 1999, has explicitly introduced the principles of due process: "…all court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials" (Article 111). As a consequence, fairness and transparency are fully embodied in antitrust proceedings, with a special emphasis on the parties' right to full hearings where they can challenge any evidence gathered by the Authority. It also important to stress that under Italian antitrust legislation, the proceedings managed by ICA can only be addressed to companies ("juridical persons") and not to individuals ("physical persons").

The Competition Act of 1990 (n. 287) sets out the substantive standards in relation to both anti-competitive behaviour (cartels and abuses) and merger review. It also empowers the Authority to run market studies when specific competitive concerns arise in a particular sector of the economy.

The Competition Act stipulates the main elements of antitrust proceedings and defence rights: the right to a full hearing, both written and oral, which implies the parties' right to a formal hearing, both when the investigation is formally launched and before it ends and the right to submit relevant information and opinions to the Authority, at any time during the investigation.

Full access to the files, hearing procedures and minutes are specifically regulated under a single piece of legislation (Presidential Decree n. 217, amended in 1998). The Authority has also issued procedural guidelines, in the areas of merger review (2005), commitments (2006) and leniency applications (2007). Legislation and guidelines on procedures concern investigations on abuses of a dominant position, anti-competitive agreements, mergers and market studies. They were published on the Official Journal and are available on the ICA website in both Italian and English.

2. Antitrust proceedings and ICA's procedures and practices

The ICA enforces both Italian law and, where applicable, European Union legislation concerning anti-competitive agreements and abuses of dominant position, whereas procedural aspects are defined only at the national level.

In general, an investigation is made of two parts: a preliminary investigation which starts when the Authority receives a complaint or decides to collect data on its own initiative (phase 1); and formal proceedings, which start after sufficient evidence is gathered, the Authority identifies possible antitrust infringements and informs the parties in writing of the alleged anti-competitive conducts and their factual basis (phase 2).

During phase 1, the subjects of preliminary investigations are not advised of the ongoing activities. This is necessary in order not to jeopardize possible phase 2 investigations that may involve "dawn raids". In phase 1, the ICA does not have any specific investigative powers, for instance, to oblige third parties to provide relevant information or to seize documents on a company's premises.

Should a case go phase 2, the subjects of the investigation are informed in writing of the Authority's decision that sketches the main factual and legal aspects of the case. Typically, the decision contains:

- the legal basis of the proceedings (Italian or EU legislation);
- the parties involved in the investigation;
- the legal context in which the alleged behaviour has taken place;
- a description of the suspected anti-competitive conduct(s);
- an economic and legal analysis of such conduct(s);
- the relevance of such conduct(s) for antitrust law;
- the name of the officer responsible for the proceedings;
- the deadline for the first hearing (60 days, 10 days for merger investigations);
- the procedure to access the documents and
- the duration of the investigation (usually one year for cartels and abuses).

3. Meetings and hearings

3.1 Anti-competitive conducts

When the Authority decides to open an investigation, a written decision is sent to the parties involved. The decision contains the elements described above under point 8 and becomes public immediately after the parties are notified. Some sensitive data may be omitted in the public version that appears on the Authority's website.

After receiving this document, the subjects of an investigation have the right to be heard within 60 days by the investigating officers. In merger cases the deadline is only 10 days since the Competition Act limits to 45 days the duration of phase 2 merger reviews. At the hearing, the company's lawyers (internal or external) may assist the subjects under investigation in the discussion with the Authority's officers that are responsible for the case. There may be several hearings between the parties and the investigating officers, at the request of either side.

The hearings are recorded and a summary of what was said during the hearing is prepared and signed by both the hearing officers and the parties' representatives. Between six and eight months after initiating the proceedings, the Authority issues a statement of objections that is sent to the parties and is not disclosed to the general public. This statement contains a detailed description of all the relevant facts, legal aspects and economic theories. The parties then have between 30 to 60 days to prepare their written replies.

The parties also have the right to a final hearing before the ICA Board, which usually takes place one month before the final decision is issued. During this hearing, both the parties and the case handlers have the possibility to submit their arguments; the Authority's board has the right to ask questions and for further information on specific aspects of the investigation that may not yet be clear.

The final hearing is not public and follows the same procedure as the other hearings (summary record of statements, the parties may be assisted by internal or external lawyers, the parties have the right to speak last and not to accuse themselves of the alleged anti-competitive conduct).

Since May 2004, when EC Regulation 1/2003 entered into force, the Authority may also impose **interim measures** whenever the competitive conditions are such that waiting until the end of the ordinary investigation may have irreparable effects, like the elimination of competition in a particular market.

In such cases, the deadlines for holding hearings and submitting written statements are much shorter in order to reach a decision within a reasonable amount of time. Whether or not the Authority decides to adopt an interim measure, the ordinary proceedings continue according to the timeframe stated in the initial decision to open the investigation.

3.2 Mergers

Merger notification procedure allows the merging parties to contact the Authority at least 15 days before submitting a formal notification of the proposed merger.

The parties can submit some basic information concerning the merger to the relevant industry department of the Authority to discuss issues of potential antitrust concern. The aim of such discussion is to give the parties an opportunity to better explain complex mergers and to make them aware of the information needed by the Authority in order to assess the proposed merger.

After a formal merger notification, the Authority may decide within 30 days that the merger does not pose any anti-competitive threat and will therefore close the file. Otherwise, always within the 30-day period, the ICA may deem necessary to open a 45-day long formal investigation on the merger. Should this happen the parties will have the same rights as for cartel or abuse of dominance cases (see point 9 and following), but the timeframe is much shorter to allow for a fast decision by the Authority.

4. Access to files

Access to files is crucial for the parties' defence strategy. Differently from other jurisdictions, immediately after the decision to start an investigation is communicated to the parties, they have the right to access the file, copy all documents they are interested in and submit written statements and opinions on file documents.

The case handlers have the right to postpone the access to specific documents when, for instance, they need to assess a confidentiality request from a third party. Access may be postponed until the statement of objections, but documents can only be marked as confidential and inaccessible to the parties if they are not used as a proof of the infringement. In other terms, all documents (or parts of documents) used as evidence of anti-competitive conduct must be accessible to the parties of an investigation for their defence purposes.

5. Duration of investigations

As previously mentioned, cartel and abuse cases usually last 12 months. The deadline is clearly stated on the Authority's decision which is notified to the parties of the investigation. The deadline can be postponed either at the parties' request or when the Authority realizes that more time is needed to properly

assess the evidence. When the deadline for the final decision is postponed, the Authority issues a new decision announcing the new deadline. The decision contains the reason for postponing the conclusion of the proceedings, is notified to the parties and published on the official website.

In merger cases, the duration of the investigation is limited to 45 days, and can be extended for an additional 30 days whenever significant evidence needs to be gathered in order to take an informed decision by the Authority's board.

6. Publication of decisions

All decisions issued by the Authority's board are public, whether they are against or in favour of the parties involved. The decision also contains a detailed summary of all the arguments submitted by the parties, as well as the counter-arguments by the Authority. Commitment decisions and decisions with interim measures are also published. The commitments submitted by the parties and accepted by the Authority are published in full and are part of the final decision.

Although final decisions are taken by a majority vote, any dissenting opinions by one or more Commissioners are not made public.

JAPAN

1. Introduction

Since the Antimonopoly Act ("AMA") is the basic rule of economic activities, it must be enforced with continuity and consistency by a neutral and fair institution. In this regard, Article 28 of the AMA stipulates that "the chairman and the commissioners of the Fair Trade Commission shall perform their authority independently." The chairman and commissioners shall be appointed by the Prime Minister with the consent of both Houses of the Diet among persons who have knowledge and experience in law or economics (Article 29 of the AMA) and, in principle, the chairman or the commissioners may not, against their will, be dismissed from office while they are in office (Article 31 of the AMA).

As regards procedure on investigation against anticompetitive conduct (non-business combination) and procedure on review of business combination, other than the provisions of the AMA, the Japan Fair Trade Commission (JFTC) publishes various rules[1] and guidelines to strive to ensure fairness. When the JFTC intends to establish or revise a rule or guidelines, it conducts a public comment procedure on the draft and compiles an English version.

In this paper, we would like to introduce both (i) procedure on investigation against anticompetitive conduct (non-business combination) and (ii) procedure on review of business combination.

2. Procedure on Investigation against Anticompetitive Conduct

2.1 Ensuring Fairness by the AMA, the Rules and Guidelines

From the viewpoint of procedural fairness, in addition to the procedural provisions of the AMA (Section 2 of Chapter 8 (Article 45 to 70-22)), the JFTC has prescribed "Rules on Administrative Investigations by the Fair Trade Commission" (Investigation Rules) to strive to ensure the fairness of the investigation procedure.

The JFTC also publishes various guidelines to clarify the enforcement standards of the substantial provisions of the AMA, as well as to enhance transparency. Recently, to accompany an amendment of the AMA that added Exclusionary Private Monopolization and certain Unfair Trade Practices to the scope of surcharge payment orders, the JFTC published the "Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act" [2] and revised the "Guidelines Concerning Unjust Low Price Sales under the Antimonopoly Act."

In addition, the JFTC publishes a press release when it takes a legal measure or issues a warning and, regarding a caution and a closure of a case, also when it considers the case should be made public from the

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1 In establishing rules with respect to the proceedings of cases, the JFTC shall keep in mind the need to ensure that the said proceedings are duly undertaken, including ensuring that the respondent has sufficient opportunity to state and prove his/her claims, etc. (Article 76 (2) of the AMA).

2 http://www.jftc.go.jp/e-page/pressreleases/2009/October/091028.pdf

viewpoint of competition policy and the concerned party(ies) consent to the publication or the suspected violators want to make it public.

2.2 Investigation Procedure (See Annex 1)

In the investigations the JFTC carries out to find proof of violations of the AMA, there are "administrative investigations" and "compulsory investigations of criminal cases." When the compulsory investigation procedure was introduced by an amendment of the AMA in 2005, the administrative investigation procedure was also completely reviewed, then, the Investigation Rules and others were amended.

2.2.1 Procedure on administrative investigation

Administrative investigation

The JFTC is vested the authority of compulsory measures to carry out necessary investigations against suspected violations by the provisions of the AMA. This authority includes on-site inspections to the premises of entrepreneurs, etc., orders to submit the related materials, retention of the submitted materials, appearance orders and interrogation, and report orders (Article 47 of the AMA). In practice, the investigators appointed by the JFTC carry out investigations by using such authority. This authority of compulsory measures is the so-called indirect compulsory authority, that is, when a person does not obey the measure, he/she will be punished.

Notification on suspected violation

The investigator shall, when carrying out an on-site inspection, make available the document stating "Title of the case", "Main points of the alleged fact violating the provision of the Act" and "Applicable provisions of the Act" ("Notification on Suspected Violation") for the concerned persons (Section 20 of the Investigation Rules).

The "Title of the case" is decided from the viewpoint to clarify the scope of the suspected violator(s). It contains (i) the type of business of the suspected violator(s) (E.g. manufacturer, wholesaler, retailer, etc.), (ii) the concerned good(s) (and/or service(s)) (E.g. cathode ray tubes for televisions) (for cartel cases) or the name(s) of suspected violator(s) (for unilateral conduct cases) in general.

The "Main point of the alleged fact violating the provision of the Act" is described as a short summary of the suspected violation and is based on the requirements of a violation of the AMA.

The "Applicable provisions of the Act" is concentrated on Article 3 (prohibition of private monopolization and unreasonable restraint of trade (cartel)) and Article 19 (prohibition of unfair trade practices) among the substantial provisions of the AMA. The JFTC tries to identify one applicable provision for each case; however, as regards unilateral conduct cases, sometimes the JFTC has to describe both Article 3 (prohibition of private monopolization) and Article 19 (prohibition of unfair trade practices).

In practice, at premises subject to the on-site inspection, the investigator refers the notification to the representative of the said premises at the beginning of the inspection. By this notification, the concerned persons are informed for the first time of the alleged fact violating the provision of the AMA.

This procedure was introduced by the complete amendment of the Investigation Rule in 2007 to ensure the concerned persons' right of defense.

When taking the above measures (submission order, etc.), the investigator shall take measures by serving the stipulated document that indicates the "Title of the case", "Requested matters" and "Penal provisions of the Act in the event of default" (Section 9 of the Investigation Rules).

If dissatisfied with the said measure, any person who was subject to the measures may make a motion for objection to the JFTC by a document stating the grounds (Section 22 of the Investigation Rules).

Cease and desist order

As a result of an investigation, if a violation of the AMA is found, the JFTC issues a cease and desist order to eliminate the violation (Article 49, Article 7, etc., of the AMA). From the viewpoint to ensure procedural fairness, the AMA stipulates that when the JFTC intends to issue a cease and desist order, in advance, it shall notify the expected content of the order, etc. ("Advance notification"), and shall provide the person who is to be the addressee of the cease and desist order an opportunity to express opinions and to submit evidence (Article 49 (3) to (5) of the AMA).

Advance notification is served by a document stating the matters, including the "tentative content of the cease and desist order," "the facts found by the JFTC and the application of law thereto" and "the opportunity to present his or her opinions in writing and to submit evidence in support thereof to the Commission and the deadline therefore" (Section 24 (1) of the Investigation Rules).

The JFTC may, when recognizing that there is justifiable reason, extend the deadline upon its own motion or upon application (Section 24 (2) of the Investigation Rules).

When a person who received the notice or an appointed representative makes a motion, and when there are other necessities, the investigator shall explain the description of the document (Section 25 of the Investigation Rules).

A person who received the notice may state opinions and provide evidence in writing. The JFTC may, when recognizing that there is a particular necessity, have the person state his or her opinion orally (Section 26 of the Investigation Rules).

Surcharge payment order

If a violation corresponds to unreasonable restraint of trade, such as price fixing, bid-rigging, etc., or, private monopolization or certain types of unfair trade practices[3], the JFTC issues a surcharge payment order (Article 7-2 etc. of the AMA). As regards a surcharge payment order, concerned persons will be given the notification on the expected content of the order and an opportunity to express their opinions and to submit evidence in advance, as well as a cease and desist order (Paragraph 6 of Article 50 of the AMA). The amount of surcharge is calculated based upon the sales amount related to the violation and certain rates which are set depending on the types of the violation, the types of business and the scales of the concerned person.

2.2.2 Procedure on compulsory investigation of criminal cases

Compulsory investigation of criminal cases

[3] When the amendment of the AMA took effect on January 1, 2010, private monopolization and certain types of unfair trade practices (Unjust low price sales, Discriminatory pricing, Concerted refusal to trade, Resale price maintenance and Abuse of dominant bargaining position) became the scope of conduct subjected to surcharges in addition to existing unreasonable restraint of trade and control monopolization.

An amendment of the AMA in 2005 introduced the procedure on compulsory investigation of criminal cases. The JFTC may execute authority for compulsory investigation against cases suspected to correspond to criminal accusation, and conduct investigations through visits, searches, seizures, etc., by obtaining a warrant from the judicial court (Article 102 and 103 of the AMA). The JFTC shall file an accusation with the Prosecutor General if, as a result of an investigation, a violation corresponding to an accusation is found (Article 74 of the AMA). The introduction of the procedure on compulsory investigation of criminal cases aimed to enhance the evidence-collection ability of the JFTC, as well as its ability to appropriately conduct an investigation against cases suspected of corresponding to criminal accusations based on a warrant.

Criminal penalties

Any person (a director, an officer or an employee of a judicial person) that has affected unreasonable restraint of trade or private monopolization shall be punished by imprisonment of no more than five years or by a fine of no more than five million yen (Article 89 of the AMA). Also, the said judicial person shall be punished by a fine of no more than 500 million yen (Article 95 of the AMA). Criminal punishment shall be imposed only when a criminal accusation is filed by the JFTC. The JFTC has a policy to prosecute the cases where administrative measures are not enough to attain their objectives, such as vicious and serious violations or repeated violations.

3. Procedure on Review of Business Combination

3.1 Securing transparency by guidelines, etc.

The JFTC publishes the "Guidelines to Application of the Antimonopoly Act concerning Review of Business Combinations" to improve transparency and predictability regarding the review of business combinations. These guidelines illustrate (i) the categories of business combinations that are to be reviewed, (ii) the criteria for defining a market, (iii) the meaning of "may be substantially to restrain competition", (iv) the analytical framework and the criteria for assessing whether a business combination may be substantially to restrain competition and (v) the examples of remedies.

On the other hand, in many cases, the parties voluntarily hold prior consultations with the JFTC in advance of prior notifications to avoid risks, such as blocking of the merger. (i) To ensure the transparency and fairness of prior consultations are the same as for the statutory procedures, and (ii) to enhance the predictability of the judgment in business combination reviews, the JFTC published "Policies dealing with Prior Consultations regarding Business Combination Plans" ("Prior Consultation Policies") in December 2002.

In addition, the JFTC publishes details of the review on some cases among those in which notification has been accepted or prior consultation has been made and which are thought to be helpful as a reference to entrepreneurs planning business combinations.

3.2 Prior consultation (See Annex 2)

3.2.1 The initiation of prior consultation

When parties apply for prior consultation concerning business combination plans, as a general rule, within 20 days from the day on which materials showing the concrete contents of the business combination plans are submitted, if the JFTC determines that additional materials are not required, then it shall provide notice of such, and in the event that it deems that additional materials are required, the JFTC shall present a list of additional materials in writing. In order to smoothly initiate prior consultation, the parties, before applying for prior consultation, can make inquiries to the JFTC concerning the general outline of the AMA

and the content of the materials showing the concrete contents of business combination plans, etc. (3 (1) of the Prior Consultation Policies).

The parties shall be able to submit any materials or written opinions, etc., that they believe should be tendered, not only at the time of initiating prior consultation, but at any time during the JFTC's review process (3 (2) of the Prior Consultation Policies).

3.2.2 Phase I review

From the day on which notice is provided to the parties that they are not required to submit additional materials, as noted in a. above, or from the day that additional materials are submitted in the event that a list of additional materials is required, the JFTC shall commence the review (this is referred to as the "Phase I review"), and will, as a general rule, within 30 days, either notify the parties that the business combination plan has no issues relating to the AMA or that a further detailed review (this is referred to as the "Phase II review") is required (3 (3) of the Prior Consultation Policies).

In the event notice is given that a phase II review is required, the JFTC will, having identified the products and the geographic scope that will become the subject of the review, explain the specific points at issue concerning the AMA and request the submission of concrete materials which are judged to be required to undertake a phase II review (4 (1) of the Prior Consultation Guidelines).

3.2.3 Phase II review

Following notice to the parties that a phase II review is required, the JFTC will initiate a phase II review. From the day on which the parties submitted the concrete materials requested, as noted in b. above, the JFTC will, as a general rule, within 90 days, respond in writing on the results of the phase II review, including the reasons for those results, and make a public announcement of the results (4 (2) e of the Prior Consultation Policies).

In the event that said plan is a non-public plan, the parties are required to undertake to make a public announcement of said plan because the JFTC needs to conduct interviews with suppliers, etc., during the phase II review (4 (2) b of the Prior Consultation Policies).

Following notice to the parties that a phase II review is required, and after the parties have undertaken to make a public announcement of the non-public plan, the JFTC will make a public announcement that a phase II review will be conducted in relation to said business combination plan. After the JFTC has made a public announcement that a phase II review will be conducted, any persons who hold an opinion in relation to said business combination plan may, within 30 days, submit their opinions in writing to the JFTC (4 (2) b and c of the Prior Consultation Policies).

In the event that the JFTC seeks to provide notice of problems with said business combination plan in relation to the provisions of Chapter 4 of the AMA during the phase II review process, then the JFTC shall provide the basis (certification of facts asserted by the parties, and the results of investigations, analyses, or surveys conducted by the JFTC) for the judgment that there is a problem, with the exception of parts which cover the business secrets of other companies (4 (2) d of the Prior Consultation Policies).

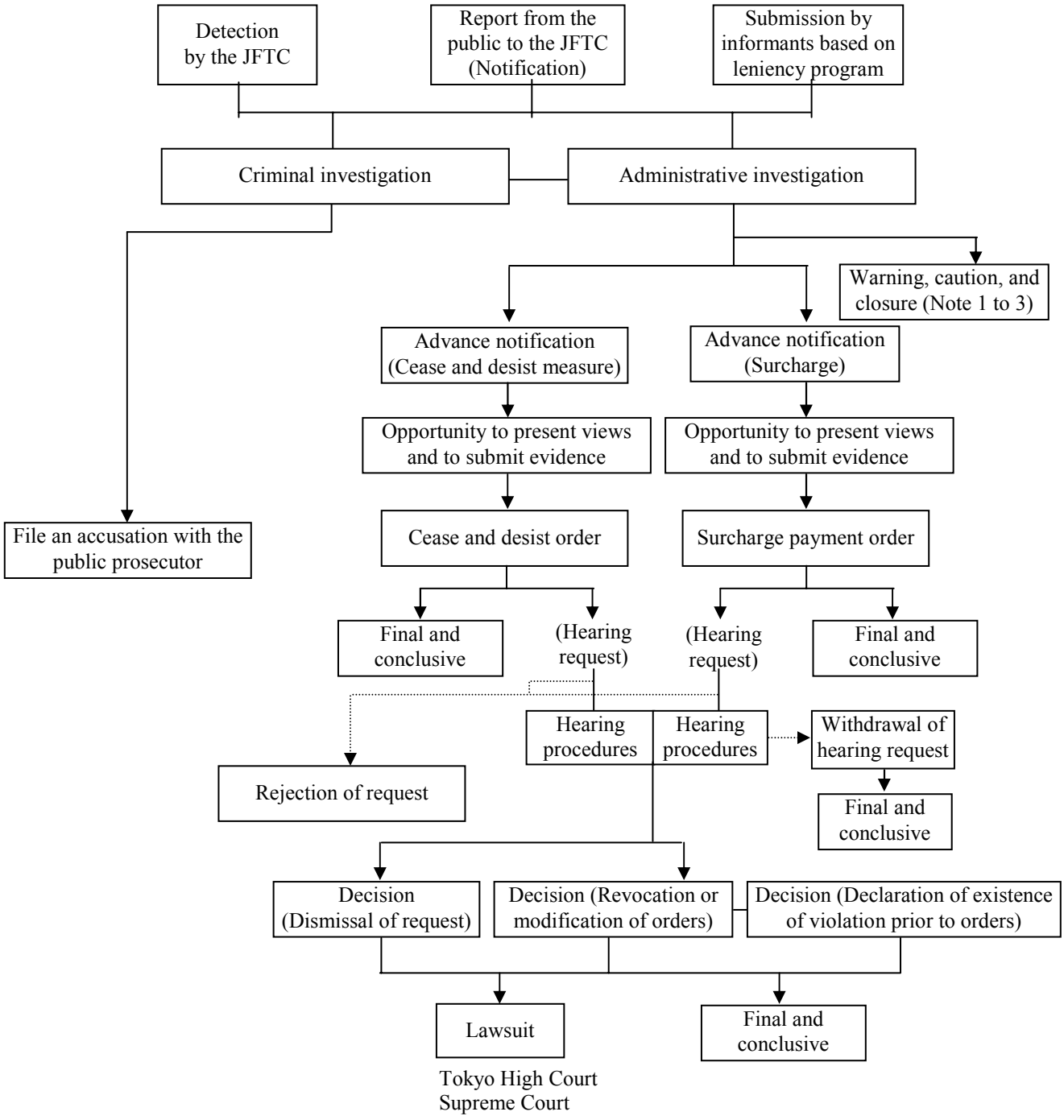
3.3 Statutory proceedings (See Annex 3)

The JFTC shall judge whether it should request the parties to submit additional information or whether there is no problem in light of the provisions of the AMA within 30 days from the acceptance of a notification on a business combination, such as a share acquisition, merger, etc. Also, the JFTC shall judge whether there is any problem in light of the AMA, either 90 days from the acceptance of any additional

information necessary for the review, or 120 days from the acceptance of the original notification, whichever is later (Article 10 (9), Article 15 (3) etc. of the AMA). If any problems exist in light of the provisions of the AMA, in advance, the JFTC notifies the parties and gives them an opportunity to present views and to submit evidence, then issues a cease and desist order, such as blocking of the business combination (Article 17-2 of the AMA). Provisions regarding advance notification and an opportunity to present views and to submit evidence are the same as for cease and desist orders in the procedure on administrative investigations for non-business combination (See above).

ANNEX 1

PROCEDURE ON INVESTIGATION AGAINST ANTICOMPETITIVE CONDUCT



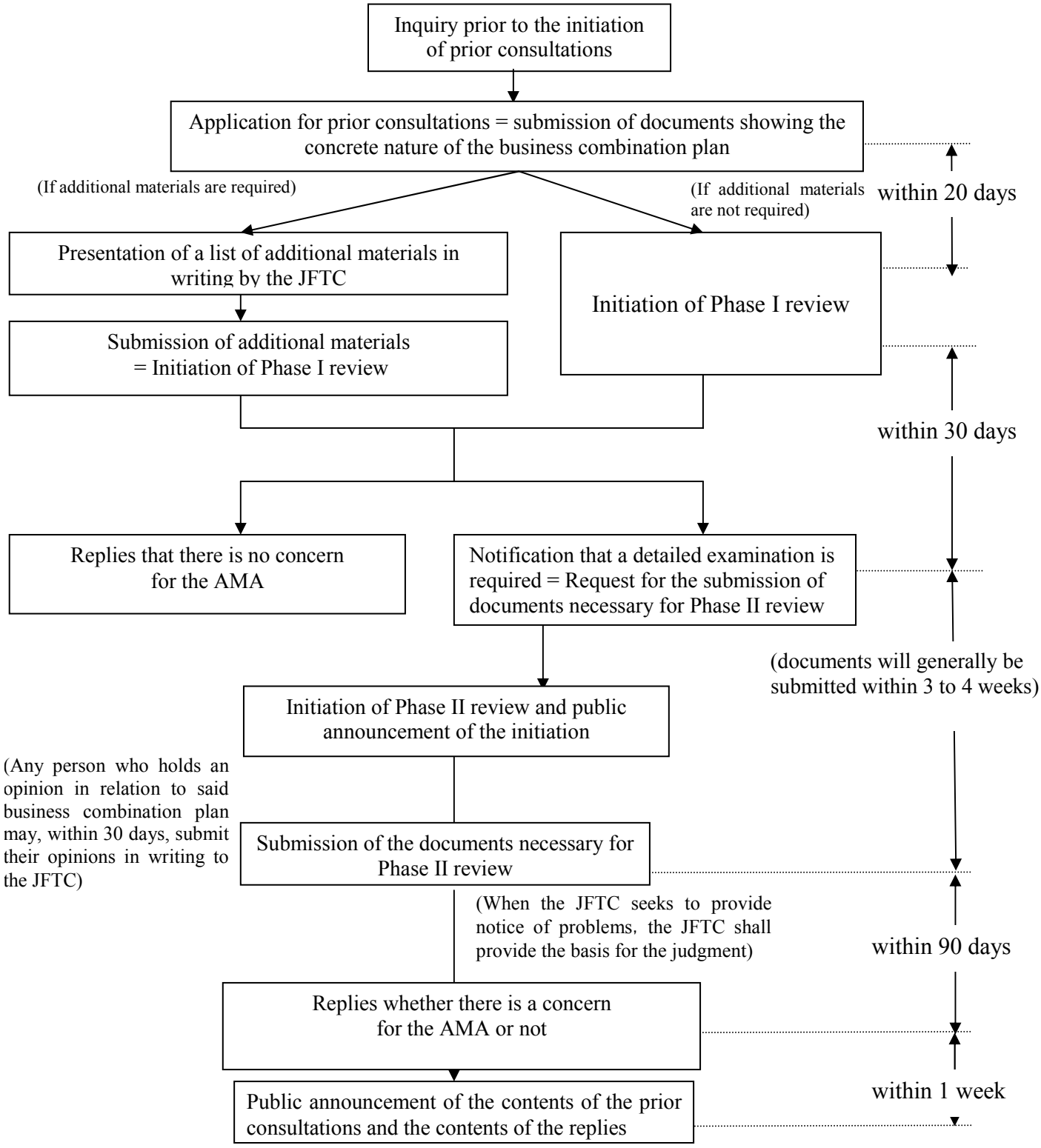
(Note) 1.Warning:A case where there is no evidence to take a legislative measure but where there is a suspicion of violation

2.Caution: A case where there is no evidence to suspect the existence of violation but where there is a possibility that could lead to violation in the future

3.Closure: A case where the investigation is terminated because there is no conduct violating the Antimonopoly Law

ANNEX 2

PROCEDURE ON REVIEW OF BUSINESS COMBINATION: PRIOR CONSULTATION

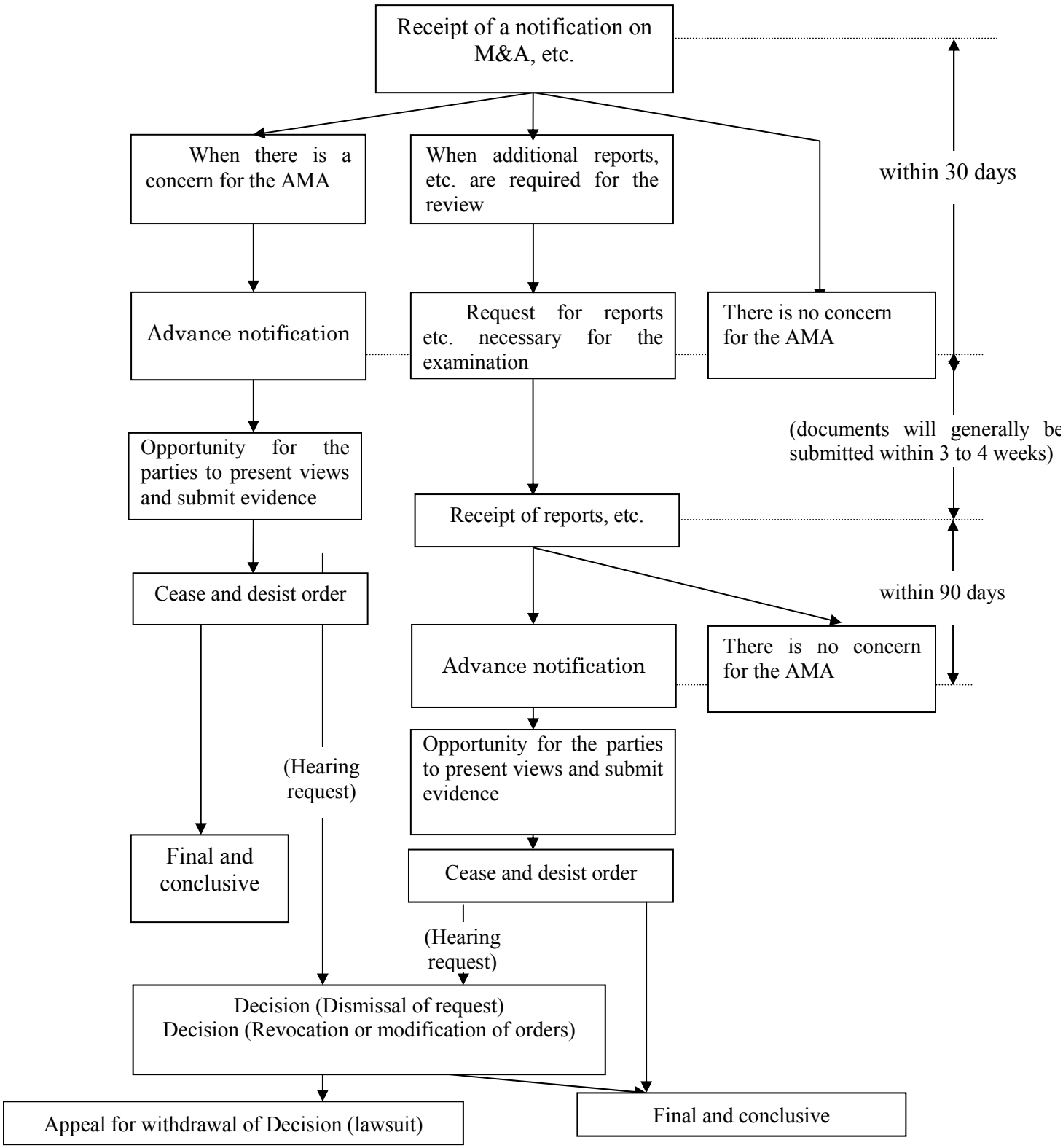


Note 1: The parties shall be able to submit any materials or written opinions, etc. that they believe should be tendered at any time during the JFTC's review process.

2 : In the case that the JFTC replies that there is problem in light of the provisions of the AMA, when the parties offers remedial measure, the JFTC will reply with taking account the contents of such an offer.

ANNEX 3

PROCEDURE ON REVIEW OF BUSINESS COMBINATION: STATUTORY PROCEEDINGS



KOREA

1. Introduction

Ensuring due process of law is a basic requirement to realize the rule of law. Particularly in a violation case of the competition law[1], there is a strong need to provide the concerned parties with an adequate and fair opportunity to make their own arguments, since a fierce debate on legal and economic issues often arises and even experts are divided on whether the concerned act infringes the competition law in the course of handling a case.

Recognizing this, the Korea Fair Trade Commission (KFTC) has continued to make effort to ensure further transparency, fairness and efficiency in the procedures of dealing with a case.

This report introduces the KFTC case-handling system and institutions to ensure fairness and transparency in the process of dealing with a competition law case.

2. Regulations concerning KFTC case-handling system

Case-handling procedures of the KFTC are governed by the "Monopoly Regulation and Fair Trade Act" (hereinafter referred to as the "Act"), its enforcement decree and "Regulation on Operation of KFTC Meetings and Case-handling Procedures" (hereinafter referred to as the "Regulation").

The basic aspects of the case-handling are stipulated in the Chapter 9 (Enforcement Agency) and 10(Investigation Procedures and Other Related Matters) of the" Act" while technical and specific matters are governed by the "Regulations". These provisions apply in the cases of merger as well as cartel conspiracy or unilateral act.

3. KFTC case-handling procedures

The KFTC handles a case in procedural order of (i) origin of the case, (ii) investigation/examination by an official designated as an Examiner and (iii) deliberation/decision by the Committee. (Please refer to Appendix for the detailed case-handling procedure).

3.1 Origin of the case (detection of legal violence)

The KFTC can investigate cases *ex officio* where there is a suspicion of violation against the competition law. In addition, any person who believes that violation of the law has occurred may submit complaints to the Commission (Article 49.1 and 2 of the Act).

If the KFTC detects unlawful anticompetitive activity or receives a complaint concerning such activity, it conducts a preliminary examination to decide whether the case is subject to an investigation by

[1] Other than the "Monopoly Regulation and Fair Trade Act (MRFTA)", 11 laws are enforced by the KFTC. However, case handling procedures are governed by the MRFTA, which regulates essential parts of the competition law such as market dominance abuse or cartel conspiracy. The procedures applied to violations of other laws are the same as the MRFTA.

the KFTC. Unless the preliminary examination finds the case fits into such occasions where it is not subject to KFTC enforcement or the complainant withdraws the complaint as set forth in Article 12 of the Regulation, the KFTC proceeds to investigate and examine the case (Article 11.1 of the Regulation).

3.2 Investigation and examination report

Once the examination on a case is launched, an official designated as an Examiner conducts investigation to collect evidence on the alleged violation and assesses the conduct based on the applicable law. For this, the investigation officers from the KFTC may conduct on-site investigation at an office or business place of the relevant company or business association to examine their business and management status, account books, documents and others, and take statements from the parties subject to investigation or interested parties under Article 50.2 of the Act. Also, the examiner may order the concerned company, business association or their executives to submit documents or other materials deemed necessary for the investigation and detain them in accordance with Article 50.3 of the Act.

In the case where the investigation finds violation of the law and, consequently, corrective measures - corrective order, surcharge, the filing of a complaint with the prosecution or other sanctions - are considered necessary, the examiner draws up an Examination Report and files them with the Committee of the KFTC[2] [3]. The Examination Report shall be served to the defendant as soon as it is presented to the Committee.

The report shall include overview on the case (the defendant, factual evidence, investigation background, etc.), structure and condition of relevant markets, factual statement of committed act and its anti-competitiveness, laws and provisions alleged to be violated, the Examiner's suggestions on the measures to be taken against the violation and other relevant documents as attachment (Article 29.1 of the Regulation).

3.3 Committee proceeding (hearing)

After an Examination Report is filed, hearing is carried out in either a "plenary session" where all of the nine commissioners participate or a "chamber session" where the three of them are present, depending on the significance of the case. A plenary session convenes[4] for cases of significant economic impact, re-hearing cases, and cases on which resolutions have not been made in a chamber or which a chamber has decided to refer to a plenary session (Article 4 of the Regulation). Other cases not handled in a plenary session are presented to a chamber session.

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2 If the Examiner found that administrative penalty is not required, the Examiner has authorities to end the procedure or issue a warning.

3 If a case is referred to a chamber session and its corrective measures does not contain surcharge or bringing the case to the prosecution, the hearing can be conducted through simplified procedure. The simplified procedure is carried out in the written format for the cases in which the agreement is made on the committed act and measures to be taken against the offense between the Examiner and the defendant (Article 28 and 60 of the Regulation). Such cases do not need to go through hearing in the oral format that requires lots of time and efforts. Nevertheless, if the chairman of the chamber deems that a different decision from the Examiner's suggestions on corrective measures needs to be made for the case, it may be referred to the official hearing despite the consent (Article 63 of the Regulation).

4 Matters related to interpretation or application of laws/rules/notice and legal enactment or amendment are also submitted to a plenary session.

In principle, the case presented to the Committee is referred to a hearing within 30days after replies of the defendants are received (Article 31 of the Regulation). The date of the hearing is notified to the defendant at least five days before the hearing according to Article 33 of the Regulation.

Procedures of hearing are similar to those of public trials, which proceed in the presence of Examiner and defendant. The proceedings involve identification questioning, opening statement, interrogation, the Examiner's suggestion on the corrective measures, closing statement (Article 34 through 43 of the Regulation). The detailed procedures are as follows;

- The chairman declares the opening of a hearing and identifies the involved parties. (Identification Questioning).
- After the Examiner outlines the Examination Report, the defendant (or his/her representative) replies to the Examiner's report (Opening Statement).
- Commissioners question the Examiner and the defendant on relevant facts to verify the anti-competitiveness of the activity (Interrogation).
- The Examiner states its suggestion as to corrective measures against the defendant.
- The defendant makes a final statement on the suggested corrective measures of the examiner (Closing Statement).

3.4 Deliberation by the committee

After the hearing, commissioners make a decision on measures to be taken against the defendant by agreement. If it is determined that there was a violation of the law, the committee may take corrective measures, impose surcharges or refer the case to the prosecution, but if not, the defendant will be free of suspicion. If it is decided that the defendant violated the law, but the violation is negligible, the committee may issue a warning.

3.5 Written decision

In the case where the defendant faces penalty (corrective measures, surcharge, and filing to the prosecution) for the violation, the written decision is served to the defendant explaining in detail the penalty imposed on the defendant and the grounds for such determination.

3.6 Appeal against the KFTC Decision

3.6.1 Filing for re-hearing and suspension of enforcement

A defendant who is dissatisfied with the decision by the KFTC may file a request for re-hearing to the KFTC within 30 days from the receipt of the written decision in accordance with Article 53.1. As this procedure is optional, the person may skip this process and directly appeal the decision to the court. As to a case requested for re-hearing, the KFTC shall hold a new hearing and make a decision within 60 days, but it can extend the decision-making period up to 30 days according to Article 53.2 of the Act.

3.6.2 Filing a lawsuit

In the case where the person wants to file an appeal to the appellate court, the person shall file a lawsuit to the Seoul High Court within 30 days from the receipt of a written decision or re-hearing result according to Article 54 and 55 of the Act.

4. Institutions to ensure fairness and transparency in case-handling procedures

4.1 Outline of institutions in force

As mentioned above, the KFTC has been fully committed to ensuring further fairness and transparency in case-handling procedures.

For example, several institutional improvements were made to case handling procedures based on discussions of a task force set up (for such purpose) in 2004, 2006 and 2008 comprising lawyers, legal scholars, economists and other outside experts. The cases in point are introducing extended hearing system (2004) and preparatory procedures for hearing, expanding the scope of documents accessible to a defendant to include supporting documents and Examiner's suggestion on corrective measures (2007, 2009), and providing further protection of confidential business information submitted by a defendant (2009).

4.2 Functional separation of investigators and decision makers

The KFTC consists of the Committee, which is a decision-making body, and the Secretariat, the body responsible for investigation and indictment.

In principle, the Committee does not engage in any investigation procedures. Instead, the Committee, which comprises nine commissioners, conducts hearings and deliberates on cases in plenary and chamber sessions. Any administrative measures of the KFTC such as corrective orders, surcharge and others should be imposed by the final deliberation of the Committee.

The Secretariat, on the other hand, is in charge of investigation and drafting & filing of the Examiner's Report to the Committee in accordance with Article 50.2 of the Act. The Secretariat, a hierarchical organization led by Secretary General, was established for administrative and investigative tasks according to Article 47 of the Act. Secretary General designates a director general of the headquarters or a head of a regional office as an Examiner in charge of a case investigation and the designated Examiner produces an Examination Report on the allocated case, which is subsequently filed to the Committee. The Committee then conducts the decision-making process in the form of adversarial proceedings (explained in 4.4.2).

4.3 Ensuring transparent investigation

4.3.1 Prior notification of investigation plans

An investigator shall conduct investigation within the minimal scope of the authority deemed necessary for competition enforcement (Article 50.2 of the Act). In the case where the investigator carries out on-site investigation at the place of business, he/she shall give advance notification in writing informing the defendant of the purpose, period and place of the investigation. The investigation shall be carried out within the purpose and period set forth in that notification. In addition, the investigator shall show the concerned person a certificate indicating his/her authority for the investigation (Article 50.4 of the Act).

Where the concerned company is ordered to submit documents or materials necessary for the investigation, a written order for the submission shall be sent to the company (Article 15 and 17 of the Regulation).

4.3.2 Contact between investigator/examiner and defendant

There is no such regulation that prevents the defendant from officially contacting the investigator or the Examiner or presenting opinions in the course of the investigation. The contact between the investigator/the Examiner and the defendant is usually made in an office, investigation room or conference room.

However, specific violations, the level of evidence or other details are not revealed to the defendant during the investigation in principle, so the defendant is to be aware of the suspected violation or investigation result when the Examination Report is served.

4.4 Ensuring fairness and transparency in hearing process

4.4.1 Offering supporting documents & opportunity to submit opinions

Upon the filing of an Examination Report to the Committee, the Examiner should serve it to the defendant as well and give the defendant sufficient time to reply to the report. The replies shall be submitted in written form.

The Report sent to the defendant is required to include attachments of supporting documents and reference data, which aims to ensure level playing ground for the defendant. Nevertheless, the Examiner may exclude insignificant materials or confidential information obtained from other businesses under Article 29 of the Regulation. In such case, the defendant may request the permission from the committee to read or copy the excluded documents (Article 29.2 of the Regulation).

Two weeks are given in principle for the defendant to reply to the Examination Report, but it can be adjusted flexibly depending on the situation. For example, where the parent company of the defendant is located in a foreign country or the case is complicated, the period can be prolonged. The defendant can also request the extension of the period.

4.4.2 Adversarial proceeding of hearing

To ensure fairness in the hearing, the KFTC adopted adversarial proceedings where the Examiner and the defendant are given the same status and have equal opportunity to present oral arguments on the committed act and its anti-competitiveness.

In addition, the defendant and the Examiner, if considered necessary, may request an examination of evidence or presence of witness or competition law experts as a person of reference to seek their opinions (Article 41 of the Regulation). In such case, the person of reference can be cross-examined.

4.4.3 Disclosure of hearing process and decision

The hearing process and decision of the KFTC is made public in general, but it may not be the case if there is a need to protect confidential information of the relevant company or business association (Article 43 of the Act). Disclosing the process of hearing and decision is an important tool to ensure transparency as the third party as well as interested parties can keep track of all the decision-making procedures.

4.4.4 Sufficient opportunity for expressing opinions

The KFTC provides the relevant parties sufficient opportunity through various policies like hearing preparatory procedures or extended hearing system to express their opinions orally as well as in writing.

Once the replies of the defendant on the examination report are submitted, the chairman of a session may allow hearing preparatory procedures to be conducted, if necessary for efficient hearing (Article 30.2 of the Regulation). During the preparatory session, main issues and evidence are reviewed thoroughly enabling the defendant to clearly understand arguments of the Examiner and to express opinions on them. It makes the overall hearing process more efficient, since the issues on which the two parties reach an agreement can be excluded from the hearing. For example, the case of Intel's market dominance abuse (2008) came to a conclusion through only two rounds of hearing, because the contentious issues were reviewed in the two written opinion exchanges and one round of preparation process.

Occasionally, hearing can be extended to the next round, if the case is found hard to produce the resolution in just one round of hearing. For instance, the cases of market dominance abuse by Microsoft (2005) and Qualcomm (2009) went through seven and six rounds of hearing respectively. Hearing can also proceed to the next round at the request of the concerned parties.

Furthermore, the KFTC provides simultaneous interpretation by installing interpretation booths at the request of foreign defendants or interested parties so that they can effectively exercise their defense right.

4.4.5 Protection of confidential information submitted by defendant

The KFTC prevents the business secret infringement in the course of hearing by implementing appropriate regulations. If the defendant wants to make statements including confidential information, he/she may present written statements which specify the scope of the confidential information and desirable measures for its protection at least five days prior to the opening of the session. If the request is accepted, necessary measures will be taken, for instance, ordering other defendants to leave the room temporarily while the protected information is presented to the Committee. The information regarded as confidential is excluded from the disclosed decision later on. (Article 40.2 of the Regulation)

Also hearing can be conducted separately for each defendant in the case where there is a need to protect confidential business information or identity of leniency applicants (Article 44 of the Regulation). This system has been actively utilized as the use of leniency application started to be promoted after 2005.

4.5 Decision disclosure and case-handling time limit

4.5.1 Disclosure of KFTC determination

Any person can access decisions of the KFTC through its website. In principle, the disclosed decision does not include personal information of the involved natural person - name, identification number, address and others - and confidential business information also can be excluded at the request of the relevant company.

In the case where it is determined that the defendant did not violate the law or faces just a warning, a written decision is not made, but still, the results and rationale behind them shall be notified to both the complainant and the defendant of the case in an official written statement.

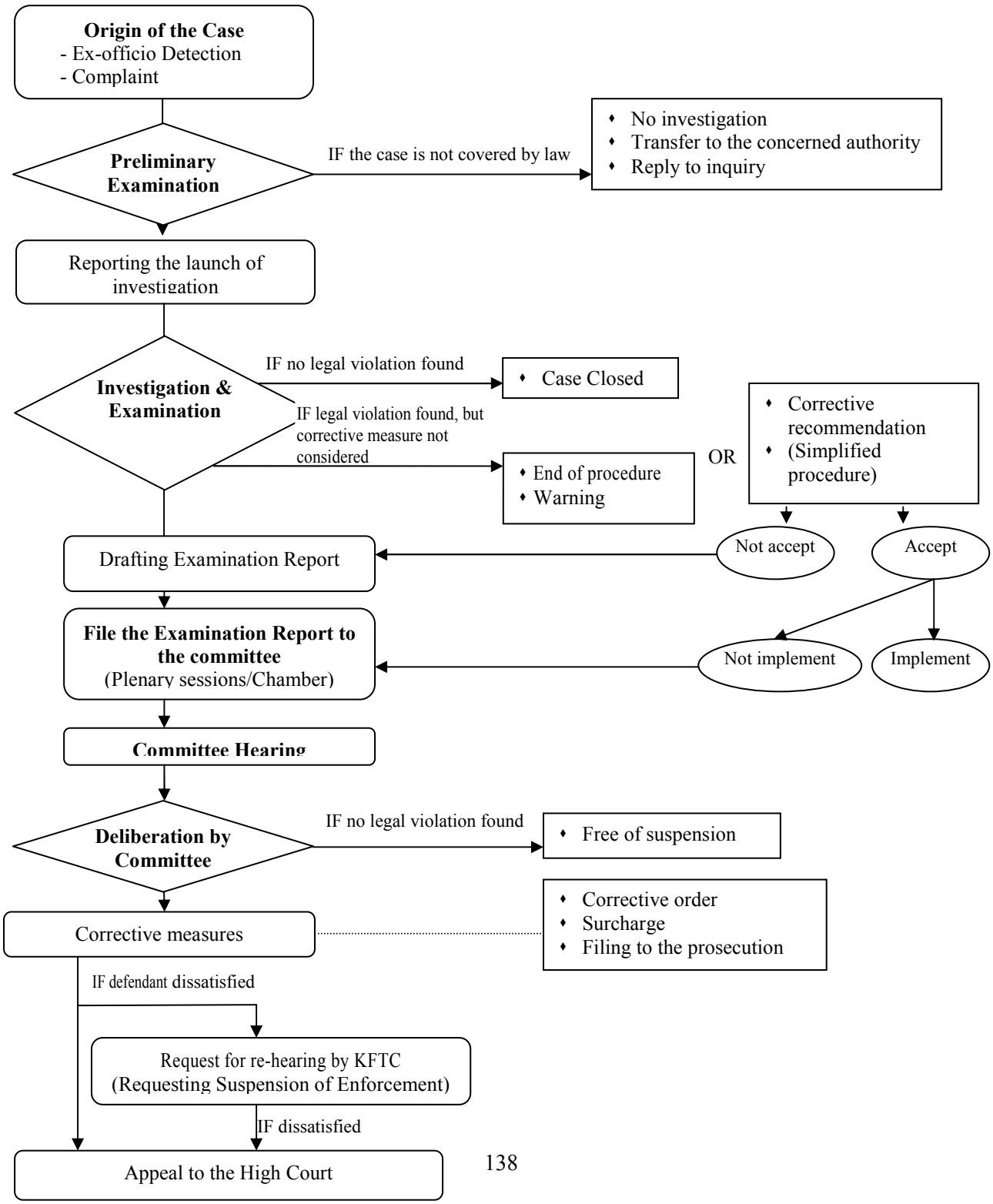
4.5.2 Time limit for case-handling

The time limit required for investigation or case handling process is not set in the law, except for preliminary merger review and a re-hearing case. The decision of the former shall be made within 30 days from filing of a pre-merger notification and within 60 days for the latter. The period can be extended up to 90 and 30 days respectively (Article 12.9 and 53.2 of the Act).

Furthermore if five years or more have passed since violation of the law, the KFTC shall neither take corrective orders nor impose surcharges for the offence under Article 49.(4) of the Act.

APPENDIX

CASE HANDLING PROCEDURE



MEXICO

Please note that this note refers to investigation proceedings regarding monopolistic practices and prohibited mergers. While the Federal Competition Commission handles other cases, such as consultations, determination of market power and opinions on public procurement proceedings, these are not referred to herein.

1. How does your antitrust regime handle transparency with respect to the substantive legal standards; agency policies, practices and procedures; identity of the decision-marker(s); and the order and likely timetable of key proceedings?

In Mexico, the antitrust regime[1] has adopted legal standards within its regulation in regards to transparency policy. The purpose of these rules is to standardize how the authority proceeds, by publicly disclosing certain information regarding the Federal Competition Commission's activities. However, in some particular cases any person may submit a formal request to obtain certain information that is not publicly available, but it fits well within scope of public domain.[2]

In that sense, all activities and investigations related to law enforcement[3] must be executed in the form of administrative procedures by the authority. These procedures are contained in the Federal Law of Economic Competition (FLEC) and its bylaw, and this regulation is available to the public.[4].

In particular, when the Federal Competition Commission decides to initiate an investigation, the law requires it to announce publicly the substantive legal statute on which is basing its investigation, and in what market, sector or industry is the inquiry being conducted.[5] Under the Mexican legal regime, all

1 The legal regime referred in this sentence includes the Federal Law of Economic Competition (FLEC), its bylaw regulation, the Federal Code of Civil Procedures, which complements the "FLEC" in procedural manners; and also, the Federal Competition Commission´s Organic Statutes (In Mexico, the Federal Constitution states that organic statutes and bylaw regulation are to be enacted by the executive branch of government, and all other laws and codes at the federal level are enacted by formal congressional procedure).

2 In Mexico, all government information considered to be public domain by the "Federal Law of Transparency and Access to Government Public Information" may be disclosed by submitting a formal request to the government agency in question. If the request is legally grounded, the agency is required to comply.

3 The substantive legal standards mentioned in the "FLEC" are in reference to cartel activity (Article 9), abuse of dominance (Article 10) and merger control (Article 16).

4 All laws enacted by the congress must be published in the official journal in order to be valid and enforceable.

5 The investigation proceedings regarding monopolistic practices initiate by a written statement issued by the Federal Competition Commission, and consequently, an abstract is published in the official journal, which is made available to the general public on the CFC´s website.

timetables related to an investigation or proceedings are established by law, and the authority has very little room for discretion.[6]

All the decisions-maker(s) must be clearly identifiable by his/her signature in every decision the agency takes and a written statement, order or writ must be issued. The CFC webpage includes a directory that provides the name and contact information for every Official from the CFC.

As to the agency's internal practices and policies, there is a set of criteria issued by the Commission´s Plenum, and these are published on the CFC website. At this time, these criteria are being reviewed as part of an initiative towards establishing a set of operational guidelines and manuals.

In addition, the Federal Competition Commission has dedicated resources to make available pamphlets and booklets that explain the procedures and substantial legal standards in a non-formal style, as well as a compendium of all relevant legislative instruments, including judicial rulings. These resources are available in written form or on the commission´s website.

2. Do the subjects of antitrust investigations have opportunities to meet with the agency at key point in the investigation? At what level? In what circumstances?

Formally, there are no procedures on how to meet with the Commission's officials or staff members. Nevertheless, it is common practice for the commission to meet with officials, even at the highest level, during all stages of an investigation.

3. How and when are subjects of enforcement proceedings informed about the factual basis, economic analysis, economic theories, and legal doctrines relevant to the allegations against them?

Once the inquiry period is over, the file along with the findings is turned over to the Commission´s Plenum for deliberation. During this stage, the Plenum must either acknowledge the probable cause and merits to proceed with, or issue an order to dismiss the case.

After that, the order is processed and legally served through an individual notice to each economic agent directly involved in the investigation. The document served contains all legal and economic arguments, merits and evidence.

4. What opportunities do subjects of enforcement proceedings have to respond to the agency's enforcement concerns? What opportunities do they have to make arguments and offer evidence, and what time constraints apply to these opportunities?

Economic agents found liable on a preliminary basis may file written rebuttal submissions and evidence to counter the initial findings by the Commission within 30 working days after being served. During this period, the economic agents have full access to the investigation evidence and data, except all information classified as confidential.

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[6] Mexico's Federal Competition Commission handles different procedures that have different lengths previously established by law. In some procedures and under certain circumstances, the law allows for additional periods of time in order to conclude the full proceedings. For instance, when the agency launches a full-scale investigation, its initial time-period cannot be less than 30 or longer than 120 working days. Once the initial period has expired, the law allows for four additional periods of 120 working days each. However, the additional periods can only be granted when it is justified by the complexity of the case, and an order must be issued by the Commission´s secretariat for each extended period, and this order can be subject to judiciary review.

After all evidence and arguments have been presented there is 10 day period in which the Commission can request further specifications on the arguments and evidence being submitted and an additional 10 day period to allow parties to file further allegations. Once this stage has expired, the Commission has 40 working days to issue the final determination. This resolution formally concludes the investigation, and is to be served to anyone found liable.

5. Is there an opportunity for a hearing prior to an agency decision? What rules apply to the hearing and hearing officer, and what rights does the subject of the enforcement proceeding enjoy?

As indicated above, there are ample opportunities to meet with various officials of the Commission at different levels, including the members of the Plenum, but no formal hearings are held, with some exceptions, like those cases where witnesses or experts are presented. These opportunities are available at all stages of the proceedings.

6. Are there limits on the length of an agency's investigation? Are there rules on the publication and content of agency's adverse enforcement decisions, and on consideration of evidence by the subject of investigation?

Pursuant to Article 30 of the FLEC, the agency's investigation cannot be shorter than 30 days or longer than 120 days, but can be extended, when justified, up to four times. An abstract of the order to initiate an investigation is published in the Official Journal of the Federation and all final decisions by the Commission (regardless of the outcome) are notified personally and published in the Commission's webpage within 15 days of notification (Excluding all confidential information).

7. Is the agency required to make any public announcement when the investigation is closed without taking an affirmative enforcement decision, or when an investigation is concluded by settlement or consent decree? Are there rules on the content of any such announcement?

Decisions whereby an investigation is terminated without any sanction being issued, or reach a conclusion by a consent-order agreement must be notified directly to parties involved in the procedure. This decision is published in the Commission's webpage within 15 days of issuing, except that information that deemed confidential.

NETHERLANDS

1. Introduction

In non-merger competition law enforcement proceedings at the Netherlands Competition Authority (NMa), and more specifically in proceedings that involve violations of the Netherlands' prohibition of cartels, and investigations thereinto, or an abuse of a dominant position, two main phases can be distinguished: 1) the investigation phase and 2) the sanctioning phase. In the investigation phase, a 'dawn raid' (i.e. an investigation at the premises of the party or parties under investigation) may be carried out, information will be obtained from the parties under investigation - and possibly from third parties - and, if 'a suspicion' that parties violated competition regulations has arisen, a report[1] may be drawn up. The Competition Department of the NMa is involved in carrying out all steps in this phase. In the sanctioning phase, which follows thereafter, the Legal Department of the NMa takes up the case. The Legal Department will grant parties the opportunity to submit their positions to the report in writing and will invite parties to a hearing. The Legal Department will hereafter advise the Board of the NMa whether or not it should be concluded that a violation has occurred, and if so, what sanction (fine or periodic penalty payment) is appropriate.

A distinctive characteristic of the aforementioned proceedings at the NMa is that a so-called 'Chinese wall' exists between the Competition Department and the Legal Department of the NMa. Based on Section 54a of the Netherlands Competition Act, all activities in connection with the imposition of a fine (or periodic penalty payment) may not be carried out by persons who were involved in drawing up the report and/or the prior investigation. The Dutch legislator's intention was to safeguard that the activities of the Legal Department are carried out without any bias.

In both of the abovementioned phases, various kinds of transparency issues and conflicts may arise in connection with the importance of having a sound execution of the NMa's tasks. For example, during the investigation phase, providing parties under investigation with information that was obtained may conflict with some of the NMa's duties (in particular detecting and investigating violations of the Netherlands' Competition Act). In the sanctioning phase however, being completely transparent is of utmost importance for the parties involved as it enables them to fully exercise their rights of defence. This has been recognised, both in the law governing these proceedings as well as in the current practice of the NMa. Both of them try to find a balance between, on the one hand, a proper execution of the NMa's duties and, on the other hand, the right to fair legal proceedings, and the right of defence of the parties involved. In both phases, the NMa is required to comply with the principles of sound administration. Transparency and the right of defence of the parties involved in the aforementioned proceedings are therefore safeguarded in various ways during each phase.

In this paper, we will set out the way in which transparency is taken into account, and the right of defence of the parties involved is safeguarded during both of the abovementioned phases in non-merger competition law enforcement proceedings at the NMa, while allowing the NMa to carry out its tasks in a

[1] A report contains an 'official allegation' of a violation of the competition rules and can, therefore, be compared with a statement of objections in a procedure at the European Commission.

proper manner. This paper will cover the main aspects of the law and current practice of the NMa with regard to such issues.

2. Transparency in the investigation phase

At the beginning of an investigation, the NMa is entitled to carry out a so-called 'dawn raid', based on Sections 5:15 – 5:17 of the Dutch General Administrative Law Act ('*Algemene wet bestuursrecht'*). During a 'dawn raid', the Competition Department of the NMa is allowed to make a 'hard copy' of documents found at the premises of the company under investigation or in the home of an individual under investigation, provided the documents fall under the subject of the investigation. The company or individual under investigation is informed on the subject of the investigation and obtains a list of documents that have been copied, and is thereby completely informed of the information obtained by the NMa at its premises.

In addition, the Competition Department is allowed to make a copy of digital information of the company or individual concerned. In practice, an electronic copy and/or a 'forensic image' is often made. A 'forensic image' contains present and former digital material (for example, a 'forensic image' of an email box will contain all presently available and formerly deleted emails). If the forensic image cannot be investigated at the premises of the company concerned, the NMa could take the image to its offices for investigation. In that case, according to the current guidelines of the NMa with regard to the investigation of such digital material ('*NMa digitale werkwijze 2007*'), the undertaking concerned will be granted a term of 10 days (after the 'dawn raid') within which to inform the NMa about what type of information in the forensic image should be regarded as 1) privileged, 2) private or 3) has no connection to the investigation. The undertaking will subsequently be invited to be present at the premises of the NMa during the perusal of the aforementioned forensic image. If a claim that certain information would fall under legal privilege cannot be assessed directly, it will be done so by an officer who has been specifically appointed by the Board for that purpose and who is not part of the team of case handlers carrying out the investigation (the so-called '*functionaris verschoningsrecht'*).[2] In a specific case in which a 'dawn raid' was carried out, the judge of interlocutory proceedings ('*voorzieningenrechter*') of the District Court in The Hague ruled in summary proceedings that, also in case of 'normal' electronic copies, a company is entitled to have its representative present when copies of digital information are investigated as to whether they fall under the scope of the investigation, in order to ensure that copied digital information which falls outside the scope of the investigation will not be investigated longer than necessary for this assessment.[3] In practice, when the NMa tries to determine whether digital information falls under the scope of the investigation, the NMa tries to do so at the premises of the undertaking or individual as much as possible.[4]

The NMa may publish information regarding an ongoing investigation, for example, that the NMa carried out a so-called 'dawn raid'. Although it is NMa policy not to provide any information about ongoing investigations, the NMa may nevertheless do so if a 'dawn raid' was made public (or was

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2 The judgment of the Court of First Instance of the EU of 17 September 2007 in cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd* and *Akcros Chemicals Ltd* v *Commission*, induced the NMa to appoint the '*functionaris verschoningsrecht'* in the end of 2007. The CFI decided in this case, as far as relevant here, that even a limited investigation of information and documents may not be carried out by a civil servant who is engaged in the investigation if such limited investigation can reveal the content of information and documents which are protected by legal privilege.

3 Verdict of the judge of interlocutory proceedings of the District Court of The Hague of 13 October 2008 in cases KG ZA 08-1043 and KG ZA 08-1128, *Fortis Corporate Insurance N.V.* and *Allianz Nederland Schadeverzekering N.V.* v *State of The Netherlands / Ministry of Economic Affairs*.

4 On 8 January 2010, the NMa published draft new 'guidelines for the investigation of analogue and digital material' for consultation.

confirmed in the media) by the undertaking under investigation.[5] In that case, the NMa will, in principle, not mention the names of the undertakings or individuals under investigation. An exception hereto will only be made if not mentioning the names of the undertakings or individuals under investigation will lead to undesired speculation about the involvement of certain companies or individuals.[6]

Neither the Netherlands Competition Act nor the General Administrative Law Act contains any provision with regard to transparency during the investigation phase. Therefore, there is no obligation to keep parties informed of the investigation of the NMa or of its developments. In general, during the investigation phase, the Competition Department of the NMa controls the amount of information provided to the parties under investigation and the 'intensity' of contact with such parties. Information obtained during an investigation may (partially) be provided to a party, for example, during an interview. Although a party under investigation is not 'officially' entitled to a meeting with members of the investigation team, meetings are occasionally held upon request by the party or parties, for example in case relevant developments have occurred the NMa needs to be informed of. In addition, a meeting may be held if the parties have offered commitments.

An interview with a party under investigation is an often used means of investigation. At the beginning of such an interview, the party's attention will firstly be drawn to its rights. Also undertakings under investigation are not obliged to answer any questions if, by doing so, this would amount to 'self-incrimination'. In that case, the employees of such undertakings are entitled to the right to remain silent.[7] A discussion has arisen in the Netherlands as to whether former employees of an undertaking under investigation are also entitled to a right to remain silent under such circumstances. In several cases, the NMa has imposed fines on a former employee who refused to cooperate in an investigation and who held the position that the aforementioned right also accrues to former employees.[8] A party has the right to have its attorney present during the entire interview. The assistance of the attorney is however limited to giving advice to the party; the attorney is not entitled to answer any question.

Neither the Netherlands Competition Act nor the General Administrative Law Act provides a deadline for the duration of an investigation. In particular in view of general and special prevention, it is also in the interest of the NMa that the investigation proceeds efficiently and within a reasonable time frame. In practice, an investigation into a cartel case or abuse of a dominant position case will likely last up to a year (or up to several years in complicated cases).

At the end of the investigation phase, if there is no 'suspicion' that the parties have violated competition law, the parties will be informed in writing about this. There are no regulations with regard to

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5 *Werkwijze voorlichting NMa*, *Staatscourant* 14 September 2009, nr. 13732, chapter '*Uitgangspunten bij de publicatie van pers- en nieuwsberichten*', para. 7.

6 *Werkwijze voorlichting NMa*, *Staatscourant* 14 September 2009, nr. 13732, chapter '*Uitgangspunten bij de publicatie van pers- en nieuwsberichten',* para. 9.

7 Verdict of the Rotterdam District Court of 7 August 2003 in case MEDED 02/259, *Texaco Nederland B.V.* v *director-general of the Netherlands Competition Authority*.

8 Decision of the director-general of the NMa of 12 December 2003 in case 3698; decision of the NMa of 9 July 2009 in cases 6622 and 6678 and decision of the NMa of 10 November 2009 in case 6719. The Rotterdam District Court has not given a judgment as to this discussion yet.

the content and timing of such an announcement. The NMa may publicize that it ended an investigation and that no violation has been established.[9]

If, however, the Competition Department of the NMa 'suspects' that the parties have violated competition law, and would therefore draw up a report, a different procedure will be followed. Depending on a case-by-case evaluation, the parties under investigation may firstly be informed about the facts underlying the violation. In that case, the parties will be given the opportunity to comment hereupon. Hereafter, a report will be drawn up and sent to the parties.

The Competition Department must make sure that the report meets a number of requirements. Section 59 under 1 of the Netherlands Competition Act and Section 5:48 under 2 of the General Administrative Law Act provide that the report should at least mention the name of the 'violator', the violation that occurred, and the legal provision that was violated, and the place and time frame during which the violation occurred. From case law of Dutch courts, it can be derived that the report should make sufficiently clear the conduct the NMa has found to have violated competition law in order to enable the parties to fully exercise their rights of defence.[10] In addition, the report should also cover relevant facts for the level of the fine that can be imposed. This case law is in line with the relevant case law on this matter of the European Court of Justice and of the Court of First Instance in EC competition law cases.[11] For this reason, the report of the NMa will in practice contain, among other things, a full description of the economic context of the violation and of the relevant market(s) concerned. In practice, a 'full' legal assessment of the alleged conduct - which in most cases contains abundant reference to applicable European and Dutch case law - is given in the report as well.

The NMa does not make publicly known that it has drawn up a report in individual cases.[12] By doing so, the NMa intends to prevent any discussion as to whether the parties to which a report was sent suffered any damage as a result of such a publication. An exception hereto can be made if an urgent reason exists, for example if such information is made known in a foreign country. In that case, some conditions are applicable. First, it should be noted that the NMa has some degree of discretion with regard to the contents of its external publication about the report, as well as with regard to the exact timing of the publication. However, regarding the principles of good government, this discretion is not unlimited. Based on a ruling of the Court of Appeals of The Hague, it can be concluded that the NMa should be careful with regard to the exact wording of a press release, as the court held that nuances in the press release may get lost when

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9 For example in December 2009, the NMa published a press release which states that the NMa, after an extensive investigation, cannot come to the conclusion that TNT abused its dominant position by offering post services below cost price (predatory pricing) on the Dutch post market.

10 Verdict of the Rotterdam District Court of 8 June 2009 in case AWB 07/4082, *Landustrie Sneek B.V.* v. *Netherlands Competition Authority*, and verdict of the Rotterdam District Court of 8 June 2009 in case AWB 07/4081, *Aannemers- en Staalconstructiebedrijf Aan de Stegge B.V.* v *Netherlands Competition Authority*.

11 See for example judgment of the Court of First Instance of 30 January 2007 in case T-340/03, *France Télécom* v *Commission*, para. 18.

12 *Werkwijze voorlichting NMa*, *Staatscourant* 14 September 2009, nr. 13732, chapter '*Algemene uitgangspunten',* para. 4. However, the outcome of a sector-wide investigation of the NMa will in practice be published by the NMa. The NMa published for example the outcome of its investigation with regard to competition in the petrol/gasoline-sector in 2005 ('*Benzine-scan 2005/2006'*) on its website (www.nmanet.nl), as well as in a press release. More recently, in April 2009, the NMa published the results of its investigation with regard to violations of the competition law on the market for car(window) repair services.

'the public' reads a press release.[13] In addition, the parties (formerly) under investigation should be informed well in advance, before a press release has been made, of the press release's contents. The parties must have sufficient time to respond to the draft press release and to correct incorrect information in the draft press release, in particular if 'the public', having read the press release 'superficially', may get the impression that the NMa has already 'made up its mind' and will decide that a violation has indeed occurred.

3. Transparency in the sanctioning phase

By sending a report to parties, the investigation phase will have 'officially' ended and the sanctioning phase will start. During this phase, the case will be handled by the Legal Department of the NMa.

The Legal Department will first carry out a so-called 'confidentiality check'. This means that all information in the file, from the parties involved or from third parties, will be examined as to whether it should be regarded as confidential. Confidential information will only be removed from the public file if the information is not necessary to serve as evidence. The Legal Department will in practice balance the interests of a party (to keep confidential information out of the 'public file') against the (general) interest of a successful 'prosecution' of a competition law case. Before the check is carried out, the parties and third parties that have submitted information, which has been added to the file, are given the opportunity to submit 'confidentiality claims'.[14] In practice, this check may take a few weeks (up to a few months in complicated cases). Once the 'confidentiality check' has been carried out, the Legal Department will first inform the parties (and, if applicable, third parties) about its decision as to the confidentiality claims made. Approximately five days[15] later, the 'non-confidential' file will be sent to the parties.[16]

Based on Section 5:53 under 3 of the General Administrative Law Act, the Legal Department is required to grant parties the possibility to submit their positions on the case. In practice, the Legal Department will initially grant parties six weeks to submit a written response to the report.[17]

In addition, a hearing will be held by the Legal Department after the written responses of the parties have been submitted. The case handlers will hear the parties during the hearing. The (former) case handlers of the Competition Department will also be present at the hearing in order to answer any questions about the investigation made. At the beginning of the hearing, the parties' attention will be drawn to their right to remain silent should a party feel that it would incriminate itself by answering any question. As no rules exist with regard to the time the parties should have at the hearing to present their views, in practice at the beginning of the hearing the parties will be granted a 'first term' of 30 to 60 minutes (depending on the 'size' and complexity of the case). Hereafter, the case handlers will ask questions. At the end of the hearing, the parties will be granted a 'second term' to put forward their final remarks. The entire hearing will be recorded on tape, in order to make sure that an accurate transcript can be made after the hearing. In practice, every effort will be made to make as much as possible a 'reproduction' of all words spoken at the

13 Judgment Court of Appeals of The Hague of 24 February 2005 in case 04/516, *Accel Group N.V.* e.a. v *Dutch State*.

14 In general, this is done at the end of the investigation phase by the Competition Department of the NMa, although the Legal Department of the NMa may also explore whether any party wishes to submit confidentiality claims.

15 This time frame is sufficient to allow a party to start summary proceedings against the NMa about its decision with regard to the confidentiality claims made.

16 At this moment, a 'hard copy' of the 'non confidential' file is sent to the parties; in the near future, a digital version will possibly be sent.

17 This paper does not cover any right of third parties.

hearing. The minutes will be sent to all parties as soon as possible after the hearing. Although the parties may submit remarks with regard to the minutes, this will not lead to any amendment of the minutes.

As mentioned above, all activities in connection with the imposition of a fine (or periodic penalty payment) may not be carried out by those who were involved in drawing up the report and the investigation before (based on Section 54a of the Dutch Competition Act). In a recent case, this provision raised the question whether the case handlers of the Legal Department of the NMa are allowed to verify a statement made by the parties involved in the sanctioning phase at a third party. In this case, the Rotterdam District Court ruled that the Legal Department hereby conducted an investigation that was intended to establish a violation and that violated the aforementioned provision.[18] For this reason, the court decided that the information obtained from the third party could not be used as (part of the) evidence that the party involved in the sanctioning procedure committed a violation. The NMa has filed an appeal against this decision at the Netherlands Trade and Industry Appeals Tribunal, which is currently pending.

Based on case law of Dutch courts, the decision of the Board of the NMa, in which a violation is established, does not necessarily have to reflect exactly the (statements made in the) report.[19] In its decision, the Board may amend factual or legal arguments mentioned in the report, or add (new) factual or legal arguments, which support the establishment of the (same) violation. At this point, Dutch case law is fully in line with case law of the European Court of First Instance.[20] At this moment, in two cases, a discussion has come up as to whether the NMa in its decision deviated too much from the envisaged violation described in the report, and whether it thereby violated the right of defence of the parties involved, because 1) in the decision a (partially) different factual description was given of the violation, or parts thereof, and 2) reference was made in the decision to documents that were not mentioned in the report, although they were included in the case file.[21]

As far as the duration of the sanctioning phase is concerned, it is first of all important to note that Article 6 of the European Convention on Human Rights applies to sanctioning procedures with regard to a violation of the Netherlands' prohibition of cartels or an abuse of a dominant position. This means, among other things, that the decision in these types of cases must be made within a reasonable time frame. According to case law of the Netherlands Trade and Industrial Appeals Tribunal, the starting moment of the reasonable time frame is, in principle, the moment when a report is handed to the parties by the NMa, from which an undertaking can reasonably expect that a fine may be imposed for a violation of competition rules (although the possibility that the reasonable time frame starts at an earlier moment cannot be ruled out).[22] The Netherlands Trade and Industrial Appeals Tribunal additionally ruled that the maximum duration of the reasonable time frame depends upon the factual and legal complexity of the case and of the

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18 Verdict of the Rotterdam District Court of 28 April 2009 in case AWB 07/4005, *ETB Vos B.V.* v *Netherlands Competition Authority*.

19 Judgment of the Netherlands Trade and Industry Appeals Tribunal of 17 November 2004 in case AWB 03/614, 03/621 and 03/659, *Glasgarage Rotterdam B.V., Carglass B.V. and the director-general of the Netherlands Competition Authority; v*erdict of the Rotterdam District Court of 8 June 2009 in case AWB 07/4082, *Landustrie Sneek B.V.* v. *Netherlands Competition Authority*, and verdict of the Rotterdam District Court of 8 June 2009 in case AWB 07/4081, *Aannemers- en Staalconstructiebedrijf Aan de Stegge B.V.* v *Netherlands Competition Authority*.

20 See for example judgment of the Court of First Instance of 30 January 2007 in case T-340/03, *France Télécom* v *Commission*, para. 18.

21 Cases *Landustrie Sneek B.V.* and *Aannemers- en Staalconstructiebedrijf Aan de Stegge B.V.,* referred to in note 19.

22 Judgment of the Netherlands Trade and Industry Appeals Tribunal of 3 July 2008 in case AWB 06/526 and AWB 06/532, *AUV Dierenartsencoöperatie U.A.* and *Aesculaap B.V.,* para. 7.18.

'behaviour' of the NMa as well as of the parties. As a 'basic rule', the tribunal pointed out that a combined duration of two years of the sanctioning phase and the administrative appeal phase thereafter, cannot be regarded as unreasonably long. If, in a specific case, the duration of these two phases exceeded two years, the NMa must be able to put forward specific arguments justifying the extended duration of the entire procedure.

Since July 1st, 2009, the Board of the NMa is required under Section 62 of the Dutch Competition Act to give a decision within eight months after the report has been submitted to the parties in cases involving a violation of the Netherlands' prohibition of cartels or an abuse of a dominant position (provided the violation started after the aforementioned date).[23] In practice, the Legal Department already makes every effort to complete cases that involve such a violation within the aforementioned time.

The Netherlands' Minister of Economic Affairs published policy rules which contain guidelines with regard to the level of fines for (among others) violations of the competition rules.[24] The level of fines for violations which commenced before 1 October 2009 is still determined under the NMa fining code.[25] Hereby, transparency with regard to the criteria applied in order to determine the level of fines and equality of rights for the parties involved are in addition safeguarded.

A decision of the Board of the NMa in which a fine or a periodic penalty payment has been imposed upon a party for a violation of the Netherlands' prohibition of cartels or for an abuse of a dominant position will first be sent to the parties. The parties will have the opportunity to indicate within five 'working days' what parts of the decision should be regarded as confidential and thus cannot be disclosed. Based on Section 65 under 2 of the Dutch Competition Act, the NMa is required to publish a (short) notice about its decision in the official Dutch Government Gazette, and may do so when five days have elapsed after the decision has been sent to the party or parties involved. In addition, Section 65 under 1 of the Dutch Competition Act states that the NMa has to make its decision available for perusal at its office after the party or parties involved have been informed of the decision. In practice, the NMa will publish the entire non-confidential version of the decision on its website (www.nmanet.nl).

4. In conclusion

In the law, as well as in current NMa practice, a good balance has been struck in non-merger competition law enforcement proceedings between offering a sufficient amount of transparency, especially when the rights of defence of the parties involved are at stake, and safeguarding a proper execution of the NMa's tasks.

Current discussion regarding these issues in the Netherlands focuses on:

- The amount of digital information that may be taken by the Competition Department to the office of the NMa for investigation, in particular as the NMa may not examine information that does not fall under the scope of the investigation (apart from a 'quick check' whether this is the case);

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23 The Netherlands Competition Act however does not provide for a sanction in case this provision is violated.

24 Policy Rules of the Minister of Economic Affairs containing guidelines on the imposition of administrative fines under legislation for which the supervision of compliance has been entrusted to the Board of the Netherlands Competition Authority of 11 September 2009 (Government Gazette, 22 September 2009, no. 14079).

25 Fining code of the Netherlands Competition Authority of 29 June 2007, as amended by a resolution of the Board of the Netherlands Competition Authority of 9 October 2007 (Government Gazette, 29 June 2007, no. 123; Government Gazette, 10 October 2007, no. 196).

- The question whether former employees of an undertaking under investigation are also entitled to the right to remain silent if, by answering any question, the undertaking would be incriminated;

- - The exact scope of the competence of the Legal Department in cartel cases and abuse of a dominant position cases after a report has been drawn up, in particular with regard to:

  – investigation: what kinds of investigative measures may the Legal Department carry out, for example should the Legal Department be allowed to acquire information in order to verify with a third party a statement that has been made by one of the parties involved in the sanctioning phase or other information obtained? In addition, should the Legal Department be allowed to gather information relevant for deciding on the legal entities that are responsible for the violation or information relevant for deciding on the fine?

  – the content of the decision: to what extent can factual or legal arguments be added or amended in the decision? For example, is the right of defence of the parties involved violated if reference were made in the decision to documents that were - although available in the case file - not mentioned in the report (and, therefore, initially not commented upon by the parties involved)?

SWEDEN

1. Introduction

The general Swedish legislation on public access to official documents is an effective guarantor for transparency. All official documents in competition files (antitrust and mergers) fall within the scope of this legislation. Consequently, the public at large may have access to official documents in individual competition investigation files. The right of access to official documents is, however, not unlimited. First of all - not all documents are official as they might be internal memoranda, in a preparatory stage etc. Secondly, there is no access to information which is secret according to the Swedish Secrecy Act.

Besides the principle of public access to official documents, there are specific provisions in the Swedish Secrecy Act (chapter 10 articles 3 and 4, 16 and 17) and the Swedish Administrative Act (article 16) providing a subject in an enforcement proceeding, with a more extensive right of access to file than the public at large. Specific criteria are stated as to if "party-access" shall be granted, and if not, for a party to be supplied with general information about the secret material´s content to the extent necessary for the party to defend its rights.

A further guarantor for transparency is the general requirement on authorities to follow the rule on communication, stated in the Swedish Administrative Act (article 17). A case may not be decided unless the party, the subject to enforcements proceedings, has been informed about factual information submitted to the authority by other persons than the party himself and has been given the opportunity to express its view on such information.

The provision on communication in the Administrative Act does not stipulate when the subjects shall be granted access to file. The Swedish Competition Authority (SCA) applies this provision depending on the nature of the case. In mergers and cases regarding abuse of dominance, parties will often be granted access to file continuously throughout the investigation. It is very common that parties request to get access to replies by companies to inquiries. This often generates quite a workload for the case team since the SCA has to make a concrete assessment of each individual document for which access is requested. In cartel cases, the SCA will normally grant the parties access to file at the same time they receive the Authority´s statement of objection.

2. How does your antitrust regime handle transparency with respect to the substantive legal standards; agency policies, practices and procedures; identity of the decision-makers; and the order and likely timetable of key proceedings

The substantive legal standards are found in the Swedish Competition Act (chapter 2 articles 1 and 7 in respect to restrictive practices and chapter 4 article 1 in respect to concentrations). The SCA uses its website as an active tool to enhance transparency and predictability of its antitrust procedures. The competition rules, both national and links to EU rules, as well as guidelines, procedures and names of the staff at the SCA, are published on the website (available both in Swedish and English). The registry and all decisions of the authority are also available on the website.

SCA guidelines covering both the SCA interpretation of substantive rules and procedural matters have been published in some areas (at present merger notifications and leniency applications) and can be found

on the website. SCA policies are also published on our website, for example the SCA´s priorities for investigating a suspected infringement of article 101 and 102 of the Treaty on the Functioning of the European Union and the corresponding articles in the Swedish Competition Act, as well as the SCA´s priorities when investigating non-compliance with public procurement rules.

The average duration of procedures is published in the Annual Report. On the website information is also given on how merger notifications and complaints are handled.

The general principle of public access to official documents also encompasses information about pending cases, which means that the public at large may request access to such information. Upon request, the SCA will make an assessment whether the information requested is "official" or not and whether it falls within any of the provisions in the Secrecy Act. Detailed information about key proceedings in an individual case may however be considered confidential under the investigation phase.

3. Do the subjects of antitrust investigations have opportunities to meet with the agency at key points in the investigation? At what level? In what circumstances?

Those subject to an investigation by the SCA have plenty of opportunities, either on their own initiative or upon request by the SCA, to meet with the case team or other SCA staff if considered appropriate, and to make their points of view known. Meetings may occur at any time during the initial stage of the investigation and/or after the parties have received the SCA´s preliminary decision in the case or its preliminary draft for application to summons. (C.f. Statement of Objection in EU Commission proceedings). In addition, parties are offered to complement their written observations on the SCA´s preliminary decision at an Oral Hearing.

4. How and when are subjects of enforcement proceedings informed about the factual basis, economic theories and legal doctrines relevant to the allegations against them?

As already mentioned in the Introduction, a party has a specific right to get access to file and the SCA has an obligation to guarantee that communication of factual information is made and that the party is given an opportunity to respond to this information, prior to a decision. However, information during an investigation may be covered by secrecy, provided that it is of particular importance for the protection of the investigation to keep the information secret (chapter 17 article 3 in the Secrecy Act). This said, secrecy is normally applicable only during the first stage of the investigation in cartel cases but an assessment has to be made in every specific case of requests from a party for access to information on the file. It may be of extreme importance that the information is not revealed. When the SCA has sent its preliminary decision (statement of objection) to the investigated parties, this provision will no longer be applicable. At this time of the enforcement proceedings, the parties will have full access to all information upon which the Authority bases its decision.

Economic theories and legal doctrines relevant to the allegations against the parties will be revealed in the SCA´s preliminary decision, at the latest. Generally, however, the parties have already received this information during the course of investigation.

5. What opportunities do subjects of enforcement proceedings have to respond to the agency´s enforcement concerns? What opportunities do they have to make arguments and offer evidence, and what time constraints apply to these opportunities?

The subjects (defendants) and where relevant the complainants and intervening parties, can make their arguments and offer evidence at any time during the investigation. Defendants in antitrust proceedings typically have four weeks to respond to a preliminary decision or a statement of objection. In merger cases, this period may need to be shorter.

6. Is there an opportunity for a hearing prior to an agency decision? What rules apply to the hearing and hearing officer, and what rights does the subject of the enforcement proceeding enjoy?

As referred to in the answer to question 2, the parties will be offered to complement their written observations on the matters to which the SCA has objected in the statement of objection at a formal Oral Hearing. Both the Oral Hearing and the rights of the subject in the enforcement proceedings are governed by the Administrative Act. There is no appointed "Hearing Officer", nor are there any specific provisions as to what person will chair such Oral Hearings, but in practice this will be done by a senior civil servant who is not directly involved in the case at hand.The general principle of public access to documents applies as well as the Secrecy Act.

It should be noted that the SCA is not entitled to prohibit a merger or decide on financial penalties for infringement of the competition rules except in cases that are not contested. When the SCA decides to bring a merger case or a cartel to the court of first instance, the Stockholm City Court, the enforcement proceedings are governed by the Swedish Code of Judicial Procedure.

7. Are there any limits on the length of an agency´s investigation? Are there rules on the publication and content of the agency´s adverse enforcement decisions, and on consideration of evidence offered by the subject of the investigation?

For antitrust cases, there are no other limits on the length of an investigation in respect of restrictive practices than the statue of limitations (5, ultimately 10 years) in the Swedish Competition Act. Merger control procedures must be concluded within the time periods defined in the Swedish Competition Act (one month for first phase and three months for an in-depth investigation at the SCA, a further six months for the court of first instance and a maximum, including the upper court, Marknadsdomstolen, of two years from the date of the concentration.

The Swedish Competition Act does not require the SCA to make its decisions public; neither adverse nor affirmative enforcement decisions. However, as mentioned in the Introduction, all official documents including the SCA´s enforcement decisions, fall within the scope of the general Swedish legislation on public access to documents. In the interest of transparency, the SCA publishes all decisions and findings on its website.

8. Is the agency required to make any public announcement when an investigation is closed without taking an affirmative enforcement decision, or when an investigation is concluded by a settlement or consent decree? Are there rules on the content of any such announcements?

The SCA is not required to make any public announcement when an investigation is closed, or when an investigation is concluded by a settlement or consent decree.

SWITZERLAND

1. Introduction

In Switzerland, the task of protecting competition is primarily performed by using the instruments provided by the Swiss Competition Law, i.e. the Federal Act on Cartels and Other Restraints of Competition (Cartel Act, CartA) and the Swiss Merger Control Regulation (MCR; together the Swiss Competition Law).

The Cartel Act is conducted by the Competition Commission and its Secretariat (together the Competition authorities). The Competition authorities give high priority to transparency and fairness in all their proceedings under the Cartel Act. Fundamental rights and principles fully apply to all their proceedings.

The substantive legal standards are mentioned in the Swiss Competition Law and the Federal Act on administrative procedure (Administrative Procedure Act). All competition rules and the identity of the decision-making body are published on the website of the Swiss Competition authorities. In addition, various interpretative guidelines, such as notices on the practice of the Swiss Competition authorities and remarks thereof, as well as major decisions are available on the website. Moreover, the casebook ("Law and policy of competition") of the Swiss Competition authorities can be downloaded on the website.

2. Procedural provisions

According to Article 39 of the Cartel Act, the Administrative Procedure Act applies in principle to all proceedings under the Cartel Act unless the Cartel Act stipulates otherwise. Therefore, for all investigations under the Cartel Act, the following provisions are relevant: firstly, the procedural provisions of the Cartel Act (e.g. Article 26 para. 3 CartA); secondly, the provisions of the Administrative Procedure Act (e.g. Article 37 Administrative Procedure Act); thirdly, the provisions that apply directly or mutatis mutandis due to a referral of the Administrative Procedure Act; and fourthly, the General Principles of administrative procedures, including the constitutional procedural safeguards, in particular out of Article 29 of the Federal Constitution and Article 6 of the ECHR.

Basically, the Administrative Procedure Act is applicable to all investigations conducted by the competition authorities regarding restraints of competition (anticompetitive agreements, abuse of dominance), merger reviews, exceptional authorizations of concentrations by the Federal Council, opinions directed to a civil court as well as appeal proceedings of the Federal Administrative Court. However, it is not applicable to the procedure of preliminary investigations as defined in Article 26 CartA.

For the explicitly stated forms of cooperative actions, such as amicable settlements and binding proposals to re-establish effective competition (Article 29 and Article 37 para. 2 CartA) the Administrative Procedure Act shall also apply. This means that the competition authorities have to assess a case – even in a more summarized way than within investigations - before finding a cooperative settlement solution. Therefore, in practice cooperative settlements take place only in form of a decision based on a "provisional assessment".

3. Subjects of antitrust investigations

The legal standing of being party to the proceeding in an administrative procedure is reserved to those, whose rights and obligations could be affected by the decision or who are legitimated to appeal against the decision. All the other parties are "third parties". The parties of an investigation are allowed to participate in the procedure, i.e. they have granted right to access the records and files, to be heard and to make statements.

Third parties who request the opening of an investigation or cautionary measures have no legal standing before opening any such measure. They may exercise party rights only after opening an investigation. If they request to open a preliminary investigation or to implement measures in such a proceeding, they only have the position of an announcing party. Third parties can – as anyone else – file a complaint, be heard as a witness or give their opinion for example to a planned merger.

The parties must be notified of suspected violation of law and of the facts examined, at a time early enough to enable the parties to make a statement of their position.

4. Access to file

The right of access to the files is a discharge of the right of the party to be heard. According to the Administrative Procedure Act, concerned persons or businesses of enforcement proceedings have the right to access the investigation files. It grants the parties to take notice of all essential documents on the proceedings which creates the basis for an effective and factual possibility to exercise the right to reply (Article 30 Administrative Procedure Act).

According to Article 26 para. 1 lit. a and b of the Administrative Procedure Act in conjunction with Article 39 CartA, the parties or its legal representatives in particular are granted access to the following files:

- Inputs from the parties and consultations performed by authorities;
- All documents serving as evidence;
- Transcripts of opened orders and instructions.

The supply of documents, data, record or any other information which may be used as incriminating evidence may not be refused.

In practice, the Competition Commission creates a chronological directory of the files for all proceedings. The parties get access to this directory and the listed files at any time of the proceeding, with the exception of preliminary investigations. Thereby, they are continuously informed about the development of the investigation which allows them to make a motion to request evidence or to provide counterevidence at an early status of the proceeding.

Comments of the parties to the files or to the Secretariat's statement of objections are submitted to the other parties for statements. Given the typically complex economic contexts in competition law matters it is - unlike in other administrative procedures - not sufficient to draw the parties attention to the right of access to the file. Instead, it's necessary to deliver the complete directory of the records to the parties not later than with the Secretariat's statement of objections.

However, the parties and other persons participating in the proceedings may request a restriction to access to the documents or to the making of copies or to the taking of notes thereof, with reference to the need of protection of business secrets.

In practice, this leads to problems if third parties or persons who are hindered from entering or competing in a market bring forward evidence but do not want the parties to know who delivered the information since they fear retaliation (boycott etc.). In this respect, the competition authorities may refuse access to the file due to essential private interests according to Article 27 lit. b of the Administrative Procedure Act. In principle, it's the Secretariat's duty as the investigating body to adopt procedural conductive injunctions. Nevertheless, since it's a legally demanding and important question sometimes it is the Competition Commission as the decision body to adopt whether and to what extend the documents will be disclosed.

To defuse the tension between the right of confidentiality by the informants and the right of access to the files by the parties, the competition authorities may appropriately circumscribe confidential facts which are essential for the decision, e.g. business key data may be described within a certain range. In cases, in which the access to a document has been refused the competition authority may only refer to it as evidence if the parties are informed about the content thereof orally or in writing and had the opportunity to reply and provide counterevidence (Article 28 Administrative Procedure Act).

However, with regard to the announcement of the essential facts the competition authorities have to do a balancing act. Sometimes they are not able to notify the corresponding content without revealing the identity of the informants or its business secrets. In such cases, the competition authorities have to refrain from using the file as evidence. The right of the parties to be heard is granted high value and therefore cannot be restricted.

5. Right to be heard

As mentioned above, the parties are entitled to get access to the files throughout the proceedings and therefore are continuously informed about the development of the investigation. This allows them to provide counterevidence at an early status of the proceeding.

According to Article 18 para. 1 of the Administrative Procedure Act, the parties may also attend the hearing of witnesses and ask probe questions. The hearing of witnesses may only be performed in absence of the parties or the access to the minutes thereof may only be refused to safeguard essential public or private interests.

Moreover, the right to be heard as mentioned in Article 29 para. 2 of the Federal Constitution and Article 29 of the Administrative Procedure Act is extended according to Article 30 para. 2 CartA. Under the Cartel Act, the Competition Commission shall decide about the appropriate measures or the approval of amicable settlement in response to the Secretariat's statement of objections. According to Article 30 para. 2 CartA, the parties involved in the investigation may comment on the Secretariat's statement of objections in writing before the Competition Commission takes its decision.

The Competition Commission may also decide to conduct hearings, *ex ufficio* or on request of the parties.

6. Right of defence

In general, the parties must be notified a suspected violation of law and the examined facts, at a time early enough to enable the parties to state their position. Already when opening an investigation, the parties are informed about the suspected violation of the competition law and as already mentioned, they have

granted access to the files throughout the investigation. In addition, the Secretariat may hold informal meetings with the parties during the investigative phase.

Furthermore, the authorities have to substantiate their decision. In particular, the Competition authorities are committed to take into consideration the arguments of the parties about relevant facts and evidence. This consideration will be reflected in the substantiation of the decision which makes decisions comprehensible to the addressees and verifiable for the Court of Appeal.

In this regard, the authorities mention in the decision all evidence which their opinion and their result of the inquiries are based on. The legal basis, such as legislation, jurisprudence, doctrines and materials, is as well mentioned in the decision. When using economic models or theories they are named as such and it is shown why they are perused in casu. As noted before, the parties involved in the investigation may respond and comment to the substantiation latest when receiving the Secretariat's proposed motion. Thus, counterarguments of the parties can be considered when the Competition Commission takes its decision.

7. Publication of decisions

Under the Cartel Act, the Secretariat shall give notice of the opening of an investigation by the way of official publication. Such notice states the purpose of and the parties to the investigation and further contains an invitation to third parties to come forward within 30 days if they wish to participate in the investigation.

According to Article 48 CartA, the competition authorities may publish their decisions. However, the Competition Commission is not obliged to publish decisions but on behalf of a transparent competition law it makes generously use thereof. Since the term "decision" is not meant in a strict legal sense, relevant decisions and resolutions of the Secretariat, such as preliminary investigations, statements and consultations may also be published.

Closing an investigation after it has been formally opened will be effected by a decision of the Competition Commission, which has to be substantiated. In addition to informing the parties, the authority may publish this decision, especially if it contains relevant information or resolutions regarding competition law.

8. Mergers and acquisitions

In contrary to other proceedings under the Cartel Act, the investigation periods regarding mergers are subject to definitive deadlines. The Swiss merger control is divided into two phases. The Competition Commission is required to notify enterprises within one month of receiving the complete notification whether it intends to initiate an in-depth investigation or not (phase I). If the Competition Commission decides to initiate an in-depth investigation, this is published and the parties are provided with a written explanation about the concerns that led to the decision. The in-depth examination has to be conducted within a period of four months (phase II).

Once the decision for initiating the second phase is taken, in a first step the Secretariat usually requests further information from the parties concerned as well as from third parties. Furthermore, it sends out questionnaires to competitors, suppliers and customers of the enterprises involved. Then, a preliminary Statement of Objections adopted by the Competition Commission will be notified to each of the parties concerned, inviting them for written comments. In a second step, hearings of the parties and third parties may take place with the Competition Commission. Furthermore, the merging parties are given regular meeting opportunities for discussions with the Secretariat.

TURKEY

Act No. 4054 on the Protection of Competition (the Competition Act) and the secondary legislation issued in accordance with it provide for the basic rules concerning procedural fairness. This contribution aims to express relevant elements of the legislation as part of the explanations on procedural fairness in the following.

1. Identity of the Decision-maker

First of all, the Competition Act overtly empowers the Competition Authority to implement the Competition Act[1] and provides the basic framework of its organisation[2] such as the Presidency[3], service units, and the Competition Board which is the decision-making body of the Competition Authority, and the duties and powers of the Competition Board[4] and the Presidency[5].

2. Guidance on Substantive Legal Standards

The Competition Act determines basic substantive standards regarding anti-competitive agreements, concerted practices and decisions, abuse of dominant position and mergers and acquisitions.

For instance, the Competition Act prohibits and lists a non-exhaustive list of agreements, concerted practices and decisions that may be regarded as anti-competitive such as those fixing prices, sharing markets etc.[6] According to the Competition Act, the prohibition concerns those agreements, concerted practices and decisions the object or effect or likely effect of which is the prevention, distortion or restriction of competition directly or indirectly.[7] Similarly, criteria to exempt such anti-competitive conduct are also cited in the Competition Act.[8] Individual decisions by the Competition Board contain information on how the criteria are applied in practice. Moreover, the Competition Board also issues communiqués and guidelines to ensure legal certainty on application of exemption criteria regarding certain type of agreements such as vertical agreements, on notification, and on certain concepts such as market definition.[9]

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1 Article 20(1).

2 Article 21.

3 The Presidency is composed of the Chairman of the Competition Board, the Deputy Chairman and the Vice-Chairmen of the Competition Board. See Article 29(1).

4 Article 27.

5 Article 30.

6 Article 4.

7 Article 4(1).

8 Article 5.

9 Current list of the block exemption communiqués and guidelines is as follows:
• Block Exemption Communiqué on Technology Transfer Agreements,
• Block Exemption Communiqué in relation to the Insurance Sector,
• Block Exemption Communiqué on Vertical Agreements and Concerted Practices in the Motor Vehicle

As to the abuse of dominant position, the Competition Act also prohibits and lists examples of abusive practices such as preventing new entry or complicating activities of rivals, applying discriminatory terms etc.[10] Again, individual decisions of the Competition Board also grant detailed information on the legal standards applicable to certain abusive conduct such as price squeeze. However, the Competition Board has not issued any secondary legislation to provide guidance concerning abuse of dominant position yet.

The legal standard for mergers and acquisitions is cited in the Competition Act as prohibition of dominance indicating that the basic concern is whether the transaction will create or strengthen dominant position as a result of which competition is significantly decreased.[11] The Competition Board has issued a communiqué[12] clarifying various issues such as factors to be taken into account in the assessment.

3. Procedural Rules

The procedural rules are granted in a detailed manner in the Competition Act. For instance, the Competition Act fixes deadlines for the proceedings to be conducted by the Competition Authority and for the rights to defence to be enjoyed by the parties.

3.1 Initiation of Preliminary Inquiry and Investigation

The Competition Board may either initiate an investigation or decide to conduct a preliminary inquiry to determine whether it is necessary to initiate an investigation.[13] Preliminary inquiries last 30 days[14] and the Competition Board has to convene to decide whether or not to initiate an investigation within 10 days following the submission of the preliminary inquiry report to the Competition Board.[15]

Sector,
• Block Exemption Communiqué on Research and Development Agreements,
• Block Exemption Communiqué on Vertical Agreements,
• Guidelines on the Voluntary Notification of Agreements, Concerted Practices and Decisions of Associations of Undertakings,
• Guidelines on Vertical Agreements,
• Guidelines on Application of Articles 4 and 5 of the Competition Act to Technology Transfer Agreements,
• Guidelines on Certain Subcontracting Agreements between Non-competitors,
• Guidelines on the Definition of Relevant Market,
• Guidelines on Explanation of Block Exemption Communiqué on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector.

10 Article 6.

11 Article 7(1).

12 Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board. There is a separate communiqué for privatization transactions providing for rules on pre-notification and authorization of such transactions. See Communiqué on the Procedures and Principles to be Pursued in Pre-Notifications and Authorization Applications to be Filed with the Competition Authority in order for Acquisitions via Privatization to Become Legally Valid.

13 Article 40(1).

14 Article 40(3).

15 Article 41.

3.2 Duration of Investigation

In case the Competition Board decides to initiate an investigation, it is concluded within 6 months at the latest.[16] The Competition Board may grant an additional period up to 6 months only once where it is necessary.[17] It should be mentioned that the period indicates the maximum time frame in which the investigation report is to be prepared. Therefore, it may take around 19 months to reach a final decision in a case involving an investigation provided that all the extensions concerning the investigation, rights to defence etc are granted and other procedural requirements are complied with.

3.3 Right of Defence

The parties concerned have to be notified of the investigation within 15 days starting from issuing of the decision that initiates the investigation.[18] The notification also requests that the parties send their (first) written pleas within 30 days.[19] It is compulsory that the Competition Board sends adequate information to the relevant parties as to the type and nature of the claims in order to enable the commencement of the first written plea period.[20]

When the first written pleas are received by the Competition Authority, an investigation report is prepared within the aforementioned timeframe and notified to the parties[21]. Upon the receipt of the investigation report, the parties may submit their (second) written pleas to the Competition Board within 30 days.[22] In response, the Competition Authority notifies the parties of its written opinion with regard to the second written pleas within 15 days.[23] The parties may send their (third) written pleas as a reply to the opinion of the Competition Authority within 30 days.[24] The Competition Act allows the Competition Board to extend the periods for written pleas only once and by one fold at the most in case the parties provide justifiable grounds.[25] According to the Competition Act, the pleas of the parties shall not be taken into account in case they are not submitted within due period.[26]

3.4 Right to Hearing

Before the final decision is taken, the Competition Act enables the parties to enjoy the right to hearing.[27] Hearing is done upon the parties' request or on the Competition Board's own initiative.[28] The

16 Article 43(1).

17 Article 43(1).

18 Article 43(2).

19 Article 43(2).

20 Article 43(2).

21 Article 45(1). It should be mentioned that the investigation report is notified to the relevant parties in a way not to disclose the trade secrets of the remaining parties.

22 Article 45(2).

23 Article 45(2).

24 Article 45(2).

25 Article 45(2).

26 Article 45(3).

27 Article 46(1).

28 Article 46(1).

hearing should be held within at least 30 days and at most 60 days from the end of the investigation stage.[29] Invitations for the hearing are forwarded to the parties at least 30 days before the day of the hearing.[30]

The Competition Act provides for principles concerning hearing.

According to these principles, hearings are held publicly unless the Competition Board decides to hold it in camera on grounds of protecting the general morals and trade secrets.[31]

Hearings are chaired by the Chairman of the Competition Board or by the Deputy Chairman in his absence.[32] There must be at least four members of the Competition Board in addition to Chairman or the Deputy Chairman.[33]

It should be mentioned that hearings should be completed in no longer than 5 consecutive sessions, and various meetings held within the same day are deemed as one session.[34]

The parties are obliged to notify, 7 days before the hearing at the latest, the Competition Board of the means of proof they shall utilize in the hearing and they cannot utilize the means of proof not notified within due period.[35]

During the hearing, the parties may utilize any evidence and means of proof.[36] The parties claimed to have infringed the Competition Act, or their representatives, and those who prove to the Competition Board prior to the session that they have direct or indirect interests, or their representatives may participate in sessions.[37]

3.5 Access to File

According to the Competition Act, the parties may, at all times, submit to the Competition Board any information and evidence likely to influence the decision.[38] Moreover, the parties may, until their request for enjoying the right to hearing, ask for a copy of any paperwork drawn up within the Competition Authority in connection with themselves, and if possible, a copy of any evidence obtained.[39] The Competition Board may not base its decisions on issues about which the parties have not been informed and granted the right to defense.[40]

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29 Article 46(2).

30 Article 46(2).

31 Article 47(1).

32 Article 47(2).

33 Article 47(2).

34 Article 47(3).

35 Article 47(4).

36 Article 47(5). Article 47(5) refers to evidence and means of proof provided in the Part Two Chapter Eight of the Code of Civil Procedure.

37 Article 47(5).

38 Article 44(1).

39 Article 44(2).

40 Article 44(3).

It should also be mentioned that the parties may always meet with the professional staff and the heads of the departments as the investigations are carried out by the professional staff under the supervision of the relevant head of the department. It is also possible for the parties to meet members of the Competition Board.

3.6 Final Decisions

The Competition Act provides for deadlines for the Competition Board to take its final decisions following the investigation stage. Accordingly, the final decision is made on the same day after the hearing, or if not possible, within 15 days, together with its grounds.[41]

In cases where a hearing is not requested by the parties, and the Competition Board does not decide to hold a hearing on its own initiative, the final decision is made within 30 days following the end of the investigation stage, pursuant to the examination to be performed on the file.[42] In case the parties concerned fail to attend the hearing despite the decision to hold a hearing, the decision is made within one week following the date of the meeting determined, pursuant to the examination to be performed on the file.[43]

It should be mentioned that even if the decisions are made within the deadlines provided above, it also takes some more time to prepare them in writing including all the necessary elements cited below and publish them accordingly. The Competition Authority strives to avoid long delays in this process via deadlines valid during the internal work within this context.

The Competition Act necessitates that the decisions taken by the Competition Board include[44]:

- Names and surnames of the members of the Competition Board who made the decision,
- Names and surnames of those who carried out the examination and inquiry,
- Names, titles, residences and distinguishing characteristics of the parties,
- Summary of the claims of the parties,
- Summary of the examination and of the economic and legal issues discussed,
- Opinion of the reporter,
- Evaluation of all evidences and pleas submitted,
- Grounds, and the legal basis of the decision,
- Conclusion,
- If any, the dissenting votes.

41 Article 48(1).

42 Article 48(2).

43 Article 48(3)

44 Article 52(1).

Moreover, it is also obligatory that duties imposed on and rights granted to the parties with the decision made have to be written explicitly such that they do not pave the way for doubts and hesitations.[45]

When decisions are signed by the members of the Competition Board participated in the relevant meeting, they are kept in the archives of the Competition Board.[46] A copy of the decision is submitted to the relevant parties in return for signature.[47] Decisions of the Competition Board are published on the internet page of the Competition Authority in such a way not to disclose the trade secrets of the parties.[48]

3.7 Mergers and Acquisitions

Regarding mergers and acquisitions, the Competition Act provides that when a merger and acquisition is notified, the Competition Board performs a preliminary examination within 15 days to decide whether to permit it or initiate a final examination to deal with it.[49] In case a final examination is initiated, the Competition Board is required to notify the relevant parties with a preliminary objection letter of the fact that transaction is suspended and cannot be put into practice until the final decision, together with other measures deemed necessary by it.[50] According to the Competition Act, rules concerning preliminary inquiries and investigation apply during the final examination phase.[51] However, it should be mentioned that although it may take around 19 months to reach a decision in a case involving an investigation as mentioned above, the final examination regarding mergers and acquisitions lasts shorter in practice.

In case the Competition Board does not respond to or take any action for the notification within due time, the transaction shall take effect and become legally valid after 30 days as of the date of the notification.[52] It should be emphasised that although the Competition Act mentions that preliminary examination will be conducted within 15 days, in practice the Competition Board finalizes it within 30 days, which is the period after which the transaction takes effect and becomes legally valid.

45 Article 52(2).

46 Article 53(1).

47 Article 53(1).

48 Article 53(2).

49 Article 10(1). The 15 day period starts when the notification is complete. Therefore, in case of incorrect or incomplete information in the notification, the period starts when such information is completed.

50 Article 10(1).

51 Article 10(1).

52 Article 10(2).

UNITED KINGDOM

1. Executive Summary

The Office of Fair Trading (OFT) and the Competition Commission (CC) recognise the importance of being transparent and of engaging effectively with parties and stakeholders.

This paper examines the specific questions raised in Working Party 3 of the Competition Committee on procedural fairness and transparency in antitrust proceedings and merger review. In particular, it discusses transparency of the law and what information is made available to relevant parties in the course of the OFT's and the CC's work (and beyond), as well as the applicable procedures (be it procedures prescribed by law or procedures that are followed by the relevant authority by way of good practice) in the application of competition law. These procedures are designed in the context of the applicable statutory regime in the UK and the general duty to act fairly. In relation to the CC, for example, statute requires it to take decisions following a competition assessment and to decide upon proportionate remedies, if appropriate.

Effective engagement with parties and stakeholders and procedural fairness can ensure that the law is applied correctly and proportionately, in accordance with sound public administration, and that the authorities achieve their overall mission of making markets work well for consumers. In respect of certain proceedings conducted by the UK authorities, statute prescribes how parties must be engaged and prohibits (at the risk of criminal sanctions) unlawful disclosure of information. Statute also prescribes the timeframe in which certain proceedings must be concluded. In relation to other proceedings, a greater degree of discretion may be applied.

The UK authorities' procedures acknowledge that they are required to act fairly throughout their investigations, and all decisions of the authorities are subject to judicial review. The provision of information (for example about the investigative process, theories of harm and current thinking) and the opportunity for relevant parties to meet with the decision makers are some of the means of meeting the authorities' obligations. In the case of the CC certain information is also shared prior to a statutory consultation.

In respect of the OFT, a certain degree of flexibility can be exercised in how it engages with relevant parties and how it approaches its substantive assessment of a case, which can help ensure that the regulatory burden on the parties is proportionate to the issues raised, and that the OFT's work is conducted as timely and efficiently as possible.

These obligations of fairness, thoroughness and timeliness sometimes conflict and together with increasing demands placed upon the UK authorities to be more thorough, more transparent and quicker, present challenges.

However, transparency and effective engagement are of paramount importance and the OFT has therefore launched a public consultation to determine how its can become more transparent about: the work it is conducting; how this work is being conducted; how long it is going to take; and how the OFT intends to involve stakeholders in the process.

Responses to the OFT's consultation identified information which the OFT is not currently under a duty to provide, but which, if provided, would bring the following benefits: better relationships with businesses, their advisers and representatives; better accountability; and improved clarity about the OFT's processes, timescales and workloads. In addition, ensuring that OFT's stakeholders are aware of the work that it does is a key factor in how OFT works towards meeting its overall mission of making markets work well for consumers.

The OFT's consultation also identified concerns of stakeholders to the publication of certain information, such as details of enforcement cases on case opening.

The OFT is due to make a decision on which of its proposals it will implement and to issue a statement on its decision in March 2010.

2. OFT Transparency Project

2.1 Background

The OFT's mission is to 'make markets work well for consumers' and it recognises that being transparent and engaging effectively with parties, and those who are interested in its work, can help it achieve its mission.

As part of a project looking at how the OFT can be more transparent, OFT has talked to businesses and individuals, and their advisers, and recently issued a consultation asking for comments and suggestions about how the OFT can increase its transparency. The full details of all the work OFT has done on its transparency project can be found at: www.oft.gov.uk/about/transparency.

The OFT's work on transparency is not limited to the clarity around legal procedures in competition enforcement cases. It also covers enforcement cases under consumer protection legislation and our market studies work[1]. It is also not limited to its formal procedures and processes. Information which facilitates direct communication between the OFT and its stakeholders - such as being able to find the name of the right person to contact, the telephone number of a senior member of staff when stakeholders have a serious problem - and information on how case teams respond to day-to-day queries as well as accurate information about timescales, all matter when assessing the 'transparency' of an organisation and have a significant impact on whether parties feel they have been treated 'fairly'.

In some instances, of course, the nature of enforcement work limits the amount of information that it would be proper to release. But subject to legal constraints, the OFT considers that greater transparency is both desirable and beneficial. The OFT has therefore launched its Transparency Project in order to understand how it can increase its transparency.

2.2 Transparency: two elements

The OFT's concept of transparency has two important elements. The first element covers the information that it provides to stakeholders about the systems and processes that are used. For example: the work the OFT is doing; why and how it is doing it; how long it is going to take; and how OFT intends to involve stakeholders in the process.

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[1] The focus of the WP3 roundtable discussion on "*Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings* is on procedural fairness and transparency on antitrust proceedings and merger review. While the principles of transparency and procedural fairness apply equally in OFT's consumer enforcement cases this area of OFT's work is not discussed further in this paper as this goes beyond the scope of the roundtable.

The second element is about the 'culture' of engagement with OFT stakeholders. By culture we mean the values and attitudes that the OFT's stakeholders can expect it to adopt when it engages with them on a day-to-day basis.

One of the concerns most often raised in the context of OFT's work on transparency is whether a move towards greater transparency puts confidential information at risk. The OFT has found it important to stress that transparency does not involve any reduction in proper treatment of confidential information. Indeed, it is possible for an opaque organisation to be careless with confidential information. The OFT considers that an organisation which holds its procedures and processes up for public scrutiny is likely to be more, not less, careful about handling confidential information.

2.3 The advantages of transparency

The OFT sees many advantages to improving transparency, including better relationships with businesses, their advisers and representatives, better accountability, and improved clarity about its processes, timescales and workloads. In addition, ensuring that OFT's stakeholders - for example, the wider business community - are aware of the work that it does is a key factor in how OFT works towards meeting its overall objectives.

The ways in which OFT engages with stakeholders during its investigations, and the way in which its stakeholders engage with OFT, have a significant impact on the time taken to complete work. Clearly understood and consistently applied processes are a key part of efficient and effective case and project management.

The OFT is keen to stress, however, that transparency and good engagement are not about accommodating requests from parties for bespoke arrangements to suit their individual needs when it is running enforcement cases, although it does include being responsive to any reasonable legitimate requests. On the contrary, transparency and good administration are about being clear about processes and procedures, getting things right, then applying firm project management techniques, confident that parties and stakeholders know what to expect from the OFT.

2.4 The OFT's consultation proposals

2.4.1 Initial pilot exercise

Before the OFT launched its consultation on specific proposals, it ran a pilot exercise providing more details about its work, typically its competition enforcement cases. This pilot had two objectives. The first was to test whether some concerns, raised by its staff around the impact on them of some proposals (for example, giving out names and telephone numbers), were justified. The second was to put in the public domain some very tangible examples of the changes the OFT might make. The full pilot can be found at: www.oft.gov.uk/oft_at_work/current-cases/

An example of the type of information the OFT provided as part of its pilot exercise is set out in the textbox below:

Box 7. Investigation into alleged price fixing of airline passenger fuel surcharges for long-haul passenger flights

The OFT is investigating alleged price fixing between two providers of airline passenger flights, in relation to passenger fuel surcharges for long-haul passenger flights to and from the UK in breach of Article 81 of the EC Treaty and the Chapter I prohibition of the Competition Act 1998.

In August 2007, the OFT announced that it had reached an early resolution agreement with one of the parties and that this party had agreed to pay a penalty of £121.5m. The other party is not expected to pay a penalty as it qualifies in principle for full immunity under the OFT's leniency policy. See press release for further information on this early resolution.

The penalty will not become payable until the OFT has issued an infringement decision. The OFT is bringing separate criminal proceedings against a number of individuals under the Enterprise Act 2002.

Date of opening: March 2006

Team Leader: Louise Shaw (020 7211 8836, louise.shaw@oft.gsi.gov.uk)

Project Director: Stephen Blake (020 7211 8469, stephen.blake@oft.gsi.gov.uk)

Senior Responsible Owner: Simon Williams (020 7211 8117, simon.williams@oft.gsi.gov.uk)

Case reference: CE/7691-06

2.4.2 Public consultation

The OFT's consultation and the proposals contained in its consultation document represent a useful starting point to the OFT's enhanced initiative and progress on the issue of transparency, rather than an end to its work on increasing transparency. However, the consultation document does not cover all areas where OFT believes there is room for innovation on transparency and OFT will make continued efforts in increasing its transparency.

The OFT's proposals to increase transparency on which it consulted are summarised in Table 1 below.

Table 1. Summary of the OFT transparency proposals

Case Stage	Proposal
Opening	**Publish opening summaries** for both consumer and competition cases as well as market studies, containing: • Details of the parties; • Issue/conduct being investigated; • Sector; • Date of opening; • Key project milestones; • Contact details for key project workers.

	Consistent use of **case initiation letters** to the parties in enforcement cases. To contain information as described above but in more detail.
During an enforcement case	**Issue formal information requests in draft**, where it would be practicable and not prejudice an investigation to do so.
	Where possible **provide advance notice of information requests.**
	Always aim to publish **indicative timescales** for key stages of the OFT's work with the aim of giving announcement dates when time is right to do so.
During a case	Keep an **open mind on sharing provisional thinking.**
Preparing for an announcement	Market sensitive – if fact of announcement known – timing will be given several days in advance. Where possible documents will be shared night before. Limited to 1 hr if multiple parties. Non-market sensitive – open about likely publication dates, expected milestones published, unless compelling reason not to.
Case closure	**Case closure summaries** to be produced for both competition and **consumer enforcement** cases.
Annual Report	**Publish more consistent performance data on closed projects,** including: • Date of opening/closing; • Summary of findings/decision/recommendations; • If necessary, indication of why we didn't meet timetable.
Additional commitments	Maintain **information about OFT governance structure** including easily available description of project roles.
	Group heads dealing directly with complaints about actions in their groups.

2.4.3 Responses to OFT consultation

In response to OFT's consultation, OFT received comments from: 8 law firms; 2 Consumer organisations; 3 Trade associations; and 2 Local Government organisations. The responses to the consultation are available on the OFT website[2].

Overall, the OFT received a positive response, particularly to the information published in its pilot programme. The most important themes in the responses were the following:

- very strong objections to publishing information about competition investigations before a Statement of Objections (SO) has been issued - with the exception of consumer representatives arguing strongly in favour of the proposal;
- calls for better engagement with the parties, not just better processes, for example regular 'state of play' meetings with the parties;

[2] See the OFT website for further information: www.oft.gov.uk/about/transparency.

- a desire for more information about the roles of individuals in cases and projects, particularly when individuals make decisions;

- objections to the proposal that once a deadline had been negotiated and agreed in the context of a draft information request, that deadline would not be extended;

- strong and opposing views on sharing provisional thinking in competition investigations with some parties arguing that it would be highly beneficial and others arguing that it would be inappropriate;

- positive responses to the proposals around stating timescales, but many respondents demanding firmer commitments;

- calls for the OFT to provide public guidance on how it handles the media around major announcements.

Overwhelmingly, the most contentious proposal is the proposal to publish the details of enforcement cases on case opening. The OFT consultation document outlined both advantages and disadvantages in publishing such information. The reasons OFT gave for making this proposal included the following:

- providing details of current work promotes a better understanding of the OFT's prioritisation process;

- better accountability for the use of the OFT's time and resources thus encouraging openness, improving discipline around time to complete work, improving processes and efficiency;

- the benefits of a searchable, meaningful, electronic record of what work the OFT has completed, and what it is still working on.

However, all law firms who responded argued against the proposal. Their reasons for arguing against the proposal (some of which were the same that OFT had identified in its consultation[3]) included the following:

- early disclosure is highly prejudicial, causing unjustifiable damage to the reputation of firms – they may suffer real financial and long lasting damage if customers and suppliers shift business away from them;

- while sectoral regulators in the UK with concurrent competition investigation powers publish information of enforcement cases on opening, the OFT is 'different' from the sectoral regulators– respondents argued the work of the sector regulators is 'more routine';

- media attention would be biased towards case opening. Case closure on administrative priority or no grounds for action decisions would not be covered by the media;

- the media do not understand the processes around competition work and this lack of understanding could lead to misreporting.

The OFT is due to make a decision on which of its proposals it will implement and to issue a statement on its decision in March 2010.

[3] See paragraphs 4.19-4.20 of the consultation paper www.oft.gov.uk/about/transparency.

3. Competition investigations: OFT's current practices and procedures

The OFT applies and enforces national law, and where appropriate also European Union (EU) law, which prohibits anti-competitive agreements and conduct.[4] Effective engagement with parties and stakeholders in competition investigations, and procedural fairness helps ensure that the law is applied correctly and proportionately, in accordance with sound public administration. This helps the OFT achieve its mission of making markets work well for consumers. The OFT is subject to the Human Rights Act 1998 and common law duties of fairness.

In exercising its investigative and enforcement powers, the OFT has in recent years made a conscious and significant move to go beyond the legal requirements that ensure procedural fairness and transparency, and to operate with greater transparency from the outset, so as to be more open about why it investigates cases, or has decided not to investigate, and also about the progress of investigations once they are underway.

3.1 Transparency on case selection and prioritisation criteria

The OFT is not under a legal duty to investigate every potential violation of competition law. The OFT selects which competition investigations to undertake by focusing its efforts and resources on deterring behaviour that poses the greatest threat to consumer welfare and, in the process, drives higher productivity and growth. At the same time, the OFT also recognises the need to avoid imposing unnecessary burdens on business through inappropriate interventions.

In order to make the appropriate decision about which potential anti-competitive behaviour to investigate, the OFT prioritises its cases. The assessment takes into account eight principles under the headings of impact on consumers, strategic significance, risks and resources.

Detailed information on how the OFT applies these principles is published in the OFT Guidance entitled OFT Prioritisation Principles.[5]

3.2 Transparency on legal and analytical standards

The OFT publishes a series of guides on the application and enforcement of competition laws in the UK[6]. The guidance documents deal with substantive analysis, for example, the OFT's assessment of agreements and concerted practices or abuse of a dominant position, as well as procedure, for instance the OFT's powers of investigation. Guidance is also available on the basis on which the OFT calculates financial penalties for competition infringements, and the requirements for the grant of lenient treatment by the OFT. [7] The OFT is also required to have regard to EU guidelines on substance.[8]

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4 Specifically, the OFT applies and enforces Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) which respectively prohibit agreements, decisions by associations and concerted practices which restrict competition and forbid the abuse of a dominant position, where trade may be affected in the EU; and the Chapter I and Chapter II Prohibitions of the Competition Act 1998 (Competition Act) which are closely modelled on Articles 101 and 102, where trade may be affected within the UK.

5 See OFT Prioritisation Principles (OFT 953) October 2008 at http://www.oft.gov.uk/advice_and_resources/publications/corporate/general/oft953.

6 These can be downloaded from the OFT's website or hard copies are available to order.

7 A full list of publications and a brief overview of their contents is available at http://www.oft.gov.uk/advice_and_resources/publications/guidance/competition-act/

3.3 Transparency on past decisions and case closures

In addition to published guidance, the OFT maintains a public register of its competition enforcement decisions, as well as those taken by UK sectoral regulators, which set out in full the evidence and information gathered by the relevant agency during its investigation, its analysis of the data, and its final decision (infringement or non-infringement).[9] The OFT also publishes summaries of competition investigations it has closed, where it has decided, on the basis of administrative priorities or lack of evidence, not to proceed with an investigation. The case closure summaries are indicative of how the OFT might approach similar cases but do not necessarily set out the full reasons for closing a case.

The OFT also publishes speeches delivered by its senior staff on competition matters. These give a useful insight into the OFT's current thinking on policy issues.[10]

3.4 Transparency with parties under investigation

3.4.1 Information on opening of competition investigations

The law states that the OFT only needs to inform parties under investigation of the existence of the investigation when the first investigatory measure is taken against them. However where the circumstances permit, the OFT engages prior to its first investigatory measure. Investigatory measures include: a notice to provide information, an inspection of premises with a warrant, an inspection of premises without a warrant.[11] The notice or warrant must state the subject matter and purpose of the investigation but it does not need to give extensive detail.

In most cases, the OFT will inform companies under investigation as early as possible and in writing of the existence of a formal investigation. Exceptionally, it may not be appropriate to do so in certain individual circumstances (for example, where this may prejudice planned unannounced inspections). In such cases, the OFT will communicate with the parties as soon as this is no longer an imminent threat.

Parties will be informed of the names and contact details of the case Team Leader, Project Director and Senior Responsible Owner. These details may also be published on the OFT website.[12]

3.4.2 Information and engagement with parties during an investigation

There is no statutory requirement on the OFT to keep parties informed about the progress of the investigation leading to a decision unless and until it decides to issue an SO, fully articulating its provisional findings.

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8 In accordance with section 60 of the Competition Act.

9 The public register is available at http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions. Under the Competition Act 1998 (OFT Rules) Order 2004, the OFT must publish its infringement decisions. However, the agency is not legally required to publish its decision if it decides that there are no grounds for action. In practice, the OFT publishes both infringement and non-infringement decisions.

10 See http://www.oft.gov.uk/news/speeches/

11 Under section 25 of the Competition Act, a formal investigation may only be opened if there are reasonable grounds to suspect an infringement.

12 See http://www.oft.gov.uk/oft_at_work/current-cases/#named1.

In practice, the OFT engages fully and on an ongoing basis with parties whose activities it is investigating as well as with certain third parties[13]. A number of stakeholders who responded to the OFT's transparency consultation named regular 'state of play' meetings with the parties as a key requirement to operating transparently. The desire to be open and transparent, however, must be balanced against the need to avoid obstruction and evidence destruction, especially in 'hardcore' competition enforcement cases. In reality, there may be a difference as to how open the OFT can be with parties depending on the nature of the case.

In terms of the OFT's use of its information-gathering powers, the OFT is mindful of the burden on companies of complying with information requests and therefore in most cases it engages in dialogue with the intended recipient to minimise that burden. For example, the OFT routinely discusses the range of questions or the format of the response so that those investigated can be clear about what information is of relevance to the investigation and, therefore, where they might need to look for it. Increasingly, the OFT sends out information requests in draft form and has discussions with notice recipients to make it easier to comply within the prescribed time limit for responding to information requests.

The deadline for submitting information varies depending on the type and quantity of information required. The OFT will consider reasoned requests for an extension to the deadline on a case by case basis. The OFT also informs recipients sufficiently in advance of an impending request to enable them to plan accordingly.

If the OFT's examination of the facts indicates the existence of a potential infringement of competition law, and the OFT considers that the case merits pursuing, the OFT will send each party under investigation and interested third parties, an SO, fully articulating its provisional findings.[14]

The SO sets out in detail the legal and economic assessment of the facts on which the OFT relies to establish the competition infringement(s); the action proposed by the OFT (such as fines and/or directions); and the reasons for the proposed action. Parties are granted access to the case file.[15] This is to ensure that recipients clearly understand the case against them and can properly defend themselves. The OFT gives advance notice to SO recipients of the expected date of issue to assist them with planning.

The SO itself is not made public but the OFT publishes a press release on its website, which is also submitted to the UK regulatory announcement service, and provided to relevant journalists.

Following the issue of the SO, the representations phase of the procedure allows parties to respond to the objections raised, before the OFT makes a final decision. Parties are given at least 40 working days to submit a written response and the OFT will consider reasoned requests for an extension to the deadline. In addition to responding to the SO in writing, each SO recipient also has the opportunity to expand on its written response by making oral representations. Such meetings are chaired by a senior OFT official who is

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13 The OFT operates a policy of providing certain third parties an opportunity to comment on and be informed of progress in OFT investigations in a structured and formal way where this will assist its investigation. This paper focuses on procedures concerning parties to an OFT investigation. For further information on the OFT's approach to third parties' involvement in its antitrust investigations see OFT Guidance on Involving Third Parties in Competition Act investigations (OFT 451) at http://www.oft.gov.uk/advice_and_resources/resource_base/legal/competition-act-1998/publications#named1.

14 As required by section 31 of the Competition Act and Rules 4 and 5 of the OFT's Rules.

15 Some material may be redacted on confidentiality and other grounds in accordance with the OFT's Rules and Part 9 of the Enterprise Act 2002.

independent of the case team. Typically, the case team and, where appropriate, certain senior OFT officials attend.

In practice, the OFT engages fully and on an ongoing basis with parties whose activities it is investigating and parties therefore do not have to wait until the representations stage to meet with OFT officials. They can request a meeting with the OFT case team and/or senior OFT officials at any stage of an investigation, so long as there is a clear purpose to the meeting and the parties provide a written agenda in advance, setting out the matters they wish to discuss.

In all cases, parties under investigation can offer binding commitments to the OFT at any time during the course of an investigation and up until a decision is made.[16] However, the OFT is unlikely to consider it appropriate to accept commitments offered at a very late stage in its investigation (for example, after the OFT has considered representations in relation to the SO).[17] In cases where commitments are offered prior to the issue of an SO, and the OFT considers they are appropriate to remedy the identified concerns, the OFT will issue a summary of its competition concerns to the companies. The OFT road tests any proposed commitments with interested third parties; and if accepted, will publish them.[18]

In appropriate cases, the OFT may engage in early resolution (settlement) discussions with parties under investigation (and where the case is appropriate such discussions are most likely to be initiated at the stage of issuing an SO and before receiving representations from the SO addressees)[19]. In practice, while the OFT has recently specifically invited parties to enter into settlement discussions, it is important to note that the ability to settle is not a 'right' to be exercised by the parties or the default standard process. It is only available in cases where the OFT considers that early resolution would be appropriate. Parties under investigation can proactively enquire whether the OFT may be willing to enter into early resolution discussions and the process is voluntary so parties are free to refuse to enter into and/or step away from any discussions.[20]

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16 Commitments can be offered under Article 5 of Regulation 1/2003 or sections 31A et seq of the Competition Act 1998. To date no OFT competition investigations have been closed by way of commitments. The commitments procedure is likely to be used in cases that are not anticipated to result in the imposition of a penalty. Once binding commitments have been accepted in respect of an agreement or conduct, the OFT must close its investigation and may not make an infringement finding in respect of that agreement or conduct. In contrast, the early resolution (settlement) process applies where the OFT proceeds to an infringement decision and imposes a reduced penalty on the parties in response to an admission of liability and co-operation.

17 The decision whether to accept binding commitments is at the discretion of the OFT and generally the OFT is likely to consider it appropriate to accept binding commitments only in limited cases. Commitments would be suitable where the competition concerns are readily identifiable and fully addressed by the commitments offered, and the proposed commitments are capable of being effectively implemented and, if necessary, within a short period of time.

18 See Enforcement (OFT 407), December 2004 available at http://www.oft.gov.uk/advice_and_resources/publications/guidance/competition-act/

19 The OFT does not exclude the option of settling cases earlier, if it is able to reach the requisite view on the evidence sooner.

20 See The Emerging Settlements Regime in the UK: The use of 'settlements' in Competition Act cases by Ali Nikpay and Deirdre Waters, August 2008 available at http://www.eui.eu/RSCAS/Research/Competition/2008(papers).shtml.

3.4.3 Information on decisions and case closures

If during the course of its investigation the OFT decides to close the investigation on the grounds of administrative priorities or because of lack of evidence, it will give the complainant(s) a reasonable opportunity to comment prior to informing the parties under investigation. As stated above, it is OFT's policy to publish on its website a summary of its reasons for closing cases.

Prior to publicly announcing its final decision on whether an infringement has been committed, the OFT gives the decision addressee(s) advance warning by way of an embargoed copy of the OFT press release. In response to the OFT's consultation, stakeholders commented that public guidance on how OFT engages with the media around major announcements would be beneficial, and OFT is currently considering how it might meet this request (see paragraphs 23-25 above).

Each addressee is provided with a copy of the OFT's fully reasoned decision (infringement or non-infringement) setting out the legal and economic analysis of the evidence upon which the OFT relies to establish the existence or not of an infringement, including any new evidence that has come to light at the representations stage, and any action that the OFT is taking (penalties and/or directions in the case of an infringement finding). A non-confidential version of the decision is placed on the OFT's website.

3.5 Duration of competition investigations

The duration of an investigation will depend on the complexity of the particular case and the amount of evidence to be considered. There are no statutory limits to the length of an investigation. There are a number of factors that can delay an investigation, such as failure to adhere to or extensions to information request deadlines. The OFT endeavours to keep parties under investigation informed at all times of the likely timing throughout its investigation. It may give updates starting with a timetable of milestones in terms of quarters, with later updates on progress (for example by sending 'update letters'), including where expected delays may arise. OFT is currently considering how to respond to stakeholders' comments that firmer commitments on timescales would be desirable.

The OFT is currently looking into ways in which it can streamline its investigations to deliver them more quickly, whilst ensuring that important rights of defence of parties under investigation are not eroded.

4. Mergers: current OFT practices and procedures at first phase examination

The UK has two competition agencies responsible for merger control: the OFT and Competition Commission (CC). The OFT undertakes the first phase examination of a merger and refers the case to the CC if a more in-depth, second phase investigation is required. If sufficiently clear cut, the OFT can accept, at the end of the phase one stage, remedies from the parties for those mergers which pose a realistic prospect of resulting in a substantial lessening of competition (SLC).

Unlike in most merger control regimes, in the UK there is no requirement to notify qualifying mergers to the relevant authority (i.e. the OFT).[21] As a consequence, the OFT undertakes fewer cases than it would do under a mandatory notification regime. This has allowed the OFT to be flexible rather than prescriptive in its approach to handling merger cases (since it does not require a prescribed method for dealing with a large number of cases raising no substantive competition issues). Indeed, in last year's ranking of

[21] Although the OFT can initiate an investigation into a transaction (whether anticipated or completed) on its own initiative by sending the parties to the merger an enquiry letter, which effectively serves as a request for a notification.

competition agencies, the *Global Competition Review* wrote of the OFT that "*compared with other top-tier competition enforcers, specialists say, the OFT is big on substance and light on process*".

4.1 OFT Timetables, first publicly available information of merger cases and details of merger case teams

The OFT (as the phase one authority) has a statutory deadline of 20 working days (which may be extended to 30 working days) in those cases which are notified by means of a statutory Merger Notice. The statutory Merger Notice timetable is available only where the merger remains anticipated. For completed mergers, the OFT must, by law, come to a decision within four months of completion. In practice, the large majority of cases that the OFT examines are notified by way of 'informal submission', in relation to which the OFT has a self-imposed target deadline of 40 working days to announce its decision.

Once a satisfactory notification has been submitted, details of the case are placed on the OFT's website, including the name of the case officer handling the investigation. The case timetable is also placed on the OFT's website although where the case is notified by 'informal submission' the administrative deadline given is a target one and the parties are not guaranteed a decision by that date.

4.2 OFT merger procedures and legal and analytical standards

The UK merger control regime has a high degree of transparency. The OFT publishes, and periodically updates, detailed guidance on merger investigations, including its *Jurisdictional and Procedural Guidance*. This detailed document, recently updated following an extensive consultation exercise with stakeholders, gives guidance on:

- jurisdictional issues,
- merger fees,
- how mergers are to be notified to the OFT,
- what information notifications should contain,
- how the assessment process operates in practice,
- remedying mergers at the phase one stage, and
- how the OFT merger control process interacts with other process (for example, the European Commission's merger control process).

Moreover, the OFT and the CC are currently producing joint guidance on substantive assessment issues in merger investigations (to replace existing separate guidance).

The OFT has also published guidance on a number of other issues such as how to complete the statutory Merger Notice[22], the disclosure of information, markets of insufficient importance (the de minimis exception)[23], the payment of merger fees[24] and the failing firm defence[25]. All OFT guidance

22 'Merger notice under section 96 of the Enterprise Act 2002', June 2003; and 'Prior notice of publicly proposed mergers', June 2003.

23 'Exceptions to the duty to refer: markets of insufficient importance', November 2007.

24 'Merger fee information', September 2009.

undergoes a public consultation process before being finalised, published and made available to download from the OFT website.

In addition to the published formal guidance, the OFT publishes speeches made by senior staff on merger matters which provide valuable insights into the OFT's latest thinking on policy issues[26].

Importantly, the UK's merger control legislation requires the OFT to publish all its merger decisions and any enforcement remedies (and changes to these). Such documents, which detail evidence and reasoning, provide a bank of decisional practice which help parties and their advisers to self-assess the competition issues in future (perhaps similar) transactions, and provide indications as to the evidence required and methodological approaches used in OFT merger investigations.

4.3 OFT engagement with merger parties

The OFT's procedures also allow for case-specific guidance to be given to merging parties before any public merger investigation begins. One mechanism is 'informal advice' whereby the OFT's Mergers Group, under certain conditions, gives confidential advice on an informal basis to a company and its advisers on its view of the competition and jurisdictional issues arising out of a merger the prospective acquirer is considering undertaking.

Another mechanism is pre-notification discussions. In this scenario the OFT case team (together with more senior staff if appropriate) will discuss likely avenues of inquiry, methodological approaches and likely evidence required with the merger parties who have already decided that they will notify their merger to the OFT.

The OFT case team keeps in close contact with the acquiring company throughout the life of a case, providing informal feedback and articulating theories of harm as they arise. How close this contact is will vary according to the complexity of the case and the nature and extent of the competition issues involved. The case team will send out questionnaires to customers and competitors early in the case[27] and will alert merger parties to any third party concerns that are based on credible theories of harm at the earliest possible opportunity (including the OFT's own concerns). OFT requests for further information from the parties are often accompanied with an outlined theory of harm that the OFT is testing.

Around the mid point of the investigation the OFT case team will have a 'state of play' discussion with the parties in order to give them as detailed an indication as possible of what competition concerns (if any) are still being examined and whether the case is likely to go to a 'case review meeting'.[28] This is similar to the process used by the European Commission under its Merger Regulation.

The OFT adopts a flexible approach in communicating with merger parties. Face-to-face meetings during the investigation stages are not usual but rather are generally confined to pre-notification meetings and 'issues meetings' toward the end of a case (described below). The OFT generally finds that telephone calls and email contact are sufficient during the live stages of most cases during which the analysis is

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25 'Restatement of the OFT's position regarding acquisitions of 'failing firms'', December 2008.

26 See the OFT's website for published speeches: http://www.oft.gov.uk/news/speeches/.

27 Sometimes, in markets involving technical issues, the OFT will liaise with the merger parties to ensure that the questions in its questionnaires make sense and are capable of being answered in a straightforward manner.

28 A case review meeting is held for those cases that have such potential competition concerns that render them candidates for a second phase investigation.

ongoing. But the OFT will meet with parties at any point of a case if a face-to-face discussion would be useful.

Merger parties have access to the case team (made up of a case handler and an economist) throughout the life of the case. They may also have direct access to more senior members of the Mergers Group (including the Director of Mergers, one of the Deputy Directors or the Head of Economics in Mergers) at this point of the investigation, depending on the complexity of the case. In more complex cases contact with senior staff may be frequent.

In addition to procedural flexibility, the OFT also demonstrates flexibility in regard to the substantive assessment of a case, which can help ensure that the regulatory burden on the parties is proportionate to the issues raised and is generally kept to the minimum necessary. For example, the OFT has cleared a case on the basis of the failing firm analysis where it was clear that evidence on the counterfactual provided the fastest route to establishing the absence of an SLC.

The OFT has also introduced the possibility of a fast track reference to the CC (at the request of the parties) in cases when it is clear that competition concerns cannot be suitably remedied at the phase one stage, though this mechanism has never been used to date.

4.4 Information provided by OFT on merger cases posing competition concerns

If a case is a candidate for reference for second phase investigation or to be remedied at the phase one stage, the OFT sends the parties an issues letter. This document articulates the OFT's concerns in writing, substantiated by evidence, and invites the parties to respond to the theories of harm set out in the paper. The parties are able to respond to the issues letter in writing and/or in person at an 'issues meeting'. This meeting, held with the case team and senior OFT Mergers staff, gives the parties the opportunity to discuss the OFT's competition concerns and to try to persuade the OFT as to why the concerns are unfounded. The OFT sends the parties the issues letter some days before the meeting (typically two or three but sometimes longer).

Whilst an extremely important part of the UK merger process, the OFT adopts a flexible approach to issues meetings. Parties are informed that it is their meeting and so, within reason, can determine the length and format of the meeting. The OFT case team is encouraged to be as candid as possible (while maintaining third party confidentiality) with the parties on the strength of their concerns about the competitive effects of the merger, the supporting evidence, what further evidence the parties could submit and the likelihood of remedies being accepted.

The OFT is willing throughout its investigation to engage in discussion with the parties on potential remedies on a 'without prejudice' basis. Indeed, in a number of cases such consideration has occurred as early as in pre-notification discussions. In terms of actually submitting a final remedy, the OFT's general policy is that, at the end of the investigation, it is for the parties to stipulate the maximum remedy offer they would be prepared to give to avoid a reference. However, the OFT has a 'near miss' policy of giving merger parties the opportunity to clarify or tweak their remedy offer in those instances in which their offer was close but not completely sufficient to remedy the competition concerns ultimately found.

4.5 Publication of OFT merger decisions

Publishing merger decisions invariably involves detailing evidence submitted by the parties and third parties, including commercially sensitive information. However, before any decision (or other document) is published, parties are given the opportunity to request that information is excised from the publicly available document on the grounds that its publication could be detrimental to their legitimate business interests.

The OFT publishes all its merger decisions, including those cases in which the OFT concludes that it does not have the jurisdiction to examine the transaction.

5. OFT Market Studies: current practices and procedures

5.1 Background

In the case of market studies, there is a high degree of engagement with key stakeholders and transparency due to the nature of the work, as is described in paragraphs 81 to 90 below.

In contrast to some of the OFT's other work, there are few statutory requirements prescribing the procedures and processes that the OFT must follow when conducting a market study, or how it should engage with parties[29]. In making decisions related to market studies, the OFT generally has more discretion than with any other of its competition and consumer powers. This ability to exercise wide discretion is appropriately balanced by internal governance rules. In addition, the processes and procedures that it follows are based on its experience of best practice and 'lessons learned'. Throughout the life of the study, the OFT engages with stakeholders, as is described below.

5.2 Selection of OFT market studies and prioritisation

The first phase is to identify markets to study, drawing on intelligence from a number of sources, including:

- complaints from businesses, consumers, and other stakeholders;
- proactive consultation with stakeholders;
- super-complaints from consumer bodies;
- government requests; and
- own initiative concerns, in particular about markets and regulation.

The initially selected studies are then formally considered against the OFT's published prioritisation principles[30].

5.3 Launch of an OFT market study

At launch the OFT publishes a press notice, usually accompanied by a scoping document. There will be set out the scope of what the OFT intends to study, any questions it is considering, its reasons for deciding to conduct a market study, an invitation to make submissions and the market study team's contact details.

The OFT may also publish progress reports and will state when a market study is likely to be completed, however there are no statutory timeframes for completing a market study.

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29 For further information see the OFT's Market Studies guidance , which it is currently consulting on http://www.oft.gov.uk/shared_oft/consultations/oft1080con.pdf.

30 The assessment takes into account eight principles under the headings of impact on consumers, strategic significance, risks and resources.

5.4 Data collection and data analysis, and consultation

The OFT does not have the power to require any person to provide information for the purposes of a market study. This makes it all the more important to engage effectively and transparently with parties.

During the data collection phase the OFT is likely to make use of customised stakeholder questionnaires, surveys and meetings. The OFT also conducts a fact-checking exercise with relevant stakeholders. As a result of the gathering and analysis of data, the OFT's questions or hypotheses are often also tested. This kind of transparency both ensures that the results of the studies are factually correct and that they are highly credible, which in turn increases their impact.

The OFT's study teams analyse the results and use the evidence they have gathered to determine whether or not there are actual consumer or competition issues in the market and, if there are, to describe them. Based on provisional findings, the study team determines which tool or tools it considers would be most appropriate to address them (including advice to Government or industry, consumer education, enforcement action, market investigation reference (MIR)), and what an appropriate remedy would be. Constructive and creative engagement with stakeholders can also deliver voluntary remedies to market problems.

If the outcome of a market study is recommendations to government or to industry, a key phase of the study process is testing potential recommendations with stakeholders (via consultation). Their involvement is needed to test the study team's analysis and to seek buy-in whenever possible to any recommendations that come out of the study.

5.5 Publication

The final report and recommendations (if made) are published. On publication, the OFT provides detailed briefing to the media because of the high level of interest in many of the studies, and because the OFT sees public opinion as one of the key drivers of change, with experience indicating that media coverage can influence the effectiveness of a study's outcome. Effective engagement with the main stakeholders and transparency is critical to achieving the maximum possible benefit from the announcement of the OFT's findings.

5.6 Government response and follow-up

Study teams plan for continued support of the study's recommendations during the 90 day period when government is considering and responding to the recommendations. The OFT presents its findings to the government departments responsible for implementing any recommended changes. In some cases, follow-up is needed after the end of the 90 day period: for example, to continue to advocate for or assist the process of change, as the government implements recommendations. Where this is necessary, the market study team itself may carry out the follow up for a planned period, or follow-up may be handed over to another part of the OFT, such as the OFT's advocacy team.

6. Mergers and markets investigations in the UK – Second-stage intensive investigation by the Competition Commission

6.1 CC Investigations- Background

The CC's role is to conduct in-depth inquiries into mergers, markets and aspects of the regulation of the major regulated industries. All cases to the CC are on reference from another body (the OFT in merger cases and the majority of market investigations although some sector regulators are also able to make market references).

In light of the OFT's procedures and practices described above, parties will already be aware of the issues that the OFT identified as raising competition concerns and which led to a reference to the CC. However, the issues that the CC may investigate and the CC's assessment of the competition concerns are not limited to those of the referring body and may vary as the investigation progresses. The CC's processes include steps designed to inform the parties of the current issues under consideration during the investigation, as explained below.

The CC is a decision making body applying competition tests (in the form of statutory questions)[31] when analysing mergers and markets. Both market and merger investigations can lead to the CC requiring and implementing remedies to address the competition problems. Both merger and market investigations must be determined according to a statutory timetable (merger references alone may be cancelled without completing the investigation in the event the merger does not proceed). Judicial scrutiny of the CC's decisions is on judicial review rather than appeal, to the specialist tribunal, the Competition Appeal Tribunal (CAT).

6.2 Overview of CC Merger and Market Investigations

The current processes were devised when the CC became determinative in 2002. They are designed to deliver the CC's aims of being open and transparent while maintaining the confidentiality of information that it obtains during the investigations. The statutory regime and processes are designed to ensure that the CC is both fair to the parties affected by the CC's decisions so that parties' rights of defence are respected and that there is wider appreciation of the CC's work in respect of individual cases and more generally (i.e. amongst the public at large, professionals and business).

The CC considers also that dialogue with the parties during the investigation and making available information about an ongoing investigation improves the quality of a decision maker's decision, for a number of reasons:

- It is a means of achieving due process and of ensuring that by having a better understanding of the case against them, the main parties in an inquiry are treated fairly;
- It enables other interested persons to understand the issues that the CC is considering and then to form their input into the process effectively;
- Transparency helps main parties and other interested persons when providing the CC with information, including identifying inaccuracies and incomplete or misleading information; and
- The effectiveness, efficiency and quality of CC inquiries and decisions are improved.

A description of the CC's processes with emphasis on communications with the main parties in mergers and market investigations is set out below. In respect of both, an investigation typically comprises three main phases (in broadly chronological order):

- Investigation, information-gathering and analysis;

[31] For mergers, whether there is a relevant merger situation and whether the merger is expected to result in an SLC. For markets, whether there are features of the market that have an adverse effect on competition. Additionally, if the CC determines that there are adverse effects on competition, it must decide whether action should be taken by it or others by way of remedy.

- Discussion and agreement by the Group (see paragraph 106 below) of provisional findings and publication of these provisional findings; and

- Making final findings, a remedies decision (if necessary) and publication of the report.

Responses are invited to key publications (Issues Statement, Provisional Findings and Notice of Possible Remedies). However, there is ongoing communication between parties and the CC throughout the investigation independent of these key stages.

The publication of the provisional findings (pursuant to the CC's *Rules of Procedure*[32] and the CC's statutory requirement to consult on its proposed decisions (see paragraph 119 below) is a key step in the investigation since it is at this stage that the parties will know whether the CC considers that there are competition concerns which may lead to an adverse finding and parties have the first indication of the CC's provisional answers to the statutory questions it must answer. Up until this stage, as explained below (see paragraph 115), the CC will have made known to the parties the matters it is considering and may also have given preliminary thoughts on various matters. This is an important stage of the investigation; it is important that parties have the ability to respond fully to the provisional findings (in writing, but supplemented by a hearing if appropriate). As explained (see paragraph 118) the provisional findings are a full account of the CC's proposed decision and its reasons. Additionally, the CC aims to ensure that at the time of publication of the provisional findings, all other material which it typically publishes on its website is available.

Recently the CC's processes during the investigative stage (i.e. before the CC had reached provisional findings) were challenged by the main party to a merger investigation. The case concerned the CC's decision to redact information from a working paper (see paragraph 116 below) on the basis of an ongoing OFT competition investigation, and for public interest reasons and reasons of commercial confidentiality. The information redacted was one piece of analysis (which ultimately was irrelevant to the CC's analysis of the merger). The conclusion on an aspect of analysis was visible, the facts and reasons for the conclusion were not. The CAT considered whether the CC's decision to withhold the information was reviewable by the CAT. The CC had argued the issue was premature because the CC did not itself know of the relevance of the information to its provisional or final decision. The CAT found that the issue was not premature, rejecting any argument that a clear line could be drawn to determine the point at which the CC's decisions could be challenged and observing that the CC is required to act fairly throughout the investigation. The CAT was particularly concerned that based upon the limited facts it had before it (the issue was considered as a preliminary issue without discussion of the merits) there was a risk that the merging party, which was due to attend a hearing prior to the provisional findings, would not have sufficient information available to it to enable it to answer questions put to its officers. The CAT did not decide upon the merits of the case since the CC withdrew its decision.[33]

The essential features of the CC's process are:

- Involvement of CC Members (the decision makers) during the investigation, including at hearings;

- Initial fact finding through questionnaires, meetings, 'site visits' and formal hearings;

- Publication of an administrative timetable and key submissions from parties (main and third);

32 CC1 The Rules of Procedure .

33 http://www.catribunal.org.uk/files/1116_Sports_Direct_Judgment_14.12.09.pdf.

- Key signposts along the way identifying the theories of harm under consideration and current thinking at key stages of the investigation – Issues Statement, Provisional Findings, Notice of Remedies (if needed), and the Final Report;

- Formal hearings between the Members and the parties on the substantive issues during the investigative process and following the Provisional Findings; and

- Fixed overall maximum time limits for investigations.

The CC's procedures do not provide for a hearing officer. However, provision is made for any person concerned about the CC's intention to disclose information which it considers is sensitive to raise the matter with the Chief Executive and Secretary of the CC who may, having considered the issue make representations to the Group. In practice, much of the dialogue between the parties and the CC is conducted at staff level, the Group becoming involved if a resolution cannot be found.

6.3 Transparency of legal and analytical procedures

The CC has published a series of guidance documents (CC Guidance) concerning its procedures and analytical approach to ensure that parties know what to expect during a CC investigation:

- Guidance on Merger References[34];

- Guidance on Market Investigations[35];

- Information on procedural aspects of the CC's investigation can be found in the CC's *Rules of Procedure*[36] and *General Advice and Information*;[37] and

- Guidance in relation to the disclosure of information during CC inquiries.[38]

All CC Guidance goes through a public consultation process before being finalised and published on the CC website.

In addition to formal guidance documents, the CC also publishes occasional papers, evaluation reports and speeches and briefing notes made by senior CC Members on topics in competition policy which provide valuable insight into the CC's latest thinking on such issues.[39]

When addressing the statutory questions the CC must consider in respect of a reference, a group of Members will have regard to the CC Guidance and will apply the methodology and analysis summarised in

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34 CC2 Merger References: Competition Commission Guidelines. The CC and the OFT are currently producing joint Merger Guidelines to replace existing separate guidelines on merger investigations which will be published as a final document in due course. See http://www.competition-commission.org.uk/about_us/our_organisation/workstreams/analysis/pdf/mergers_guidelines.pdf.

35 CC3 Market Investigation References: Competition Commission Guidelines.

36 CC1 The Commission Rules of Procedure.

37 CC4 General Advice and Information.

38 CC7 Chairman's Guidance on Disclosure of Information in Merger and Market Inquiries.

39 http://www.competition-commission.org.uk/rep_pub/analysis/index.htm and http://www.competition-commission.org.uk/our_role/speeches/index.htm.

it as it considers appropriate. Depending on the circumstances of each case, the CC will apply the approach described in the CC Guidance flexibly and may, if it considers it appropriate to do so, depart from that approach.

6.4 Transparency of the Inquiry Process

6.4.1 Identity of the Decision Makers

The CC Chairman appoints a group (minimum 3 Members) (the Group) at the beginning of an investigation. The names and biographical details of these Members are conveyed, along with other general information about the conduct of the investigation, to the main parties in a First Day Letter. Information about the Members is also published on the CC website.

6.4.2 Publication on the CC Website

Each inquiry has its own designated web page which parties and the public can access for information and access to non confidential main and third party submissions and CC published documents. The inquiry website plays an important role in every inquiry. In some market investigations, when there are several hundred main parties, it can be the main means of communicating with those parties who take a less active role in the investigation. The website is generally the means by which the CC meets its statutory obligations to publish notices and other relevant CC documents (for example, notices of cancellation or extension of a reference or the implementation of remedies).[40] In addition to the statutory publicity requirements, the CC also publishes as good practice:

- Main and third party key arguments and views;
- Surveys commissioned by the CC and sometimes parties also;
- Parties' responses to CC key publications; and
- Issues Statement, various working papers (market investigations), Provisional Findings, Notice of Possible Remedies and proposed decision on remedies (market investigations only).

6.4.3 Timetable of Key Proceedings

An administrative timetable is prepared at an early stage of the investigation which makes provision for the major stages of the reference. The major stages of the reference may include, gathering information; issuing questionnaires; hearing of witnesses; providing a statement of issues; notifying provisional findings; notifying and considering possible remedies; considering exclusions from disclosure; and publishing reports. This is published on the inquiry web page and may be revised.

6.5 Meetings with CC Staff and Members

The main parties have several opportunities to meet with staff and Members at key points in the investigation, the format of which varies in formality.

At the beginning of an investigation, the staff team meets the main parties (these tend to be separate meetings though in some market investigations a meeting is held at which all main parties are invited to attend). The agenda typically includes discussion of the procedures and contacts, the draft administrative

[40] See section 107 Enterprise Act 2002.

timetable, possible dates for site visits and hearings, issues to be addressed during the inquiry, information that the main parties are to provide to the CC and dates for receipt of such information and the CC's rules on disclosure.

Site visits to the parties' offices or facilities are also arranged at the early stage of the investigative process, enabling the CC (staff and Group Members) to learn more about the industry and the party in its own context and enable the party to put their case informally. The main party is usually asked to prepare the itinerary, which typically includes a presentation, followed by a tour of the business areas and a session for questions.

During the investigative stage hearings are held with third and main parties (typically there is one hearing with the main party in merger investigations but this can be more often in market investigations). Although the CC has the power to require attendance at hearings, the vast majority of these are held on a voluntary basis. These are typically formal with a record taken (often a full written transcript). The hearings with main parties are with the Members of the Group asking the questions, supported by the staff. Hearings with third parties are typically with staff, particularly in merger investigations, although hearings with key third parties may be with the members. Prior to the hearing the parties will have submitted their initial written submission to the CC and have seen the CC's statement of issues, as well as third party material published on the website. In some cases the parties will also have been provided with a staff commentary on the issues statement and/or a number of working papers (see below). The parties are invited to comment orally on the investigation (including any thinking shared by the CC with them) in opening and closing statements and the remainder of the hearing is principally focused on evidence gathering by the CC.

A further hearing is held following the publication of the Provisional Findings although main parties sometimes choose not to attend if the provisional findings indicate the clearance of the merger. In addition to commenting on the provisional findings, the hearing explores possible remedies.

The initial staff meeting and hearings described above are regular set pieces. Additionally there are many other communications (meetings or telephone) between the parties and the CC (mainly the staff) including the holding of meetings to discuss particular technical analysis which can also be attended by some members of the Group.

6.6 Information for the Main Parties in relation to the case against them

6.6.1 Issues Statement

As explained, the parties will have seen the reasons for the reference having been made. The CC publishes at an early stage of the investigation an issues statement. This is the first occasion in which the CC sets out the issues it is exploring. It serves as an agenda both for the hearing with the main parties and contains hypotheses which are set out as theories of harm. Theories of harm consider the possible problems which may result from the merger or arise in the market, how these problems should be investigated and whether or not they could lead to adverse finding. The issues statement is published on the CC website alongside a news release. Any interested parties are invited to comment on the issues statement, usually within 2 weeks of its publication. Particularly in market investigations, the focus of the CC's work may alter as the investigation proceeds. The CC ensures that the parties are aware of these developments through the various forms of communications it has with the parties though it would not typically issue a revised issues statement.

6.6.2 Working Papers

The staff team prepare internal analytical working papers which analyse the information provided by parties in response to questionnaires and in hearings. Each paper considers a different topic of analysis – for example, the transaction, market definition, the counterfactual, competitive effects and entry and expansion. They are internal documents that do not contain findings on the statutory questions the CC must answer (i.e. whether the merger gives rise to an SLC or whether, in the case of market investigations there is an adverse effect of competition) although may contain views on particular aspects of the investigation.

Extracts from these working papers showing the assessment of the material the party concerned provided, are often 'put back' to parties to check for factual accuracy and also to identify material which the party wishes to treat as sensitive. In some cases, particularly in the case of background working papers and more generally in merger investigations, extracts are also provided to main parties and so enables them to understand the issues the Group is considering, the methodology it is using and possibly also the Groups' initial thoughts of the material. Although none of the CC's rules requires the working papers (or extracts) to be routinely supplied to main parties, the CC is often willing to provide these, believing that such communications during the investigative stage assists with the efficiency and quality of the investigation.

6.7 Opportunity for Parties to respond to CC thinking

6.7.1 Provisional Findings

At the completion of the investigative stage, the CC publishes a Provisional Findings report that sets out its proposed decision on the statutory questions it must answer, its reasoning and also the core background details necessary for an understanding of the inquiry, including details of the main parties, the principal features of the industry and a description of the merger situation,.

The findings are published in compliance with the *Rules of Procedure*. In addition, the publication of Provisional Findings generally satisfies the CC's statutory obligations under the Enterprise Act 2002 (the Act),[41] which requires the CC to consult persons, as far as practicable, affected by the decision. In considering what is 'practicable', the CC must have regard to:

- any restrictions imposed by any timetable for making the decision; and
- any need to keep what is proposed, or the reasons for it, confidential (see below)

The publication of the Provisional Findings commences the period of consultation which may be no less than 21 days. Responses from parties to the Provisional Findings are published on the website. The hearing held following the publication may be held during this consultation period in merger cases but sometimes later in a market investigation.

If the Provisional Findings are adverse, the CC will consider appropriate remedies. A notice of possible remedies is published at the time of or shortly after the publication of the Provisional Findings. The notice outlines the Group's potential remedies for consideration by the parties. In accordance with CC Guidance, the notice is sent to the main parties and published on the CC website. The notice of remedies typically gives the parties no less than 14 days to respond in writing. Possible remedies are also discussed at the hearing held following the publication of the Provisional Findings and remedies notice.

41 The CC's duty to consult is contained in section 104 (merger inquiry) and section 169 (market investigation).

During the period between publication of the Provisional Findings and the final report, in addition to a hearing, parties frequently submit comments on the provisional findings and remedies and there will often be meetings at staff level in particular to discuss proposed remedies in detail. In merger cases, the main party will receive a detailed paper setting out the CC's provisional decision on the remedies question and its reasoning and invite comment. In market investigations the CC's provisional decision on remedies is published.

While the CC's processes aim to ensure that the parties provide comment and evidence in good time to enable the CC to meet the statutory deadline by setting deadlines for submissions, the CC is also flexible, receiving additional evidence throughout the investigation subject to deadlines published in its administrative timetable.

6.8 Limits on the CC's investigation and content of publication

6.8.1 Time Limits

The CC is required to publish its final report in respect of merger investigations within 24 weeks of the reference being made and within 2 years for market investigations.

The statutory deadline for mergers may be changed in two circumstances:

- By a single extension of no more than 8 weeks if the CC considers that there are special reasons why the final report cannot be prepared and published within the period; and

- If the CC considers that a 'relevant person'[42] has failed to comply with any requirement of a notice issued under section 109 of the Act. If a party is unwilling or unable to provide information, the CC can under section 109 of the Act, issue a notice requiring either the attendance of a witness or production of documents. A failure to comply with such a notice may lead to an extension of the inquiry timetable.

There is no power to extend market investigations.

6.8.2 Disclosure of information

The Act imposes a general restriction on the disclosure by the CC of 'specified information'[43] that it has obtained in connection with the exercise by the CC of its merger or market investigatory functions. This general restriction on disclosure is subject to limited exceptions, largely contained in 'gateways' set out in Part 9 of the Act. Part 9 of the Act sets out the circumstances in which the Group may disclose 'specified information'.

In addition to identifying an appropriate gateway, before any disclosure of specified information is made, the CC must consider the need to exclude from disclosure (so far as practicable)[44]:

- any information contrary to the public interest;

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42 As defined in section 39(5) of the Act.

43 See section 238 of the Act.

44 Section 244 of the Act.

- any commercial information whose disclosure might harm the legitimate business interests of the undertaking to which it relates; and

- information relating to the private affairs of an individual whose disclosure might significantly harm the individual's interests.

In general, the CC is successful in balancing the statutory prohibition on disclosure of information with both its transparency and requirement to be fair to parties affected by its decisions. To date it has not found it necessary to make use of confidentiality rings or similar procedures.

6.9 Public Announcements

6.9.1 Final Report

The CC's final report contains its final decisions on the competition questions and remedies (when applicable), together with the reasons for those decisions and such information as is necessary to facilitate a proper understanding of the decisions and the reasons. This report is published on the CC's website.

UNITED STATES

Substance and process in government antitrust investigations go hand in hand. Regardless of the outcome of an investigation, concerns about process create the impression that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the enforcement outcome.

This submission provides an overview of the practices of the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (together, "the Agencies") with regard to transparency and procedural fairness. Part I discusses transparency with respect to substantive standards and agency policies and procedures. Part II discusses open and frequent dialogue with the parties, and Part III addresses the closely related issue of informing parties of the allegations against them in a timely manner. Parts IV and V describe the opportunities that parties are given to respond to agency concerns and to be heard prior to an adverse decision. Part VI addresses the length of antitrust investigations, and Part VII summarizes the Agencies' practice with regard to the publication of decisions.

Although the Agencies' investigatory processes are similar, their enforcement processes differ procedurally. DOJ is a cabinet department of the U.S. government, and must initiate an enforcement action in an appropriate U.S. district court. The court determines whether the law has been violated and orders any relief or remedy required. The FTC is an independent agency that enforces competition and consumer protection laws and may use its own administrative processes, codified in Part III of its rules, to enforce the law. Under this process, the Commission, following a full investigation, issues an administrative complaint, which initiates an enforcement proceeding that is overseen and resolved by an administrative law judge, subject to review by the full Commission and, ultimately, a U.S. court of appeals. The FTC thus exercises both prosecutorial and judicial, functions.[1] The FTC may seek a preliminary injunction in U.S. district court in aid of the administrative proceeding, *e.g.*, to block a merger before it is consummated.[2] The Commission's process affords respondents procedural rights that are quite similar to those in a court proceeding. Thus, even though the Agencies' processes differ, both agencies provide procedural fairness to subjects of enforcement proceedings.

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1 Representative Covington, who authored the original bill that led to the FTC Act, emphasized that the agency would have specialized expertise and experience, and thus should have both prosecutorial and judicial functions: "[T]he function of the Federal Trade Commission will be to determine whether an existing method of competition is unfair, and, if it finds it to be unfair, to order discontinuance of its use. In doing so, it will exercise power of a judicial nature…. The Federal Trade Commission will, it is true, have to pass upon many complicated issues of fact, but the ultimate question for decision will be whether the facts found constitute a violation of the law against unfair competition. In deciding that ultimate question the Commission will exercise power of a judicial nature." Congressional Record, Sept. 10, 1914, at 14931-33.

2 15 U.S.C. § 53(b). Under the same provision of the FTC Act, the Commission may also seek permanent injunctive relief.

1. Transparency of substantive standards and agency policies and procedures

There are three primary antitrust statutes in the United States: the Sherman Act,[3] which became law in 1890; the Clayton Act,[4] which was enacted in 1914; and the Federal Trade Commission Act,[5] which also became law in 1914. Under the United States common-law system, independent courts issue decisions that apply the general statutory provisions to specific facts as presented through adversarial litigation. As the United States Supreme Court has explained:

Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.[6]

The extensive body of court decisions under the common-law system is an important way that substantive legal standards become known and transparent to the business community, lawyers, economists, and consumers.[7] In addition, the FTC, through its administrative enforcement process, contributes to the body of decisional law interpreting the Clayton and FTC Acts.

The Agencies also publicize substantive guidance, including information about how they decide whether to open an investigation or challenge conduct on antitrust grounds. Both agencies have published guidelines, available on their websites, that describe the standards they use to analyze various kinds of conduct that could raise an antitrust concern.[8] The best known of these guidelines are the Horizontal Merger Guidelines[9] which reflect the best practices and thinking regarding substantive merger review. They periodically have been revised since first adopted over forty years ago, and currently are under review. To increase transparency, the Agencies supplemented the Merger Guidelines in 2006 with a Commentary on how they apply the Guidelines in particular investigations.[10] The Agencies also have published similar guidance regarding collaboration among competitors,[11] issues concerning intellectual property,[12] and particular industries.[13]

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3 15 U.S.C. § 1 *et seq.* The Sherman Act is enforced by DOJ.

4 15 U.S.C. § 12 *et seq.* The Clayton Act is enforced by both DOJ and the FTC.

5 15 U.S.C. § 45 *et seq.* The FTC Act, Section 5 of which encompasses violations of the Sherman Act, is enforced by the FTC.

6 *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

7 *See, e.g.*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 551 U.S. 877, 899 (2007) ("Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraint[s] of trade" evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach.").

8 *See generally* http://www.justice.gov/atr/public/guidelines/guidelin.htm; http://www.ftc.gov/bc/guidance.shtm.

9 U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf.

10 COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.htm.

11 U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

12 U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), *available at* http://www.justice.gov/atr/public/guidelines/0558.pdf.

These formal guidance documents are supplemented in various ways. Officials from the Agencies frequently speak about the substantive direction in which they intend to move,[14] and file *amicus curiae* briefs in private litigation that describe their policies.[15] The Agencies provide guidance to businesses about the legality of proposed conduct under the antitrust laws. In particular, through FTC staff advisory opinion letters and DOJ business review letters, persons concerned about the legality of proposed business conduct may request the Agencies to state their respective antitrust enforcement intentions.[16] Both agencies also actively participate in competition-related academic, professional, business, and governmental forums, including, for example, the Organisation for Economic Co-operation and Development, the International Competition Network, and the American Bar Association's Antitrust Section. In addition, both agencies engage in advocacy in public policy or regulatory proceedings conducted elsewhere in the government. The Agencies' officials also regularly publish articles in print and electronic journals. This all allows for an active dialogue among the business community, antitrust lawyers, economists, academics, and the agencies regarding the substantive standards involved in initiating, litigating, and closing antitrust investigations.

Transparency on substance is matched with equal emphasis on procedural transparency. As Assistant Attorney General Christine Varney has emphasized, this aspect of transparency – allowing parties and the public to understand *how* the agency makes decisions – is vitally important.[17] For that reason, DOJ's internal practices and procedures are exhaustively described in the Antitrust Division Manual, which is published on its website.[18] DOJ also created its Merger Review Process Initiative[19] to facilitate dialogue with the parties on the procedural aspects of merger review, especially the timing of the process. DOJ's criminal cartel enforcement website similarly provides a wealth of information regarding its leniency program and other elements of its cartel investigations.[20] Finally, DOJ civil staffs are quite open with the

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13 *See, e.g.*, U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996), *available at* http://www.justice.gov/atr/public/guidelines/1791.pdf.

14 *See, e.g.*, Christine A. Varney, Assistant Attorney General, Antitrust Federalism: Enhancing Federal/State Cooperation, Remarks as Prepared for the National Association of Attorneys General (Oct. 7, 2009) at 7-14 (describing a possible direction for the law of resale price maintenance), *available at* http://www.justice.gov/atr/public/speeches/250635.pdf, and among others, addressing issues related to Section 5 of the FTC Act and the review of the Horizontal Merger Guidelines, *Chairman Jon Leibowitz: Priorities and challenges for the US Federal Trade Commission*, Concurrences No. 1-2010 at 1-6, *available at* http://www.concurrences.com/article_revue_web.php3?id_article=30209&lang=en.

15 *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner, American Needle, Inc. v. Nat'l Football League, No. 08-661 (2009), *available* at http://www.justice.gov/atr/cases/f250300/250316.pdf. DOJ makes all of its appellate briefs readily available on its website http://www.justice.gov/atr/public/appellate/appellate.htm. The FTC's *amicus* briefs are available at its website http://www.ftc.gov/ogc/briefs.shtm.

16 An overview of DOJ's business review process, as well as past business review letters, is *available at* http://www.justice.gov/atr/public/busreview/201659a.htm. An overview of FTC's advisory opinion process, including previous opinions, is *available at* http://www.ftc.gov/bc/advisory.shtm.

17 *See* Christine A. Varney, Assistant Attorney General, Procedural Fairness, Remarks as Prepared for the 13th Annual Competition Conference of the International Bar Association (Sept. 12, 2009) at 2, *available at* http://www.justice.gov/atr/public/speeches/249974.pdf.

18 *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL (2008) *available* at http://www.justice.gov/atr/public/divisionmanual/atrdivman.pdf.

19 *See* http://www.justice.gov/atr/public/220237.htm.

parties regarding how an investigation is proceeding and when major landmarks are approaching. Together, these sources give parties a good idea of how DOJ will evaluate matters before it, especially the identities of the key decision makers and the timetable of important events.

The FTC's practices and procedures for investigating and enforcing the competition laws for which it is responsible are also transparent. The Commission's procedures are codified in its publicly-available Rules of Practice; Part II relates to investigational procedures, while Part III, as indicated above, sets forth adjudicative procedures.[21] The FTC recently engaged in a comprehensive review of its Part III rules, including seeking and responding to public comment. The agency's pre-merger notification requirements are fully set forth in subchapter H of the Commission's rules.[22] FTC staff communicates with parties about how an investigation is proceeding and its schedule. While the timetable of a given investigation necessarily depends on the complexity of the factual and legal issues involved, the schedule for resolving an administrative adjudicative proceeding is defined expressly, as explained below.

FTC decision-making staff are easily identified. The agency's permanent, professional antitrust enforcement staff is housed primarily within its Bureau of Competition, with additional contributing staff provided by the Bureau of Economics and several Regional Offices, among others. Last year, the Bureau of Competition published a user's guide, which identifies its organizational structure, all competition-related staff, and how their work fits into the agency's maintaining competition mission.[23]

2. Open and frequent dialogue between antitrust agencies and the parties

The Agencies highly value open communication with the subjects of antitrust investigations, subject, of course, to appropriate confidentiality constraints.[24] At every stage, parties are encouraged to meet with the lawyers and the economists charged with investigating the conduct at issue. These discussions encompass the procedural course of the investigation (including the scope of document requests)[25] and staff's substantive theories of the case.[26]

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20 *See* http://www.justice.gov/atr/public/criminal.htm. With respect to criminal cartel matters, DOJ has worked for over a decade to provide appropriate transparency. We have: (1) transparent standards for opening investigations; (2) transparent standards for deciding whether to file criminal charges; (3) transparent prosecutorial priorities; (4) transparent policies on the negotiation of plea agreements; (5) transparent policies on sentencing and calculating fines; and (6) transparent application of our Leniency Program. For a more detailed discussion on transparency in the Antitrust Division's criminal enforcement program, *see*, Gary R. Spratling, Transparency In Enforcement Maximizes Cooperation From Antitrust Offenders, presented before Fordham Corporate Law Institute (October 15, 1999), *available at* http://www.justice.gov/atr/public/speeches/3952.htm; Scott D. Hammond, Cornerstones of an Effective Leniency Policy, Speech Before the ICN Workshop on Leniency Programs at Section V (Nov. 22-23, 2004), *available at* http://www.justice.gov/atr/public/speeches/206611.htm; and Scott D. Hammond, The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All, address before the OECD Competition Committee, Working Party No. 3 (October 17, 2006), *available at* http://www.justice.gov/atr/public/speeches/219332.htm.

21 *See* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=3ad5b48a02eb1707974872e00175bbb5&c=ecfr&tpl=/ecfrbrowse/Title16/16cfrv1_02.tpl**.**

22 For information about premerger notification, *see* http://www.ftc.gov/bc/hsr/index.shtm.

23 *See* http://www.ftc.gov/bc/BCUsersGuide.pdf.

24 Of course, antitrust agencies must abide by a variety of confidentiality constraints (which Working Party 3 will discuss at its June 2010 session).

25 Indeed, this is a key object of DOJ's Merger Review Process Initiative. *See* http://www.justice.gov/atr/public/220237.htm. With respect to staff requests for additional documents following a pre-merger filing,

During an FTC investigation, staff is available to meet with the subject of an investigation at its request. Parties are free to request meetings with agency personnel, including investigating staff, the Director of the Bureau of Competition, and Commissioners, at the appropriate stage of the investigation.[27] Parties are especially urged to open a continuing dialogue with agency economists early in any investigation, r to address issues related to the collection and analysis of relevant data and the applicability of different potential economic theories.[28] Parties are also free to submit "white papers" containing argument, facts, and theories they believe relevant during the investigation. Notably, Part II of the Commission's rules, which govern investigations, state: "Any person under investigation compelled or required to furnish information shall be advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation."[29]

Similarly, in a typical DOJ investigation, these ongoing discussions with parties will engage more and more senior staff and policy officials, including the Deputy Assistant Attorneys General, as the investigation proceeds, allowing DOJ and the parties to refine and narrow the open issues.[30] Moreover, before any civil investigation matures into a lawsuit, parties ordinarily will have a chance to meet directly with the Assistant Attorney General, as well as present written materials outlining their positions in detail. Finally, parties are always free, at any stage of an investigation, to present relevant information or other facts directly to the investigating staff.

The agencies have found that this openness enhances their ability to investigate and prosecute successfully by focusing energies on the real areas of dispute. More important, this type of transparency ultimately helps the agencies make the right enforcement decision.

3. Informing parties of the allegations against them

As discussed above, the subjects of civil investigations have ample opportunity to interact with the Agencies' staff and senior officials and to discuss the theories that the agencies are pursuing during the investigational stage. If DOJ decides to bring an enforcement action, the allegations against the parties will be set forth in a complaint, which is filed in federal court and available to the public. If the FTC

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the FTC's rules grant parties a right to discuss the requests with an authorized representative of the FTC, and outline a procedure for resolving any conflicts.[25] Similarly, DOJ provides an internal appeals process in merger investigations as early as the request for documents stage. *See* Second Request Internal Appeal Procedure (2001), *available at* http://www.justice.gov/atr/public/8430.pdf.

26 Criminal investigations are necessarily more secret: proceedings before the grand jury must be kept confidential under United States law, and investigations can include covert techniques.

27 Once the Commission has issued an administrative complaint, however, neither the respondent nor the Commission's litigating staff is permitted to have *ex parte* communications on the merits of the dispute with those involved in the decision-making, such as an administrative law judge or the Commissioners. *See generally* 16 C.F.R. § 4.7. The purpose of these rules is to ensure procedural fairness, *i.e.*, to ensure that one party does not have the opportunity to influence resolution of relevant factual and legal issues without the other party's having an opportunity to respond.

28 *See* "Best Practices for Data, and Economics and Financial Analyses in Antitrust Investigations," *available at* http://www.ftc.gov/be/bestpractices.shtm.

29 16 C.F.R. § 2.6.

30 *See* Varney, Procedural Fairness, at 3 ("Frank exchange during all phases of an investigation allows us to conduct investigations more efficiently by focusing all parties on the real issues in dispute. Simply put, transparency and cooperation enhance enforcement efforts and are fully consistent with litigation tactics.").

decides enforcement is warranted, the charges are identified in an administrative complaint, and, if the FTC is also seeking preliminary relief, in a federal court complaint.

If the FTC issues an administrative complaint, resolution of the matter is governed by the agency's Part III rules. Like the federal procedural rules that govern the Agencies' actions in court, the FTC's Part III rules require counsel for the agency and respondent to identify individuals likely to have information relevant to the proceeding, and to produce documents (or certain information about documents) relevant to the proceeding, subject to limited exceptions, such as privilege; they also authorize the parties to obtain other discovery from one another through a variety of means.[31] The parties must also identify their experts and produce reports prepared by, and permit pre-trial discovery of, these experts.[32]

When an Agency's case proceeds to court, defendants are entitled under constitutional law and federal procedural rules to extensive review of the evidence that the Agencies have gathered for its case. The standard rules for discovery in civil litigation govern the Agencies' cases,[33] and those rules, for example, require the government (indeed all parties to a litigated matter) to provide documents, as well as the names of individuals, that it may use to support its claims, and entitle defendants to request documents from the government, to depose the government's witnesses, and to obtain substantial information about the government's expert testimony, if any.[34]

4. Opportunities to respond to agency's concerns

Entities under investigation have multiple opportunities to discuss their defenses or positions with staff lawyers and economists, and with senior management. They also have the opportunity to present written materials describing why the conduct under investigation should not be challenged or why proposed remedies would be sufficient to prevent competitive harm.

When an Agency's case proceeds to court, constitutional law and rules of federal procedure provide many opportunities for defendants to present evidence and make arguments in their favor. These procedural rights include the right to legal representation, to present witnesses and documentary evidence, to cross-examine the government's witnesses and experts, to present legal arguments to the judge or jury as to why the case should not proceed, to test the legitimacy of documentary evidence, and to appeal any adverse determination. Although there are some statutory constraints on the timing of trials, the nature and timing of trial proceedings vary widely according to the needs of the parties and the judges' schedules.

The procedural rights granted to respondents in FTC adjudications are similar to those in a court proceeding. For example, at the administrative trial, the respondents "have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing."[35] Under the FTC's rules, the trial is typically expected to occur within five months of the filing of the complaint in cases in which the agency is also seeking preliminary injunctive relief in federal court,

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31 *See generally* 16 C.F.R. § 3.31. As under the Federal Rules of Civil Procedure, parties to an administrative proceeding may, under the FTC's procedural rules, discover information from each other through depositions, written interrogatories, production of documents, and requests for admission. *Id*. *See* also 16 C.F.R. §§ 3.32 (admissions), 3.33 (depositions), 3.35 (interrogatories), 3.37 (production of documents). Of course, parties may also obtain discovery from third parties. *See, e.g.,* 16 C.F.R. § 3.34.

32 16 C.F.R. § 3.31A.

33 *See* Fed. R. Civ. P. 26-37, *available at* http://www.uscourts.gov/rules/CV2008.pdf.

34 In criminal cases, U.S. constitutional guarantees require other sorts of affirmative disclosures. *See, e.g.*, *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

35 16 C.F.R. § 3.41(c).

and within eight months in all other cases.[36] Accounting for the administrative law judge's initial decision, as well as any review by the Commission of that decision, the administrative proceeding will typically conclude within fourteen months in cases in which the Commission has sought preliminary injunctive relief, and no longer than twenty months in all other cases. As a result, counsel for the Commission and the respondent have opportunities to present arguments to the adjudicator in a fair, organized, and timely manner.

The Agencies are open to settlement negotiations at virtually every stage of the antitrust investigation or trial proceeding.[37] The Agencies view the opportunity for settlement as an essential part of their role as antitrust enforcers -- an appropriate settlement is often sufficient to achieve the goals of the antitrust enforcement while both conserving resources and enabling the parties to achieve their legitimate business objectives. Accordingly, the Agencies view the opportunity for parties to present settlement options and to discuss consensual resolution as a key aspect of a fair and transparent investigation process.[38]

5. Opportunities to be heard before adverse decisions are taken

As indicated, DOJ cannot unilaterally order parties to take or not take certain actions (*e.g.*, block a merger). Instead, DOJ must file a lawsuit in court to obtain relief, and defendants to such lawsuits are entitled to a formal hearing or trial before a court takes final action against them. As noted above, once a case proceeds to trial, constitutional law and rules of federal procedure provide many opportunities for defendants to present evidence and make arguments in their favor.

The FTC, by contrast, has the power to order respondents to "cease and desist" from anticompetitive practices if the Commission finds, after a full administrative proceeding, that a law violation has occurred. Parties may seek reconsideration of that decision as well as a stay by a federal appellate court. As explained above, parties have the opportunity to be heard through these processes before a decision is made against them. If the FTC wishes to block a merger pending an administrative proceeding to determine the lawfulness of the transaction, however, it must, like DOJ, seek relief in U.S. district court.

There is no opportunity for a formal hearing before either of the Agencies before the Agencies decide to file a complaint. However, as discussed more fully above, both agencies afford parties in civil investigations significant ongoing informal opportunities to be heard on the merits before deciding whether to bring a lawsuit. As mentioned, parties in civil matters are able to submit written materials detailing their

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36 16 C.F.R. § 3.11(b)(4).

37 Of course, even though a party may be willing to settle early in an investigation, the agencies must have sufficient information to be satisfied that there is a sound basis for believing that a violation will otherwise occur before negotiating any settlement. *See, e.g.,* ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2004), available at http://www.justice.gov/atr/public/guidelines/205108.htm. As part of consummating a settlement, the FTC files both a complaint and a settlement document; in order to issue a complaint, the FTC Act requires the agency first to "have reason to believe" that the respondent "has been or is using any unfair method of competition," and to find that "a proceeding by it in respect thereof would be in the interest of the public." 45 U.S.C. § 45(b).

38 In criminal cartel matters, DOJ has strived to maximize transparency in the plea negotiation context to help companies predict in advance how they will be treated if they offer to cooperate pursuant to a plea agreement. For a further discussion of transparency in the criminal cartel plea negotiation context, *see* Scott D. Hammond, The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All, address before the OECD Competition Committee, Working Party No. 3, at Section II (October 17, 2006), *available at* http://www.justice.gov/atr/public/speeches/219332.htm; and Scott D. Hammond, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Address Before the 54th Annual Spring Meeting of the ABA Section of Antitrust Law (March 29, 2006), *available at* http://www.justice.gov/atr/public/speeches/215514.htm.

positions, and they typically are able to meet directly with the Assistant Attorney General in the case of DOJ, Commissioners in the case of the FTC, and other senior officials at either agency, to explain their case. It is not unusual for the agencies to alter or refine their thinking in response to those meetings and submissions. While this procedure does not involve formal witness testimony, business executives and industry or economics experts, as well as the parties' lawyers, often attend to explain their views.

6. Length of agency investigations

For both Agencies, the time limits of merger review are structured by the Hart-Scott-Rodino ("HSR") Act.[39] Under the HSR system, merging parties notify both agencies before consummating transactions exceeding certain monetary thresholds, and they may be required to wait additional time if the agencies need to review documents, obtain oral testimony, or consider other evidence before deciding whether a proposed transaction is anticompetitive.[40] Recognizing that even the full initial waiting period is not always necessary, the agencies allow, and frequently grant, requests for early termination of merger investigations.[41]

Conversely, some transactions warrant a more extended investigation. Because the HSR framework allows the agency to request documents and other information, and the transaction cannot be consummated until the parties have fully provided that information, the agency and the parties have an interest in limiting the volume of information provided and the length of the investigation. In 2006, the FTC announced reforms to its merger review process that allows for the parties to agree to a limitation on the scope of information requested by the agency in exchange for certain obligations regarding the prompt production of information and agreeing to delay consummation of the transaction.[42] The parties may, but are not required to, enter into a timing agreement with the FTC in accordance with this process. Similarly, DOJ, through its Merger Review Process Initiative,[43] endeavors to negotiate process and timing agreements with the parties that ensure a timely but complete investigation. These discussions involve an agreement that the parties will delay closing the transaction in exchange for limits on document production and a reasonable schedule for engaging substantively with DOJ, further document production, depositions, and other major investigatory milestones.[44] The timing in merger matters, however, is ultimately determined by the HSR statutory time limits for review. The parties, absent an agreed-upon schedule that alters this timing, are free to proceed according to those time limits.

In civil non-merger cases, there are no formal time limits on the length of investigations. To conserve scarce resources and ensure that anticompetitive behavior is timely challenged, however, both agencies endeavor to move investigations forward as quickly as possible, and to close investigations if they fail to progress.[45] As indicated above, if an investigation by the FTC results in an administrative complaint, the FTC's Part III rules establish a schedule to bring the adjudication to appropriate milestones and final resolution within defined periods of time.

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39 15 U.S.C. § 18.

40 The time periods under the HSR Act govern when the parties may consummate their transaction; the agencies may bring a case even after the applicable statutory time periods have expired.

41 *See* http://www.ftc.gov/bc/earlyterm/index.shtml.

42 *See* http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf.

43 *See* http://www.justice.gov/atr/public/220237.htm.

44 *See* Model Process and Timing Agreement, *available at* http://www.justice.gov/atr/public/220240.pdf.

45 With respect to criminal violations of the Sherman Act, the statute of limitations is "five years . . . after such [an] offense shall have been committed."15 U.S.C. § 3282(a).

7. Publication of agency decisions, including closing statements

7.1 FTC practice

The FTC may conclude a matter in one of three ways: (1) by issuing a final order at the conclusion of an adjudication conducted under Part III of its rules; (2) by entering into a settlement with the parties, during either the investigatory or enforcement stage; or (3) by concluding that no enforcement is necessary. Each of these actions results in a public announcement, except when the agency closes a pre-merger review.

If the agency initiates an enforcement proceeding by issuing an administrative complaint, an administrative law judge will issue an initial decision after a trial. The complaint, hearing record, and initial decision are public documents, except to the extent they contain confidential information submitted by private parties.[46] Similar to a complaint filed in federal district court, the administrative complaint must contain a "clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law," as well as a "[r]ecital of the legal authority and jurisdiction for institution of the proceeding."[47] The initial decision is subject to review by the full Commission, and the Commission's decision, in turn, is subject to review by a U.S. court of appeals. Both of these decisions are also public documents.[48]

The Commission's acceptance of a proposed consent agreement also initiates a public process, whether before or after an enforcement action has been initiated. Every consent agreement proposed must contain certain provisions, largely designed to ensure that the decree is enforceable and legally sustainable in case compliance problems arise later.[49] If the FTC accepts a proposed consent agreement, the proposed agreement and complaint are available for public comment. To facilitate input by the public, the Commission simultaneously publishes an analysis to aid public comment, which explains in lay terms the violations alleged and proposed remedies. It is intended to disclose information sufficient to educate the public about the facts and underlying rationale of the proposed consent agreement, and describe the competitive harm addressed, the nature and extent of the evidence involved, the nature of the proposed remedy vis-à-vis the harm identified, and the consumer impact of the competitive harm. After the comment period closes, the Commission evaluates the record and determines whether to accept, change, or reject the settlement.[50]

Of course, the Commission may also conclude an investigation without taking any enforcement action. If it does so, it sends a closing letter to the respondent. Generally speaking, closing letters are public, other than those associated with a transaction that triggered HSR pre-merger filings.

As part of its efforts to provide further transparency to its decision-making process, the FTC sometimes publishes public statements explaining the reasons for closing second-stage merger

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46 Confidential information redacted from the public version is available to the respondent in a sealed version of the document.

47 16 C.F.R. § 3.11(b). The administrative complaint must also include a "form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint," and "[n]otice of the specific date, time, and place for the evidentiary hearing." *Id*.

48 Again, confidential information may be redacted.

49 16 C.F.R. § 2.32.

50 16 C.F.R. § 2.34.

investigations.[51] As a general matter, publicizing the agency's rationale for declining to take enforcement actions in significant matters is a key element in informing the public about FTC practice and increases predictability for firms contemplating transactions likely to undergo federal merger investigation.[52] As former Chairman Majoras commented in 2007 in the context of issuing enforcement guidelines, "Because we are a law enforcement agency, we also strive to make certain that the business community and the public at large are well-informed about our competition policies. Ultimately, the FTC's work will not garner the needed public support unless we explain clearly the principles that apply and how we apply them."[53]

7.2 DOJ practice

The only adverse enforcement decision that DOJ can take in either a civil or criminal matter is to bring a civil lawsuit or criminal charge, which are by nature public events.[54] The minimum contents of civil complaints and criminal charging documents are a matter of federal procedural rules and Supreme Court case law. Those rules require a civil complaint to contain a "short and plain statement of the grounds for the court's jurisdiction," as well as a "short and plain statement of the claim showing that the pleader is entitled to relief."[55] At the pre-litigation stage, DOJ has numerous informal methods for considering the evidence offered by parties, including meetings between parties and staff or senior officials. Once a case proceeds to court, however, the submission and consideration of evidence is governed by federal rules of evidence and procedure, and any final judicial decision will be public.

Although there are no formal rules requiring DOJ to make a public announcement upon closing an antitrust investigation, it has a policy of doing so in significant civil matters.[56] It does so in part because "[p]ublic dissemination of enforcement and non-enforcement rationales benefits businesses attempting to

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51 *See, e.g., Statement of Bureau of Competition Director Richard Feinstein on the FTC's Closure of Its Investigation of Consummated Hospital Merger in Temple, Texas* (December 23, 2009), *available at* http://www.ftc.gov/os/closings/091223scottwhitestmt.pdf; *Statement of Federal Trade Commission Concerning Google/DoubleClick*, FTC File No. 071-0170 (December 20, 2007), *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf; *Statement of the Federal Trade Commission Concerning Federated Department Stores, Inc./The May Department Stores Company,* FTC File No. 051-0111 (August 30, 2005), available at http://www.ftc.gov/os/caselist/0510001/050830stmt0510001.pdf; and Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc**,** FTC File No. 021 0041 (October 2, 2002) available at http://www.ftc.gov/os/2002/10/cruisestatement.htm. For a detailed explanation of the Commission's analysis in the Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc matter, *see also* Joseph J. Simons, Merger Enforcement at the FTC, Keynote Address to the Tenth Annual Golden State Antitrust and Unfair Competition Law Institute (October 24, 2002), *available at* http://www.ftc.gov/speeches/other/021024mergerenforcement.htm.

52 *See* Joseph J. Simons, Report from the Bureau of Competition, Remarks Before the 51st Annual ABA Antitrust Section Spring Meeting (April 4, 2003), *available at* http://www.ftc.gov/speeches/other/030404simonsaba.htm.

53 Chairman Deborah Platt Majoras, Opening Remarks at the AEI/Brookings Joint Center Workshop on The Role of Competition Analysis in Regulatory Decisions (May 15, 2007), at 14, *available at***.**http://www.ftc.gov/speeches/majoras/070515aei.pdf.

54 In rare cases, with leave of the Court, DOJ will file criminal antitrust charges under seal.

55 *See, e.g.*, Fed. R. Civ. P. 2, 3, 7-8; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). A criminal indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. *See* Fed. R. Crim. P. 7 (c)(1).

56 *See* Issuance of Public Statements Upon Closing of Investigations (2003), *available at* http://www.justice.gov/atr/public/guidelines/201888.pdf.

comply with complex antitrust standards and consumers through a better understanding of the antitrust laws," and because "[t]ransparency of antitrust analysis helps international enforcers understand U.S. standards for antitrust enforcement, encourages international convergence on enforcement standards, and serves to prevent noncompetition issues from inappropriately influencing antitrust enforcement."[57] As Assistant Attorney General Varney has explained, the use of closing statements in civil matters was imported from the European Commission, and it represents an area in which DOJ is still learning and working to improve.[58] DOJ views those statements as an important element of transparency because they are the principal method through which non-enforcement decisions are explained. Closing statements enable parties to better understand enforcement decisions and feel that they are being treated fairly and impartially.[59] They also provide important guidance to the business community and antitrust lawyers on how similar transactions or conduct might be evaluated, allowing them to plan future business arrangements accordingly.

When DOJ concludes a civil antitrust investigation by settlement or consent decree, the Tunney Act requires a complaint, proposed settlement, and a competitive impact statement to be filed in federal district court.[60] The Act provides for wide publication of the details of any proposed settlement, and for a period of public comment on the proposal. The statute requires DOJ to consider those comments, and the court must ultimately determine that the settlement is in the public interest before it can take effect.[61]

Finally, in the civil area, there are occasions in which potentially anticompetitive conduct is terminated before the filing of a complaint, such as the abandonment of a joint venture or a "fix-it first" divestiture of a portion of merging businesses. Although the Tunney Act does not apply to such situations, DOJ recognizes that such circumstances nonetheless merit an explanation as to why these steps satisfied its competitive concerns. Thus, it often issues press releases in such situations describing its analysis of the competitive effects of the actions that were being proposed and the steps being taken to address them.[62]

8. Conclusion

Both Agencies have found that transparent processes with parties during a civil investigation facilitate our enforcement efforts and further the public interest. Exposing our enforcement actions and the reasons behind them to scrutiny allows us to better understand and appreciate all of the facts, the underlying economics, and the law. In short, we believe that transparency of this nature is not only fair to parties but also leads to better enforcement.

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57 *Id.*

58 Varney, Procedural Fairness, at 11.

59 *Id.*

60 15 U.S.C. § 16.

61 In criminal cartel matters, plea agreements are usually public documents, and the district court typically holds a public hearing before agreeing to accept the guilty plea. Fed. R. Crim. P. 11(C)(2) requires that the parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement *in camera*.

62 *See, e.g.*, Dep't of Justice, Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (Nov. 5, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/239167.pdf.

EUROPEAN COMMISSION

1. General Introduction

The European Commission (hereafter, the "Commission") considers it vital to ensure procedural fairness and transparency in the enforcement of competition law. Companies must not only be able to ensure that their practices are in conformity with the applicable laws in those jurisdictions where they operate; they must also be able to correctly understand the procedures and the statutory or other legal authority under which they are taking place and must be adequately and timely informed of the allegations being made in such proceedings, in order to be able to properly defend themselves.

If due process were not ensured, the risk of enforcing wrongly and unfairly would undermine procedures and risk harming companies and ultimately consumers. This would be contrary not only to the rights of these companies, but also to the objective of making markets work better for businesses and consumers.

The Commission has therefore consistently given high priority to due process and fairness in antitrust and merger proceedings. The purpose of this note is to briefly set out the general framework that governs the EU administrative enforcement system, to explain the rights of defence and the safeguards in-bred in the system, to describe recent efforts to improve transparency and predictability in Commission competition proceedings and then to examine the specific issues raised in the OECD Competition Committee.

2. The EU administrative enforcement system of competition law

Before examining the main issues concerning procedural fairness, transparency and, more generally, the rights of the parties that are the target of enforcement proceedings under EU competition law[1] (i.e., undertakings subject to either proceedings under Articles 101 and/or 102 TFEU[2] or to the obligation to notify a concentration to the Commission pursuant to the EC Merger Regulation[3]), it is important to understand the general framework that governs the EU administrative enforcement system of competition law.

As regards the enforcement of Articles 101 and 102 TFEU, in the legal system of the European Union, the Commission, which is an administrative authority, investigates potential infringements of the competition rules and adopts binding decisions (including the imposition of fines). These decisions are subject to judicial review, on all points of fact and law, including unlimited review of the evidence, of the factual findings derived there from and of the legal qualification of the evidence. With regard to the fines imposed by the Commission, the Court may annul them or increase or reduce their amount. And this

1 Hence, this Note does not explicitly refer to rights of third parties, complainants or other involved parties.

2 Treaty on the Functioning of the European Union, entered into force on 1 December 2009. Articles 81 and 82 of the EC Treaty have thus become Articles 101 and 102 respectively of the TFEU. The two sets of provisions are in substance identical.

3 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

system is not unique. In Europe, the majority of EU Member States have opted for similar administrative systems.

The legal system of the European Union, as described above, is fully compatible with the requirements of the European Convention of Human Rights (hereafter "ECHR"). First, for decades the Courts of the European Union have found Commission action compatible with fundamental rights, as common constitutional principles of the Member States. Second, the alleged combination of roles by the Commission (as "investigator", "prosecutor" and "judge")[4] has been challenged in the cases *Enso Española*[5], *Aristrain*, and most recently *Lafarge*. In *Lafarge* the General Court (formerly the Court of First Instance) examined carefully the question and came to the conclusion that the Commission is not a court and that the system of the European Union is compatible with the requirements of protection of fundamental rights[6]. In *Aristrain*, the General Court specifically rejected the argument that the scope of review by the Courts of the European Union did not comply with standards set out by the case law of the ECHR[7].

With regards to merger control, the EC Merger Regulation also provides for a regime of administrative enforcement, with an agency (the Commission) vested with exclusive jurisdiction to review concentrations of a Community dimension[8], subject to the control of the Courts of the European Union. The said Regulation institutes a «one-stop shop» system, based on the principle of ex-ante administrative authorisation: companies must notify to the Commission their intended mergers and acquisitions (prior notification of concentrations)[9] and must not implement them before they have been authorised («stand-still clause»)[10].

The Commission has to decide whether or not a notified concentration would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, and thus authorize it (eventually with the commitments offered by the parties) or prohibit it[11]. Unlike proceedings under Articles 101 and 102 TFEU, where the Commission may decide not to pursue an alleged infringement – for a variety of reasons, which may include the lack of evidence necessary to prove an infringement and to rebut the principle of the presumption of innocence-, in a merger case, the Commission is bound to adopt a decision on the proposed merger, on the basis on available evidence[12]. The European Court of Justice concluded in that regard its

4 These terms are not perfectly accurate to qualify the roles of an administrative authority.

5 Judgment of the Court of First Instance of 14 mai 1998, Enso Española SA v. Commission, Case T-348/94, [1998] ECR p. II-1875, p.55-65

6 Judgment of the Court of First Instance of 8 July 2008, Lafarge SA v Commission, Case T-54/03, [2008] ECR p. II-120 pts. 36 to 47

7 Judgment of the Court of First Instance of 11 March 1999, Aristrain v Commission, Case T-154/94, [1999] ECR p. II-645, points 30 to 41.

8 Those concentrations that met the turnover thresholds of Article 1(2) and (3) of the EC Merger Regulation or that are referred to the Commission by Member States pursuant to Articles 4(5) and 22 thereof.

9 Article 4 of the EC Merger Regulation.

10 Article 7 of the EC Merger Regulation.

11 Article 2(2) and (3) of the EC Merger Regulation.

12 Admittedly, as Article 10, paragraph 6, of the EC Merger Regulation provides that a notified concentration is to be deemed compatible with the common market where the Commission has not taken a decision on the compatibility of that concentration within the prescribed period. As the European Court of Justice has pointed out, this *"is, however, an exception to the general scheme of the Regulation, which is laid down in particular in Articles 6(1) and 8(1), according to which the Commission is to rule expressly on the*

Bertelsmann judgment that the Commission is, in principle, required to either approve or prohibit a notified concentration *"in accordance with its assessment of the economic outcome attributable to the concentration which is most likely to ensue"*[13]. There is no presumption of legality in the EC merger control regime (needless to say, there is no presumption of illegality either) and, therefore the standards of proof for decisions approving a concentration, on the one hand, and decisions prohibiting a concentration, on the other, are the same (the test is thus symmetrical).

In sum, it is the Commission that authorises or prohibits the mergers notified to it. As already mentioned, the Commission's merger decisions are subject as well, in any event, to review by the Courts of the European Union[14]. As in the case of antitrust, the Courts of the European Union fully review the findings of facts (i.e. their accuracy) and the Commission's application of the law (i.e. the absence of an error in law), but do recognize a margin of appreciation to the Commission with regard to complex economic assessments[15].

3. Respect of rights of defence in the Community system

The protection of rights of defence in Commission investigations and procedures is not only a requirement under the regulatory framework and the case-law of the Community Courts. It is, as set out above, also an essential priority for the Commission.

As regards antitrust, the Commission has to respect the presumption of innocence and has therefore the burden of proving the infringement (not for the applicability of Article 101, paragraph 3 TFEU)[16]. In the investigation, undertakings can not be compelled to incriminate themselves but they have no absolute right of silence[17]. The Commission is obliged to indicate the purpose of the investigation already during the investigation[18].

Once the Commission has reached the preliminary conclusion that there is an infringement, it issues a statement of objections (hereafter "SO")[19] which must contain all the objections raised against the undertaking. Within the set time limit (which can be extended by the Hearing Officer)[20] the undertakings can reply in writing to the SO. In addition, they can request an oral hearing, which will be presided by an independent official, the Hearing Officer[21]. To prepare their written and oral defence, undertakings have

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concentrations which are notified to it" (C-413/06 P Bertelsmann and Sony Corporation of America / Independent Music Publishers and Labels Association (Impala), [2008] I-4951paragraph 49).

13 Case Bertelsmann and Sony / Impala, cited above, paragraph 52 (emphasis added).

14 See, in that regard, Article 21(2) of the EC Merger Regulation.

15 See, e.g., Case T-87/05 Energias de Portugal ***(EDP)*** v Commission ECR [2005] II-3745, paragraph 151.

16 Article 2 of Council Regulation (EC) No 1/2003, OJ L 1, of 4 January 2003, p. 1

17 Judgments of the Court of 18 October 1989, Orkem v Commission, Case 374/87, [1989] ECR p. 3283. and of the Court of Fits Instance of of 20 February 2001, Mannesmannröhren-Werke AG v Commission, Case T-112/98, [2001] ECR, p. II-729.

18 Judgment of the Court of First Instance, AC-Treuhand AG v Commission, Case T-99/04, [2008] ECR p. II-1501, point 51 to 56.

19 Article 27, paragraph 1 of Council Regulation (EC) No 1/2003, OJ L 1, of 4 January 2003, p. 1

20 Article 10 of the Mandate of the Hearing Officer (Commission Decision 2001/462 of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings, OJ L 162, of 19 June 2001, p.21.)

21 Article 4 of the Mandate of the Hearing Officer.

the right of access to the file (the complete file, with the exception of business secrets, internal Commission documents and "other" confidential information such as the names of informants)[22]. The oral hearings are not public.

Thereafter the Commission prepares a draft decision, on which the Advisory Committee (which is composed of experts from the EU national competition authorities) is consulted, and finally the College of Commissioners adopts the administrative decision which is subject to legal review by the Courts of the European Union.

As mentioned already above, the Courts of the European Union have explicitly confirmed the compatibility of the system with the fundamental rights requirements.

Similarly, in the area of merger control, the burden of proof lies with the Commission to demonstrate that an operation should be prohibited or cleared. It is, in effect, for the Commission to find that a notified concentration does or does not raise serious doubts as to its compatibility with the common market and, in the first case, to ultimately conclude (after a two-phase procedure) whether the legal test of compatibility or incompatibility is satisfied[23]. In any event, the burden of proof shifts from the Commission to the notifying parties when efficiencies are claimed[24].

The EU merger procedures also provide for strict procedural safeguards in order to guarantee the respect of the rights of the defence of the undertakings concerned. In particular, before adopting a decision prohibiting a concentration, the Commission has, first, to open proceedings with a motivated decision and, subsequently, make known its objections to the notifying parties by way of a SO, give them access to the file, allow them to reply in writing and offer them the possibility of an oral hearing[25]. The process for the adoption of a prohibition decision is similar to the one described above (consultation to the Advisory Committee and adoption of the decision by the College of Commissioners). The undertakings concerned have the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them. Finally, it shall be observed that the Hearing Officer plays an important role as well in merger procedures.

4. Safeguards in-bred in the system

In order to ensure that all relevant views and evidence are properly taken into account before a final decision is adopted, and that the assessment proposed by the case team is sound, there exist a number of safeguards in the decision-making process, that counter any suggestion of institutional bias. They are of different nature and operate at different stages of the decision-making process. These safeguards apply generally to antitrust and merger control proceedings. Moreover, it shall be observed that decisions

22 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, of 22 December 2005, p. 7.

23 See Articles 6, 8 and 2 of the EC Merger Regulation.

24 In particular, it is incumbent upon the latter to provide, in due time, all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised and to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31 of 05/02/2004, p. 5), paragraph 87).

25 Articles 6(1)(c) and 18 of the EC Merger Regulation. See as well Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004, p. 1).

pursuant to Articles 101 and 102 TFEU and decisions prohibiting a merger are taken by the College of Commissioners. Finally, as it has been mentioned, decisions adopted by the Commission are subject to legal review by the Court of Justice of the European Union.

4.1 Safeguards

4.1.1 Chief Economist

The Chief Economist assists in evaluating the economic impact of the Commission's actions in the competition field, and provides guidance on methodological issues of economics and econometrics in the application of EU competition rules. The Chief Economist and his team contribute to individual competition cases as appropriate, in particular in cases involving complex economic issues and quantitative analysis. He/she reports independently to the Director-General of DG Competition and provides independent advice to the Commissioner responsible for Competition on cases or policy issues which he/she has followed.

4.1.2 Peer Review

The Peer Review panels are set up by DG Competition, in agreement with the Commissioner responsible for Competition, in complex merger and antitrust cases in order to provide a "fresh pair of eyes", checking the factual, legal and economic basis of cases and procedural issues and coherence. The aim of the Peer Review Panel is to have an open discussion on the line proposed by the case team. The Panel can either identify areas where further work is necessary; identify objections that should be dropped; recommend that the case is not pursued further; or recommend that the case team continue with the case on an unchanged basis. The organisation of the panel and the members of the Peer Review team are not made public and the peer review of a case does not involve in any way the parties subject to the proceedings or any third party.

4.1.3 The Hearing Officer

The Hearing Officers ensure that the right to be heard is safeguarded[26]. The Hearing Officers carry out their tasks in full independence of DG Competition, and disputes arising between the latter and any party subject to the proceedings can be brought before the Hearing Officers for resolution.

In addition to dispute resolution, the Hearing Officer is directly involved in certain parts of antitrust and merger proceedings, including in particular the organisation and conduct of the oral hearing, if one is held. After the oral hearing, and taking into account the parties' written replies to the SO, the Hearing Officer reports to the Commissioner responsible for Competition on the hearing and the conclusions to be drawn from it. Moreover, prior to a final decision being taken by the College of Commissioners, the Hearing Officer informs it whether any procedural issues of significance have arisen and, in particular, whether the right to be heard has been respected during the administrative proceedings. The final report is sent to the parties subject to the proceedings, together with the Commission's final decision, and is published in the Official Journal of the European Union.

4.1.4 The Legal Service and other associated Commission services

The Commission Legal Service, which is attached directly to the President of the Commission, advises the College on the legality of each draft decision and is involved at key steps in the investigation.

[26] Commission Decision of 23.05.2001 on the terms of reference of hearing officers in certain competition proceedings, OJ L 162 19.06.2001, p.21.

This is in practice an important safeguard that is sometimes not given much attention in the public debate. Other Commission services are consulted during the proceedings.

4.1.5 Advisory Committee

The consultation of the Advisory Committee provides a valuable opportunity for the Commission to discuss its draft decisions with experts from the competition authorities of the Member States in a confidential and dedicated forum prior to its decisions being adopted. This contributes to improving the quality of the decisions adopted by the Commission. To ensure that the members of the Advisory Committee have full knowledge of the facts and law of the draft decision on which they are consulted, they receive, and have access to, the most important documents and other existing documents necessary for the assessment of a case and have the right to take part in the oral hearing.[27]

4.2 Adoption of the decision by the College of Commissioners

Decisions about the application of Articles 101 and 102 TFEU are taken by the College of Commissioners, upon the proposal of the Commissioner responsible for competition policy. In the merger field, decisions declaring the notified operation incompatible with the common market (and, in general, final decisions on substance adopted after the initiation of proceedings)[28] are adopted as well by the College of Commissioners.

By virtue of the Treaty on the Functioning of the European Union, Commissioners shall "*refrain from any action incompatible with their duties".* Each Member State has undertaken to respect this principle and not to seek to influence the members of Commission in the performance of their tasks.[29]

4.3 Judicial review

In accordance with Article 263 TFEU, the decisions adopted by the Commission are subject to legal review by the Court of Justice of the European Union, namely the General Court and the Court of Justice. It follows from established case law that the Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met. As the General Court has stated, when it reviews the legality of a decision finding an infringement of Article 101(1) or 102 TFEU, the applicants may call upon it "*to undertake an exhaustive review of both the Commission's substantive findings of facts and its legal appraisal of these facts*."[30]. With regard to the review of complex economic and technical appraisals made by the Commission, the Court of Justice of the European Union will assess whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.[31] The same standards apply as well to the review of merger decisions (see above).

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27 Article 11(2) of Regulation 1/2003 and Article 14(3) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18), as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ L 171, 1.7.2008, p. 3).

28 Decisions adopted pursuant to Article 8 of the EC Merger Regulation.

29 Article 245 TFEU.

30 See Joined Cases T-25/95 etc *Cimenteries CBR and Others v Commission* [2000] ECR II-508, para 719.

31 Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, points 87 -89.

Moreover, by virtue of Article 31 of Regulation 1/2003, the Court of Justice of the European Union may annul, reduce or increase the fine or periodic penalty payment imposed by the Commission.[32]

5. Best Practices In competition proceedings aimed at improving transparency and predictability

5.1 Best Practices relating to merger proceedings

In January 2004, DG Competition adopted Best Practices on the conduct of EC merger proceedings, with the aim of providing guidance for interested parties on the day-to-day enforcement of the EC Merger Regulation. These Best Practices were notably intended to foster and build upon a spirit of co-operation and better understanding between DG Competition and the legal and business community.

The Merger Best Practices have undoubtedly increased understanding of the merger investigation process and thereby have further enhance the efficiency of investigations and ensured a high degree of transparency and predictability of the review process. These Best Practices cover proceedings from the initial pre-notification contacts to the eventual remedies discussions and the adoption of the decision.

Furthermore, the Commission has published Model Texts for Divestiture Commitments and for Trustee Mandates under the EC Merger Regulation, designed to serve as best practice guidelines for notifying parties submitting commitments in merger proceedings. Through the use of these standardised models, the merging parties and the Commission are somewhat relieved of the heavy demands – both in terms of time and resources – that would otherwise be required to negotiate the standard terms and provisions for commitments and trustee mandates under tight time constraints. The use of these models, thus, expedites the proceedings and allows the merging parties to concentrate more on the actual substance and implementation of the commitments.

5.2 Best practices relating to antitrust proceedings

In order to further enhance the transparency and the predictability of Commission antitrust proceedings, detailed explanations concerning how European Commission antitrust procedures work in practice have been published very recently, on 6th January 2010, by DG Competition and the Hearing Officers on the Europa website.

The explanations are outlined in three documents, namely Best Practices for antitrust proceedings, Best Practices for the submission of economic evidence (both in antitrust and merger proceedings) and Guidance on the role of the Hearing Officers in the context of antitrust proceedings. The documents will make it easier for companies under investigation to understand how the investigation will proceed, what they can expect from the Commission and what the Commission will expect from them.

The documents will be applied by the Commission provisionally as from their publication, but stakeholders have been invited to submit comments on the documents with a view to adjusting them in the light of comments from interested parties.

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[32] Article 261 TFEU and Article 31 of Regulation 1/2003. A similar provision exists for decisions imposing fines in merger proceedings (see Article 16 of the EC Merger Regulation), for instance for supplying incorrect or misleading information or for violation of the obligation to notify or of the stand-still clause (Articles 14 and 15 of the EC Merger Regulation).

5.2.1 Best Practices in antitrust proceedings

The Best Practices in antitrust proceedings takes the reader through the A-Z of antitrust proceedings, starting with how the Commission decides whether to give priority to a certain case and ending with potential adoption of a decision. The aim of the Best Practices is to further improve procedures by enhancing transparency, while at the same time ensuring the efficiency of the Commission's investigations. Important areas where the Commission will amend its procedures include:

- earlier opening of formal proceedings, as soon as the initial assessment phase has been concluded
- offering state of play meetings to the parties at key points of the proceedings
- disclosing key submissions, including giving early access to the complaint, so that parties can already express their views in the investigative phase
- publicly announcing the opening and closure of procedures, as well as when Statement of Objections have been sent
- providing guidance on how the new instrument of commitment procedures is used in practice.

5.2.2 Hearing Officers' Guidance Paper

The aim of the Guidance is to make their role more transparent. The Paper not only sets out the various tasks of the Hearing Officers as established in their mandates but also outlines how they are usually carried out. It furthermore explains how companies can make best use of an Oral Hearing. Additionally, it provides companies subject to investigations, complainants and other third parties with a manual of when they can turn to the Hearing Officers to ensure due process is ensured. Finally, the Paper explains the reporting obligations and the advisory role of Hearing Officers towards the Competition Commissioner, the College of Commissioners and the addressees of Commission decisions.

5.2.3 Best Practices on submission of economic evidence

Considering the increasing importance of economics in complex cases, DG Competition often makes requests for information asking for substantial economic data (for example used in econometric analysis) during its investigations. Parties also often submit arguments based on complex economic theories on their own initiative. In order to streamline the submission of such economic evidence, the Best Practices on economic evidence outline the criteria which these submissions should fulfil. It also explains the practice of DG Competition case teams and the Chief Economist when interacting with parties which submit economic evidence.

6. Commission's practice with respect to the specific issues raised by the OECD

6.1 Transparency with respect to the substantive legal standards; agency policies, practices and procedures

6.1.1 Antitrust

Proceedings concerning the application of Articles 101 and 102 TFEU are in particular regulated by Regulation 1/2003 and the Implementing Regulation. The Notices on access to file[33] and handling of complaints[34], as well as the Hearing Officers' Mandate[35], also contain numerous provisions that are relevant for the conduct of proceedings. Moreover, as mentioned above, the Best Practices for antitrust proceedings, Best Practices for the submission of economic evidence (both in antitrust and merger proceedings) and Guidance on the role of the Hearing Officers in the context of antitrust proceedings have been published on DG Competition's website recently.

6.1.2 Mergers

As mentioned above, the substantive legal standard in proceedings under the Merger Regulation is set out in the Regulation itself, notably in Article 2(2) and (3): the Commission has to ascertain whether or not a notified concentration would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

EC Merger control proceedings are regulated not only by the EC Merger Regulation and its Implementing Regulation, but by a comprehensive body of Notices (covering, inter alia, jurisdictional aspects[36], procedural rules[37], substantive assessment[38], remedies[39], etc.), Best Practice Guidelines and Model and Standard Texts[40].

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33 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ C 325, 22.12.2005, p. 7).

34 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (OJ C 101, 27.4.2004, p. 65).

35 Commission Decision of 23 May 2001 on the terms and reference of hearing officers in certain competition proceedings, OJ L 19.6.2001, p. 162.

36 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16 April 2008, p.1.

37 Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 56, 5 March 2005, p. 32. Commission Notice on case referral in respect of concentrations, OJ C 56, 5 March 2005, p. 2.

38 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5 February 2004, p. 5. Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18 October 2008, p. 6.

39 Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22 October 2008, p. 1.

40 See above.

6.2 Meetings at key points of the investigation

6.2.1 Antitrust

During the investigative phase, DG Competition may hold informal meetings with the parties subject to the proceedings. Similarly, DG Competition will normally offer State of Play meetings at several key stages of the case. These correspond, in principle, to the following events: (1) Shortly after the opening of proceedings; (2) At a sufficiently advanced stage in the investigation; and (3) in case a Statement of Objections is issued, the parties will also be offered a State of Play meeting after their reply to such Statement of Objections or after the Oral Hearing.

State of play meetings do not exclude discussions between the parties and DG Competition on substance or on timing issues on other occasions throughout the procedure as appropriate.

Although State of Play meetings would normally not take place in the context of cartel proceedings, meetings with senior management may also be arranged with the parties in cartel proceedings in order to, when appropriate, discuss important issues related to their case.

In addition to bilateral meetings, DG Competition may exceptionally also decide to invite all parties involved to so called "triangular meetings", i.e. a meeting involving all the parties involved in a particular investigation, if it is desirable in the interest of the fact-finding investigation, to hear the views of all parties in a single meeting.

6.2.2 Mergers

In merger proceedings, notifying parties are normally in constant contact with the Commission services, starting with the pre-notification contacts (even in seemingly non-problematic cases) and culminating, if need be, in remedies discussions. Indeed, the Commission endeavours to give all parties involved in the proceeding ample opportunity for open and frank discussions and to make their points of view known throughout the procedure.

In particular, State of Play meetings are offered to the notifying parties at the following five different points in the Phase I and Phase II procedure: (1) where it appears that "serious doubts" within the meaning of Article 6(1)(c) of the EC Merger Regulation are likely to be present; (2) within 2 weeks following the adoption of the Article 6(1)(c) decision, initiating proceedings; (3) before the issuing of a Statement of Objections; (4) following the reply to the SO and the Oral Hearing; and (5) before the Advisory Committee meets.

Triangular meetings, as described above, are also possible although seldom used.

6.3 Information about the facts, economic theories and legal doctrines relevant to the allegations

6.3.1 Antitrust

Before adopting a decision adverse to the interests of the addressees, in particular, a decision finding an infringement of Article 101 and 102 TFEU and ordering its termination (Article 7 of Regulation 1/2003) and/or imposing fines (Article 23), the Commission gives the parties subject to the proceedings the

opportunity to be heard on the matters to which the Commission has objected[41]. The Commission adopts a Statement of Objections and notifies it to each of the parties subject to the proceedings.

The SO sets out the preliminary position of the Commission regarding the alleged infringement of Articles 101 and/or 102 TFEU, after its in-depth investigation. Its purpose is to inform the parties concerned of the objections raised against them with a view to enabling them to exercise their rights of defence in writing and orally (at the hearing). It thus constitutes an essential procedural safeguard which ensures that the right to be heard is observed. The undertakings concerned shall be provided with all the information they need to defend themselves effectively and to comment on the allegations made against them.

The SO shall also clearly indicate whether the Commission intends to impose fines on the undertakings at the end of the procedure (Article 23 of Regulation 1/2003). In these cases, the SO will refer to the relevant principles laid down in the Guidelines on setting fines.[42] In the SO the Commission shall indicate the essential facts and matters of law which may result in the imposition of a fine, such as the duration and gravity of the infringement and that the infringement was committed intentionally or by negligence. To the extent possible, the SO will also mention the facts that may give rise to aggravating and attenuating circumstances. Although there is no legal obligation in that regard, the parties will be invited to comment on all elements of importance for any subsequent calculation of fines, should the objections be upheld, including the relevant sales figures to be taken into account.

If the Commission intends to impose remedies on the parties, the SO shall indicate the envisaged remedies that may be necessary to bring the infringement effectively to an end. The information given should be sufficiently detailed to allow the parties to defend themselves on the necessity and proportionality of the remedies. If structural remedies are envisaged, in accordance with Article 7(1) of Regulation 1/2003, the SO shall spell out why there is no equally effective behavioural remedy or why any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.

The addressees of the SO are also granted access to the Commission's investigation file, in accordance with Article 27(2) of Regulation 1/2003 and Articles 15 and 16 of the Implementing Regulation, so on the basis of that evidence, they can express their views effectively on the preliminary conclusions reached by the Commission in its So.

6.3.2 Mergers

Likewise, in merger proceedings, before taking any decision provided for in Article 6(3), Article 7(3), Article 8(2) to (6), and Articles 14 and 15 of the EC Merger Regulation, the Commission must address a SO to the persons, undertakings and associations of undertakings concerned[43]. The Commission shall base its decision only on objections on which the parties have been able to submit their observations.

Notifying parties have upon request a right to access the Commission's file after the Commission has issued an SO[44]. Further, the notifying parties are given the opportunity to have access to documents

41 Article 27 of Regulation 1/2003. This covers also decisions ordering interim measures (Article 8) or fixing the definitive amount of periodic penalty payments (Article 24(2)).

42 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, Official Journal C 210, 1.09.2006, p. 2-5.

43 Article 18 of the EC Merger Regulation.

44 Article 18(3) of the EC Merger Regulation and Article 13(3) of the Implementing Regulation.

received after the issuing of the SO up until the consultation of the Advisory Committee. Even before the adoption of an SO, DG Competition provides notifying parties, in a timely fashion, with the opportunity to review key documents following the initiation of proceedings and thereafter on an ad hoc basis.

6.4 Possibilities to respond the agency's enforcement concerns

6.4.1 Antitrust

Pursuant to Article 27(1) of Regulation 1/2003, the Commission shall give the addressees of a Statement of Objections the opportunity of being heard on matters on which the Commission has taken objection. The written reply gives the parties subject to the proceedings the opportunity to set out all facts known to them which are relevant to their defence against the objections raised by the Commission.

6.4.2 Mergers

As indicated, the right of the parties concerned to be heard before a final decision affecting their interests is also guaranteed in the Merger Regulation[45]. As in antitrust proceedings, any issues related to the right to be heard and other procedural issues, including access to the file, time limits for replying to the SO and the objectivity of any enquiry conducted in order to assess the competition impact of commitments proposed in EC merger proceedings, can be raised with the Hearing Officer.

6.5 Hearings

6.5.1 Antitrust

The parties to which a Statement of Objections has been addressed may, in their written reply, and within the same time limit, request an oral hearing. The oral hearing allows the parties to develop orally their arguments which have already been submitted in writing and to supplement, where appropriate, the written evidence, or to inform the Commission of other matters that may be relevant. Indeed, the fact that the hearing is not public guarantees that all attendees can express themselves freely and without constraint.

In view of the importance of the oral hearing, it is the practice of DG Competition to ensure continuous presence of senior management *(Director or Deputy Director General)* in oral hearings in antitrust cases, together with the case team of Commission officials responsible for the investigation. The competition authorities of the Member States, the Chief Economist's team, and associated Commission services, including the Legal Service, are also invited to attend by the Hearing Officer.

6.5.2 Mergers

Similarly, in merger proceedings, where the Commission intends to take a decision pursuant, notably, to Article 6(3) or Article 8(2) to (6) of the EC Merger Regulation (or a decision imposing fines or periodic penalty payments pursuant to Articles 14 and 15, respectively), it must afford the notifying parties who have so requested in their written comments the opportunity to develop their arguments in a formal oral hearing[46].

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45 Article 18 of the EC Merger Regulation. See as well Articles 14-16 of the Implementing Regulation.

46 Article 14 of the Implementing Regulation.

6.6 Limits on the length of an agency's investigation/rules on the publication and content of the agency's adverse enforcement decisions

6.6.1 Antitrust

Regulation 1/2003 does not fix strict legal deadlines for antitrust procedures. However, the Commission is attentive to the need to adopt decisions within a time frame that is appropriate and relevant to the circumstances, considering the legitimate expectations of the market players concerned, their customers and ultimately consumers. Indeed, when a decision imposes the termination of an infringement, bringing that infringement to an end as soon as possible is crucial in order to minimise its harmful effects. Similarly, when remedies (structural or behavioural) are to be imposed, it is important that they are implemented as soon as possible[47]. Beyond this, timely decision-making is important because of the deterrent effect of such decision with regard to similar conduct by other undertakings, but also because it may open the possibility for the victims of the infringement to recover damages for the harm they have suffered.

Even in the absence of strict deadlines in Regulation 1/2003, the Commission has sometimes committed itself to particular deadlines (albeit non-binding) for the conduct of its investigations. For instance, the Commission has committed to endeavour to inform complainants of the action that it proposes to take on a complaint within an indicative time frame of four months from the reception of the complaint[48].

All final decisions pursuant to Article 7, Article 9 and Article 23 of Regulation 1/2003 are adopted by the Commission, upon proposal of the Commissioner responsible for competition policy.

Immediately after the decision has been adopted, the parties shall be informed of the decision. A certified copy of the full text of the decision as well as a copy of the final report of the Hearing Officer shall then be notified to the parties by express courier service. A press-release will be published.

The summary of the decision, the Hearing Officer Report as well as the Opinion of the Advisory Committee shall be published shortly after the adoption of the decision in the Official Journal of the European Union in all official languages[49]. In addition to the requirements set out in Article 30(1) of Regulation 1/2003, DG Competition will also endeavour to publish a non-confidential version of the decision in the authentic languages as soon as possible on its website.

6.6.2 Mergers

The EC Merger Regulation imposes strict time limits on the exercise of the Commission's powers and duties, in the form of compulsory legal deadlines. Where the Commission does not take a decision within the relevant time frame, the proposed concentration is deemed to have been declared compatible with the common market[50]. These deadlines are extremely short, in particular in view of the inherent complexity of

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47 According to Article 8 of Regulation 1/2003, in cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a *prima facie* finding of infringement, order interim measures.

48 See Notice on the handling of complaints. paragraph 61.

49 With the exception of Irish (*see* Article 2 of Council Regulation N°920/2005 of 13 June 2005).

50 Article 10, paragraph 6, of the EC Merger Regulation. The European Court of Justice has recognised that this provision is a *"specific expression of the need for speed, which characterises the general scheme of the [EC Merger] Regulation and which requires the Commission to comply with strict time-limits for the*

merger control. These short and strict deadlines reflect the extraordinary importance, for the business community, of timely decisions and legal certainty with regard to the implementation of mergers and acquisitions. Furthermore, the Commission has traditionally proved its willingness to accommodate the notifying parties' usual preference for a "phase I" decision, as long as it can ensure the quality and robustness of such a decision, and, in particular, as long as it is duly satisfied that, if competition concerns have been identified, the proposed remedies are proportionate and remove these concerns in their entirety.

The Commission is under the legal obligation to publish the decisions which it takes pursuant to Article 8(1) to (6), Articles 14 and 15 of the EC Merger Regulation, together with the opinion of the Advisory Committee in the Official Journal of the European Union[51]. The practice of the Commission is, in any event, to make public the texts of its decisions, normally in its webpage, beyond this strict legal obligation.

6.7 Public announcement when an investigation is closed

6.7.1 Antitrust

When closing a case after proceedings have been formally opened, DG Competition, in addition to informing the parties, will normally indicate the fact of the closure on its website and/or issue a press release stating that it has been decided not to further pursue the case. The same applies in cases where proceedings have not been formally opened but DG Competition has already made public the fact that it was investigating the case (e.g. by having publicly confirmed certain inspections). If the case is closed with regards only to certain parties subject to the investigation (notably in cartel cases) DG Competition will normally indicate the closure of the case regarding these parties in the press release issued at the time of the adoption of the final decision against the remaining parties. The Commission intends to make public on its website its decisions rejecting complaints (pursuant to Article 7 of the Implementing Regulation) which are of general interest.

6.7.2 Mergers

The Commission makes public the adoption of all final decisions in merger cases (normally through the issue of a press release[52]). The text of these decisions is made fully accessible to the public, in a non-confidential version, on DG Competition's website. A short notice is published in the Official Journal indicating where the decision can be found in the website.

7. Conclusions

The Commission has consistently given high priority to due process and fairness in antitrust and merger proceedings. Fundamental rights and principles fully apply in the context of Commission proceedings. Companies enjoy extensive rights to be heard. The Commission also operates a multi-layered system of safeguards. Finally Commission decisions are subject to extensive legal review by the Courts of the European Union.

Although the Commission is convinced that it has one of the most transparent enforcement system in the world, the Commission is well aware of the constant need to learn from current practice and make

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adoption of the final decision" [Case C-202/06 P Cementbouw Handel & Industrie / Commission [2007] ECR I-12129, paragraph 39].

51 Article 20 of the EC Merger Regulation.

52 For simplified cases, a daily list of decisions adopted is made public.

improvements to the due process in the application of law of the European Union. The Commission therefore welcomes the debate on these issues.

BRAZIL

1. Introduction

CADE is recognized as one of the most transparent organizations in the Brazilian public administration. It's been referenced as a model for other regulatory agencies with respect to its policy of transparency. The objective of this report is to share the experience of CADE with other antitrust authorities in the world, seeking to improve through critique and suggestions. First, it outlines the Brazilian legislation that regulates the issues. Next, we present the five main policy objectives of transparency in Brazil (accountability, due process, prevention against lobbies, juridical security and quality control). Following that, we describe the measures adopted by CADE aimed at ensuring transparency and the measures that are to be implemented in 2010. A specific part is dedicated to the treatment of cases of exception (the protection of confidentiality of commercial and private investigations). Before concluding, there are related public statements of professionals about the transparency of CADE.

2. Legislation

The right of access to information is recognized formally in Brazil through its 1988 Constitution. Article 37 provides that the public administration must comply with the 'principle of publicity'. Article 5, XXXIII, states that 'everyone has the right to receive, from public bodies, all information of his/her specific, collective or general interest; […] except for those that are indispensable to the security of society or Estate'. Article 5th, LX, grants that 'the law can only restrain from publicity acts in legal proceedings whenever it is needed to protect privacy or social interest'. Antitrust agencies and proceedings must comply with those principles.

3. Reasoning

The primary reasoning behind the right of access to information is to enable citizens to hold public bodies and their officials accountable (accountability and prevention of corruption). José Afonso da Silva, a preeminent Brazilian scholar, interprets that the publicity 'has been always considered an administrative principle [in Brazil] because the Government, since it's public, is supposed to act the most transparently, in order to provide to citizens, whenever they want, full knowledge about what its officials are doing'. Transparency also derives from the due processes clause, which effectiveness depends on providing to the defendant knowledge of every step of legal proceedings taken by authorities, in order to enable him/her to respond to accusations or react to violations of his/her rights. It is necessary not only for assuring the right of defense, but also for improving the quality of rulings. Transparency is also important to bring the body safe from **lobbyists** and **political pressure**. BARRIONUEVO states, "*the transparency of CADE reduces the pressure on it*" (2009:91). In this regard, former Commissioner Thompson Andrade has made an important statement: "*It is important to clarify that in any disclosure made of cases [Nestlé / Garoto] in the media, I have not received pressure from the Minister of Justice or members of government - indeed, not only in this case but in any other. At these moments, we can assess how important the CADE is as an open and transparent national organization, with decisions made in front of everyone, including the press. It creates a protection, and also a great responsibility for directors, which they need to ensure* "(2009:167). Transparency gives greater **legal certainty and advocacy** on the importance of competition. As Franco Neto has said, (2009:144) "*the transparency of CADE also relates a lot to the market. The emphasis on dealing with market data, decisions always public and debatable since the process of developing expertise*

popularized the value of competition, which is very important. " Finally, transparency increases the quality of CADE's decisions by reputation control. CADE's Commissioners are usually appointed amongst academics and antitrust experts, and have incentive to maximize reputation within their peer group. The former President of CADE, Elizabeth Farina, said that "*transparency not only meets the requirement of publicity, it improves the level of technical decisions. The counselor knows that the discussions held in the House are being heard by experts, for the public interest [...] They all more careful, knowing that the scrutiny of their output is greater* "

Practice. The Brazilian antitrust process is assured the same guarantees, rites and formalities of the judicial process (although CADE is not a judicial body).

Both conduct of anticompetitive investigations and the notification of merger are filed 'automatically'. All new information, opinions, studies, documents and decisions are included with the records. The investigator or the process server has the right to be informed as to all acts. The records are public and available for public consultation in CADE to anyone. The rule is: the accused or the process server has the right to be informed of all acts in the process and can stand up against them.

In January 2010 CADE made available on the Internet scanned copies of the all records of proceedings in their files, from 1962 to the present. These digitized copies can be accessed by anyone anywhere in the world via the Internet.

The accused has the right to monitor produced evidence and may retain technical assistants, experts and consultants. The statements and testimony are made under the watch of the accused or his lawyer.

CADE acts similarly to a court of law. Their decisions are received in open session to the interested parties and the public. Six Directors and the President take CADE's decision and vote in a public session. All votes must be substantiated and motivated. Differences of opinion among Directors are debated in public. The Controlling Director is appointed by a draw held in public session with a trial to follow. First, the President assigns the case to be tried. Then, the Controlling Director reads the report, which describes the main facts of the case. Afterwards, the Attorney General of CADE may present its views orally within 15 minutes. Then, the lawyers of the accused or the process server may submit their reasons orally within 15 minutes. At that time, the public prosecutor may submit his views orally within 15 minutes. Next, the Controlling Director presents his vote, with discussions between the Directors and the President following. Afterwards, the other Board members vote one by one and, finally, the President. If a director or the President deems it necessary, they can "request a review" of the case, in which case the trial is suspended until the next session. Within five days, the outcome of the trial should be published in the 'Official News' (the newspaper containing all official publications of the Federal Government).

Audio of the sessions is broadcast live over the Internet. Anyone anywhere in the world is able, through the Internet, to listen to a live trial session of CADE. The electronic file containing the recording sessions (from 2005) is permanently available through the CADE.

The votes are tallied. Reasoning for decisions must be clear and objective. All votes of CADE are available for review on the Internet.

After each session, CADE's Press Office publishes a "Bulletin of Proceedings," which explains, in language accessible to the general public, the main decisions taken by CADE.

Any person, including interested parties in cases at trial, may request a meeting with the Directors and the President. The meetings can be requested through the appropriate form, indicating the identity of the applicant, the date and time you want to be heard, the subject to be addressed and the identification of

companions, if any, and your interest in the subject. The meeting should be held preferably at the headquarters of CADE. At least two authorities must be present at the meeting.

CADE has been publishing the agenda of its members on the Internet since 2005. Every meeting or official undertaking appears in this public forum. According to the President of Consumer Protection for the State of São Paulo (PROCON / SP), Roberto Pfeiffer, "*The publication of the agenda of directors is very important. Board members are civil servants and should act through the public, lawyers, parties, and society as a whole to see what public servants are doing. There are no secret meetings. If a party meets with the counselors, the other party needs to know*"(Pfieffer, 2009:178).

The President of CADE may be called at any time to provide information to Congress. The President (or Board designated by him) provides information in committees in both houses of Congress on all matters that are addressed by legislators. These hearings are televised and are made available for future reference.

There is a member of the Public Prosecutor specifically appointed to monitor the activities of CADE. The Public Prosecutor (Parquet) is an independent institution of the Executive and the Judiciary. The Public Prosecutor needs (i) to examine the government agencies, (ii) to propose criminal prosecution and (iii) defend, including lawsuits, the 'collective rights', so-called because they are rights that belong to the community as a whole (e.g., environment, heritage and culture and free competition). This member of the Public Prosecutor may request information and arrangements, provide advice in individual cases and participate in trial sessions. It acts as "society's inspector" regarding the activities of CADE.

The 2009/2010 Strategic Planning of CADE's Press Office provides: (i) Combining internal and institutional marketing efforts in order to clarify to various interested parties the sense of urgency in preparing for the new CADE, (ii) Leveraging the symbolic violence CADE's actions and acclimate society with the efficacy of administrative and criminal prosecution, and (iii) raising the awareness and acceptance of the principles of competitive policy in society as a whole in order to develop a competitive culture in Brazil " (Recommendation 2005 OECD Peer Review No 10) (iv) to ensure that the image of credibility, transparency, reliability, hi-tech, honesty and court efficiency is maintained, and (v) To ensure that decisions of the cases enable the public to evaluate the rationality and justice in the application of competitive law "(Recommendation 2005 OECD Peer Review No 4).

CADE publishes a monthly newsletter called "CADE Reports". It is sent by email to over 5,300 subscribers and contains news about the most important decisions, interviews and other information regarding the activities of CADE.

The President of CADE meets regularly with professional associations to account for and maintain direct and open dialogue on the activities of CADE. In 2009, the President met with the Chambers of Commerce in Germany, Spain, France, the United States and the UK, with representative bodies of lawyers and economists with expertise in antitrust groups representing business sectors as well as organizations representing consumers.

CADE's site is an important mechanism not only for advocacy but, above all, transparency. On the site, it's possible to review the procedural progress of all processes, access digitized files, recover institutional information, access full cases from CADE, access the full content of the law; access all press releases and news reports, and check statistics on the activities of CADE (such as supplies, analysis time, etc..).

All acts and information on management of CADE, such as contracts, bids, agreements, purchasing, budget, expenses, air ticketing etc.. are available on the Transparency of the Public Ministry of Justice website (www.mj.gov.br / transparency).

Under the internal rules of CADE, public consultation on all legislation that comes to pass should be carried out.

A Management Report is published annually by CADE, available in paper form and on the web.

The General Comptroller and the Judicial Union, the bodies responsible for auditing and approving the accounts of all federal government agencies, supervise CADE.

CADE's Press Office releases press releases often informing the general public about important facts from CADE or news stories. The Press Office is charged with the drafting of press releases explaining to the general public the reasons for the decision of the House, especially to implement restrictions on mergers or apply sanctions.

The President of CADE and its members often write articles and give interviews to newspapers and magazines, which are recorded and made available often.

In December 2009, a protocol was signed with the bureau of consumer protection at the Ministry of Justice (DPDC / MJ) that allows an individual to enter the companies convicted of the cartel's "blacklist" of companies that harm consumers. This list is published annually on the basis of claims made by consumers in the 27 states.

In 2009, the Ethics Committee of the CADE was established; comprised of three members responsible for ensuring compliance with ethical standards; provide advice, and guidance to suggest a course of action.

4. Measures in Implementation

Although the practice has demonstrated a reasonable degree of transparency, CADE is constantly seeking to advance mechanisms for improvement:

In 2010, CADE will establish the Ombudsman. This is the person responsible for receiving, assigning priority and investigating complaints, requests, protests etc…

In December 2010, The Management Report for 2009/2010 will be released in an un-bureaucratic, "reader friendly" format.

CADE Twitter will be launched in 2010, enabling stakeholders to monitor real-time activities and major events of the organization and its members.

English and Spanish versions of the CADE website are planned for launch in July 2010, to enable monitoring of their activities by the global antitrust community.

5. Exceptions

Some information and documents are exempt from private and confidential treatment. Secrecy is enacted to prevent knowledge of the information or of access to the whole document, including investigation or notifying. Confidentiality is imposed to restrict knowledge of information or access to documents by anyone other than the accused or the process server. Secrecy is ordered on rare occasions, and only during the time necessary to ensure the effectiveness of evidence. It is usually granted in cases of

telephone tapping. Obviously, if the accused knows in advance that their telephone communications are being intercepted, the test becomes ineffective. However, once the recording is made, the accused has the right to be informed that the recording has taken place and be able to access its content. At the discretion of the Director or the Controller Counselor and in the interest of legal discovery, upon request, the Company may be granted confidential treatment of records, documents, objects, data and information that are related to bookkeeping, financial situation business; fiscal and banking secrecy, secrets of a business, production process and secrets of the industry, especially industrial processes and formulas for the manufacture of products, sales of the applicant or group to which he belongs, date, transaction value and form of payment; documents that formalize the act of concentration notified; annual report to shareholders or quota holders, unless the document has a public character, value and volume of sales and financial statements, customers and suppliers; capacity, production costs and expenditure on research and development of new products or services; other cases, at the discretion of the President or Controller.

Confidential treatment of information and documents from the CADE will not be granted when: notably they are public by law, including in other jurisdictions or are public domain in this country or abroad; on Administrative Procedure, at the discretion of the Counselor or the President, distinguished ability, confidentiality of information can lead to a curtailment of defense, if they are related, among others, to the following categories of information: a) shareholding structure and identification of its respective controller, b) part of the organization's corporate business group c) studies, research or data compiled by the institute, association, union or other entity that brings competitors, except those ordered individually or with a confidentiality clause d) lines of products or services offered, e) data on market to others, f) any contract for deed or filed before a notary public or the Board of Trade in this country or abroad; g) property, corporate and financial public companies (including foreign ones), and there wholly owned subsidiaries, which must be published or disclosed under corporate law or securities market.

The onus is on the person making the request for confidential treatment of information, objects or documents to indicate the regimental device authorizing the request. Confidentiality will be accepted or rejected through a reasoned decision. The total allowed confidentiality of documents, objects and information, will be merged into file boxes, annotated with the words “CONFIDENTIAL”. If confidential information is entered in the body of the petition, demonstration, or its application, the applicant must submit: (i) a full version, identified on the front page with the term “CONFIDENTIAL VERSION”, which will be assessed in the main proceedings disjunctive of where you will place the certificate, after acceptance by the President or Rapporteur, and kept confidential until a further decision, and (ii) a version identified on the front page with the word “PUBLIC VERSION”, edited with marks, erasures or deletions, so as to omit strictly numbers, words, or any other reputable confidential information, which is at once joined to the main proceedings.

Recently, CADE regulated its system of 'plea bargaining', whereby companies accused of being a cartel may propose a negotiated settlement with the antitrust authority. These proposed agreements have been kept secret until the date of trial. On one hand, this measure gives greater power to CADE, particularly against the other defendants. On the other, it makes the negotiation process less transparent, nullifying the benefits of membership. The issue is still subject to debate at CADE and subject to revision.

The Internal Rules of the CADE, adopted in 2007, provide that confidential information from individuals in possession of CADE will be made available to the public five years after the trial. However, in 2009, the President of CADE, through a Legal Service opinion of the CADE, did not implement the measure, ensuring that private information held by the CADE can not be disclosed except under express consent of the party requiring privacy (see: http://www.cade.gov.br/Default.aspx?1326f4041df2090a1c290155e2).

6. Testimonials

CADE is recognized in Brazil as one of the most transparent bodies of the Federal Public Administration. DUTRA says that "*the action and transparency of CADE is a belief of the Brazilian society and the international community*" (2009:14). PFEIFFER says that "*the transparency of CADE's actions has been a major factor in the defense of competition in Brazil."* FRANCO NETO said that " *I was very impressed with the transparency with which the CADE operates, the advertising it gives to its ordinary activities. It works very well within the rules of modern democracy, and I see this exhibition as something extremely positive. Council meetings open to the public now transmitted in real time over the Internet, a calendar of advisers on the Internet, public hearings; this pattern of behavior is an example of acting in the public interest. [...] In conclusion, the competition and defense CADE is doing transparently and in front of the public is extremely positive for Brazilian society and country's development*" (2009:144). FONSECA says that "*It must also emphasize the transparency with which decisions are made. Since the legal discovery, public hearings are an important element for assuring a transcendence of public interest in upholding the interest of the community, which is the holder of the interests protected by law and by the agency of CADE. The trials are always public, with explanatory memorandum to inform the decision of each case. The lawyers and the parties always have access to the Board for reasons of their exposure through memorials. The trials always provide the intervention of lawyers as a defense and clarification of points of view*"(2009:123). From CAMPILONGO (2009:158): "*If you compare what happens in the CADE to what happens in some regulatory agencies [...], transparency, attention to due process, the reception of lawyers, access to files, all is very diverse [...]. The contrast with the CADE is visible. I think this is due in part to the fact that the CADE sessions are public*." The National Union of Civil Servants from the National Regulatory Agency said in a statement, "*The **Sinagências** understand how necessary and urgent it is to open the meetings of the collegial decision-making by regulatory agencies as has charged the public, the media and some sectors of government*" . In the note, examples cited included the transparency in the deliberations of the Administrative Council for Economic Defense (Cade).

7. Conclusion

The transparency of CADE has been an important factor in legitimizing the organization and the antitrust policy for Brazilian society. CADE is committed to increasing transparency in order to safeguard the benefits it has received.

BULGARIA

The Bulgarian legal system recognises due process rights which are provided for at the highest possible level-in the Constitution of the Republic of Bulgaria. According to Art. 56 of the Constitution, everyone shall have the right to legal defence whenever his rights or legitimate interests are violated or endangered. All natural and legal persons have the right to be accompanied by legal counsel when appearing before a court or an agency of the State.

There is no explicit legal definition as regards the due process in the Bulgarian legislation but the Constitution provides for a general clause on the appeal before court of all action and legal acts issued by state authorities. Pursuant to Art. 120 of the Constitution, the courts shall exercise control over the legality of the acts and actions of the administrative bodies and citizens and legal entities shall be free to challenge any administrative act which affects them, except those listed expressly by the laws.

When issuing administrative acts, the state bodies must respect the fundamental rights provided for in the Administrative Procedural Code (APC). By virtue of Art. 12 of the APC, the administrative authorities are obliged to ensure transparency, authenticity and thoroughness of the information in the administrative proceedings. Given that antitrust proceedings are considered administrative by the Bulgarian law and the decisions of the national competition authority have a status of individual administrative acts, the principles of accessibility, publicity and transparency are also regarded in antitrust proceedings.

In November 2008 the Bulgarian Parliament adopted the new Law on Protection of Competition (LPC). The adoption of the new law ensured full coherence of the national legislation with the European *acquis*, introduced some new procedures related to the different types of proceedings initiated by the Bulgarian Commission on Protection of Competition and strengthened its powers, while at the same time more efficiently guaranteeing the protection of the rights of the parties in the proceedings and of the constituted interested persons.

The main pillar of this enhanced protection of the rights of the parties is the introduction of an intermediate act in the proceedings, namely, the Statement of Objections. Thus, the parties concerned can fully exercise their right to defense, having complete information on the nature of the infringement they are alleged to have committed, the facts on which the objections of the CPC are founded, as well as the legal analysis of the Commission on the merits of the case.

1. Rights of defence of parties to an antitrust proceeding

Bulgarian Law on Protection of Competition (LPC) is the main law, which contains both the substantive and the procedural provisions, related to antitrust investigations, as well as to merger control. Five chapters of the LPC are devoted to procedural rules, one chapter describes the general procedural rules, and each of the others sets specific procedural rules applicable to the different proceedings (antitrust infringement, merger control, sector inquiries, competition advocacy, and unfair competition).

Such extended procedural rules were introduced just with the current Law on Protection of Competition, adopted in November 2008 in order to guarantee the transparency, the right of defense and due process. This new procedural framework is based on the procedural rules of the European Commission and of other EU Member State competition authorities.

In addition to the provisions in the law, the Commission on Protection of Competition (CPC) is entrusted with the power to adopt normative acts (methodologies, instructions etc.) on the application of the law. These normative acts aim at substantiating some of the provisions in the LPC in order to make its enforcement practice and procedures more clear and transparent for the parties to the proceedings. The CPC is required by the law to adopt detailed rules on certain provisions of the LPC, at the same time the Commission is given the discretionary power to adopt other acts as it may deem necessary.

The Commission on Protection of Competition adopted in the beginning of 2009 the following acts, which refer to procedural issues:

- Rules on Access to File;
- Leniency Programme with Procedural Rules on its Application, Template for Leniency Application and Guidelines for Filling the Leniency Application;
- Internal Rules on Protecting the Identity of Persons who have given statements or provided information relevant to infringements of the Law on Protection of Competition (Rules on Protected Witnesses).

The CPC is currently drafting rules on commitment decisions.

All these acts are adopted with a decision by the Commission on Protection of Competition and as such they are applied during the proceedings. They are published on the CPC Internet site and in the CPC electronic registry. The Commission prepared press releases after the adoption of the acts in order to inform the public about their existence.

In the context of the administrative proceedings before the CPC as national competition authority, the principles of transparency, fairness and legal protection of the affected parties are respected by various ways: by giving information about the nature of the charges, ensuring access to file, containing all non-confidential data collected in the proceedings, providing an opportunity for written objections regarding the charges; oral explanations in public hearings, judicial review of the final act of the authority.

2. Contacts and meetings with the agency

The investigation at the Commission on Protection of Competition is performed by a case team, which is appointed with an order of the CPC chairman immediately after the proceeding was initiated. The investigation and the work of the case team are monitored by a Member of the Commission, who is appointed for the specific case by the Chairman in its order for the initiation of the proceeding.

With the formal letter sent to the parties immediately after the initiation of the proceeding, they are given the names and the phone numbers of the CPC experts from the case team, to whom the parties can turn during the investigation. These experts are responsible for and maintain the contacts with the parties during the investigation.

During the investigation the case team has the power to use all investigatory tools provided for in Art. 45 of LPC. In the exercise of certain powers of investigation, such as request for information and evidence, requiring oral statements or conducting of inspections, it is sometimes objectively necessary for the parties to the proceedings to meet the case team and/or to have telephone conversations or e-mail communication with case handlers. The meetings with the case handlers are organized on *ad hoc* basis and are only intended to ensure the process of gathering evidence on the specific case.

Furthermore, the parties and the interested third parties constituted to the proceedings have the right to be heard in an open sitting of the Commission before it takes a decision on the merits of the case. In this respect the Chairman of the CPC schedules an open sitting, at which the members of the decision-making body meet and hear the parties and the interested third parties. These meetings with the CPC board aim at ensuring the proper exercise of the affected parties' right of defense prior to the adoption of the final decision on the case.

The parties to the proceeding before the CPC has the right of access to all evidence, collected during the investigation, with the exception of those, containing production, trade or other secret, as well as to internal documents of the Commission. The documents, containing production, trade or other secret, protected by law, must be identified as confidential by the parties, who have submitted them. No access is given to these documents to the other parties to the proceeding. However, there is a possibility, provided for in the LPC, to grant access to the documents in question, if they are considered to be of significant value as evidence to the alleged infringement or in order to guarantee the right of defence of the other party(ies). In this case, the access is granted with a ruling of the Commission, which can be appealed before the Supreme Administrative Court.

When the Commission on Protection of Competition investigates an alleged violation under Art. 101 or Art. 102 TFEU (ex Art. 81 EC and Art.82 EC), it applies independently or in parallel with the relevant national prohibitions the provisions on cooperation under Council Regulation (EC) No 1/2003. By virtue of Art. 12 of the Regulation, the CPC can exchange with the European commission and with the other National Competition Authorities all kind of information, incl. confidential one. The documents and the corresporndence with the European Commission and the other National Competition Authorities become part of the CPC case file, but the parties to the proceeding or other parties are not given access to these documents (Art. 55, para 1). The protection regime of these documents is similar to the one, regulating the access to the Commission's internal documents.

The access to file is granted to the parties before the scheduling of the oral hearing. The parties to the proceedings have the right to access to file after addressing the statement of objection to them. They are granted access to any evidence, collected in the course of investigation with the exception of those containing production, trade or other secret, protected by law, and the internal documents of the CPC.

3. Agencies' notices and parties' responding submissions

When an investigation is open, the CPC case team informs the parties with a letter about the fact of the initiation of the proceeding, the legal grounds for the initiation (complaint, ex officio, etc.), articles of the LPC, which are allegedly violated and short description of the claimed nature of the violation, the addressees' right to identify the submitted documents that are claimed to contain production, trade or other secret information, the names and telephones of the case team.

As a general rule, the following means for collection of evidence, prescribed by the law, are used during the investigation: requests to the parties to the proceeding and/or to other persons and state bodies for submission of information and of material, written, digital and electronic evidence; on-site inspections, requests for information or assistance from other EU Member State National Competition Authorities or from the European Commission.

When sufficient evidence on the case has been collected during the investigation, the case team prepares and submits it to the Member of the Commission, who in turn informs the Chairman of the CPC that the report has been prepared. The Chairman puts the report of the case team in the agenda of the closed sitting of the Commission not later than in 14 days after the investigation has been concluded. At the

closed sitting of the CPC, the Members of the Commission make consideration on the report of the case team and decide on the further course of the proceeding.

The Law on Protection of Competition provides for the following scenarios on the further course of the proceeding:

- The Commission on Protection of Competiton may consider, based on the report of the case team, that no violation of Art. 15 LPC (prohibited agreements, decisions and concerted practices) or Art. 21 LPC (abuse of dominance) is established, or there are no grounds for pursuing action for violation of Art. 101 or Art. 102 TFEU (ex Art. 81 EC and Art.82 EC) and it will adopt decision in this respect.

  In such a case, the parties are notified about the decision of the CPC and they are informed of their right to have access to the documents in the file under Art. 55 LPC.

- The Commission on Protection of Competition may consider, based on the report of the case team, that it is not able to take a definitive decision on the case, it adopts a ruling for returning the case with mandatory instructions to the case team for additional investigation (Art. 71, para 1, p. 2 LPC).

- The Commission on Protection of Competition may consider, based on the report of the case team, that the conclusion of the case team for established violation under Art. 15 LPC (prohibited agreements, decisions and concerted practices) or Art. 21 LPC (abuse of dominance) and for violation of Art. 101 or Art. 102 TFEU (ex Art. 81 EC and Art.82 EC) is sufficiently substantiated (grounded, proved), it adopts ruling for submission to the parties concerned of Statement of Objections for violation of the law, committed by them.

The ruling for the submission of Statement of Objections is not subject to appeal before the Supreme Administrative Court.

The Statement of Objections is the document which describes the infringement with its specific characteristics, the participants in the infringement and the period of the infringement, incl. the economic theories and legal doctrines relevant to the allegations against the parties.

The Statement of Objections is a new instrument for Bulgarian competition law. It was introduced in the Law on Protection of Competition, adopted in November 2008, in analogy to the Statement of Objections, submitted during the European Commission proceeding on the application of Art. 101 or Art. 102 TFEU (ex Art. 81 EC and Art.82 EC). Its introduction was grounded on the case law[1] of the Court of Justice of the European Union, which establishes that the submission of Statement of Objections aims at giving the undertakings, which are alleged to have violated the competition rules, all the information needed in order to enable them to defend themselves effectively before the European Commission adopts its final decision on the case. The Statement of Objections must be sufficiently clear to enable the parties concerned properly to take cognizance of the conduct complained of by the European Commission. This prerequisite will not be fulfilled if the submitted Statement of Objections does not state clearly the infringement with its specific characteristics, the participants in the infringement and the period of the infringement.

[1] See Judgment of the Court of 31 March 1993 (Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 A. Ahlström Osakeyhtiö and others v Commission [1993] ECR I-01307.

Under Art. 74, para 3 LPC, the CPC ruling for submission of Statement of Objections is given to the complainant and the alleged infringer(s), the other parties to the proceeding (constituted interested parties) are only notified of the fact of its adoption. The CPC ruling shows a period, not shorter than 30 days, during which the parties (the complainant and the alleged infringer(s)) have the right to present their written objections to the submitted Statement of Objections. The constituted interested parties have the right to present their opinion (Art. 74, para 2 LPC). The deadline starts to run as of the date the CPC ruling was received (for the complainant and for the alleged infringer(s)) or as of the date of its notification (for the constituted interested parties).

The submission of written objections to the Statement of Objections is a materialization of the right of defence for the alleged infringer(s) during the proceeding before the CPC and it is up for the parties to decide whether to exercise this right or not to. If they decide to exersise their right of defence, sibmitting objections to the Statement of Objections, the parties have the obligation to submit, together with the written objections, all supporting evidence (Art. 74q para 4 LPC). If the parties do not have possession of the evidence, it is sufficient just to show them.

In case the parties fail to present (or show) the necessary supporting evidence and this failure is not due to objective reasons, the evidence presented or showed by them at a later stage cannot be taken into consideration by the Commission on Protection of Competition when the final decision on the case is adopted. Due to the same reason, the parties cannot submit before the court statements for facts, which were known to them at the moment of the submission of their written objections, but for which they failed to present supporting evidence to the CPC, provided that there were objective reasons for the failure.

In order to guarantee the right of defence for the parties to the proceedure before the CPC, the CPC ruling for submission of Statement of Objections contains explicit text, informing the parties and the interested parties that they have the right to access the case file, as well as the right to be heard by the Commission at an Oral hearing.

If after the oral hearing the Commission considers that it has to change its initial Statements of Objections (e.g. to widen the alleged violations of the law, to extend the alleged violations to new infringers, to change the legal basis of its objections, etc.), the CPC adopts new ruling, with which it submits its new or changed Statement of Objections. In this case the Commission observers the procedure follow during the submission of the initial Statement of Objections, i.e. new time limit is given to the parties for submission of written objections, access to file to granted again and the parties have the right of a new Oral hearing.

However, if the CPC declines to maintain part of it Statement of Objections, it does not adopt new ruling, but may adopt final decision on the case. The same applies to the case where the Commission abolishes all its objections, then it may adopt a final decision, with which it establishes that no violation of Law on Protection of Competition was committed or that there are no grounds for taking actions for infringement under Art. 101 TFEU or Art. 102 TFEU (ex Art. 81 EC and Art. 82 EC).

4. Oral hearing

As already pointed above, besides the access to file, the parties to the proceeding have the right to be heard by the Commission on Protection of Competition in an open sitting before the case is decisided on the merits (Art. 76, para 1 LPC). The Commission may, at its discretion, decide to hear other persons as well.

The hearing of the parties takes place in an open sitting of the CPC. The open sitting is scheduled after the submission of objections and observations by the parties following the Commission's Statement

of Objections. The open sitting is scheduled for a date, not earlier than 14 days after the expiration of the deadline for submission of objections and observations. This period of not less than 14 days is needed to the CPC to get acquainted with the objections, opinions and evidence of the alleged infringers and to take them into consideration when deciding on the case.

The parties are notified of the date of the oral hearing under the provisions of the Administrative Procedural Code.

The parties, the constituted interested parties and other persons are heard by the Commission on Protection of Competition during *in camera* sitting. They are given the possibility to state freely their objections to the submitted Statement of Objections. The Chairman of the CPC, who presides the meetings of the Commission, determines the way the Members of the Commission may ask questions to the parties, the interested parties and the other persons. The parties and the other participants in the hearing may pose questions to one another. When the Chairman considers that all facts of the case were clarified, he gives the floor to the parties to express their final opinions on the case. The CPC Chairman closes the oral hearing procedure when the case is clarified from factual and legal side. Even though it is not explicitely provided in the Law on Protection of Competition, a possibility exists that the oral hearing of the parties and the other participants in the proceedure could not be finished during one meeting, due to which it may be needed to schedule and have more than one meeting for the oral hearing.

The oral hearing is recorded by a secretary, who makes transcript of the hearing. The transcript of the hearing becomes part of the documents contained in the case file.

After the oral hearing, if there is no need for amendment of the initial Statement of Objections, the CPC Chairman schedules *in camera* sitting of the Commission and the final decision is adopted.

The parties are notified for the decision adopted under the provisions of the Administrative Procedural Code.

The final decision of the Commission on Protection of Competitition may be appealled before the Supreme Administrative Court in 14 days after the notification of the decision.

5. Duration and timing of investigations

The Law on Protection of Competition sets the legal framework on the issue of the time limits for concluding an initiated proceeding before the Commission on Protection of Competition. The law establishes different regime on the length of the investigation for the antitrust proceeding, on one hand, and for merger cases, on the other. In case of antitrust investigations, there is no time limit for the CPC to finalize the proceeding. In the area of merger control, however, the LPC provides for strict time deadlines.

5.1 Merger control proceeding

The proceeding for authorization of planned concentration is initiated not later than 3 days after the merger notification, containing all required information, was submitted of by the parties. In case where all the necessary information was not submitted by the parties, they are informed in writing to submit it within 7 days as of the receipt of the CPC letter.

Pursuant to the LPC, the Commission on Protection of Competition makes an assessment of the concentration in a preliminary investigation, which should be concluded in within 25 working days as of the day following the day of initiation of proceedings.

In case the notifying parties propose amendments to the concentration, the time limit for adopting decision is extended with up to 10 additional days upon request by the parties or *ex officio*.

Within these time limits set, the Commission should adopt a decision, with which it:

- pronounces that the operation does not constitute a concentration or does not fall within the scope of LPC; or
- authorizes the concentration; or
- authorizes the concentration, taking into account the amendments, proposed by the participants in the concentration; or
- starts an in-depth investigation.

When a decision is taken to start in-depth investigation of the notified concentration, this decision is published in the electronic registry of the Commission on Protection of Competition and all interested parties are given 30 days as of the date of the publication to submit information or opinion on the effect of the concentration on the relevant market. The time limit for concluding the investigation is 4 months as of the date of the publication of the decision for in-depth investigation in the electronic registry. This time limit for adopting the final decision could be further extended with up to 25 working days in cases of factual or legal complexity and10 working days in addition to the extension with 25 working days in case of remedies proposed by the parties.

5.2 Antitrust proceeding

As already stated, the Law on Protection of Competition does not set any time limit to conclude proceeding for alleged abuse of dominant position or prohibited agreements, decisions and concerted practices. Moreover, this absence is part of the significant amendments made to the previous Law on Protection of Competition, which was in force in the period 1998-November 2008. Under the previous regime, the Commission on Protection of Competition was required to finish an antitrust investigation within 90 days with a possibility for extension with no more than 30 days in cases of legal and factual complexity.

The reason for abolishing this time constraint was the experience of the Commission which showed that it was hardly possible to conclude in such a short time investigations involving big number of undertakings and documents and/or requiring extensive economic and legal analysis. The analysis of the legal provisions on this matter, contained in the competition laws of the competition authorities within the European Union, confirmed that the absence of time limits in antitrust proceeding is rather a rule.

Normally, the authority does not inform or consult the parties when setting internal deadlines for specific activities nor of any revised timescale for such activity. But sometimes the authority sets certain time limits after consultation with the affected parties, such as time limits for the reply to a request for information by which the authority requires from the addressee lots of evidential data. In such cases the provision of explanation and justification for setting a specific timescale is considered necessary.

6. Decisions: publication and public announcements

The Law on Protection of Competition, adopted in November 2008, in its Art. 64, provided for that the Commission on Protection of Competition maintains an electronic registry of its acts. The electronic

registry can be considered as new tool for increasing the transparency of the CPC work and decisions and for facilitating the parties to a proceeding, the legal professionals, the media and the society as a whole.

Besides the positive impact of the registry as a technical tool for competition advocacy and for raising competition culture purpose, it has its importance as a procedural instrument ensuring information on and access to documents which are of legal interest for the parties of the proceeding as well as for other interested and/or third parties. Art. 64 LPC stipulates that the CPC decisions (with the exceptions, explicitly set in the law) are subject to appeal before the Supreme Administrative Court by the parties to the proceeding and by any third party with legal interest in the case. The deadline for submitting an appeal to the court for the parties to the case is 14 days as of the date of their notification under the Administrative Procedural Code, while for the third parties this 14 day period starts as of the date the decision was published in the electronic registry.

The electronic registry is public and it is available via CPC Internet site. It was developed as part of the CPC project, financed by the European Social fund and was launched in the beginning of July 2009.

The registry contains short information (case number, applicable law[2], legal grounds, parties) on each proceeding, initiated before the CPC with the corresponding decisions, rulings and orders, adopted by the Commission on Protection of Competition on a specific case, as well as announcements on some acts, which are not subject to publication. All normative acts on the application of the Law on Protection of Competition, adopted by the CPC, are also published.

The acts, published in the electronic registry, are the public versions of the respective documents.

Pursuant to Art. 64 LPC, the CPC is required to publish in the electronic registry all final decisions with which the Commission pronounces on the substance of the case, namely:

- establishes infringement (and the infringer) or lack of infringement;
- imposes sanctions/fines on the infringer;
- exempts from sanction or reduces the amount of the sanction;
- orders termination of the infringement, incl. with remedies;
- authorizes (incl. with conditions)/prohibits concentration;
- exemption decisions;
- adopts competition advocacy opinion;
- adopts sector inquiry;
- etc.

Besides the final decisions, the LPC requires that certain intermediate decisions, adopted during a proceeding, are also published in the electronic registry. They are the following:

[2] Beside the Law on Protection of Competition, the CPC is applying also the Public Procurement Law and the Concessions Act as Bulgarian national public procurement review body.

- decisions to open an in-depth investigations of concentrations

- decisions for termination of the proceeding due to lack of competence to pronounce; when notifying party (in case of mergers) or the other party have terminated their existence, do not exist, or could not be found; the notifying party withdraws its notification; commitment decisions, etc.

In addition to these acts, the law provides for that announcements of initiated proceeding for authorization of concentrations and for investigations of alleged violations of antitrust rules (abuse of dominance and prohibited agreements cases) should also be published in the registry.

Shortly after the CPC registry started functioning, the Commission management took a decision to broaden the scope of the acts and announcements published. The main consideration for this management decision was to ensure greater transparency and more information on CPC enforcement practice and its act, which may be of interest for the parties and the constituted third parties to a case, as well as to legal practitioners and the business community. Thus, the following acts of the Commission, as well as announcements, are subject to publication in the registry:

- decisions for reopening of proceeding, which was terminated after commitment decision;

- decisions for pecuniary sanctions (for non-provision of cooperation or information required, for breaking the seals during on-site inspections), for periodic pecuniary sanctions (for non-observance of: CPC decision for termination of infringement and for remedies imposed; CPC commitment decision; CPC ruling on imposition of Interim measures) and for fines imposed;

- ruling for suspension of proceeding (when the decision of the CPC is pending on decision of a matter within the competence of another body) and for its re-opening;

- announcements for the imposition of Interim measures;

- announcements for initiation of proceeding *ex officio* or upon request by interested parties;

- announcements for Statement of Objections, submitted to the parties;

- announcement for initiation of ex officio proceeding for not notified concentration or for concentration, which was finalized in a way or under conditions contrary to those authorized by the CPC;

- announcements for acts, adopted by the CPC, where the interested party is not known or it was not found at the address shown by him;

- announcements for the initiation of sector inquiry.

As it could be seen, practically all Commission's acts (decisions, ruling, orders) with procedural significance for the parties to the case, as well as for third parties, are either directly published (their public version) in the electronic registry or information on their adoption is made available through announcements, in case direct publication is not possible as it could the infringe the right of defense or harm the interests of the parties concerned.

In addition, in certain specific instances, the electronic registry is very important procedural notification tool. In case where the interested party is not known or it was not found at the address shown

by him, Art. 61, para 3 of the Administrative Procedural Code provides for the opportunity to post a public announcement for the decision taken with the date of the announcement being the date of the notification with all legal consequences as regards the legal deadline for appeal before the court.

Not less important is the fact that the functions of the registry allow for prompt publication of the above-mentioned information, well before the legal deadlines set in the LPC for the publication (14 days after the adoption of a decision, 7 days after the initiation of proceeding or the end of on-site inspection. The acts, adopted by the Commission on Protection of Competition, are published in the registry after their notification to the parties concerned, which as a rule takes not more than 2-3 days. The short information for initiated proceeding under the Law on Protection of Competition is published practically the same or the next day.

Apart from the publication of the CPC acts (decisions, rulings, orders) and announcements in its public electronic registry, the Commission on Protection of Competition maintains very active public relations policy. The press-office of the CPC prepares, publishes on the Commission's Internet site and sends to the media press releases on initiation of cases, on decisions or rulings, adopted by the Commission and on CPC decisions, confirmed by the Supreme Administrative Court. The main considerations for selecting a case or decision to be publicized with a press release is its importance for the Commission's enforcement policy, the interests of the business and the consumers, its significance with a view of the market concerned or specific public debate, etc.

LITHUANIA

1. Introduction

Proceedings concerning the application of the competition rules, including both non-merger antitrust proceedings and merger review, are regulated by legal acts of the Republic of Lithuania (the Law on Competition of the Republic of Lithuania (hereinafter the Law on Competition) and the Rules of Procedure of Competition Council) in detail. The main principles of public administration (such as the principle of objectivity and the requirement to motivate the decisions) are applied to the proceedings of the Competition Council too. The Law on Administrative Proceedings of the Republic of Lithuania (Article 89) establishes that an administrative act must be rescinded if it is illegal because it was adopted in violation of the principal established procedures, especially in breach of the rules intended to ensure an objective evaluation of all circumstances and the validity of the decision. This rule is applied to the resolutions adopted by the Competition Council.

The procedures applied by the Competition Council of the Republic of Lithuania are similar to those of European Commission, but one should take in mind that the cases examined by the Lithuanian competition authority are much lesser in extent and complexity. Most often there are no disputes due to procedural issues so judicial practice is poor. Nevertheless recently investigated undertakings exercise their procedural rights more active demanding the clarity and transparency of the decisions.

According to applicable law there are a few stages of the investigation however not all of them are achieved in some cases. First of all there is a possibility to open the investigation examined and if there are data enough allowing to reasonably suspect the infringement the actions of investigation specified in the Law of Competition are carried out. Upon the completion of the investigation the Competition Council may send the findings of authorised officers regarding the restrictive practices to parties of the proceeding. After receiving their written comments the case is examined in a public hearing and a prohibition decision can be adopted or the case terminated due to the lack of evidence. The termination of the case can be adopted without a public hearing upon the completion of the investigation. The final decision is declared in the resolution of the Competition Council and the parties of the proceeding shall have the right to appeal to the administrative court against this resolution. The main aspects of the investigation are discussed further on.

2. The opening of the investigation

The case could be based on a complaint by an undertaking or on the initiative of the Competition Council and in both cases there should be a motivated decision. The request for investigation must be examined not later than within 30 days from submission of the application and documentation. The Competition Council must examine all possible competition rules infringements and can not choose cases only with the most significant impact or cases which are relevant with a view to defining competition policy. It is possible not to start investigation only according to the grounds specified in the Law on Competition (for example if the facts indicated in the application are of minor importance, there are no data available allowing to reasonably suspect the infringement, the applicant has failed to provide documents required). The resolution to refuse to start the investigation can be appealed to the administrative court, so the refusal of the Competition Council must be clearly justified. Cartel cases are

often initiated by the Competition Council, however in 2009 the first application for leniency was received and maybe there will be more such occurrences.

The Competition Council examines the possibility of competition rules infringement in the initial stage of investigation. If there is such a possibility the justified decision due to investigation of the restrictive practices shall be taken. The undertakings can appeal against this decision. At the moment of the first investigative measure address to them (normally a request for information or an inspection), undertakings are informed of the fact that they are subjects to an investigation as well as about purpose of such an investigation.

3. The investigative phase

The initial period for the investigation is 5 months, as it is stated in the Law on Competition. The Competition Council may extent this period by justified resolution each time by up to 3 months and the number of extensions is unlimited that is why the exact length of specific investigation is unknown. In some cases the investigation could proceed up to several years, yet generally timespan is about a year, depending on human resources.

During the process of investigation officers are empowered to conduct inspections at the premises of undertakings, or in certain circumstances, also at private premises, to require undertakings to provide the Competition Council with all necessary information, to get oral or written explanations from the persons connected with the activity of the undertakings under investigation. The scope of the request for information is defined by authorized officers however undertakings may provide all necessary information they think the officers need. Pursuant to Article 34 of the Law on Competition the parties to the proceedings shall have the right to be heard and to give explanations both in writing and orally. During the investigative phase the authorized officers may hold informal meetings with the parties subject to the proceedings, complainants or third parties, nevertheless generally such meetings take place at the request of the parties. The parties are invited to substantiate their statements or presentations in writing. If meetings take place at the request of the Competition Council generally the statements or presentations are officially protocolled. In more complex cases informal meetings with the parties can be hold at the request of authorized officers due to have a discussion with the undertakings about the more complex and significant circumstances of the investigation. The procedures of such informal meetings are not regulated and depend on the complexity of the case and initiative of undertakings. The meetings with the members of the Competition Council who are responsible for the adoption of the final decision[1] are not organized during the investigation, yet it would be a specific case demanding more detail analysis or there would be certain request of an undertaking and a decision of member's of the Competition Council to grant such meeting.

4. Completion of investigation

Once through the investigation measures authorized officers have reached a preliminary view of the main issues raised by the case there can be different procedural paths for the Competition Council proposed: (i) to finish the investigation and present to the parties the written findings of an authorized officer (with a view to adopting a prohibition decision); (ii) to terminate the investigation if it becomes evident that there is no composition of the infringement; (iii) to terminate the investigation with offered commitments suitable to address the competition concerns arising from the investigation.

[1] The Competition Council shall consist of the Chairperson and four members. The Competition Council is responsible for all decisions in all competition cases.

4.1 Procedures leading to a prohibition decision

Before adopting the final decision the Competition Council shall give the parties the opportunity to be heard and the document with the findings of the authorized officers regarding the restrictive practices is presented (the Statement of Objections). There is a preliminary position of the Competition Council regarding the alleged infringement of competition rules, factual basis and matters of law about the investigation reported. Regardless the initial opinion of the parties the Statement of Objections is a comprehensive document with all arguments and conclusions needed, moreover there is a possibility of imposition of a fine or other remedies indicated.

The parties (suspected undertaking(s), the initiator of investigation and third parties) shall be offered to submit their written comments on the findings of the authorized officers within the 14 days period with the prolongation possibility (up to few months) in order to ensure that the right to be heard is appropriately observed. The parties are granted access to the complete investigation file with an exception of confidential documents.

The Law on Competition (Article 33) establishes oral hearing for all competition cases before adopting the final decision so that the parties are allowed to develop their arguments orally which have been submitted in writing already. The hearing of cases at the sessions of the Competition Council shall be public with an exception of closed hearing when it is important to keep commercial secrets of undertakings. The members of Competition Council, the officers responsible for the investigation, associated Competition Council's services including the legal service and the parties to the proceedings are attended at the hearing. The parties to the proceedings shall be notified in writing of the place and time of the hearing of the case. The chairman of the hearing is the chairperson of the Competition Council or other member of the Competition Council when the chairperson is absent. The very first of speaking is the officer responsible for the investigation who presents the main findings of the investigation. After that the complainant, the undertaking suspected of infringement of the Law on Competition and third parties are allowed to speak. After every speech there are questions asked by the members of the Competition Council, the officer responsible for the investigation and the third parties. The questions to the authorized officers are not allowed (with an exception of permission of the chairman of the hearing), for there is no such right to the parties of the proceedings established by the legal acts. The Supreme Administrative Court of Lithuania ruled that such procedure does not infringe the right to defense for the proceedings of the Competition Council is an administrative procedure and the parties do not enjoy the rights of the parties of judicial proceedings. The public hearing is protocolled and the parties have the right to make their comments about the protocol.

After the oral hearing the decision is announced in a two-week period. If having regard to the parties replies given in writing and the oral hearing and on the basis of the assessment of all information obtained allegations are substantiated, the Competition Council will proceed towards adopting a prohibition decision. If however the allegations are not substantiated the Competition Council will close the case or remand the case for supplementary investigation. After the supplementary investigation the parties are notified of the findings of the officers again and they have the right to submit their comments. After that a new oral hearing is organized. The final decision of the Competition Council is stated in a justified resolution in all cases.

Article 36 of the Law on Competition states that the resolution of the Competition Council must state the circumstances of infringement, evidence of guilt, explanations given to the Competition Council by the undertaking suspected of infringement, complainant and third parties as well as their assessment, the motives and legal grants of the resolution to be adopted. The Competition Council is obliged to justify its decision, to consider the arguments of the parties and to asses them. The resolution must be based only on

those findings and facts and circumstances of the investigation with respect to which the undertaking suspected of infringement had an opportunity to give explanations.

4.2 Procedure for terminating the investigation when there is no evidence of the infringement found

In case the investigation is terminated without finding any prove of the alleged infringement the justified resolution is announced in a webpage of the Competition Council and the interested parties (complainant and the undertaking suspected of infringement) are informed in written form. The resolution explains all relevant circumstances and decision established. The resolution can be appealed to the administrative court. If there are defects of the investigation detected during the judicial procedure the court can make a decision to remand the case to the Competition Council for supplementary investigation. If the case is closed after the public hearing the decision is published in the official gazette.

4.3 Commitments procedure

The Law on Competition (Article 30) establishes that the investigation can be terminated if the actions did not result in the significant damage to the interests protected by the law, and the undertaking suspected in the infringement voluntarily ceases the actions and submits to the Competition Council commitments in writing that are intended to address the competition concerns identified by the Competition Council. If the Competition Council accepts these commitments it shall adopt a decision which makes them binding on the parties subject to the proceedings. There were several times when the investigation was terminated on this ground. The last one was in year 2009 when the vehicle traders of Lithuania submitted the commitments not to require performing the technical maintenance of vehicles covered by warranty in authorized service stations only. The undertakings are allowed to submit their commitments in any stage of investigation, even when it is completed and the findings were send to the parties for their comments. Interested parties may be invited to submit their observations however the Competition Council is empowered to assess the appropriateness of the commitments by itself. After the termination of investigation on this ground the operative part of the resolution shall be published in the official gazette. There must be relevant circumstances and sufficiency of the commitments of the undertaking evaluated. Commitment decisions are not appropriate in cases when not all requirements of the Law on Competition (as mentioned above in Article 30) are fulfilled. The decision to terminate the investigation and commitments of the undertaking are announced in the webpage of the Competition Council.

5. Adoption and publication of resolutions

All resolutions of the Competition Council are passed by majority vote with at least three members of the Competition Council participating in the voting. The voting is protocolled, all resolutions, i.e. their operative parts, passed after public hearing, and accepted commitments are published in the official gazette. The whole resolution is published in the website of the Competition Council. The resolutions of the Competition Council shall be delivered to the parties to the proceedings.

6. Procedures in merger cases

Procedures in merger cases are regulated in detail by the Law on Competition and by the resolution on procedure for the submission and examination of notification on concentration by the Competition Council. The Law on Competition (Article 13) states that the Competition Council shall examine the notifications of concentration within four months from the receipt. If the Competition Council does not adopt the resolution within this period the undertakings shall have the right to implement the concentration according to the conditions specified in the notification. The only one exception established by the law is to extend the examination of the concentration upon the duly grounded request of the person notifying the

concentration by one month if this person is going to submit commitments due to implementation of concentration. Such an exact period established by the law provides the undertakings with the sufficiently clearness nevertheless in more complex cases the very operative actions of the Competition Council are required to analyze the possible consequences of the concentration and to fit in limited timetable.

All notifications of concentration are published in the official gazette, indicating the nature of concentration and the parties concerned. All interested parties shall have the right to announce their objections and other comments. In case of receiving one or in case of possible refusal to grant the permission to implement the concentration the undertaking notifying the concentration and all other interested parties are invited to submit their oral explanations to the Competition Council.

If there is a possibility of the restriction of competition due to concentration, the undertaking is informed about the concerns of the Competition Council and has a chance to submit the commitments in order concentration to be permitted. The submitted commitments are exposed publicly and all interested parties shall have the right to announce their opinion. If there are any objections due to concentration the oral hearing is organized where all interested parties and members of the Competition Council are participating.

All final resolutions of the Competition Council upon the examination of concentration are published in the official gazette and website of the Competition Council.

7. Conclusions

Procedural issues of the competition cases are regulated in detail by Lithuanian legal acts and the Competition Council is obliged to follow all the requirements very strictly. The requirements for the passing resolutions allow the undertakings to announce their opinion and exercise their right to defense. The resolutions of the Competition Council are clearly motivated; there are relevant circumstances and legal assessment introduced. The undertakings exercise their right to appeal the resolutions to the court actively, so any uncertainty or obscurity can lead into revocation of the resolution. It is debatable if the procedural transparency should not be increased by notifying the parties with preliminary result in earlier stages of investigation. It would allow undertakings to respond to authorized officers more efficiently and to avoid the possible defects of the final decisions.

ROMANIA

1. An overall picture on the transparency of the Romanian Competition Council's enforcement activities

In order to ensure legal certainty, the substantive legal standards of competition law (including merger control) are incorporated in 'hard law' such as:

- competition law no. 21/1996 republished (art.5(1) and 6 in respect of restrictive practices and art. Art. 12 in respect of economic concentrations);

- block exemption regulations providing exemption criteria regarding certain types of agreements;

Most frequently, the same substantive standards are further expanded and thoroughly explained in 'soft law', such as regulations and guidelines interpreting the competition law provisions for the use of the direct recipients of civil enforcement proceedings and courts.

Moreover, following EC model, written guidance in the form of "guidance letters" can be provided to companies and is reserved for cases where a genuinely novel question concerning articles 5 (1) and 6 of the Competition Law arises, making it difficult for them to assess their agreements or conduct in the light of the competition rules. However, the Guidelines issued by Romanian Competition Council (hereinafter referred as RCC) in this respect mention that such guidance letters are subject to the RCC's enforcement priorities.

RCC has further completed this framework with a series of notices providing guidance on Community Competition rules applicable in Romania after 1st of January 2007, the access to RCC's investigation files in the cases regarding anticompetitive practices and economic concentration, and on certain concepts such as market definition.

The entire legislative package covering hard and soft rules in antitrust proceedings and merger review as well as the non-confidential version of RCC's enforcement decisions are made publicly available on its website. Moreover, RCC is publicly announcing the opening of its investigations on its website or through press-releases unless such publication may harm the investigation.

Note should be made also that in the current process of reforming the primary legislation in competition field, RCC wanted to ensure maximum transparency and submitted to public consultation the draft of the new law in order to make possible the comments of the stakeholders.

RCC begins its administrative antitrust procedure either at its own initiative or on the basis of the intimation or following a complaint lodged by a legal or natural person provided that it complies with certain requirements set up by RCC through its Guidelines on formal complaints and in both cases there should be motivated grounds for the opening of the proceedings.

The administrative investigation proceedings carried out in cases of cartel infringements and abuse of dominance can be split in two stages:

The investigation or fact-finding stage is dealt with by a rapporteur with the support of his case team. During the first stage of the investigation, RCC requests information and documents from the suspected companies and most frequently, carries out surprise inspections on the premises of the firm(s) or, in certain circumstances, also at private premises in order to gather documentary evidence which is absolutely crucial for anticompetitive agreement cases, but relevant for abuse cases too. The use of these investigative tools entails that the company will be informed of the allegations against it as well as of the legal basis providing for the company's obligation to provide information and documents.

During the second stage, RCC informs the undertakings concerned about its objections through the submission of the report on the investigation which occurs with minimum 30 days before the hearing, allows the parties to prepare their defense, provides them with the opportunity to see the file, orders the hearing and makes a final reasoned decision through the hearing. The decision made by RCC can be then appealed by the parties of the proceeding to the Bucharest Court of Appeal within 30 days since its communication in writing.

There is (generally) no precise time frame on the duration of the proceedings in the law (excluding merger control). The duration of the investigations varies from case to case, according to the complexity of the market, the available information, whether the accused parties and/or third parties cooperate etc.

However, in order to increase the effectiveness of its investigations, RCC has recently made an assessment of the average duration of its investigations, and found out that RCC's investigations last, on average, 26 months. As a result, RCC has recently taken measures to reorganize its investigation teams, in order to increase their performance and to streamline the due process of the antitrust investigations.

Finally, in merger field, the legal standard for economic concentrations and the likely duration of the proceedings in the two phases of merger review cited in the Competition law together with the merger guidelines and regulations clarifying various issues such as the factors to be taken into account in the assessment ensure transparency and procedural fairness towards the subjects of merger control.

2. Meetings at key points of the investigations

In practice, RCC attempts during its investigations to have an ongoing conversation with parties, only at the Division staff levels, so that parties have an accurate view of RCC's concerns. RCC finds these communications as mutually beneficial since they enable a meaningful dialogue and consultations with respect to any significant legal or practical issues as an investigation progresses and it may even speed up the proceedings.

The procedures of such informal meetings are not regulated and depend on the complexity of the case.

In merger control, informal meetings with the case handlers in order to discuss the content and the amount of details they deem necessary for the notification to become effective, as well as to speed up the procedure, are also possible.

3. Issues relating to the rights of subjects to defend themselves

The undertakings that are the subject of the investigation are given a meaningful opportunity to review the evidence gathered against them and to submit observations in writing on the reasoned report on investigation - which is similar to the statement of objections in EU competition proceedings, usually within 15 days. However, this informal deadline may be further extended upon requests, in order to ensure that the right to be heard is appropriately observed.

In order to prepare their written and oral defense, the parties' associates and executive managers have the right of access to the file at the premises of RCC and may obtain copies and excerpt from the investigation procedure acts, if they justify a legitimate interest. Documents and information from the file, which constitute business secret may also be accessed, only upon decision of the RCC's president to the extent that the respective information is of an incriminating or exculpatory nature. That means that the undertakings indicted by the investigation report are allowed to formulate their defense making use of the same documents on which the investigation report relied upon.

The subjects of enforcement proceedings to whom RCC addressed a copy of the report on the investigation are also allowed to present oral arguments at the hearings, before RCC takes any decision, both in the cases regarding anticompetitive practices and economic concentrations.

The oral hearings are not public and are only open to the parties under investigation, the rapporteur and his case team, the senior management and RCC's Plenum. Apart from the incumbents, the author of the complaint or intimation as well as other natural or legal persons may participate in the hearing provided that they request to participate in the hearing stating that they hold information relevant for the case and this request is approved by the president of RCC.

The parties to the proceedings shall be notified in writing of the place and time of the hearing of the case. The chairman of the oral hearing is the president of the RCC. Such hearings usually begin with the rapporteur giving a summary of the facts of the case and presenting the main findings of the report on the investigation before RCC's Plenum. The addressees of the report on the investigation then deliver their oral arguments. After every speech, there are questions asked by the members of RCC's Plenum.

In order to ensure fairness and full adversarial hearing, RCC's Plenum shall refrain from questions leading to self-incrimination. After the oral hearing, the final decision as to the infringement of competition lies with the RCC's Plenum who will make a resolution in a maximum two week - period. There is no hearing officer.

Allowing the parties to be assisted by a lawyer regardless of whether it is during the on-site inspection or deposition, to see the evidence in RCC's possession unless provisions on confidentiality prevent it and the opportunity to explain or challenge that evidence, RCC ensures that its enforcement decisions are based on sound and strong evidence.

Moreover, it should be specified that since the burden of proof is on the RCC alleging the violation of competition law, the undertakings are given the privilege against self-incrimination during the investigations. Also, they reserve the right to challenge before the court the RCC's enforcement decisions, the orders issued by RCC's president through which the inspection is authorized or the act through which they are sanctioned, according to article 50 letter d) and e), with a fine of up to 1 % of the aggregate turnover of the financial year prior to the sanctioning for submission of incomplete information, documents, business records and books during inspections and for the refusal to be subject to an inspection that is ordered by the president of the RCC.

The experience gained by RCC in carrying out daw-raids called for the need to clarify certain rights of defence and consequently, they are planned in the revised version of the Competition Law which is currently, in the process of approval. The new law will specifically mention that RCC shall only use the information gained in an inspection for the purpose for which they have been obtained and shall observe the client-attorney privilege concerning the conversation and communication between the person (including corporations) subject to inspection and the outside legal counsel.

4. Limits on the length of an agency's investigation/ rules on the publication and content of the agency's adverse enforcement decisions

There are no statutory deadlines for the completion of investigations or for the adoption of decisions by the Competition Council. However, the right of the RCC to apply administrative sanctions for the substantive violations of the law are subject to a five-year limitation period which runs from the day when the anticompetitive practice stopped. For the violations of the law which are continuous or reiterative, the statute of limitations shall run from the day the last anticompetitive action or fact ended.

Moreover, any action undertaken by the Competition Council in view of a preliminary inquiry or in view of opening an investigation concerning a certain violation of the competition law interrupts the course of the statute of limitations provided for under Article 58 of the Romanian Competition Law. The interruption of the statute of limitations produces effects over all undertakings or associations of undertakings involved in the violation of the law. In this case, a new time limit of a similar duration begins to run from the date the RCC has undertaken any action from those mentioned before. The statute of limitation shall expire no later than the day on which a period equal to the double of statute of limitations elapses, applicable to the commitment of the violation at issue, in case the RCC did not impose any of the sanctions provided for by this law.

In the case of merger review, the procedures must be concluded within time periods which are defined in the Competition Law.

Immediately after the decision has been adopted, the parties shall be informed of the decision. The non-confidential version of the decisions is published in the Official Journal of Romania, part 1 or and/or on the RCC's website. Also, according to article 57 (2) of the Competition law, when publishing the decisions, the legitimate interests of the concerned undertakings shall be taken into consideration, so that no business secret is revealed.

5. Specific measures limiting and/or preventing disclosure/discovery in relation to documents that form part of the authority's procedure

In view of the potential for information leaks to damage legitimate business interests, the Antitrust Division takes very seriously its obligation not to disclose confidential information.

The disclosure of specific information linked to an investigation can be made under strict conditions in line with the Romanian Competition Law and the Guidelines on the rules for the access to the Competition Council's file in case of restrictive practices and in the economic concentration cases (harmonised with the specific EU rules).

Given its main purpose, to guarantee an effective right to defence, the possibility to access the file is granted to all persons to whom the investigation report has been submitted (i.e. the parties to an economic concentration or to an alleged anticompetitive practice, in certain circumstances the author of a complaint/intimation and other involved individuals or legal persons). However, according to article 44 (3) from the Competition law no.21/1996, republished, "no documents, data and information from the case file, classified as state secret or confidential character, are available for study, duplication or taking excerpts, without the President's decision."

Article 62 of the Competition law provides that "Any person who uses or discloses documents or information having business secret character, received or acknowledged during work or work-related duties, for other purposes than those stipulated in this law will be held liable according to the criminal law, and may be forced to remedy the damages caused."

More detailed provisions concerning identification and protection of confidential information can be found in Regulation for the application of articles 5 and 6 of the Competition Law no.21/1996 regarding anticompetitive practice, in cases of complaints. The rule is that information, including documents, shall not be communicated or made accessible by the RCC if they contain business secrets or other confidential information of any person.

The RCC may request undertakings and associations of undertakings which have produced documents or statements to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings to whom such documents are to be considered confidential. The RCC may also request undertakings or associations of undertakings to identify any part of a report on investigation, or a decision adopted by the RCC which, in their view, contains business secrets.

The RCC may set a time-limit within which the undertakings and associations of undertakings shall:

- substantiate their claim for confidentiality with regard to each individual document or part of document, statement or part of statement;

- provide the Competition Council with a non-confidential version of the documents or statements, in which the confidential passages are deleted;

- provide a concise description of each piece of deleted information.

If the undertakings or associations of undertakings fail to comply with the Competition Council's requests, then the documents or statements concerned are deemed not to contain confidential information.

Where the RCC intends to disclose information provided by an undertaking or by an association of undertakings, which the undertaking and/or association of undertakings considers to be confidential, it shall inform them in writing of its intention and of its reasons. The RCC shall set a time-limit within which the undertaking may inform it in writing of its views. If the undertaking and/or association of undertakings continue to object to the disclosure, the RCC shall adopt a decision on the disclosure of the given piece of information which shall be notified to the undertaking concerned.

6. Public announcements when an investigation is closed without taking an affirmative enforcement decision

According to article 42 of the Romanian Competition Law, whenever, after an investigation has been commenced, it is found out that it did not lead to reasonable evidence that the law was violated, able to justify remedies or sanctions to be imposed by the RCC, the latter, by Order of the President, may close the investigation and informs the parties involved immediately. In addition to informing the parties, RCC normally publishes the fact of the closure on its website and/or issues a press release stating that it has been decided not to further pursue the case.

As to the rules on the content of such announcements, RCC ensures the protection of the legitimate interests of the concerned undertakings so that no business secret is revealed.

7. Conclusions

As displayed throughout the paper, the competition legal framework in force in Romania ensures, to a large extent, a transparent enforcement system. Nevertheless, the RCC very much welcomes the debates on these issues and is eager to learn from the practical experience of its peers on the occasion of the

roundtable discussions in order to further enhance the transparency and predictability of its proceedings in antitrust and merger review.

RUSSIAN FEDERATION

Information transparency has always been one of the major priorities for the FAS Russia. The information about the activity and the decisions of the FAS Russia as well as about goals, priorities and directions of competition policy is published on the FAS Russia' official web-site www.fas.gov.ru.

The main aim of the information disclosure is to increase the transparency of the activity of the antimonopoly authority so that interested parties would be more confident in predictability, consistency and fairness of the decisions taken by the FAS Russia.

In order to determine the information about the FAS Russia activity to be published on the official web-site, the FAS Russia developed its Regulation No. 48 of 21.12.2009 "On Information Policy of the FAS Russia and its Regional Offices".

According to this Regulation every citizen and organization has a free access to the information about the FAS Russia' activity, in particular about its enforcement activity, including:

- initiated cases on violations of the antimonopoly legislation;
- facts of receiving application and the decisions taken on these applications by the FAS Russia;
- results of inspections conducted on the basis of complaints submitted to the FAS Russia and on its own initiative;
- results of market analysis conducted by the FAS Russia;
- decisions and instructions taken by the FAS Russia with regard to cases on violation of the antimonopoly legislation;
- courts decisions on the cases related to the FAS Russia.

The FAS Russia ensures that the rules and procedures of case examination and merger review process are clear, transparent and publicly available. For this purpose all the rules and procedures are incorporated to the Federal Law No. 135-FZ of 26.07.2006 "On Protection of Competition" which is placed on the FAS Russia's official web-site. This law is equally applicable for residents and non-residents.

The FAS Russia has elaborated certain procedural documents that describe the rules and procedures of case examination and merger review process in detail such as:

- Administrative Regulation No. 447 of 25.12.2007 on initiation of cases on violation of the antimonopoly legislation;
- Administrative Regulation No. 294 of 20.09.2007 on merger review;
- Administrative Regulation No. 293 of 20.09.2007 on creation and reorganization of commercial companies.

This information is available on the FAS Russia's official web-site.

These rules and procedures are clear and transparent and help the interested parties to understand the FAS Russia' enforcement process.

Typical procedure on consideration of cases on violation of the antimonopoly legislation is the following:

Upon receiving an application on violation of competition legislation the FAS Russia has a right to consider all the relevant materials for up to 1 month. If there is enough evidence, the FAS Russia can initiate a case on alleged violation of a certain Article of the Federal Law "On Protection of Competition". If there is no evidence to prove the presence of violation, the FAS Russia makes an official refusal to initiate a case. If the FAS Russia lacks evidence that allow it to make any conclusion, the authority can prolong the period of case consideration to gather and analyze additional evidences for up to 2 months (part 1, article 44, the Federal Law 135-FZ "On Protection of Competition"). The antimonopoly authority has to inform the applicant on such prolongation in written form.

In case the FAS Russia takes a decision to initiate a case on violation of antimonopoly legislation, it issues the Order on establishing violation of antimonopoly legislation case and creation of the Commission for examination of the cases of violation of the antimonopoly legislation (hereinafter referred to as the Examination Commission). This Order also references to the Article of the Federal Law 135-FZ "On Protection of Competition" that was violated. The copy of such Order is sent to the applicant and respondent of this case within 3 days from the date of its issue. This means that the parties to the case consideration obtain sufficient and timely information on the facts and the competitive concerns that form the basic for the proposed adverse decision and have a meaningful opportunity to respond to such concerns. Information about the initiation of a case on violation of antimonopoly legislation is published on the FAS Russia official web-site.

After 15 days from issuing the Order on establishing violation of antimonopoly legislation case the Chairman of the Examination Commission of the FAS Russia appoints the date for case-hearing by issuing an Order that declares what case would be examined and explains to the parties related to the case their rights and the sequence of actions that can be taken before and during case-hearing.

The parties to the case have an opportunity to consult with the FAS Russia at the key stages of investigation with respect to any significant legal or practical issues that may arise during the case consideration; they also have a right to respond to any questions arising during case examination from the very beginning, in particular get familiarized with the case materials, take notes from these materials, provide evidences and get familiarized with other evidences, ask other participants questions, provide explanations to the Examination Commission in written or oral forms, provide arguments on all raised questions, get acquainted with the petitions of other parties, participate in the case consideration.

The case on violation of antimonopoly legislation is examined by the Examination Commission within the period of up to 3 months from the date of issuing the Order on establishing violation of antimonopoly legislation case. If the FAS Russia needs to receive additional information on the case the period of case examination can be prolonged for up to 6 months. The Examination Commission must inform the parties to the case about prolongation of the case examination period. The decision taken is based on objective factors using economic analysis and competition assessment.

During the case hearing by the Examination Commission the parties actively participate in discussion presenting their opinions and explanations concerning the given case.

The decision on the case taken by the Examination Commission can be announced during the case hearing after the completion of the case examination. The decision of the Examination Commission is presented in the form of document and is signed by the Chairman of the Examination Commission and by all members of the Examination Commission, participating in the case hearing. Only resolute part of the decision taken by the Examination Commission is announced during the case hearing. The complete decision is prepared within the period of up to 10 days from time of announcing the resolute part of the decision. The copies of such complete decisions are submitted to the parties to the case. These decisions are also published on the FAS Russia official web-site.

The parties to the case consideration can seek review of the FAS Russia decisions by the arbitrary courts. Appeal procedure is given in the Arbitration Procedure Code of the Russian Federation. The decisions about all appeals are published on the FAS Russia's web-site for the information of the interested parties.

Besides the cases on violations of the antimonopoly legislation, the FAS Russia also conducts merger review. The FAS Russia examines the documents and materials concerning the possible mergers during one month period, and in case if it lacks the evidences to make any conclusion, the authority can prolong the period of merger review in order to gather and analyze additional information for up to 2 months (part 3, article 33, the Federal Law 135-FZ "On Protection of Competition"). In case if such decision is taken the FAS Russia posts the information about the expected transaction, declared in the application, on its official web-site for getting consent for implementation of transaction. The interested persons have the right to submit to the FAS Russia the information about the influence of this transaction on the condition of competition. Full procedure of merger review is given in the Administrative regulation No. 294 of 20.09.2007.

The Press-service of the FAS Russia publishes information about the FAS Russia decisions on examined cases and mergers on the official web-site and provides official comments to mass media and other interested parties.

The information placed on the web-site does not include information treated as the commercial secret or personal data.

The full texts of the courts decisions of all instances on the appealed decisions, instructions and final decisions of the FAS Russia are also placed on the web-site.

SOUTH AFRICA

1. Introduction

South Africa's Constitution protects the rights of individuals to just administrative action that is lawful, reasonable and procedurally fair. In fulfilling their mandate, the competition authorities are therefore required both in terms of the Constitution and of its enabling legislation, to adhere to the principles of natural justice and procedural fairness.

2. Rules for the conduct of proceedings before the competition authorities

While the Competition Act (the Act) prescribes certain procedures to be followed in investigation and adjudication, it also provides for regulations, determined by the Minister of Trade and Industry, to detail rules for the conduct of proceedings in the Commission and Tribunal. The rules cover the delivery and filing of documents; timeframes; access to records; complaint procedures; exemption procedures; merger procedures; and appeal and review procedures. There are also prescribed forms that must be used when making submissions to the Commission.

Notwithstanding the certainty that these procedures are meant to provide, the authorities have been challenged on the application of these rules. As relatively young authorities, it was expected that there would be instances where the interpretation of rules and procedures are challenged on genuine grounds of fairness. In a number of cases, the courts have had to balance the rights of those that are the subject of enforcement proceedings with the rights of the authorities to investigate, prosecute and adjudicate on practices in the public interest.

However, the courts have recently begun to distinguish between genuine objections and tactics to protract litigation and delay a decision on the merits of a case. In an application for leave to appeal an adverse decision, the Judge President of the Competition Appeal Court held that *"competition law must be prosecuted in this country with fairness but also with expedition. The legal community, which appears both in this court and the Tribunal, owe their clients a paramount duty, but they also owe, as officers of the Court a duty to the integrity of the legal system. There needs to be a debate in the legal profession of South Africa as to the role of lawyers in relation to balancing the interests of clients and duty as officers of the court enjoined to uphold the integrity of the system without which there can be no rule of law."* [1]

3. Time frames

Upon receipt of a complaint, the Commission directs inspectors to investigate the complaint "as quickly as practicable" although it has a statutory time limit of one year which may be extended by agreement with the complainant. If the Commission does not refer a complaint to the Tribunal for adjudication within the one year period or the agreed extended period, the complaint is deemed to be non-referred. In one matter, the respondent sought to invalidate the Commission's referral by arguing that the

[1] Clover Industries and Ladismith vs The Competition Commission (Competition Appeal Court case number 78/CAC/Jul08).

statutory time limit commenced at the time that the Commission received information regarding the alleged anticompetitive conduct rather than at the time it formally initiated an investigation.

4. Informing the respondent of the complaint

The Act and its rules do not require the Commission to notify the respondent that is the subject of the complaint. However, in practice investigators contact respondents during the course of the investigation either in writing or by telephone, to obtain information for the Commission to decide whether or not there is evidence of anti-competitive conduct. In terms of the rules the respondent is only entitled to a concise statement of the conduct complained of. The Tribunal[2] confirmed that the Commission does not need to provide the respondent with details of the complaint. In practice, the Commission decides on the extent of the details it provides based on whether disclosing the details would compromise the investigation.

5. Summons, search and seizure procedures

In one case[3] the Tribunal set aside a summons for being unbounded and too wide in its ambit. In this case, the Tribunal laid down the principle that a summons must at minimum contain the prohibited practice that is the subject of investigation in order to protect the respondents' rights against self-incrimination. In practice, the issuing of a summons is often followed by communication, written and oral between the Commission and the respondents and/or their legal representatives regarding the scope, conduct and time frames detailed in the summons. During this communication, the Commission often provides further clarity of the conduct and agrees to time limits for submission of the information requested in the summons.

In the Commission's first search and seizure which was conducted on the premises of Pretoria Portland Cement (PPC) in August 2000, the Commission failed to provide the respondent with the affidavit it relied on to obtain the search warrant and invited a television crew to the raid. Consequently, the Supreme Court of Appeal chastised the Commission for not providing the affidavit and invading the privacy of the respondent. The Commission was accordingly compelled to return all seized information. The judge in the case[4] said: *"I take a serious view of the Commission's conduct and am of the view that we must make it clear that we will not allow persons or businesses to be subjected to an abuse of power and must also make it clear to the Commission that it also is subject to the Constitution and the law and must accordingly mend its ways in certain respects."*

The Commission has subsequently developed detailed protocols for implementation of search and seizure operations. The affidavits used in the application for search warrants are limited to the subject matter of the investigation. The respondents are provided with copies of the search warrants and affidavits. Investigators conducting the raids are conscious of the rights of the respondents to dignity and privacy. Further, the raid is not made public until after it has been conducted.

6. Access to confidential/restricted information

There have been numerous cases clarifying the rights of respondents to information held by the Commission. The Commission is bound by a claim to confidentiality and must respect such a claim. The

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2 Sasol Chemical Industries vs The Competition Commission and others (Tribunal case number 45/CR/May06).

3 Woodlands and Milkwood vs The Competition Commission (Tribunal case number 103/CR/Dec06).

4 Pretoria Portland Cement and Slagment vs The Competition Commission and others (Supreme court case number 64/2001).

Commission may challenge the confidentiality claim by application to the Tribunal. The Tribunal held in a case[5] relating to a confidentiality claim, that if the Commission finds the claim inadequate, in the interests of fairness, it must notify the respondent and provide it with an opportunity to rectify any defects before making the information public. In practice, the Commission consults with respondents before disclosing any confidential information whether or not it has been declared by the Tribunal as confidential.

Respondents often argue that they require such access to enable them to determine whether or not to litigate and/or what case they must answer to. In a Competition Appeal Court case[6], the court allowed access to confidential information in order to not prejudice the respondent's rights. However, access was limited to only the respondents' legal representatives viewing the information at the Commission's offices and not reproducing documents. Further, the legal representatives were required to give confidentiality undertakings to the Commission prior to be given the access. Legal representatives must convince the Competition Tribunal that it is necessary for their clients to have sight of the information.

In another case[7] the Tribunal found that the Commission was entitled to refuse access to its consultation notes as this would have a chilling effect on the Commission's ability to investigate. However, if the Commission relies on information from such notes in hearings, it must present that information in a written form or call witnesses. This was again confirmed in more recent cases[8] where the Tribunal recognized that certain classes of information are restricted and that the restriction is "not unfair and is informed by a rational need to preserve the integrity and effectiveness of the investigative process."

7. Prosecution of a complaint

A decision to refer a complaint is taken by both the Commissioner and Deputy Commissioner after considering evidence gathered during the investigation process. There is no statutory requirement on the Commission to hear the respondent's side before deciding on the referral. This was confirmed in a case[9] when the Tribunal clarified the roles of the Commission and the Tribunal. The court held that the Commission is an investigative body and does not make a final decision on the case. At the time of its decision to prosecute/refer the case, the respondent is not required to defend itself and therefore the *audi alterem partem* rule does not apply and procedural fairness is not denied. The respondent is given the opportunity at the Tribunal hearings to state its case and defend itself. In practice however, the Commission affords a respondent a number of opportunities during the investigation as well as on conclusion thereof to make representations to the Commission, with or without legal representation. The Commission often engages in "without prejudice" settlement negotiations with the respondents which involves the weighing up of a number of factors in determining an appropriate penalty including the remedy proposed by the respondent and whether or not the outcome to be achieved by settling would be the same as would have been realized through litigation.

On another procedural issue the Competition Act states that a complaint may not be referred to the Tribunal against a firm that has been a respondent in completed proceedings before the Tribunal relating to

5 The New Reclamation Group vs The Competition Commission (Tribunal case number 81/X/Jul07).

6 The Competition Commission vs Unilever plc (Competition Appeal Court case number 13/CAC/Jan02).

7 Netcare Hospital Group and Community Hospital Group (Tribunal case number 68/LM/Aug06).

8 Pioneer Foods vs The Competition Commission (Tribunal case numbers 15/CR/Feb07 and 50/CR/May08); and Astral operations and Elite Breeding vs The Competition Commission (Tribunal case number 74/CR/Jun08).

9 Norvatis SA and others vs The Competition Commission and others (Tribunal case number 22/CR/B/Jun01).

substantially the same conduct. In a case[10] before the Tribunal, it confirmed that it is unjust for respondent's to be subjected to double jeopardy and set aside the Commission's case on the grounds that the Commission had withdrawn a case and initiated another relating to substantially the same conduct as the earlier complaint.

8. Adjudication of a complaint

The rules allow for an exchange of pleadings, commencing with referral documents that are filed in the Tribunal. The rules also allow for a discovery process. The pleadings must meet the standard of fairness which requires that the respondents are entitled to understand the case that is made against them.[11] There must be factual basis in the pleadings of why there is an alleged contravention of the Act and mere speculation of a contravention is insufficient.[12] Hearings before the Tribunal are conducted in public and in an inquisitorial manner, in accordance with the principles of natural justice. Parties in hearings and witnesses are frequently summoned and interrogated at hearings. The respondent is in the majority of cases represented by legal counsel. After arriving at a decision, the Tribunal provides written reasons for such decisions, which are published on its website[13]

9. Conclusion

The Commission has had to deal with many challenges on the grounds of procedural fairness. The Tribunal and Competition Appeal Court provide the necessary "checks and balances" to ensure that the right of a respondent to procedural fairness is protected. The Commission has had to adjust and refine its procedures in line with the findings of the courts.

10 Sappi Fine Paper vs The Competition Commission (Competition Appeal Court case number 23/CAC/Sep02).

11 The Competition Commission vs United SA Pharmacies (Tribunal case number04/CR/Jan02).

12 FFS Refiners vs Eskom and others (Tribunal case number 64/CR/Sep02).

13 www.comptrib.co.za.

CHINESE TAIPEI

1. Introduction

The Administrative Procedure Act was implemented in January 2001. The legislative purpose of the Act is to ensure that all administrative acts are carried out in pursuance of a fair, transparent and democratic process based on the principle of administration by law so as to protect the rights and interests of the people, enhance administrative efficiency and further the people's reliance on administration. Therefore, the Fair Trade Commission (hereinafter the FTC) has to follow the administrative procedures provided in the Administrative Procedure Act in performing such administrative acts as rendering administrative dispositions, entering into administrative contracts, establishing legal orders and administrative rules, deciding on administrative plans, employing administrative guidance and dealing with petitions.

2. Transparency relating to the law and agency procedures

The Administrative Procedure Act allows parties to participate in the procedure, such as the rights to make statements and examine relevant materials or records. Furthermore, the information related to the rights and interests of people shall be made available to the public in accordance with the Freedom of Government Information Act. As a result, the parties can fully state their opinions in the administrative procedures and the credibility of administrative measures can be enhanced. The transparency relies on the specific and compliable regulations; hence, in addition to the Administrative Procedure Act, the Fair Trade Act and relevant administrative rules stipulated by the FTC also regulate the transparency of administrative enforcement proceedings.

Article 26 of the Fair Trade Act states, "the FTC may investigate and handle, upon complaints or ex officio, any violation of the provisions of this Act that harms the public interest." Paragraph 1, Article 27 of the same Act provides that "in conducting investigations under this Act, the FTC may proceed in accordance with the following procedures: 1. to notify the parties and any related third party to appear to make statements; 2. to notify relevant agencies, organizations, enterprises, or individuals to submit books and records, documents, and any other necessary materials or exhibits; and 3. to dispatch personnel for any necessary on-site inspection of the office, place of business, or other locations of the relevant organization or enterprises."

Pursuant to Article 28 of the same Act, the FTC shall carry out its duties independently in accordance with the Act and may dispose of the cases in respect of fair trade in the name of the Commission. The policy statements and guidelines enacted by the FTC are to help related enterprises avoid violations and at the same time to serve as a reference for handling future cases by the FTC.

To ensure that enforcement complies with the standards of transparency, predictability, non-discrimination, accountability and expediency in administrative procedures, the FTC has enacted relevant rules for each stage of the proceedings as follows.

3. The opportunities for a party to make contact with the competition agency

During its investigation, the FTC should comply with Articles 36, 39, 102, and 103 of the Administrative Procedure Act, Article 27 of the Fair Trade Act, and Articles 31 to 33 of the Enforcement Rules of the Fair Trade Act. More detailed rules are provided in the "Guidelines for Case Investigations made by the FTC."

The administrative procedures in Chinese Taipei are based on ex officio investigations. An administrative authority shall conduct inquisition ex officio into evidence regardless of any allegation that may have been made by the party, and shall take into consideration circumstances both advantageous and disadvantageous to the party. Therefore, the FTC often initiates the notification of parties and any related third party to appear and make statements during its investigation. If the FTC finds any facts unfavorable to the party during its investigation, the FTC shall notify the party in writing to make statements regarding matters that could lead to major controversies. Prior to an administrative disposition, the respondent or enterprise subject to a complaint or investigation (i.e., the potential subject of an administrative disposition) shall also be notified to make statements, provided that cases under the FTC hearing process are exempted (the hearing procedure will be discussed later).

In a general investigation, the FTC shall notify the complainant, interested party, and the respondent within 7 days after receiving a complaint or conducting an ex officio investigation. Such a person shall reply in writing within 15 days after receiving the notice. In urgent or complex cases, the parties may be required to appear and make statements at the FTC; and written records of the statements may also be made at the party's domicile, business location, or a third location (for example, the city or county government office).

Subparagraph 1, Article 27 provides for the notification of parties and any related third party to appear and make statements, and except under urgent circumstances, the notice must be served no later than 48 hours prior to the date when the appearance is required (Article 31 of the Enforcement Rules to the Fair Trade Act).

In case the notified person appears and makes statements at the FTC, the staff members in charge shall lead the conversation. Usually there are two staff members, one hosting the conversation and the other producing a written record of the statements. The entire process shall be videoed or taped, and written records shall be made on site. After the completion of the written record of the statements, the record must be read out loud or else read and signed by the notified person.

4. The duty to cooperate and the right to access relevant materials and records

During its investigation, the FTC shall notify the party that is to make statements either in writing or on site. The written notice[1] shall contain the matter to be investigated, the explanations or materials that the notified party is required to provide with respect to such a matter, the time limit within which an appearance must be made or a written statement prepared, the legal basis for the FTC's investigation[2], and the legal effects of failing to present a statement or to appear without due cause[3] (i.e., the FTC may successively assess thereupon an administrative penalty until the party provides the information or appears to make a statement).

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1 Articles 31 and 34 of the Enforcement Rules of the Fair Trade Act and Article 104 of the Administrative Procedure Act

2 Article 27 of the Fair Trade Act

3 Article 43 of the Fair Trade Act

Pursuant to Article 43 of the Fair Trade Act, in regard to any person subject to any investigations conducted by the FTC who refuses the investigation without justification, or refuses to appear to respond or to render relevant materials such as books, records, documents, or exhibits by the set time limit, the FTC may impose an administrative penalty of not less than twenty thousand and not more than two hundred fifty thousand New Taiwan dollars upon it. Should such person continue to refuse the investigation without justification upon a further notice, the FTC may continue to issue notices of investigations, and may successively assess thereupon an administrative penalty of not less than fifty thousand and not more than five hundred thousand New Taiwan dollars each time until it accepts the investigation, and appears to respond, or provides relevant materials, documents or exhibits.

The length of time in which a party responds to the FTC is determined on a case-by-case basis. Frequently the subjects may make phone calls to request that the FTC extends the period for responding; extensions longer than 14 days are often rejected by the FTC. The FTC may also request that applications be made in writing to be decided later by the FTC.

Article 27-1 of the Fair Trade Act states that a party or a related person has the right to apply to the FTC for reading, transcribing, copying or taking photographs of relevant materials or records in order to claim or defend his/her legal rights and interests. To this effect, the qualifications of the applicant, the time, the method and scope of access and other information are required, and this is outlined in the "Regulation Governing Access to Materials and Files of the Fair Trade Commission."

5. Hearings and relevant regulations

As required by the enacted Administrative Procedure Act, the "FTC Guidelines on the Procedure of Public Hearings" was promulgated in December 2000 and was amended in July 2005. This provides the solid basis for holding public hearings, and in cases where public hearings are held, the parties may forgo petition to the Appeal and Petition Committee and directly bring suit to the administrative court upon the FTC resolution.

According to Articles 54 to 66 and 107 to 109 of the Administrative Procedure Act and the "FTC Guidelines on the Procedure of Public Hearings", the FTC may hold a hearing for a case that has any of the following circumstances:

- Cases in violation of Article 10, Article 11, Paragraphs 1 or 3, Article 14, Paragraph 1 of the Fair Trade Act, cases of failure to perform additional burdens imposed on mergers by the FTC, or cases where a merger is prohibited pursuant to the provisions of Article 12, Paragraph 1, or major or complicated cases involving applications for concerted action are denied pursuant to the proviso of Article 14, Paragraph 1. Furthermore, cases may include those that would exert across-the-board influence in their respective markets, or have substantial influence on the interests of upstream and downstream industries and the public interests.

- After investigation in accordance with Article 27 of the Fair Trade Act, cases regarded as major to fair trade policy.

- A review and follow-up of the FTC's administrative actions.

- Other cases where hearings are deemed to be necessary.

A hearing shall be initiated by Commissioners or the office handling hearing procedures, and shall be held only after a Commissioners' meeting makes a decision regarding the hearing. The same procedure shall apply when a party files a written application explaining the need to hold a hearing.

The rights of a party include the following:

- During the hearing, a party is entitled to make statements and offer evidence and, if the hearing moderator permits, may also put questions to officers designated by authorities, witnesses, expert witnesses, and other parties or agents thereof.

- A party may immediately raise objections to what he/she considers to be any illegal or improper disposition rendered by the hearing moderator.

The only hearing held by the FTC was in October 2005 concerning a case of alleged concerted actions by domestic cement enterprises. Meanwhile, consultation meetings are usually held for major or complicated cases to collect opinions from the industry, academia and administrative agencies.

6. Regulations on the length of investigation periods, contents and the announcement of administrative dispositions

6.1 The limits on the length of investigation periods are as follows:

Merger cases: Article 11 of the Fair Trade Act states that the FTC must decide whether to raise an objection within 30 days of the acceptance of the completed filing materials, but it may shorten or extend the period as it deems necessary and notify the filing enterprise of such change in writing. Such extension may not exceed 30 days.

Concerted actions cases: Article 14 of the Fair Trade Act states that the FTC must approve or reject an application for exempted concerted actions within three months, the period of which may be extended once if necessary.

Other complaints or interpretation applications to the FTC are mostly determined ex officio; the initiation and close of relevant administrative procedure are conducted ex officio and are therefore not subject to the investigation periods. However, according to Article 27 of the Administrative Penalty Act, the power to impose the sanction of administrative penalty is barred by limitation if not exercised upon the lapse of a period of three years. Such period shall commence from the day the act in breach of duty under administrative law terminates, except where the consequence of such act occurs at a later date, in which case the period shall commence from the date the consequence occurs. Where a sanction of administrative penalty is annulled by the lapse of time, the FTC may not prosecute or sanction the action in question.

6.2 Regulations regarding the contents[4] and announcement of decisions are explained as follows:

The following unilateral administrative acts with direct external effects rendered by the FTC are administrative dispositions: the decision to punish or not, the decision to object or not, and the disapproval or approval. An administrative disposition shall satisfy substantial legal criteria; for example, the authority must have jurisdiction, and the contents must be lawful, possible and certain.

In the case of an administrative disposition rendered in writing, the following particulars shall be given: 1. the basic information of the person subject to the administrative disposition; 2. the subject matter, facts, reasons and legal basis of the disposition; 3. the name of the authority rendering the disposition, with the signature and personal seal of its head officer; 4. the statement to the effect that it is an administrative

[4] Articles 95 to 98, and 100 to 101 of the Administrative Procedure Act, the FTC Principles on the Subject Matter of the Disposition in Writing, and the FTC Principles on the Facts, Reasons, and Articles of the Disposition in Writing

disposition and the means of remedy available in case of dissatisfaction with the administrative disposition, the time period within which remedy may be sought and the authority with which application for remedy must be filed. The reasons the FTC rejects or agrees to an application for investigation and facts or evidence provided by the person subject to the administrative disposition shall be given in the "reasons" section of the disposition rendered in writing.

All announcement[5] for cases decisions involving the Fair Trade Act are posted on the FTC website pursuant to the FTC Directions on On-line Information, provided that approval on exempted concerted actions shall be published in the government gazette pursuant to relevant laws.

7. Regulations regarding administrative settlements[6]

According to Article 136 of the Administrative Procedure Act, in the event that the administrative authority is unable to ascertain complete factual or legal information during an investigation, in order to achieve its administrative objectives and resolve a dispute, the authority may enter into an administrative contract of settlement in lieu of imposing administrative sanctions. Since it was founded, the FTC with its limited resources has commonly been confronted with cases involving complicated, anti-competitive conduct. Therefore, for an efficacious resolution of individual cases and in the interests of all parties, the FTC enacted the "Guidelines for Administrative Settlement."

Prior to proceeding with the negotiation process, the case should be reported at the Commissioners' meeting regarding whether or not to reach an administrative settlement, as well as the key points and scope of negotiation. All administrative settlement contracts shall be made in writing, and conclusions in the contract making process shall also be made in writing. The major conclusions resolved by the Commissioners' meeting shall be published on the FTC website according to the "FTC Directions on On-line Information."

5 Article 17 of the Fair Trade Act, FTC Directions on On-line Information and the FTC Directions for Administrative Information published on the Executive Yuan Gazette

6 Articles 136 and 139 of the Administrative Procedure Act and the FTC Guidelines for Administrative Settlements

BIAC

The Business and Industry Advisory Committee (BIAC) to the OECD welcomes the OECD Competition Committee's initiative to focus on procedural fairness and appreciates the opportunity to make these submissions to the OECD Competition Committee's Working Party No. 3 (WP3) for its Roundtable on "Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings" on 16 February 2010.

1. Introduction

In BIAC's opinion, there are certain minimum standards for procedural fairness which should be met by all civil and administrative proceedings for the enforcement of competition law, regardless of the structure of the regime under which those proceedings take place. Such minimum standards flow from fundamental rights enshrined in international treaties.[1]

Procedural fairness is critical to protect the interests of firms subject to competition law enforcement proceedings who face the risk of substantial sanctions, not least being increasingly onerous financial penalties[2] but which may also include the prohibition of or mandated changes to business practices and transactions. Importantly, such fairness also strengthens and streamlines agency decision-making, reducing the number of appeals, and increases public confidence in agency decisions and so is of general public benefit.

The global spread of laws to protect and promote competition and the increasing internationalisation of business mean that business practices and transactions are now frequently subject to multiple competition regimes and the actions of individual competition authorities frequently impact on firms outside their jurisdiction. Convergence in implementing crucial minimum standards in this complex and interrelated environment would be of significant benefit for business and the competition agencies, as well as ultimately the consumers they all serve.

These submissions aim to identify those procedural standards which, in the experience of the business community and reflecting the interests of both firms under investigation and those potentially aggrieved by wrongful conduct, prove particularly vital in practice to ensuring procedural fairness and which are not currently universally adopted by competition agencies in all enforcement proceedings they conduct.

1 These submissions are not intended to set out a comprehensive survey of due process protections. For example they do not deal with the specific implications of the various international treaties and conventions enshrining fundamental rights or with other sources of legal rights of defence. Neither do they consider discrimination on the basis of the nationality of the firms involved in proceedings.

2 The subject of penalties (other than procedural considerations in para 4.5) is outside the scope of this paper.

2. Transparency

2.1 Transparency with respect to substantive legal standards

The increasing number of countries which have adopted competition laws and the internationalisation of business mean that businesses increasingly need to understand the requirements of multiple sets of (not yet convergent) competition rules in order to ensure that their business practices, agreements and transactions are in full compliance.

Access to the text of relevant laws and regulations is seldom sufficient to enable a firm to understand its obligations, to comply with them and to deal effectively and responsibly with any enforcement proceedings which may be initiated. Businesses need sufficient detail of the interpretation of the substantive rules to be able to predict how those rules will apply to contemplated business activity. If a reasonable reading of published information regarding the law and an agency's decision-making practice would not allow a firm to understand that its conduct would violate the law, the firm should not face penalties even if the conduct is subsequently held to constitute a breach.[3]

2.2 Transparency with respect to agency policies, practices and proceedings

In addition to clear and publicly available detail of the substantive laws, business also needs to understand agency policy and practice in key areas. Agencies should consult on, and provide sufficient detail in respect of enforcement priorities to ensure that agency investigations are begun on a sound footing and are more predictable.

Business also needs to be aware of the procedures applicable when seeking approval and, eventually, when dealing with any one of a range of different enforcement proceedings.

Enforcement proceedings should follow established, published procedures to ensure fair and equal treatment of cases. The published details should include the organisation of the enforcement agency; a description of the steps involved in the process and the decision-maker(s) involved at each step; the likely timing of those steps; the operation of checks and balances within the agency process; information concerning any available settlement procedure; and mechanisms for exercising appeal rights.

2.3 Transparency during enforcement proceedings

During enforcement proceedings, it is essential that firms under investigation be informed of the objectives of the investigation and the specific legislative provisions under which the agency is proceeding and that they be given full information of the allegations being made including their factual, legal and economic basis, to ensure that such firms can defend themselves adequately.

Provision of this information in a timely manner, as proposed in more detail below in the stage by stage review of minimum standards of fairness for enforcement proceedings, is an essential aspect of a fair process and can also ensure that proceedings are resolved as efficiently and expeditiously as possible, which is in the interest not only of the firms concerned but also of the agencies. Appropriate procedures regarding confidential information, as discussed in section 7 below are needed to ensure that the transparency required for firms to defend themselves effectively is achieved without undermining legitimate business secrets.

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[3] Substantive guidelines issued by agencies to help explain their interpretation and enforcement of applicable laws, regulations and procedures have proven to be a valuable form of competition advocacy. Guidelines help to promote transparency and improve firms' abilities to adhere to the law.

3. Fairness during the investigation stage

3.1 Immunity/leniency procedures

BIAC supports the use of fair and reasonable programmes to grant immunity or lenient treatment ("leniency") to firms involved in competition law violations which voluntarily provide evidence to the competition agency on a timely basis.

Leniency programmes are an important basis upon which the increasing number of agencies obtain evidence of serious violations and BIAC would welcome greater consistency and convergence in the terms and application of such programmes.

To the extent that competition violations may often impact markets in more than one jurisdiction, there is also an urgent need for more coherence in the way in which leniency programmes can operate together fairly across the jurisdictions and agencies involved. There is currently scope for firms which are the first to volunteer evidence to miss out on the full rewards for their cooperation under some potentially applicable regimes and, even, for other firms to game the system. BIAC recommends that agencies operating leniency programmes should seek to introduce convergent procedures for handling multi-jurisdictional cases and should focus, as an initial step, on developing systems to ensure that a firm which is the first firm to make a full leniency application in any relevant jurisdiction, which advises agencies in other relevant jurisdictions immediately of its intention for apply for the leniency there and which completes those applications within a reasonable time should be treated as having made all such leniency applications on the date when the first application was completed.

3.2 Evidence gathering

The procedures available to investigators for the gathering of evidence should be employed in a reasonable and proportionate manner, taking account of the nature of the proceedings and the burden placed upon the subjects of the investigation and other market participants involved. Companies should be given reasonable time to respond to such requests, upon consultation with the agency. General inquiries, such as market studies or sectoral inquiries, should be confined to situations where an agency can demonstrate that the inquiry is proportionate in light of the agency's evidence-based competition concerns. Where inquiries are appropriate, they should be defined clearly and as narrowly as the identified competition concerns permit. Requests for information and the format for its provisions should be designed to minimise the burden on the market participants concerned[4] while enabling the investigators to understand the conduct or transaction under investigation and its likely impact on competition in the affected market. Invasive measures such as surveillance, on-the-spot investigations of company premises and private homes, the removal of forensic images of company data and searches should be used only in proceedings concerning serious "hard core"[5] violations or the covert abuse of unquestionable market power, only when circumstances so require, and only upon warrant confirming the necessity of such measures. The investigating authority must also take care to respect relevant data protection and privacy laws, in particular when handling electronic data. When questioning individuals in the course of investigations, great care must be taken that they are informed of their rights, in particular their right to privilege against self-incrimination.

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4 The scope and format of information requests should be discussed with the parties where appropriate, e.g. in sectoral inquiries or merger investigations where the timetable allows this.

5 "Hard-core" infringements generally include price fixing; output limitation; and the sharing of markets or customers between competitors.

A central principle of procedural fairness is that authorities should seek to gather evidence in order to establish an accurate factual record on the basis of which sound competition law and policy can be applied. Investigators should therefore be expressly obliged to carry out their task fairly and to take full account of the need to ascertain and record all relevant evidence, without making any distinction between evidence supporting the charges and exculpatory evidence.

Evidence should be recorded comprehensively and in a manner that can be made available to the defendant (e.g. an agenda and full record of all facts and matters discussed and provided to investigators during meetings and other discussions with complainants, witnesses and third parties should be made and kept on the investigation file).[6]

Investigators should have the expertise and resources necessary to collect and evaluate all relevant evidence, to understand the conduct under investigation and to evaluate its impact, including appropriate legal, economic and linguistic skills and specialist support.

In considering whether conduct under investigation was knowingly, intentionally or negligently in violation of the competition laws, as well as in setting any penalty, full regard should be had to evidence of any competition compliance programme and of all actual efforts to ensure compliance implemented by the firms concerned. The existence of a well designed and implemented compliance programme should be a mitigating factor resulting in a reduction in any penalty to be imposed.

3.3 The rights of defence - legal advice

Investigators should respect the rights of every firm to seek legal advice from counsel of their choice. This should include the recognition of legally-privileged status for all advice from in-house counsel and other lawyers advising the firm, whether or not they are admitted to practice in the jurisdiction of the investigation. It should also include permitting a firm to have its counsel present at all appropriate stages in the proceedings, including at on-site inspections and during interviews of a firm's employees and potential witnesses.

3.4 Transparency and engagement early in and throughout the investigation

A firm targeted by an investigation should be advised of the procedure and timing, be kept informed of its progress and be given the opportunity to discuss the case and respond to agency concerns throughout the investigatory procedure. In BIAC's opinion, the rights of defence should be recognised in a full, on-going manner and not, as is currently the case in a number of jurisdictions, be limited to a one-off right to respond to fully developed formal charges presented at the end of the investigation, by which time investigators' views may have become entrenched. In the practical experience of businesses involved in enforcement proceedings, an early opportunity to comment on agency concerns can be crucially important to minimise misunderstandings and secure a fair process.

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6 For example, it is noted that the DG Competition consultation document on "Best practices on the conduct of Art 101/2 TFEU proceedings" (http://ec.europa.eu/competition/consultations/2010_best_practices/index.html, paragraphs 38-45) does not fully address the criticisms of the European Ombudsman in respect of the Intel Article 102 investigation. In its decision, the Ombudsman indicated that the Commission should ensure that a proper internal note, to be placed on the file, is made of the content of all meetings and telephone calls with third parties where information is gathered or where important procedural issues are discussed. (http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/html.bookmark#hl8).

There should be a strong presumption in favour of disclosing the facts, documents, theories and legal authority to firms under investigation as early in the investigative process as is practicable.[7] Such disclosure should take place, in any event, sufficiently in advance of the preparation of any written statement of charges so as to enable the firm(s) under investigation to address relevant evidence, facts, theories of harm, and legal authorities with the investigators prior to the finalisation of the statement of charges. Investigators should also be available to meet regularly with firms being investigated to discuss the agency's concerns, to explain its evolving view of the facts, evidence and claims at issue and to provide the parties a genuine opportunity to respond to such concerns on an early and on-going basis. There should be a strong presumption that an agency will agree to meetings with a party that presents an agenda of issues for discussion, and that there will be a meaningful, two-way dialogue at those meetings.

A commitment by agencies to such on-going transparency and engagement will not only allow firms a full and fair right to respond but will also help to narrow the scope of disputed issues, correct misconceptions, reduce the likelihood that the agency may be surprised by arguments made in response to its formal charges and will enable the agency to test its theories during the course of the investigation, thereby enhancing the quality of the agency's fact-finding and its ability to allocate its resources efficiently.

In particular, BIAC recommends the following as minimum standards for transparency and engagement on a stage by stage basis during the investigation.

- Initiation - A firm targeted by an investigation should be given written notice of it; its objective, legal basis and scope; indicative timeline of the investigative process; as well as the investigation team[8] as soon as the implementation of appropriate confidentiality safeguards allow. There should be the opportunity for an early meeting with the investigators, including senior members of the antitrust agency and senior managers of the investigation team, to discuss and clarify the matter.

- Preliminary Assessment - A soon as the investigators have completed their initial evidence gathering and assessment of the case, targeted firms should be informed of the investigators' preliminary assessment, including a description of the factual basis for the possible charges, the evidence and the economic theories and legal analysis contemplated by the investigators in support of the potential charges. The firms should also be given copies of all complaints and supporting materials and of all evidence, both inculpatory and exculpatory, subject only to protection of legitimate business secrets as described in section 7 below.

- Reaction to the Preliminary Assessment - Targeted firms should have the right to react to the preliminary assessment, to discuss the proposed charges and comment on the evidence[9] and the economic theories and legal analysis, including at meetings with the senior staff of the agency, as well as managers of the investigation team and with any economists and other specialists involved. The opportunity to meet and confer with the investigators should be granted

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7 By contrast, for example, in Korea "the level of evidence or other details are not revealed to the defendant during the investigation in principle." Submission of Korea, Roundtable on Procedural Fairness: Transparency Issues in Civil and Administrative Proceedings, ¶ 27 (20 Jan. 2010). The defendant receives access to ***certain*** supporting documents and reference data" only when the Examination Report setting forth the statement of charges is issued. Id., ¶ 29 (emphasis added).

8 The parties should also be kept up to date on an ongoing basis by being informed promptly of any changes in the team membership.

9 The agency should have the ability to encourage - although not require - 'triangular' meetings between all parties and the agency, e.g. to deal with opposing views in respect of the evidence.

sufficiently in advance of any written recommendation by the investigators to the decision-makers on proposed findings of fact and conclusions of law.

- Prior to Formal Charges - It is particularly important that after their reaction to the preliminary assessment, firms under investigation be offered a meeting with the official(s) responsible for deciding whether the investigation should proceed to the stage where formal charges will be made before that decision is taken.[10]

4. Formal charges and the right to respond

If the agency decides to bring formal charges against the firms under investigation, a written report (the Report) provided to the defendants should identify all charges that the agency is making against them, as well as all documents, statements and other evidence upon which the agency relies. The Report should disclose which entities within each corporate group are charged with responsibility for the charges and the basis for such responsibility. The Report should also include and describe all of the underlying data (including the sources of such data) and the methodology used to prepare any chart, graph or other analysis relied upon in the Report. Contemporaneously with the issue of the Report, the agency should provide the defendant with copies of all of the evidence, including all potentially exculpatory evidence, subject only to the confidentiality safeguards described in section 7.

The agency should have the burden of proving each element of the violation charged against the defendants through the evidence relied upon in the Report.

The defendant should be entitled to respond in writing to the Report charges against them, to comment on the evidence and to offer their own evidence in rebuttal as well as to respond to the investigators' proposed economic theories and legal analysis. The time allowed for this written response should be fully adequate and should take into account, inter alia, the complexity of the case as illustrated by the duration of the investigation, the need for translations of the Report and of the evidence, and the quantity and complexity of the relevant evidence. Businesses regularly have real practical difficulties in responding adequately to charges against them because of the inadequate time allowed by agencies for the formal response, including in cases where the investigation has taken several years, meaning that extra time is needed to investigate historic facts, where a fully adequate period for response would not cause any significant delay in the overall timeframe of the investigation.

Where a Report makes charges against multiple defendants or where a version of it is provided to any other party for comment, each defendant should have the right to receive and submit comments on a non-confidential version of any response or comments submitted by others.

The defendant should also be provided with full details of any proposed penalty and remedies which the investigators intend to propose to the decision-maker(s), the manner in which any penalties have been calculated, the necessity for any remedies and the facts and evidence to be relied upon to justify them. Agencies should bear the burden of proving that proposed penalties are proportionate to the seriousness of the infringement and the damage caused to consumers and the economy[11] and consistent with penalties imposed for other economic and corporate offences. Depending upon the structure of the agency's process, the issue of penalty and remedies may be more fairly addressed at a separate later stage, following the process regarding the existence of the violation, in which case defendants should be given a full

[10] For example, the OFT's quaintly named "Last Cigarette" meetings in merger cases.

[11] See for example the judgment of the Paris Court of Appeal (19 January 2010) reducing significantly the fines imposed on a number of steel companies (www.autoritedelaconcurrence.fr/doc/ca08d32_siderurgie.pdf).

opportunity to respond in writing and request a hearing regarding any penalty and remedies proposed at that stage. It is the practical experience of business that in many cases these issues are at least as controversial as the basic questions as to liability and extending a properly transparent process to the issue of penalties and remedies is not only crucial to basic fairness but might significantly reduce the need for and complexity of appeals.

5. A fair hearing

As well as the opportunity to respond in writing to the charges and any proposed penalty and remedies, defendants should have the right to a hearing before the decision-maker(s) or agents having the power to represent them. It should be clear that merely providing such a hearing, in the absence of the minimum due process standards applicable to the investigatory stage discussed above, does not in itself constitute adequate due process.

The purpose of this hearing is to provide the defendant with the opportunity for a live, in-person presentation of their response to the charges, for the defendant to question the evidence and witnesses relied upon by the investigators, including any complainants and others who have provided evidence on which the agency relies, to question the investigators and bring forward witnesses for the defence, who will also be available for questioning. The hearing should provide the decision maker(s) with the opportunity to evaluate the charges, the strength of the evidence, the credibility of the witnesses and the company's defences and hence to evaluate the extent to which the investigators have discharged their burden of proving the charges.

The schedule for such hearings should be set after consultation with the defendant and should allow ample time sufficient for full consideration of the case, bearing in mind the complexity and volume of the issues and the evidence. Rules governing hearings should be established well in advance and rules of procedure and evidence at the hearing should be applied equally to the agency and the defendant.

The submission of additional evidence and arguments by the agency following the close of this hearing should be prohibited absent extraordinary circumstances. The defendant should be allowed to make supplemental submissions following the hearing in response to any new matters raised and any such supplemental submissions should be disclosed to the other parties who should be provided with a reasonable opportunity to respond.

During and after the hearing, *ex parte* contact between the agency staff presenting the case against the defendant and the decision-maker(s) and their staff should be prohibited until such time as the final decision has been rendered.

6. Fair decision making

It is critical to a fair process that there be a clear and visible separation between the roles of those responsible for conducting the investigation and those responsible for making any enforcement decision to which such investigation may lead.

Many regimes entrust the investigation and decision-making function to different bodies but these functions should be separate even if they are discharged by the same agency. An agency responsible for investigation and decision-making which does not rigorously separate these two functions will inevitably be and be perceived to be subject to prosecutorial bias, however genuinely well-intentioned and ethical its officials may be.[12] Rights of appeal are not a practical substitute, so far as business is concerned, for

[12] Wils, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function" (2004) 27 *World Competition: Law and Economic Review* 202, 215. For example, in Case Number 2001

fairness at the agency stage, given the additional time, costs, commercial and reputational damage incurred while an appeal is pursued.

Decision-makers should be independent of political influence.

Decisions should only be addressed to defendants identified in the Report and must only rely on facts and evidence disclosed to the defendants and to which defendants have had a full opportunity to respond. Decisions should be fully reasoned and include all relevant findings of fact and conclusions of law. Any adverse decision should address all of the major defences and points raised by the defendants and should explain why they were not persuasive.[13]

7. Confidentiality

Throughout enforcement proceedings, a competition agency will regularly be faced with tension between the need to provide firms subject to the investigation with full details of the complaints and evidence to enable them to respond fully to the allegations on the one hand and the confidentiality required to protect legitimate business secrets of complainants and others participating in the investigation on the other hand. The agency will also need to safeguard the confidential information of firms under investigation.

It is important for agencies to ensure that confidentiality protection extends only to information that is legitimately in need of protection from disclosure. An agency should not redact or anonymise information on its own initiative. The agency should in its procedural rules provide clear guidelines identifying the criteria used to define confidential information in a manner consistent with the laws of the jurisdiction concerned. It is good practice for an agency to have in place a procedure for review and mediation of disputes concerning confidentiality. Business finds such procedures useful, even if they are informal and internal, particularly where judicial review of such procedural questions is available only after the outcome of the enforcement proceeding or is costly and time-consuming.

In providing access to the file, the agency should give the defendant full access to all non-confidential materials (whatever process is applied to protect confidential elements).[14] Moreover, subject to confidentiality safeguards as discussed in paragraph 7.4, the defendant should also be allowed access to all confidential information. In exceptional circumstances, where there is compelling commercial sensitivity surrounding the sharing of certain confidential information such that it would be demonstrably harmful to allow the defendant full access to it even under the safeguards described in paragraph 7.4, it may be

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Heon-Ga 25, the Seoul High Court on its own initiative asked the Constitutional Court of Korea to rule whether the procedures of the Korean Fair Trade Commission violated due process under the Korean Constitution. While the Court held the KFTC's procedures were not unconstitutional, 4 out of the 9 judges dissented, arguing that the KFTC violated due process under the Korean Constitution by failing to segregate its investigatory and decision-making bodies; failing to provide defendants with sufficient opportunity to gather evidence and put forth a defense and failing to ensure that its Commissioners possessed sufficient expertise, qualifications and independence.

13 Except where expressly agreed to by the defendant pursuant to a settlement procedure.

14 Procedures, such as some "data room" type arrangements or limiting access to the file as a whole to defendant's counsel, in the practical experience of business, may be unsatisfactory and deny the defendant the ability to understand in context the detail of the case against it. Business is most concerned that short-cut procedures may become the norm, e.g. DG Competition's consultation document on best practices (paragraph 85) contemplates that a defendant may not "unduly refuse" a data room procedure (under which only its external counsel will have access to the file, undermining the company's own right to access as well as its right to rely on internal counsel).

appropriate to request that defendant(s) agree to special procedures for dealing with the exceptionally sensitive elements (without prejudice to the defendant's right to access materials).[15]

It is also important that agencies have in place and implement rules requiring agency personnel to protect all information gathered as part of investigations, including the status of investigations and possible procedures, from improper disclosure and from use otherwise than for the purpose of the investigation in question. Such rules should ensure that the agency does not share information with anyone other than the parties being investigated and agency personnel working on the investigation. The rules should also provide that the firms being investigated and others participating in the investigation must not disclose such materials to anyone other than their counsel and retained experts and must not use such materials otherwise than for purposes of the investigation in question, or where required by law.

Finally, the agency should provide the defendants, complainants and third parties with an opportunity to request that any confidential information they submitted be redacted from the public version of the decision.

8. Judicial review

The courts play a significant role in guaranteeing due process, particularly when competition agencies are an administrative body. It is important for the courts to ensure antitrust proceedings are conducted in a fair manner. The courts' function as a check and balance of the competition agency enhances not only the credibility of the enforcement action, but is in keeping with basic principles for fairness and rule of law that are hallmarks of a developed and accountable legal system.

Defendants should be entitled to a timely right to appeal any decision issued by a competition authority before a court consisting of impartial judges. In the interests of certainty for business, the court must be obliged to give judgement within a reasonable time (and with appropriate rules regarding interim relief including suspension of decisions under appeal where appropriate).

Courts should have full jurisdiction, ensuring that not only the defendant's rights with respect to transparency and due process were respected by the competition authority; but that the court also reviews the law and facts relied on by the agency (as well as any exculpatory evidence not relied upon by the agency) to come to its own appraisal of the law and facts. In doing so, the role of the courts should be to confirm that the burden of proof was indeed met by the agency. Finally, the court should review any imposed penalty or remedy to determine that it is appropriate.[16]

9. Publication of enforcement proceedings and decisions

Business needs to understand how competition law is being applied and non-confidential copies of infringement decisions should be published promptly and in full. Decisions relating or formal case closures, meaning the closure of cases which have proceeded beyond the preliminary assessment of the

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15 Such special procedures could include, for example: (1) arrangements for disclosure on the basis of terms negotiated by the defendant and the party concerned; or (2) a procedure pursuant to which the defendant would be given access to the confidential information on terms defined in an access agreement between the parties and the agency (whose terms would regulate *inter alia* the identity of those persons within the firms in question who may have unrestricted access and, if deemed necessary, penalties for breach of non-disclosure or use restrictions).

16 This should include its own assessment of whether the penalty/remedy is proportionate and consistent with other cases, as described above in paragraph 4.5.

evidence, should also be published with sufficient detail to enable business to understand the agency's legal analysis and enforcement approach.

In contrast, the agency should minimise publicity regarding cases at earlier stages and should have full regard for the presumption of innocence in drafting and disseminating announcements. If the agency does make a public statement regarding its receipt of a complaint and/or the initiation of an investigation, it should make clear that it has reached no conclusions regarding the merits of the complaint or the lawfulness of the conduct that is the subject of the investigation.

In cases involving multiple defendants, when considering publication regarding the outcome for some defendants only, the agency shall have due regard to the presumption of innocence for all remaining defendants. In most cases this will require that publication be delayed until the case against all defendants is resolved.

Prior to making any press release or public statement regarding enforcement proceedings or decisions, the agency should notify the firm concerned. It is best practice to provide sight of the proposed text and an opportunity for the firm to comment on it. Business finds such openness by an agency in relation to planned publicity extremely helpful in practice to ensure an appropriate firm response to press and stakeholder enquiries and to avoid unintentional disclosure of confidential material.

10. Length of investigation proceedings

Fundamental rights of the defence require that the investigation should be carried out expeditiously[17] and business is interested in avoiding excessive periods of uncertainty while investigations continue, particularly where the fact of the investigation is in the public domain and the business risks reputational harm. At the same time, it is not in the interests of firms under investigation for time periods be too short to allow for proper analysis and full attention to the firm's response to any allegations against it. BIAC therefore recommends that the time period for an investigation should be set by the agency at the start of the proceedings taking account of the complexity of the matters concerned and subject to overall maximum time limits. The investigation period should be extended only when delay is caused by the defendant's failure to deal promptly with reasonable requests from the investigators or by serious unforeseen causes.

11. Conclusions

BIAC welcomes the opportunity for these important matters of procedural fairness to be discussed and is confident that improved enforcement procedures, as outlined in these submissions, would not only be good for business but would also strengthen agency decision-making and increase public awareness of and confidence in agency decisions, thereby promoting the public interest in sound and effective competition policy.

[17] The need to act within a reasonable time in conducting administrative proceedings relating to competition policy is a general principle of EU law. This is an element of the right to good administration - contained in the Charter of Fundamental Human Rights, made binding by the Lisbon Treaty. See also *French Perfumes* (Judgment of the Paris Court of Appeals of 10 November 2009) where the decision of the Conseil de la Concurrence was quashed on account of the excessive length of the proceedings (specifically the 4.5 year delay between the act under investigation and the date on which the companies became aware of the fact that they would be required to submit a defence).

SUMMARY OF DISCUSSION

The Chair opened the roundtable and noted that the topic had generated significant interest among the delegations, as indicated by the thirty country contributions received by the Secretariat. The purpose of the roundtable was to consider transparency issues in civil and administrative enforcement proceedings, related to both merger review and other antitrust proceedings. The Chair noted that in many countries well established and transparent procedures for merger review already exist, accompanied by detailed guidelines and statutory timelines for the different phases of the review. However, beyond merger review there are a number of questions and issues concerning procedural fairness and transparency which the roundtable would discuss.

The Chair suggested structuring the discussion around six main topics:

- General transparency with respect to law, procedures, decision makers and timetables for proceedings.
- When and how the parties are informed of the allegations against them.
- Opportunities for the parties to respond and present evidence, and the role of hearings and hearing officers.
- Opportunities for the parties to meet with agency officials including decision makers.
- Rules on the length of investigations, publication of adverse decisions and consideration of evidence offered by the subjects or parties of the investigation.
- Procedures for announcing when an investigation is closed or a settlement is reached.

In order to identify the key issues in each of these areas, the Secretariat invited six delegations to make initial presentations.

1. General transparency with respect to law, procedures, decision makers and timetables for proceedings

To introduce the first topic for discussion, the Chair invited the delegation from the United Kingdom to take the floor.

The delegation from the United Kingdom ("UK") outlined the recent work carried out by the Office of Fair Trading (OFT) as part of the Transparency Project (The Project). The Project concerns how the OFT, as a competition authority, provides information to the parties concerned, to interested third parties and to the public at large on pending and completed cases and projects. The information is about how the casework is carried out, what is done and why the OFT is doing it. The Project also covers the culture of the organisation when it engages with the parties under investigation, interested third parties and with the public; it deals with the values and attitudes that they can expect when dealing with the OFT on a day-to-day basis.

The UK delegation noted that transparency *vis-à-vis* the parties in cases and projects (i.e. the main focus of the roundtable) is only one part of the project. The Project is also concerned more broadly with the OFT's interaction with a wider range of people, i.e. those with interest in a specific case, complainants or other players in the sector as well as suppliers and customers. As a public body, the OFT is also concerned with transparency *vis-à-vis* those referred to in the UK as 'stakeholders'. The OFT may be formally accountable to some stakeholders, whereas there are many others who simply have a keen interest in what the OFT does. These informal stakeholders may feel that the OFT is not sufficiently open, or less open than some other public bodies in the UK with similar functions, which is essentially a question of good administration.

Transparency matters for a number of reasons:

- It leads to faster, better informed and more robust casework and decision making by following processes that are more consistently applied and better understood by all those that are participating.

- It drives efficiency in casework and decision making, and it forces discipline around deadlines allowing cost savings for the agency and for the parties. It supports the fundamental rights of due process and fair treatment to the parties involved and provides them with certainty and predictability.

- It provides better outcomes in casework, leading to better respect for decisions that are taken and greater understanding of the work of a competition agency and the benefits of a competition regime, including in particular the promotion and understanding of what is meant by a competition culture.

During the Project, the OFT consulted on a number of proposals, including (i) when the opening of a case should be announced and what detail should be announced both to the parties and to the public, (ii) the extent to which draft formal requests for information should be shared during the investigation, and whether advance notice should be given for intended information requests as well as indicative timetables for key stages, (iii) provision of updates at key stages and the holding of state of play meetings, (iv) the way in which provisional thinking on a case is shared with the parties as that thinking develops, (v) engagement with the parties around preparations for the public announcement of the decision, (vi) the publication of performance data on closed cases and the provision of more information on OFT governance structure and decision taking as well as on the different roles that people perform within the case team.

During the consultation, one very sensitive subject concerned the announcement of the opening of a case. The OFT currently issues a brief announcement either at the same time a statement of objections is issued, or when a case is resolved through either early resolution or settlement. Unless there has been some publicity around the case at an earlier stage, e.g. as a result of inspections that have been carried out, the brief announcement will usually represent the first time the public hears about a case. Law firms which responded to the consultation adamantly opposed any earlier announcement or publication of information about a case on, for example, the OFT website, even though the publication would clearly state that the investigation was at an early stage and the OFT had an open mind on the issue of infringement. Businesses considered that earlier publication would damage the reputation and goodwill of the companies involved. One of the main reasons for avoiding early announcements was the greater attention of the media who, it was claimed, may not fully understand or at least may not explain effectively the processes involved in competition proceedings.

The OFT informed the Working Party that further reflection was planned on the outcome of the consultation before any general principles were published. Greater transparency does not mean that the

OFT would contemplate the release of any information. There are strict statutory obligations concerning confidential information which are supported by sanctions against individuals. The purpose of the Project is not to hamper the OFT's ability to run investigations in a sensible way or to make open-ended promises about procedural reforms that would commit the OFT to change its way of operating, or to enable parties to use process issues inappropriately to prolong cases. The 'one size fits all' approach may not be appropriate and some flexibility and discretion will always be required. Further work on transparency will be done in the second stage of the project including better information on governance and decision making, publication of more information gathered during the course of the OFT's work and better information on how and when the OFT will formally and informally consult.

The Chair thanked the UK delegation for their presentation and called upon the delegation from the Netherlands to discuss the functioning of the internal firewall between the investigating arm and the prosecuting arm of the competition authority (NMa).

The delegation from the Netherlands confirmed that there is a firewall in place between the NMa's investigating and prosecuting teams. For all enforcement cases that may lead to fines, the competition department and the legal department have very distinctive tasks and do not overlap or confer. The firewall was developed to protect the integrity of case handling by the agency. The legal department, which sits on the other side of the firewall, revisits the cases with a fresh pair of eyes and prevents the investigators from adopting a self-serving or biased vision of the case.

In practice, this means that the competition department carries out the investigation of cases, including dawn raids, interviews with the parties and market researches. If the result of this investigation leads to a suspicion of an infringement, the competition department may draft a report or a statement of objection. The director of the competition department leads the investigation and signs the draft report. The Board of Directors of the NMa is not involved at this stage of the procedure. Once the report is drafted by the competition department, it is handed over to the legal department. The legal department, which is responsible for prosecuting cases, only becomes involved in a case once the competition department has closed the investigation. The legal department then makes an independent assessment of the merits of the case. It reviews the file and it may ask the parties to submit written observations and to attend an oral hearing. After the oral hearing the legal department drafts a decision which is then submitted to the Board of Directors of the NMa. The legal department discusses the draft with the Board of Directors only, and the competition department is not involved.

When the legal department declines to pursue a case, the case is simply closed and the Board of Directors of the NMa is not involved. These cases can lead to some tension within the institution. However, they have also acted as an incentive for the case handlers to ensure that each and every case is properly investigated before being brought to the legal department. Recent case law has indicated that the courts take a strict view when it comes to compliance with the firewall provisions, which provides parties with more confidence in the system and awards the NMa more credibility as a public institution. However, there has been some scepticism about the separation of staff in the NMa, as both the competition and legal departments still work under the same Board of Directors.

The introduction of the firewall stems from the legislature's decision to protect the integrity of case handling by separating the investigation and the drafting of the final decision. There was a concern that the case handlers and investigators might become biased during the course of the investigation, and therefore they should not be involved in determining the level of fine. From a cost perspective, the system may arguably be inefficient since two separate departments within one institution both deal with the same case. However, after ten years of experience, firewalls have proved very effective in strengthening cases and helping to build a credible institution. The benefits of "double" case handling therefore have outweighed the costs.

As noted, there have been instances where the legal department declined to bring a case where the competition department had recommended it. However, there are different forms in which this can happen and it is hard to provide statistics. For example, an infringement case was brought by the competition department concerning at the same time a cartel and an abuse of a dominant position. The legal department concluded that the cartel case was sound but decided to drop the part of the case on the alleged abuse of dominance. In another example, the competition department believed that an infringement it had investigated lasted over five years, whereas the legal department thought that the evidence only showed a three year infringement. Cases, such as these ones, where the legal department takes a stricter approach amount to approximately 10% of the total number of cases investigated by the competition department.

The Chair thanked the Dutch delegation and turned to the Belgian contribution, which explained that information regarding the procedure and investigation of a case is published in the three official languages of Belgium (i.e. Flemish, French and German). However, according to the Belgian submission, the final decision is only published in the language of the case. The Chair asked how this worked in practice and how transparency is achieved in a system with multiple official languages.

The delegation from Belgium explained that because of the three language communities the government is obliged to use the relevant language for the region when communicating with its citizens. There is one competition agency in Belgium, but consisting of three different entities. These entities include (i) the Competition Council which is an administrative tribunal and makes decisions according to judicial procedures, (ii) the College of Competition Prosecutors who conduct and lead the investigation and are supported by (iii) the agents of the Directorate General for Competition (DG Comp), which is part of the Ministry for the Economy.

During an investigation the agents of DG Comp must respect the law on the use of languages in administrative matters and are obliged to use the language of the region where the firm subject to the investigation is based for official purposes. Therefore, an undertaking in the Walloon region will receive written communications drafted in French, and a firm based in Flanders will receive communications in Flemish. However, the Competition Act provides for the application of the law on the use of languages in judicial affairs. Therefore, a defendant can always request the use of a language of his or her choice. Where there are multiple defendants, then the language of the majority is used. Therefore, during an investigation multiple languages may be used, but the report by the competition prosecutor will be drafted in the language chosen by the defendant.

After the report of the prosecutor, the Competition Council will take the final decision according to the rules applicable to judicial procedures, i.e. the parties can be heard and can submit observations. The law in this area was previously not very clear, but in January 2010 a decision of the Brussels Court of Appeal stated that the observations by the parties can be in the official language of the procedure, but the defendant can ask for a translation at the judge's discretion. The final decision of the Competition Council will be in one language, but the procedure can be conducted in different languages. In general the approach adopted is very pragmatic, with the defendant usually having the final word on language. For example, in merger cases, while the merger notification must be in one of the three official languages, the annexes to the merger notification can be in English. To sum up, a competition investigation can be run in different languages, and the language can even change during the investigation, but in the end the final report and the decision by the Competition Council will be drafted in only one language.

The Chair then asked the South African delegation about a recent decision of the Court of Appeal which held that competition law must be enforced with fairness but expeditiously, and asked whether it is possible to be fast and fair at the same time.

The delegation from South Africa explained that the South African system does not consider fairness and expeditiousness to be mutually exclusive. In South Africa, fairness in administrative action is a constitutional right and as such it is given effect in the Competition Act. Fairness is also the basis for the structural separation of the Commission's investigative and prosecutorial function from the adjudicative function of the Competition Tribunal (the "Tribunal"). Expedition was given effect in the Competition Law in two ways: (i) timelines stipulating deadlines for completion of merger transactions, the filing of pleadings and the investigation for prohibited practices, and (ii) a specialist judicial system for the adjudication of competition cases by the Tribunal. Decisions of the Tribunal can be then appealed to the Competition Appeal Court (the "Appeal Court"), and then to the Supreme Court of Appeal (the "Supreme Court").

The supervisory roles of the Tribunal, the Appeal Court and the Supreme Court have ensured independence, transparency and accountability in decision making. During the drafting of the Competition Act and the establishment of the institutions responsible for competition enforcement, concerns were expressed by the business community regarding possible over-regulation. The competition regime as it has been developed has gone a long way to allay these concerns of over regulation, while at the same time ensuring competitive markets. However, the Appeal Court and the Tribunal have expressed concerns that parties to competition proceedings may abuse the system, which is designed to ensure fairness and expediency, by making interlocutory appeals to frustrate and delay the hearing of cases on the merits. For example, in the twelve months prior to this roundtable, the Appeal Court heard four applications for leave to appeal but declined all four of them. In another case concerning a cartel in the milk industry, two initial interlocutory applications have themselves, over the three years since the matter was referred, given rise to seven separate applications. Defending its right to prosecute the cartel in this intensive and extensive litigation has therefore taken up valuable time of the Competition Commission.

In one of the interlocutory applications, a leniency applicant sought to release himself from the leniency agreement on the basis that the obligation to cooperate would conflict with his right to defend himself from the allegations the Commission was bringing. Having heard the application and the various matters raised by the applicant, the Appeal Court observed that competition law must be prosecuted with fairness, but also with expedition. Legal representatives appearing before the Appeal Court and the Tribunal have duties towards their clients, but as officers of the court they also owe a duty to the integrity of the legal system. Therefore, the expedient resolution of competition cases is as much an integral and fundamental part of the system as is the respondent's right to an administrative action that is lawful, reasonable and procedurally fair. It is hoped that, as the jurisprudence develops and settles some of the technical challenges that have been raised by parties, a balance between fairness and expediency will be struck.

2. When and how subjects are informed of allegations against them

The Chair then moved to the second topic for discussion, i.e. how and when agencies inform the parties of the allegations raised against them, and gave the floor to the Japanese delegation for its opening presentation.

The delegation from Japan explained that under the Antimonopoly Act (AMA) there are two opportunities for subjects of an administrative investigation to meet with agency officials: (i) during the initial on-site inspections and (ii) after the inspection when the JFTC provides the subjects of the investigation with an opportunity to express their opinion or submit evidence before issuing an administrative order.

In Japan, almost all case investigations start with on-site inspections rather than through a discovery process or written request orders. The decision to conduct such an inspection is made by the Japan Fair

Trade Commission (JFTC) and there is no need to seek court approval. At the first opportunity during the on-site inspection, the subjects of the investigation are informed of the facts alleged against them. Historically, this was carried out orally, but under the new Rules on Administrative Investigations (the "Rules") introduced in 2005 to improve fairness this must now be done in writing. Section 20 of the Rules stipulates that when carrying out an on-site inspection the investigator must provide the subjects with a document stating: (i) the title of the case (i.e. the type of business and the goods or services concerned); (ii) the facts which indicate a violation of the AMA; and (iii) the applicable provisions of the AMA. If evidence relating to another infringement is found during the on-site inspection, this may also be collected and possibly used against the subject. Following the on-site inspection, the JFTC analyses the written evidence collected and takes depositions from the employees of the company under investigation. The JFTC then examines the facts that have been found in detail, and considers if these are sufficient to issue an order.

The second opportunity to meet with agency officials is at the final stage of the investigation. Article 49(3) of the AMA stipulates that "*the Fair Trade Commission shall, where it intends to issue a cease and desist order, give in advance to a person who is to be the addressee of the cease and desist order an opportunity to express his or her opinions and to submit evidences*." Article 49(5) of the AMA states that the JFTC must inform the addressee in writing of the following issues: (i) the expected content of the cease and desist order, (ii) the facts found by the JFTC, and the relevant laws and regulations, and (iii) that the parties have the opportunity to express their views on the case and to submit evidence, and the deadline within which they can do so. Under Section 25 of the Rules if, following the written notice, the addressee is dissatisfied, the Chief Investigator shall explain orally the evidence necessary for establishing the foundation for the fact finding of the JFTC. After the explanation of the evidence (normally within 2 weeks from the notification of the expected order to the subjects of the investigation), the company can express its views on the case or submit evidence. Apart from the two specific opportunities referred to above, the subjects of the investigation can express opinions, submit evidence and provide written statements for their counterargument to the JFTC throughout the investigation process.

The Chair thanked the Japanese delegation for their presentation, and turned to the Korean contribution, which stated that the specific alleged violations, the level of evidence and other details are not revealed to the defendant during the investigation, but only when the examination report is served. The Chair asked Korea to explain how this works and whether there are any advantages or disadvantages to disclosing the alleged violations only later in the process.

The delegation from Korea clarified that while the specific violation is not formally revealed, the information is disclosed unofficially. Under the Korean Monopoly Regulation & Fair Trade Act (the "Act"), when an investigator carries out the investigation, especially during on-site inspections, the company under investigation shall be notified in writing of the alleged infringement and of the relevant provisions in the Act. As the investigation continues, the investigator and the subjects of the investigation have continuous contacts and communications. In response to the investigator's requests for statements, responses to enquiries and material necessary for the investigation, the subject of the investigation can always dispute the allegations and submit materials in support of its position. There is no regulation that prevents the parties from contacting the investigator or presenting arguments during the investigation.

Contacts between the investigator and the subjects of investigation are usually carried out in the offices of the KFTC, and through such contact the subjects of the investigation can identify the violations in question and the issues at stake. The detailed results of the investigation, including the specific infringements and the evidence used to prove them are disclosed to the defendant officially through the examination report. This process allows the KFTC to provide sufficient opportunities for the parties to express their views on the case. In addition, during the hearing process the KFTC ensures the rights of

defence of the parties in various ways, such as preliminary hearing procedures or by extending hearings to accommodate the parties' need to present their case.

The Chair noted that the Korean system therefore does not require a written documentation at the front end like in Japan, but allows for dialogue all the way through. The Chair then asked the Swedish delegation to comment on the advantages and disadvantages of their system which provides access to the case files at a certain point in the procedure.

The delegation from Sweden clarified that there are two prongs to the Swedish system under the Administrative Act (the "Act"), which ensure transparency of competition cases. The first is the parties' right to access the case file, which requires the party to be proactive in requesting the access itself. There are special access rules which apply to the parties in the investigation and which are more liberal than those granting access to third parties. The parties can, and generally do, ask for access to files the day after the dawn raids have been carried out. In a merger filing, the parties will ask for, and be given, access very early. If there are confidentiality rules which prevent access, then general information about which documents are in the file and what information they contain may be disclosed (for example, that a document is a market survey). However, in cartel or abuse of dominance cases, access to file is granted in a much more restrictive way.

The second prong is an obligation on the competition agency to communicate to the parties its views about the facts of the case. While there is no statement in the Act concerning when this should be done, the courts have made clear that this should happen at the latest during the statement of objection stage. Therefore, it may be carried out earlier. However, in a recent case a party requested access to the file a few weeks after a large dawn raid and access was denied at that time on grounds that the case was still in the investigation phase. The denial was upheld by the court. To date, the Swedish Competition Authority has won all access to file appeal cases brought to court, although this system has not been tested with a case involving a third party yet. In some cases, especially those involving mergers, giving the parties early access to the facts can be advantageous for the agency, as the merging parties tend to be more proactive in the investigation and this leads to a smoother investigation phase in general. However, assessing each request individually does generate a substantial work load for the authority. In terms of the content of the case file, the Act specifies what constitutes an official document, and agency working papers such as internal notes and memos are not within the definition of which documents can be requested.

The Chair next asked Bulgaria to comment on its first experiences after the introduction in 2008 of the statement of objections, along the example of the EU, and how this has changed the investigative techniques and methodologies of the agency.

The delegation from Bulgaria responded that in December 2008 a new law on the protection of competition entered into force in Bulgaria. The law substantially amended the procedure and the framework of competition proceedings before the national competition authority in order to ensure that the parties' due process rights were fully respected. The law introduced for the first time the use of a statement of objection ('SO'), i.e. a document describing the infringement, its characteristics, its participants, its duration and the economic and legal theories underpinning the allegations against the parties. The SO was introduced to mirror the process adopted by the EC under Articles 101 and 102 TFEU. The Bulgarian authority is therefore now fully compliant with the principles of due process established in the EC. The SO should be sufficiently clear to enable the parties to defend themselves against the objections raised by the competition agency. The addressees of the SO have the right to submit a written response to the SO (the 'RSO') within a period which should be no less than thirty days from the day the SO is served. The RSO must include all supporting evidence. The RSO constitutes part of the defendant's right of defence and it is the defendant's choice whether to exercise it or not. In order to guarantee the parties' rights of defence, the SO contains explicit provisions informing the parties that they have the right to access the case file, and the

right to be heard by the decision making body at an oral hearing, prior to the adoption of the decision. The parties are given access to the whole case file with the exception of documents that contain trade or business secrets and any internal documents belonging to the authority.

Given that the new law entered into force only a year ago, the Bulgarian authorities could not report any specific experience with the issuance of SOs as yet. However, the Bulgarian delegation noted an interesting correlation between the use of the SO and other procedural instruments available to the competition authority, e.g. the power to approve commitments proposed by the parties. Following the decision to start issuing SOs, in a number of cases the parties started to offer commitments to the authority. In these cases, the companies admitted the allegations brought against them and proposed specific commitments to terminate the anti-competitive behaviour. The Bulgarian competition authority is therefore currently drafting guidelines on commitment decisions to ensure parties' rights are fully respected.

3. Opportunities to respond and present evidence; role of hearings and hearing officer

Moving to the third topic for discussion, the Chair noted that it is important to discuss how hearings are effective in protecting and promoting the rights of the parties prior to a decision. The Chair asked the EU delegation to explain how the hearing system works in Europe.

The delegation from the EU quoted from a speech given by the Chair at a conference in Fiesole (Italy) last year, in which she said that different legal traditions may well entail different processes yet still provide due process for the parties. The EU delegate agreed with the statement, but added that administrative enforcement systems in recent times have been questioned when it comes to transparency and fairness. While it is important to ensure compliance with due process, there must be a serious debate on how more fairness and transparency can be achieved in such systems. This is what recently happened in the EU with the publication of Best Practice Guidelines. The guidelines attempt to address the specific procedural issues in antitrust proceedings, introducing additional transparency measures to ensure both procedural fairness and more effective investigations by explaining how procedures function on a day-to-day basis. At the same time, the guidelines complement the existing legal framework and the best practices for merger investigations that were adopted by the European Commission in 2004. This ensures that the parties fully understand what to expect when they are faced with a Commission investigation. Best practice guidelines are useful to ensure a uniform treatment of antitrust and merger procedures across sectors, but also provide more flexibility than case law, as new approaches to the best practices can be proposed.

The European legal framework considers the parties' right to be heard as a basic element of the right of defence. This can be divided into four major components:

- The right of the parties to receive a statement of objections
- The right of access to the Commission's investigation file
- The right to submit comments in writing
- The right to a formal oral hearing

All these rights of defence are guaranteed by Hearing Officers, who are officials of the Commission but, once they are appointed, they are entrusted with a certain degree of independence. Independence is guaranteed by the fact that Hearing Officers do not report to the services of DG Comp but they report directly to the Competition Commissioner. From this point of view they are fully independent. Although they do not adjudicate on substance, they report to the Commissioner on whether the rights of defence have been fully respected and provide a full report on the Oral Hearing. The main role of the Hearing Officers is

therefore to observe the procedure, to protect the rights of defence of the parties and to organise and chair the Oral Hearing. This involves balancing the defendants' right to present their arguments against the right of the Commission and interested parties to present an opposing view. Hearing Officers also have the power to admit certain third parties and witnesses, to accept the presentation of evidence at the Oral Hearing, and to ask questions to everyone present. They may also be called upon to adjudicate disputes between the Commission and the parties on issues such as timing for response to a Statement of Objections, confidentiality issues and access to file. The substantive decision making will then be carried out by the full College of Commissioners and once a final decision is adopted it is appealable before the European courts.

Beyond the role of the Oral Hearing and the Hearing Officers, some of the additional transparency measures included in the set of Best Practices issued for public consultation are:

- The *formal opening of an antitrust procedure* will be carried out at the early stages of the investigation and will be announced publicly. This is already the practice in mergers and avoids cases being started and remaining in limbo. After an investigation is opened, the parties will therefore have the right to know whether the case is proceeding into a second phase, or whether the case is being abandoned.

- In addition to the rights that the parties already have regarding access to file, they will also be permitted to *review and comment on key submissions* by third parties, e.g. non-confidential versions of complaints or other substantive documents, and this right will accrue from the early stages of the procedure.

- *State of play meetings* (which are already used in merger proceedings) will allow the parties at predetermined moments of the procedure to meet with the case team and the senior managers of DG Comp and to be informed of the progress made in the investigation and to have an opportunity to discuss the theories of harm. This is for the benefit of transparency and fairness but also in the interest of efficiencies, as discussing the theory of harm with the parties at an early stage allows the authority to discard weaker arguments and focus on those worth pursuing.

- The introduction of transparency measures in *commitment procedures* and in particular on the *results of the market test*.

The Chair then asked Finland to elaborate on the procedures it uses as a substitute for an oral hearing and how these work in practice.

The delegation from Finland explained that in the Finnish system the Finnish Competition Authority (FCA) investigates cases and brings them to court and the court acts as the decision making body. Proceedings are written, and an important element of transparency and the rights of defendants and third parties is the right to access the documents in the case file. The FCA is obliged to publish a document stating its case and the process is therefore similar to that used in the EU with the statement of objections. The parties can then comment on this document. There is therefore no institutionalised oral hearing at the FCA level, but it is possible to hear parties orally if they wish. However, once the investigation moves to the court proceedings stage, oral hearings are used. Court sessions are public and include the hearing of witnesses, third parties and other interested parties. Therefore, oral hearings are part of the Finnish system, but only once the case is tried before a court (including at the level of the Supreme Administrative Court).

The Chair next asked Germany to explain under what circumstances the Bundeskartellamt decides to hold a hearing, given that they are not mandatory, and how hearings are organised.

The delegation from Germany responded that procedural fairness is a fundamental principle in the German constitution, and the right to be heard is a key component of this fundamental principle. This is explicitly reiterated in the Competition Act. The right to be heard comes into play more decisively before an adverse decision is taken by the competition authority. The Bundeskartellamt must present its facts and preliminary conclusions to the parties and provide the parties with the opportunity to present their views on the case and on the Bundeskartellamt's preliminary conclusions. This is standard procedure in the case of any adverse decision, i.e., a prohibition decision or decisionsdecision to impose fines in cartel or abuse of dominance cases, or in merger cases, where the Bundeskartellamt is considering whether to issue a prohibition decision or to require the imposition of remedies. This also applies to cases where third parties are admitted to the proceedings and the decision is contrary to the third parties' interest.

Under German procedural law there are no strict formalities regarding a party's right to be heard, and the procedure may be carried out in writing or orally in discussions between the parties and the Bundeskartellamt. The scope of the hearing depends on the complexity of the case, and the decision must take into consideration all the previous interactions between the Bundeskartellamt and the parties. A hearing may be more extensive if there has been little interaction between the parties, whereas less time will be needed if numerous exchanges and meetings have taken place, and all the relevant issues have already been discussed. Complex cases will usually warrant an oral hearing, and the lack of a rigid framework for conducting the process allows flexibility in the system to adapt it to the needs of the relevant proceeding. Hearings are between the case team and the parties and therefore not open to the public, although on rare occasions the parties may request a public hearing or the agency may hold a public hearing *ex-officio*. To ensure that the parties' rights are fully protected, a strict review of both the decision and the proceedings is carried out by the courts.

The Chair turned to the Swiss contribution and asked Switzerland to explain in more detail how their hearing process works, with a particular focus on the examination of witnesses by the parties.

The delegation from Switzerland explained that in Switzerland there is no specific regulation on cartel procedures, and therefore the general Administrative Procedural Act applies to all the proceedings under the Cartel Act. One provision allows for parties to attend hearings of witnesses and third parties and to ask additional questions. Parties are permitted to submit counter-evidence where appropriate. Witnesses can be invited *ex-officio* by the agency and also by the parties. In both cases the parties are permitted to ask additional questions. The parties will be informed of the hearing within at least a 30 day notice period. The invitation will inform them of the objective and timeframe of the hearing, and of their right to ask additional questions within the scope of the hearing.

The Chair asked Greece about the right of parties to present exculpatory evidence and data during and prior to the statement of objections phase.

The delegation from Greece explained that the Greek system, which is similar to many others in continental Europe, makes a distinction between the investigation (which is done by the Directorate General) and the decision (which is taken by the Board of the Competition Commission). The Board operates in many respects like a court. In the Greek system, the defendant is given access to the complaint very early in the investigation stage and well before the statement of objections. However, the parties are not permitted access to all other elements of the file. Parties also have the opportunity to discuss the case with the agency in informal meetings, and they have the right to submit memoranda or observations at any point during the investigation. Once the statement of objections is issued, usually two to three months before the hearing occurs, the parties have the right to submit a written reply to the statement of objections, usually within thirty days from the hearing. A distinctive feature of the Greek system is that during the hearing, the parties are permitted to cross-examine each other, as well as the witnesses and experts of the other parties. This technique has worked well, and has assisted the Board in reaching its decision in a

number of cases. The parties are then entitled to submit post-hearing submissions, within fifteen days of the hearing itself. Combined with the earlier open discussions this further assists the authority in testing the theories of harm.

Parties to an investigation will be alerted of a case against them through, for example, a request for information (RFI) which will refer to the subject matter, the legal basis of the claim and whether it is an *ex-officio* matter or following a complaint. The party then has the right to access the complaint. One shortcoming of the Greek system is that the law does not make any distinction between the complaint itself and the right to access the complaint. Therefore, in theory the defendant party could seek access to the complaint a day after it has been filed. However, in practice the authority is likely to allow access only once the investigation has started.

The Chair noted that, regardless of whether jurisdictions have formal requirements for a hearing, there are often opportunities for parties to be heard formally or informally. There is a range of opportunities for interactions between agencies and parties, and a number of jurisdictions use state of play meetings as well as official hearings.

4. Opportunities to meet with agency officials, including decision makers

The Chair then asked the delegation from Canada to make an opening presentation on the opportunities that parties have in Canada to meet with agency officials handling the case and with the decision making body.

The delegation from Canada emphasised that procedural fairness and transparency are key priorities for the Competition Bureau (the "Bureau"). The Bureau enforces the criminal and the civil provisions of the Competition Act (the "Act"). The Bureau is headed by a Competition Commissioner, who has the power to carry out investigations but not to take decisions. If a violation of the Act is established, the Bureau files a case with the courts.

In criminal matters, the Bureau works very closely with the Director of Public Prosecutions. Criminal charges are referred to the criminal prosecutors, who bring cases before the courts. In court, the constitutional due process protections apply to the highest level. Under section 29 of the Competition Act there is a strict provision on the disclosure of confidential information, which restricts the Bureau's ability to share the information it possesses. However, the Bureau is mindful of the balance to be struck between transparency and the protection of any competitively sensitive and confidential information it may have. Therefore, while there are no mandated rules on this balance, the Bureau makes significant efforts to be transparent, through engaging, listening, responding and debating the issues with the parties at every possible opportunity throughout the process.

The use of Guidelines is the principal way in which substantive standards are articulated. Comprehensive guidelines cover all the major areas of the Bureau's work, most notably in the field of mergers as well as competitors'competitors collaboration. The Bureau consults extensively about these guidelines, and is always open to amending them if ever there are areas that need to be revisited.

It is in the informal aspects of the Bureau's competition procedure where the most progress can be made. Informal meetings are held from the outset of the investigation, especially in the merger context. There is also a strong tradition of parties approaching the Bureau before filing a merger notification, which is a good example of the Bureau's reputation when it comes to safeguarding confidential information. Early contacts enable the Bureau to obtain an understanding of the issues from the outset, and to make decisions regarding where limited resources should be targeted, in addition to providing the parties with a better understanding of the issues on which the Bureau is focussing. The new two-stage merger review

process, which came into force in 2009, is a good example of this. The process is formally explained in guidelines, which encourage parties to contact the Bureau before filing a transaction and even before a request for information is sent, in order to identify the key issues and front-end load any production requests.

The main responsibility of the head of an enforcement agency is to ensure her engagement in the matter, and that may include appearing at key milestone events during the process. This allows meaningful opportunities for the parties to dialogue with the Commissioner, who should attend these meetings with an open mind. The Bureau is focussing on two areas for improvements. The first is closing statements or 'technical backgrounders'. The Bureau uses closing statements, but not extensively. Although there is always a balance to be struck with confidentiality issues, these types of statements offer an important way of educating third parties on how the Bureau carries out its work. The second area for improvement concerns the review of consent agreements. Historically, a more formal type of process was used including a full hearing, which tended to become very lengthy and in some cases lasted for years. Therefore, when the Commissioner and the parties agreed to a resolution that would resolve the competition problem, the transaction was still held up for a significant amount of time before being able to implement the agreed resolution. In addition, Bureau resources were being exhausted. In light of these problems, an amendment to the Act was passed to allow for registering of a consent agreement, and in order to mitigate against any perceived concerns by third parties it was decided that confidential information should be kept to a minimum. Third parties have the right to challenge consent agreements, but they need to know if they are affected by the agreement.

In summary, transparency and procedural fairness are both Bureau priorities. There is a natural tension between transparency on the one hand and confidentiality on the other, but the Bureau is working hard, particularly in the mergers context, to clarify how its processes work. The key element is the willingness to commit to a dialogue, as this is what will improve the efficiency, effectiveness and credibility of the Bureau's decisions.

The Chair thanked the Canadian delegation for its presentation and commented that most authorities engage with the parties to understand the strengths and weaknesses of the parties' positions. However, there is still some scepticism in the business community about a 'real' commitment to dialogue by many agencies, and a feeling that while a discussion may take place, what the parties say often does not make a difference. On this specific point, the Chair invited BIAC to take the floor.

The delegation from BIAC opened its remarks by commending the Working Party for the discussion on procedural fairness, and emphasising the importance of the topic. Much of the roundtable discussion had been reassuring in demonstrating an agreement on the part of the agencies that procedural fairness secures better decisions and a smoother process. BIAC noted the recent improvements in a number of jurisdictions, and in particular the openness expressed by a number of the agencies to go beyond legal guarantees and use their discretionary authority to seek to improve the fairness of the process. However, it is felt that there is further work to be done and further progress to be made. All parties involved should be striving towards minimum standards for a truly fair process, and the agencies should be using their discretionary authority to achieve a fair process even when it is not mandated by law. According to BIAC, transparency should be a key component of minimum standards for good administration. But BIAC also stressed that transparency has different facets. Transparency towards defendants is very different from transparency required *vis-à-vis* other stakeholders. BIAC noted that in some of the contributions to the roundtable there was an inadequate recognition of the extent to which the different interests of the defendants or the parties should give rise to a different outcome in relation to transparency. That is not to say that the rights of third parties and of the public should not be recognised, but there are different interests to be protected.

A key topic, which raised a number of very interesting comments, is the degree of the agency's engagement with the parties as a way to ensure that the parties are well aware of the objections that the agencies are raising against them. Different agencies have adopted different processes offering the parties the right to know what the basis of the investigation is, and providing a right to reply. The most important comment on this issue is to stress the importance of early engagement. A number of authorities have explained how they offer parties a right to respond to their formal statement of charges, whether through the notice of proposed order in Japan, the statement of objections in the EC or the investigation report in Korea. However, in the practical experience of businesses there are concerns that these formal charges come at a very late stage in the process, when the minds of the investigators are more or less made up. Investigators have found the facts to their satisfaction and allow the defendants to respond to formal charges almost as a matter of formality.

BIAC would therefore encourage the use of discretionary powers where appropriate to ensure a high level of involvement earlier in the process. Encouraging comments in this regard were heard from the Swedish delegation indicating they provide that involvement at an early stage, and from the Greek delegation in relation to early access to complaints. However, there should be more comprehensive recognition that the parties should not only be provided with a description of the allegations, but that they should be also given access to the actual evidence underpinning these allegations before any preliminary concerns become fixed. This will enable agencies to focus on the right issues, make better decisions and secure better outcomes for business. As regards hearings, there has been a development from the situation where parties were merely 'heard' by virtue of being in the same room as the investigators. However, the bar for hearings needs to be raised further, starting with an agreement on what the perceived purpose for a hearing is. In BIAC's view, the purpose should be to give the decision maker, or at the very least someone acting on their behalf, the opportunity to evaluate the evidence and therefore permit a very thorough process. It has also been encouraging to hear expressions of increased openness to the examination of witnesses in jurisdictions which have not previously had a cross-examination process as part of their normal policy. The need is for a real and effective hearing, where the evidence is tested with the purpose of establishing what the facts are and whether the allegations are supported by the evidence. This should not be seen as a threat to agencies or the enforcement of competition law, but a means to ensuring proper enforcement.

The Chair opened the floor for the general discussion.

The delegation from the UK commented that the UK Competition Commission is in a slightly different category from some other agencies as it does not prosecute infringements, and instead investigates whether markets are working well or whether a merger substantially lessens competition. However, the basic tenets of fair procedure apply just as much in these contexts. The need for procedural rules is based on the proposition that a decision arrived at by a fair process is likely to be a better decision. There are paradoxes, however, and given the different authorities and systems around the world, fairness can mean different things in different contexts. It is entirely fair to separate investigation and prosecution from decision making, and in the context of Competition Commission investigations panels of part-time Commissioners are used, supported by staff and with a full time Chairman. However, the Commissioners are involved in the investigation, the fact finding and the issue identification right from the beginning. They maintain contact, oversee and take part in the hearings that take place during the investigation. Commissioners should not be kept separate from the investigation and only come in at the end to take the decision. Indeed many parties express concern that they have been not given sufficient access to the body of decision makers during the course of the investigation.

This is the situation in the context of the Competition Commission, but the concept of fairness can differ across agencies. However, jurisdictions should not approach these rules with the intention of engaging in the minimum process to avoid their decisions being appealed. It is not simply a case of

operating a fair procedure; the agency also has to be fair and the decision makers must listen to what the parties say. Investigators may, and frequently do, hear arguments that trigger a realisation that the current line of argument is wrong, and that the agency's thinking should be changed and adapted. If an agency does amend its view in this way, this encourages parties to believe that a process involving the decision makers in fact finding is nonetheless fair.

The delegation from Hungary took the floor to comment on the use of informal meetings with parties. This is not a straightforward issue in practice and there are two reasons for this. The first is the cultural preference in Hungary for a more traditional procedural rigidity, and the use of formal rather than informal solutions in public administration. The use of discretion is not as well accepted under Hungarian legal traditions as in other jurisdictions. The second reason is that informal meetings may raise concerns of corruption. Corruption is a real problem in Hungary and it is insufficient that the agency is not actually corrupted; an agency must also give the appearance of being 'clean'. Therefore, the use of informal contacts with parties in a competition investigation may raise concerns related to the lack of transparency for third parties who were not involved in the informal contact. Despite these accountability concerns, Hungary has made significant progress in informal settings, especially in the pre-notification stage of mergers. However, there is always pressure to resist engaging in these types of informal contacts.

The Chair responded that concerns about impropriety are not specific to Hungary, and asked Canada to comment on the issue that while informal contacts may work in some countries, in others it could be perceived as part of a broader problem.

Canada responded that there is a general scepticism from third parties with regard to informal contacts, and the drive for agencies should be towards a process which does not just appear to be fair, but is fair in the relevant context. Historically hearings were used relatively early in the Canadian merger review process, because if an injunction was not obtained within 42 days, parties had the right to close the transaction. However, this resulted in the agency and the parties hardening into litigation mode, which distorted the process and took the focus away from the dialogue 'on the merits' at a very early stage. The rationale for introducing the two-stage merger process was the commitment to early and continuous dialogue with the parties. Hearings are to be called for in some contexts, but the value of formal hearings can be questioned with respect to the investigative stage of a merger, i.e. prior to the decision, in a context where a decision to file or not is being made.

The US delegation took the floor and referred to the point made by the EU that different systems can accommodate appropriate protections of procedural fairness and provide for transparency. In the US, the Federal Trade Commission (FTC) has an administrative system, with elaborate rules to ensure protection rights just as the Department of Justice has its own set of procedural protections that apply in a judicial context. In echoing the points made by the Chair, Canada and the UK, the US emphasised that the key consideration is the spirit in which rules and practices are administered. Therefore, the agencies should keep an open mind, and approach the process in a spirit of give-and-take and be open to shaping and changing their minds along the way. This benefits not only the parties, who have an opportunity to explain their position, but also allows the agencies to sharpen the focus of their investigations and improve their decision-making procedures. At the FTC, there are multiple and continuous opportunities for the parties to interact with the staff, the management and the Commissioners at successive levels of the investigation. Parties are encouraged to take advantage of those opportunities and they do so.

FTC investigations typically begin with an initial phase during which the staff enquires as to whether there is sufficient evidence of a legal violation to pursue the investigation. The prospective party is often contacted at this stage and is welcome to meet with the staff to explain their position, and try to dissuade the staff of the need to continue an investigation or the need to issue compulsory process at that stage. Many investigations are closed at that point, but if the investigation proceeds, the parties may come in

again, in some cases numerous times, to meet with the investigative staff. This will include both the attorneys and the economists involved in the investigation. It can be particularly valuable to establish a dialogue between the parties and the economists as it may shape the nature and the analysis of the data collected by the economists in the investigation. For example, if the parties have an economic model that predicts no competitive harm from the practice under investigation, it is very valuable to be able to test that model at this early stage of the investigation. The result could be a modification of the agency's theory of harm and the remedies that may be desired at the end stage of the investigation.

If at that stage the investigation still appears worthy of continuing, the staff will recommend to the Bureau of Competition that the case be pursued. The parties are again invited to come in at this stage and meet with the Director of the Bureau of Competition and the Director of the Bureau of Economics to argue that their case should not proceed to the Commission level. Nonetheless, if the Director of the Bureau feels that the case should proceed to a recommendation that the Commission take law enforcement action, the parties may come in and meet with the Commissioners. This is often done via individual meetings with each Commissioner, including the Chairman. The parties are typically represented by their counsel, and may be accompanied by company officials. Parties may also, and often do, bring in economic and industry experts to support their position and answer questions at every stage.

According to FTC rules, the Commission has to inform investigative targets of the purpose and scope of the investigation, the nature of the conduct that may constitute a violation, and the applicable provision of the law. Parties can and typically do provide a summary of their case in a document known as a White Paper that sets out their view of the facts, the legal arguments and the economic arguments involved in the investigation. The parties may argue that the Commission should not bring a case or they may advocate a settlement with specified relief. They may persuade the staff to drop all or part of their case in light of deficiencies in facts or theory. Even if they do not succeed in persuading the staff, the parties can learn about the particular interests of the agency and therefore better hone their arguments.

Alternatively, in the course of these meetings, the staff may persuade the parties of the seriousness and the strength of their arguments on a particular aspect of the case and may then persuade the parties of the need and benefit to settle rather than pursue lengthy and expensive litigation. The opportunity to exchange ideas and information is not a favour bestowed by the agencies, but is a tool that helps focus the investigation on a real dispute and also may help the agencies make the right decision.

5. Rules on the length of investigations, publication of adverse decisions and consideration of evidence offered by the subjects or parties of the investigation

Moving to the next topic, the Chair asked the Polish delegation to address in their presentation issues such as the length of investigations and the publication of adverse decisions.

The delegation from Poland explained that their procedural model for antitrust enforcement is administrative. There is one authority, the Office for Competition and Consumer Protection, (the "Office") responsible for the investigations, the adoption of decisions and the imposition of financial penalties. The legal basis for the Office's functions is the Act on Competition and Consumer Protection (the "Act"). Every antitrust proceeding is opened by the President of the Office, and complaints are treated only as a basis for analysis.

The length of investigations is provided for in the Act. There are usually two investigation phases: (i) *explanatory phase*, lasting between 30 and 60 days; and (ii) *antimonopoly phase*, which takes place after the objections are presented to the parties and which can last up to five months. However, the legislation allows for extensions of these deadlines if necessary for a full development of the case. The majority of merger cases are cleared within two months, and a recent calculation showed the average length of a

merger examination in Poland is 67 days. However, if additional information is required the time period can be extended. Parties actively participate in the proceedings; they have access to file at each stage of the investigation and also have the possibility to request informal meetings with the agency's officials. These meetings can be organised at every stage of the investigation. The parties can also request to be heard in formal hearings. However, a written procedure is generally preferred by the parties. If documents are provided in a foreign language, they must be translated into Polish, and certified by a sworn translator. This is to facilitate judicial review of the Office's decision.

Transparency is key to the procedure and every effort is made to ensure that the principle of transparency covers all aspects of the Office's activities. For example, guidelines have been adopted on how the Office sets fines and on the leniency program. A special help line was also opened last year to allow firms to call and ask questions about the leniency program. Every three years the Office prepares a competition policy strategy document which is later approved by the government. This document is publicly available and includes the goals and the enforcement priorities for the following years. Prior to the introduction of any new soft law, public consultations and meetings are organised.

The publication of decisions is strongly connected to transparency. The majority of decisions are published in the Office's Official Journal which is available on the Office's website. Since 2009, an updated version of the decisions database has been available. The consistency and coherence of decisions are also key to procedural fairness. The structure of the Office differs from other European countries as it is decentralised; the headquarters are in Warsaw and there are nine regional branches around Poland. The divisions in Warsaw are responsible for the protection of competition on the national market, while the branches are responsible for local and regional markets. The review of decisions for consistency is therefore important; for this reason, every draft decision issued by the case handlers, both in the headquarters and the branches, is examined by the legal department and the Chief Economist's team. It is important that the assessment is made by lawyers and economists not engaged in the proceedings.

Poland concluded that procedural fairness is a cornerstone for competition enforcement and a guarantee of effectiveness. The Office will continue to enhance its effectiveness without detriment to parties' rights. International cooperation, sharing best practices and experiences as well as learning from each other's successful solutions can be extremely valuable in this respect.

6. The rules on announcements when an investigation is closed or a settlement is reached

The Chair then moved to the last part of the roundtable and asked the delegation from Chile to make a presentation on the announcements that agencies make when closing an investigation or when reaching a settlement with the parties.

The delegation from Chile explained that there are two competition authorities in Chile: (i) the Competition Tribunal, which is a judicial body with adjudicative powers on competition matters, and (ii) the Fiscalia Nacional Economica ("FNE") which is the competition agency. Each body has similar rules and practices regarding announcements when a case is closed or settled. FNE now publishes on its website all decisions regarding the closing of an investigation, the settlements reached with parties and the filing of charges before the tribunal. Until mid-2008 the publication of these decisions was only a practice. There was no legal rule requiring the agency to publish this information as the constitutional provision on transparency, introduced by amendment in 2005, was not yet directly enforceable. The content of the document made public may differ in each case. When FNE closes an investigation and decides to bring a case to the Competition Tribunal, it published a summary of the grounds for filing the case. In the case of a settlement, it is common to issue a short press release, but not to disclose the full content of the settlement before this is approved by the Competition Tribunal. When important companies are involved, the close of

an investigation or a settlement is commonly reported by the press. These procedures may in addition justify a full press release by the FNE.

In August 2008, Chile passed the Transparency Act. The Act regulates the transparency of government and other public bodies' activities, actions and acts. Under this legislation, a new transparency council was established and all activities of the government were required to be made public, with few exceptions. This included active transparency duties such as the requirement that certain information should be available to the public at all times on the relevant websites. The act also provides for an active transparency duty with regard to "*all acts and resolutions which affect third parties*". This provision therefore obliges the competition agency to publish all acts and resolutions which meet the above standard, such as the closing of an investigation or the settlement of a case. The Competition Tribunal publishes on its website, among other rulings and resolutions, all settlement approvals and other decisions which may end a dispute (for example inadmissible claims). In general, almost all records and interim decisions of a case are available on the Competition Tribunal website.

From its establishment in 2004, until mid-2008, the Competition Tribunal also adopted the practice of publishing its main resolutions (in full and in abstract) on its web site. In 2005, when the constitutional provision on transparency and publicity was introduced, it broadened the scope of publicised documents. Since the enactment of the 2008 Transparency Act, the Competition Tribunal, like the FNE, is now required to publish certain acts and resolutions in accordance with the Act. The Competition Tribunal's website also has a press room link where relevant procedures regarding important cases are reported.

The Chair thanked Chile for its presentation and opened the floor to any closing comments or observations on procedural fairness.

Brazil took the floor and referred to the concerns raised by Hungary regarding informal meetings. It is generally agreed that informal meetings have a paramount importance for merger analysis because they provide a deeper comprehension of the facts of the case. In order to minimise concerns related to these informal meetings, Brazil adopts three safeguards: (i) informal meetings are held by at least two officials, (ii) a party wishing to hold a meeting must apply for it in a formal way so that there is a record of it, and (iii) the schedule of all Commissioners is publicly available on the internet.

BIAC emphasised that its suggestion to have minimum standards across jurisdictions did not envisage a "one size fits all" checklist. The way in which agencies achieve minimum standards should be organised in light of their particular system and the ultimate goal of fair process. It is, however, clear that there should be minimum standards if agencies are to avoid actual or perceived prosecutorial bias based on investigators becoming convinced by a case before they hear the parties and then proceeding to make a decision. Some concern was expressed that hearings may lead to a more litigation-minded framework at an early stage and this is not to be encouraged. A proper oral hearing should be in addition to and not instead of an early and engaged process. As for meetings in informal settings, BIAC echoed the view that this is a real issue and not unique to the Hungarian system. An advisable approach, which a number of agencies have adopted, is to ensure a rigorous gathering and recording of all evidence and information, including evidence gathered in an informal context. Noting that the Polish delegation mentioned their new and transparent leniency helpline, BIAC expressed its support for agencies operating an appropriate leniency policy. Studies should also be encouraged on how to converge leniency processes so they operate together in a fairer way. There have been situations in which a business has come forward and made a full and frank admission, but been denied the full benefit of leniency due to inconsistent and difficult processes. The jurisdictions represented in the Working Party have the fundamental objective of ensuring competitive markets and protecting competition for the benefit of consumers and market players. It should be stressed that many businesses invest a great deal in doing their very best to comply with competition law. This should to be taken into account and fair credit be given to parties making those efforts.

The delegation from Greece returned to the Hungarian comment on corruption, and emphasised that while there may be concerns related to informal contacts, the benefits outweigh the negatives. Informal meetings are very important tools, not only as they are in accordance with the parties' right to be heard, but they also enable the authority to form a clearer and more objective view of the case. However, safeguards should be put in place and officials should do the best they can not to raise concerns. The process adopted in Greece is similar to that of Brazil, with informal meetings being conducted by at least two officials. The parties are also invited to substantiate their statements or presentations in writing, within a certain time after the meeting. These documents later form part of the case file.

Hungary noted that the comments of other delegates aligned with Hungary's approach. The situation in Hungary is not that informal contacts are a problem as such, but that they could be perceived as being a problem. The agency is not involved in any sort of unethical practices, but there are corruption cases in other parts of the administration and those scandals taint the work of all agencies, including the competition agency. Informal contacts are clearly advantageous in competition investigations, but it can be difficult to demonstrate the merit of these contacts against the backdrop of corruption investigations in other areas. The solution is to provide an element of transparency or formality to the situation, but this may lead to the question of whether it is not only 'fairness' which has a different meaning across jurisdictions, but the notion of 'formal' or 'informal' may also have different meanings in different countries.

The delegation from Ireland made suggestions about how best to make sense of the variety of different experiences around the world. Procedural fairness may apply to three areas: (i) investigation, (ii) decision making and (iii) judicial review.

- *Investigation phase*: Virtually all jurisdictions have an investigative process which is essentially administrative. The terminology differs from country to country, with some using Phase I and Phase II, and others using preliminary and final, but the fact remains that at some point the parties have a right to be told that they are being investigated. What is unclear is at what stage this should take place, given that the investigative agencies need time to review the evidence they have. There are also issues concerning the compulsion part of the investigative process. Some countries require court orders for search warrants and in others the competition agencies are able to issue administrative requests for information. In addition, there will also be constitutional rights to consider, e.g. rights against self-incrimination.

- *Decision phase*: This is the phase where most issues occur as there are two fundamental enforcement systems around the world: one administrative and one judicial. The first issue, common to all systems, is that the party must have the right to know the case against it, so that it can respond fully before a decision is taken. Disclosure, access to file and state of play meetings are all relevant here. The next issue concerns the fairness of the decision-making process. If the jurisdiction has a judicial decision-making system, such as the US, Ireland and Canada, disclosure and procedure in general is governed by the courts. However, this is not the case in administrative systems, and consequently issues related to procedural fairness have been raised. However, even in an administrative context the investigating part of the administrative agency is not necessarily connected to the decision-making part. In Europe, for example, the French Autorité de le Concurrence has an investigative arm which works entirely separately from the chamber that decides the case. The Netherlands has a similar separation. A different model is that used in the EU, which is followed by many of its member states, in which the investigation and decision making is carried out by the same entity. This system has raised substantial debate in Europe.

- *Judicial phase*: Which ever investigation and decision-making system is adopted, all jurisdictions have a court review built into the process. Therefore, in the end competition issues will always be

governed by the rules of the courts, and the courts have their own systems, which do not usually treat competition cases differently from other cases.

In conclusion, whether the process is administrative or judicial, or a mixture of both, competition law is not given any special dispensation and it will always need to fit within the legal framework. Therefore, any changes proposed in one system must have regard for the legal system in general, as competition decision making will not usually be given a unique place in legal culture.

The Chair thanked all the delegation for a very interesting and stimulating discussion and concluded the roundtable discussion.

COMPTE RENDU DE LA DISCUSSION

La Présidente déclare la table ronde ouverte et note que le thème abordé a suscité un grand intérêt parmi les délégations, comme en témoignent les 30 contributions de pays reçues par le Secrétariat. Cette table ronde a pour objet l'examen des questions relatives à la transparence des procédures d'application de la loi en matière civile et administrative, à la fois dans le cadre du contrôle des fusions et d'autres procédures de droit de la concurrence. La Présidente fait observer que de nombreux pays disposent déjà de procédures transparentes bien établies en matière de contrôle des fusions, assorties de lignes directrices détaillées et de délais réglementaires pour les différentes phases de contrôle. Toutefois, au-delà du contrôle des fusions, il reste un certain nombre de questions et de problématiques relatives à l'équité et à la transparence en matière de procédure qui seront examinées dans le cadre de cette table ronde.

La Présidente propose d'articuler la table ronde autour de six grands thèmes :

- Transparence générale concernant la législation, les procédures, les décideurs et les calendriers des procédures ;
- Moment et modalités de la notification aux parties des allégations portées contre elles ;
- Possibilités offertes aux parties de répondre et de présenter des preuves, et rôle des audiences et des conseillers-auditeurs ;
- Possibilités offertes aux parties de s'entretenir avec des agents des autorités de la concurrence, notamment les décideurs ;
- Dispositions régissant la durée des enquêtes, la publication des décisions défavorables et l'examen des preuves fournies par les personnes visées par une enquête ou parties à celle-ci ;
- Procédures de notification de la clôture d'une enquête ou de l'intervention d'un règlement.

Le Secrétariat invite six délégations à présenter un exposé d'introduction de façon à mettre en lumière les principales questions associées à chacun de ces thèmes.

1. Transparence générale concernant la législation, les procédures, les décideurs et les calendriers des procédures

La Présidente invite la délégation du Royaume-Uni à prendre la parole pour présenter le premier thème de la table ronde.

La délégation du Royaume-Uni donne un aperçu général des travaux menés récemment par l'*Office of Fair Trading* (OFT), le Bureau de la concurrence britannique, dans le cadre du Projet *Transparency* (Projet Transparence, ci-après « le Projet »). Celui-ci porte sur la façon dont l'OFT, en tant qu'autorité de la concurrence, informe les parties concernées, les tiers intéressés et le grand public sur les affaires et projets achevés ou en cours. Il s'agit d'indiquer quelles sont les modalités de traitement des dossiers, en quoi consiste le travail de l'OFT et quel en est l'objet. Le Projet porte également sur la culture de l'organisme en matière de dialogue avec les parties faisant l'objet d'une enquête, les tierces parties intéressées et le

public ; il a trait aux valeurs et aux attitudes qu'ils sont en droit d'attendre lorsqu'ils s'adressent régulièrement à l'OFT.

La délégation du Royaume-Uni note que la transparence vis-à-vis des parties aux affaires ou projets (c'est-à-dire le thème central de la table ronde) ne constitue qu'une partie du Projet, qui porte aussi plus généralement sur les rapports entre l'OFT et un large éventail d'acteurs, à savoir ceux qu'intéressent une affaire particulière, les plaignants ou d'autres acteurs du secteur, ainsi que les fournisseurs et les clients. En tant qu'organe public, l'OFT est en outre concerné par la transparence vis-à-vis de ceux qu'on appelle au Royaume-Uni « les parties prenantes » (*stakeholders*). Il peut avoir une responsabilité formelle à l'égard de certaines parties prenantes, mais chez beaucoup d'autres, ses travaux se limitent à susciter un vif intérêt. Ces parties prenantes informelles ont parfois le sentiment que l'OFT n'est pas suffisamment accessible, ou qu'il l'est moins que d'autres organes publics britanniques ayant des fonctions similaires, ce qui est avant tout une question de bonne administration.

La transparence est importante pour plusieurs raisons :

- Elle conduit à un traitement des dossiers et à une prise de décision plus rapides, plus fiables et en meilleure connaissance de cause, les procédures étant mieux comprises et appliquées de façon plus cohérente par toutes les parties ;

- Elle est source d'efficience dans le traitement des dossiers et la prise de décision et oblige à tenir les délais, l'autorité de la concurrence et les parties réalisant ainsi des économies. Elle favorise le respect des droits fondamentaux des parties à une procédure régulière et à un traitement équitable et offre aux parties certitude et prévisibilité ;

- Elle assure de meilleurs résultats dans le traitement des dossiers, d'où un plus grand respect des décisions qui sont prises et une meilleure compréhension des travaux des autorités de la concurrence et des effets positifs d'un régime de concurrence, en particulier la promotion et la compréhension de ce qu'on entend par « culture de la concurrence ».

Au cours du Projet, l'OFT a mené une consultation sur un certain nombre de propositions portant notamment sur : i) le moment opportun pour annoncer l'ouverture d'une procédure et les détails à donner à la fois aux parties et au public ; ii) le degré de confidentialité des projets de demande formelle de renseignements pendant l'enquête, et la nécessité ou non d'une notification préalable concernant les demandes de renseignements envisagées ainsi que le calendrier indicatif des principales étapes ; iii) l'indication de l'état d'avancement aux principales étapes et la tenue de réunions-bilans ; iv) les modalités de partage avec les parties des réflexions provisoires sur une affaire au fur et à mesure de l'élaboration de ces réflexions ; v) association des parties aux préparatifs en vue de rendre publique la décision ; vi) la publication de données sur les performances concernant les affaires closes et la communication d'un complément d'information sur la structure de gouvernance et le processus décisionnel de l'OFT ainsi que le rôle des différents membres de l'équipe chargée des affaires.

La consultation a mis en lumière le caractère très sensible de l'annonce de l'ouverture d'une procédure. À l'heure actuelle, l'OFT publie un bref communiqué, au moment de la communication des griefs ou lors du règlement précoce d'une affaire. À moins que celle-ci ait eu auparavant un certain retentissement, par exemple à la suite des inspections qui ont été effectuées, le public n'aura généralement pas entendu parler de l'affaire avant la publication de ce communiqué. Les cabinets d'avocats ayant pris part à la consultation se sont farouchement opposés à toute annonce ou publication d'informations sur une affaire à un stade antérieur, sur le site Web de l'OFT, par exemple, même si une telle initiative indiquerait clairement que l'enquête en est à ses débuts et que l'OFT n'a pas de parti pris sur la question de la violation. Les entreprises ont estimé que la publication d'informations à un stade antérieur nuirait à la

réputation et à l'image de marque des entreprises en cause. L'une des principales raisons d'éviter les annonces précoces réside dans l'attention accrue qu'elles suscitent de la part des médias qui, selon certains participants à la consultation, risquent de ne pas comprendre pleinement, ou tout au moins de mal expliquer, les procédures mises en œuvre dans les affaires de droit de la concurrence.

L'OFT a informé le Groupe de travail qu'une réflexion approfondie sur les résultats de la consultation était prévue avant la publication de tout principe général. Une plus grande transparence ne signifie pas que l'OFT envisagerait de rendre publiques d'éventuelles informations. Il existe en effet des obligations réglementaires strictes, étayées par des sanctions à l'encontre des personnes, en matière de confidentialité des informations. Le Projet n'a pas pour vocation d'entraver la capacité de l'OFT à mener des enquêtes avec bon sens ou de formuler des promesses indéfinies sur des réformes de procédure qui contraindraient l'OFT à changer son mode de fonctionnement, ni de permettre aux parties de recourir indûment à des questions de procédure pour prolonger les affaires. Il pourrait s'avérer inadapté d'appliquer une solution toute faite, et un certain degré de souplesse et d'appréciation sera toujours nécessaire. De nouvelles activités sur la transparence seront menées lors de la deuxième étape du Projet, en vue notamment d'améliorer les informations sur la gouvernance et la prise de décision, de publier un plus grand nombre de données recueillies tout au long des travaux de l'OFT, et d'améliorer les renseignements sur les modalités et les dates des futures consultations formelles et informelles de l'OFT.

La Présidente remercie la délégation du Royaume-Uni pour son exposé et invite la délégation des Pays-Bas à parler du fonctionnement de la cloison étanche qui, au sein de l'autorité nationale de la concurrence (*Nederlandse Mededingingsautoriteit*, ou NMa), sépare la composante chargée des enquêtes de la composante chargée des poursuites.

La délégation des Pays-Bas confirme l'existence d'une cloison étanche entre les équipes de la NMa chargées des enquêtes et des poursuites, respectivement. En ce qui concerne toutes les affaires d'application du droit de la concurrence susceptibles de se solder par des amendes, le département de la concurrence et le département juridique ont des attributions très distinctes ne se recoupant pas, et ils ne se concertent pas. Cette cloison étanche a été mise en place afin de protéger l'intégrité du traitement des affaires par l'autorité de la concurrence. Le département juridique, situé de l'autre côté de la cloison par rapport au département de la concurrence, reconsidère les affaires avec un regard neuf et empêche les enquêteurs de tirer un avantage personnel ou de faire preuve de partialité dans le cadre de l'examen de ces affaires.

Concrètement, c'est le département de la concurrence qui s'occupe d'enquêter sur les affaires, y compris d'organiser des perquisitions surprises, de réaliser des entretiens avec les parties et de mener des études de marché. Si le résultat de l'enquête fait naître des soupçons de violation, le département de la concurrence peut rédiger un rapport ou une communication des griefs. Le Directeur du département de la concurrence dirige l'enquête et signe le projet de rapport. Le Conseil d'administration de la NMa n'intervient pas à ce stade de la procédure. Une fois le rapport établi par le département de la concurrence, il est transmis au département juridique. Celui-ci, qui est chargé d'instruire les affaires, ne joue un rôle dans leur résolution qu'à partir du moment où le département de la concurrence a clos l'enquête. Le département juridique examine alors l'affaire sur le fond. Il passe le dossier en revue et peut demander aux parties de soumettre des observations par écrit et de participer à une audience, à l'issue de laquelle le département juridique établit un projet de décision communiqué ensuite au Conseil d'administration de la NMa. L'équipe du département juridique s'entretient du projet exclusivement avec les membres du Conseil d'administration, le département de la concurrence n'étant pas associé à cette étape.

Lorsque le département juridique renonce à instruire une affaire, celle-ci est simplement close et le Conseil d'administration de la NMa n'intervient pas. Ce cas de figure peut engendrer une certaine tension au sein de l'autorité. Toutefois, il incite aussi ceux qui traitent les affaires à s'assurer que chacune d'entre

elles, sans exception, fait l'objet d'une enquête en bonne et due forme avant que le département juridique en soit saisi. La jurisprudence récente a montré que les tribunaux font preuve d'intransigeance lorsqu'il s'agit du respect des dispositions relatives à la cloison étanche, qui renforce la confiance des parties dans le système et procure à la NMa une crédibilité accrue en tant qu'organisme public. D'aucuns se sont pourtant montrés sceptiques à l'égard de la séparation du personnel de la NMa, étant donné que le département de la concurrence comme le département juridique relèvent toujours d'un unique Conseil d'administration.

L'introduction de la cloison étanche résulte de la décision du législateur de protéger l'intégrité du traitement des affaires en isolant le processus d'enquête de la rédaction de la décision finale. On s'est inquiété de la possibilité que les personnes qui traitent les affaires, ainsi que les enquêteurs, deviennent partiaux au fil de la procédure, raison pour laquelle il convient qu'ils ne participent pas à la détermination du montant de l'amende. Du point de vue des coûts, il n'est pas interdit de penser que ce système est peu rentable dans la mesure où deux départements distincts au sein d'un organisme donné traitent chacun les mêmes affaires. Cela étant, après 10 années d'existence, la cloison étanche affiche un bilan très positif en termes de renforcement du traitement des affaires et de participation à la construction d'un organisme crédible. Les avantages d'un « double » traitement des affaires l'emportent donc sur les coûts.

Comme indiqué, le département juridique a renoncé dans certains cas à instruire une affaire, contrairement à la recommandation du département de la concurrence. Néanmoins, ce cas de figure pouvant se produire sous différentes formes, il est difficile de fournir des statistiques. Par exemple, le département de la concurrence a traité une affaire de violation du droit de la concurrence impliquant à la fois une entente et un abus de position dominante. Le département juridique a conclu à la recevabilité du volet de l'affaire concernant l'allégation d'entente mais décidé de rejeter le volet concernant l'allégation d'abus de position dominante. Autre exemple : le département de la concurrence a estimé à plus de cinq ans la durée d'une violation sur laquelle il avait enquêté, alors que, selon le département juridique, les preuves n'attestaient qu'une durée de trois ans. De telles affaires, où le département juridique adopte une approche plus restrictive que le département de la concurrence, représentent environ 10 % du nombre d'affaires sur lesquelles enquête celui-ci.

La Présidente remercie la délégation des Pays-Bas et passe à la contribution de la Belgique, où il est expliqué que les informations sur les activités d'enquête et d'instruction concernant une affaire sont publiées dans les trois langues officielles du pays (c'est-à-dire le flamand, le français et l'allemand). Cependant, selon le document soumis par la Belgique, la décision finale n'est publiée que dans la langue de l'affaire. La Présidente demande comment cela fonctionne en pratique et comment la transparence est assurée dans un système caractérisé par plusieurs langues officielles.

La délégation de la Belgique explique que l'existence de trois communautés linguistiques oblige le gouvernement à utiliser la langue appropriée lorsqu'il communique avec les habitants d'une région. Il existe en Belgique une seule autorité de la concurrence, qui comprend trois entités différentes : i) le Conseil de la concurrence, tribunal administratif rendant des décisions en fonction des procédures judiciaires ; ii) l'Auditorat, qui mène et dirige les enquêtes ; iii) la Direction générale de la concurrence, qui fait partie du Ministère belge de l'économie et dont les agents appuient la mission de l'Auditorat.

Durant une enquête, les agents de la Direction générale de la concurrence doivent respecter la législation sur l'emploi des langues dans le contexte administratif et sont contraints d'utiliser, à titre officiel, la langue de la région où est établie l'entreprise faisant l'objet de l'enquête. Par conséquent, les communications adressées par écrit à une entreprise de Wallonie seront rédigées en français, alors qu'elles le seront en flamand pour une entreprise ayant son siège en Flandre. Toutefois, la Loi sur la protection de la concurrence économique prévoit l'application de la législation sur l'utilisation des langues dans les affaires judiciaires. Aussi un défendeur peut-il toujours solliciter l'emploi de la langue de son choix. En présence de plusieurs défendeurs, c'est la langue majoritairement représentée qui est utilisée. De ce fait,

plusieurs langues peuvent être employées au cours d'une enquête, mais le rapport de l'Auditeur sera rédigé dans celle qu'aura choisie le défendeur.

À la suite du rapport de l'Auditeur, le Conseil de la concurrence prendra la décision finale conformément aux règles applicables aux procédures judiciaires, à savoir que les parties peuvent être entendues et soumettre des observations. Auparavant, la législation dans ce domaine n'était pas très claire, mais en janvier 2010, la Cour d'appel de Bruxelles a décidé que les parties pouvaient communiquer leurs observations dans la langue officielle de la procédure, mais que le défendeur avait la possibilité d'en demander une traduction, ce à quoi le juge accéderait s'il le jugeait bon. La décision finale du Conseil de la concurrence sera rédigée dans une langue, tandis que la procédure pourra être menée dans plusieurs. En général, l'approche adoptée est très pragmatique, le défendeur ayant habituellement le dernier mot quant au choix de la langue. Par exemple, dans les affaires de fusion, si la notification de l'opération doit être rédigée dans l'une des trois langues officielles, les annexes à cette notification peuvent être établies en anglais. Pour résumer, une enquête en matière de concurrence peut être réalisée dans différentes langues, la langue retenue pouvant même changer en cours d'enquête, mais en fin de compte, le rapport final et la décision du Conseil de la concurrence seront rédigés dans une seule langue.

La Présidente, interrogeant alors la délégation de l'Afrique du Sud à propos d'une récente décision de la Cour d'appel stipulant que le droit de la concurrence doit être appliqué avec équité mais diligence, demande si ces deux principes sont compatibles.

La délégation de l'Afrique du Sud explique que dans le système sud-africain, l'équité et la diligence ne sont pas considérées comme s'excluant mutuellement. En Afrique du Sud, l'équité en matière de procédure administrative est un droit constitutionnel, et c'est à ce titre qu'elle est invoquée dans la loi sur la concurrence. L'équité est également le fondement de la séparation structurelle entre la fonction d'enquête et de poursuite de la Commission de la concurrence et la fonction de décision du Tribunal de la concurrence (ci-après dénommé « le Tribunal »). Le principe de diligence est traduit sous deux formes dans la loi sur la concurrence : i) des chronologies stipulant les délais à respecter pour l'achèvement des opérations de fusion, le dépôt des conclusions et l'enquête sur les pratiques interdites ; ii) un mécanisme judiciaire spécialisé pour le règlement des affaires de concurrence par le Tribunal. Il peut ensuite être fait appel des décisions du Tribunal auprès de la Cour d'appel de la concurrence (ci-après « la Cour d'appel »), puis de la Cour suprême d'appel (« la Cour suprême »).

Les rôles du Tribunal, de la Cour d'appel et de la Cour suprême en matière de surveillance ont garanti l'indépendance et la transparence de la prise de décision ainsi que le respect de l'obligation connexe de rendre des comptes. Pendant l'élaboration de la loi sur la concurrence et la mise en place des institutions chargées de faire appliquer le droit de la concurrence, les milieux d'affaires ont exprimé des craintes quant à un éventuel excès de réglementation. Le régime de concurrence tel qu'il a été mis au point a dans une large mesure apaisé ces craintes d'un excès de réglementation, tout en assurant parallèlement le caractère concurrentiel des marchés. Toutefois, la Cour d'appel et le Tribunal se sont inquiétés de la possibilité que les parties aux affaires de concurrence abusent du système, qui est conçu pour garantir équité et diligence, en lançant une procédure d'appel interlocutoire afin de gêner et retarder l'audition des affaires sur le fond. Par exemple, au cours des 12 mois qui ont précédé cette table ronde, la Cour d'appel a été saisie de quatre demandes de pourvoi en appel mais les a toutes rejetées. Dans une autre affaire concernant une entente dans le secteur du lait, deux demandes initiales d'appel interlocutoire ont elles-mêmes donné lieu à sept autres demandes au cours des trois années qui ont suivi la soumission de l'affaire. La Commission de la concurrence a donc consacré un temps précieux, dans le cadre de ce vaste et dense contentieux, à défendre son droit à poursuivre les entreprises impliquées dans l'entente.

Dans l'une des demandes d'appel interlocutoire, une partie requérant la clémence s'est employée à se dégager de l'accord de clémence au motif que l'obligation de coopération serait incompatible avec son

droit à se défendre contre les allégations portées par la Commission. Ayant examiné la demande et les divers points soulevés par le requérant, la Cour d'appel a fait observer que les auteurs de violations du droit de la concurrence devaient être poursuivis en justice avec équité, mais aussi avec diligence. Les représentants légaux plaidant devant la Cour d'appel et le Tribunal ont des devoirs envers leurs clients, mais en tant qu'auxiliaires de justice, ils ont aussi une obligation à l'égard de l'intégrité du système juridique. Par conséquent, le règlement rapide des affaires de concurrence est un élément tout aussi fondamental et à part entière du système que le droit du défendeur à un procès administratif légitime, équitable et régulier sur le plan de la procédure. On espère que, au fur et à mesure que la jurisprudence s'étoffera et apportera une solution à certains des problèmes techniques soulevés par les parties, un juste milieu sera trouvé entre équité et diligence.

2. Moment et modalités de la notification aux parties des allégations portées contre elles

La Présidente passe ensuite au deuxième thème de discussion, à savoir le moment et les modalités de la notification aux parties des allégations portées contre elles, et donne la parole à la délégation du Japon pour son exposé d'introduction.

La délégation du Japon explique qu'en vertu de la loi nationale antimonopole, les personnes visées par une enquête administrative ont deux occasions de s'entretenir avec les agents de l'autorité de la concurrence : i) lors de la première inspection in situ ; ii) après l'inspection, lorsque la Commission japonaise de la concurrence donne aux personnes visées par l'enquête la possibilité de soumettre leurs observations ou de produire des preuves avant la publication d'une ordonnance administrative.

Au Japon, la plupart des enquêtes sur des affaires de concurrence débutent par une inspection in situ plutôt que par une démarche de communication de pièces ou une injonction de produire des preuves écrites. La décision de mener cette inspection est prise par la Commission japonaise de la concurrence, qui n'a pas besoin de solliciter l'approbation des tribunaux. À la première occasion, c'est-à-dire lors de l'inspection in situ, les personnes visées par l'enquête sont informées des allégations dont elles font l'objet. Autrefois, cette notification se faisait oralement, mais en vertu du nouveau Règlement concernant les enquêtes administratives (ci-après « le Règlement »), qui est entré en vigueur en 2005 en vue d'améliorer l'équité, elle doit désormais se faire par écrit. L'article 20 du Règlement stipule que lors de la réalisation d'une inspection in situ, l'enquêteur doit remettre aux personnes visées un document indiquant : i) l'intitulé de l'affaire (c'est-à-dire le type d'entreprise et les biens ou services concernés) ; ii) les faits laissant supposer une violation de la loi antimonopole ; iii) les dispositions applicables de cette loi. Si des preuves liées à une autre infraction sont découvertes au cours de l'inspection in situ, elles peuvent également être recueillies en vue d'une possible utilisation contre les personnes visées par l'enquête. À l'issue de l'inspection in situ, la Commission de la concurrence analyse les preuves écrites collectées et prend les dépositions des employés de l'entreprise visée par l'enquête. La Commission examine alors en détail les faits qui ont été mis en lumière, et juge s'ils justifient ou non la publication d'une ordonnance.

La seconde occasion de s'entretenir avec les agents de l'autorité de la concurrence se situe à la dernière étape de l'enquête. Il est stipulé à l'article 49 3) de la loi japonaise antimonopole que la Commission de la concurrence, lorsqu'elle envisage de publier une ordonnance de cessation et d'abstention, offre préalablement au futur destinataire de l'ordonnance la possibilité de soumettre ses observations et de produire des preuves. Aux termes de l'article 49 5) de la loi, la Commission de la concurrence doit notifier par écrit au destinataire les points suivants : i) la teneur prévue de l'ordonnance de cessation et d'abstention ; ii) les faits découverts par la Commission, ainsi que la législation et la réglementation applicables ; iii) la possibilité pour les parties de soumettre leurs observations sur l'affaire et de produire des preuves, et le délai accordé pour ce faire. Conformément à l'article 25 du Règlement, si après avoir été informé par écrit, le destinataire n'est pas satisfait, l'enquêteur en chef indique oralement quelles sont les preuves nécessaires pour asseoir les fondements de l'enquête menée par la Commission.

Une fois ces preuves précisées (normalement dans un délai de deux semaines à compter de la notification de l'ordonnance prévue aux personnes visées par l'enquête), l'entreprise peut soumettre ses observations sur l'affaire ou produire des preuves. En dehors des deux occasions spécifiques évoquées ci-dessus, les personnes visées par l'enquête peuvent, tout au long de celle-ci, soumettre leurs observations, présenter des preuves et fournir des dépositions écrites en vue de réfuter les éléments avancés par la Commission de la concurrence.

La Présidente remercie la délégation du Japon pour son exposé et en vient à la contribution de la Corée, dans laquelle il est indiqué que la nature exacte des allégations de violation, le niveau de preuve et d'autres détails ne sont pas révélés au défendeur pendant l'enquête, mais seulement au moment de la publication du rapport d'examen. La Présidente demande à la Corée d'expliquer comment cela fonctionne et d'indiquer si le fait de révéler les allégations de violation seulement à un stade avancé du processus présente de quelconques avantages ou inconvénients.

La délégation de la Corée précise que si la nature exacte de la violation présumée n'est pas révélée officiellement, elle l'est de manière officieuse. Conformément à la loi coréenne sur la réglementation des monopoles et l'équité des pratiques commerciales (ci-après dénommée « la loi »), l'entreprise faisant l'objet d'une enquête, en particulier lors des inspections in situ, doit être informée par écrit des allégations d'infraction portées contre elles et des dispositions applicables de la loi. Tandis que l'enquête se poursuit, l'enquêteur et les personnes visées ne cessent d'échanger et de communiquer. En réponse aux demandes de dépositions, de renseignements et de pièces nécessaires à l'enquête, les personnes visées par l'enquête peuvent toujours contester les allégations et produire des pièces étayant leur position. Aucune réglementation n'empêche les parties d'entrer en contact avec l'enquêteur ou de présenter des arguments au cours de l'enquête.

Les entretiens entre l'enquêteur et les personnes visées se déroulent généralement dans les bureaux de la Commission coréenne de la concurrence, et permettent aux personnes visées par l'enquête de prendre connaissance des violations en question et des enjeux. Les conclusions détaillées de l'enquête, notamment les infractions spécifiques et les éléments ayant servi à les prouver sont révélés officiellement au défendeur par l'intermédiaire du rapport d'examen. Cette méthode permet à la Commission de la concurrence d'offrir aux parties suffisamment d'occasions de soumettre leurs observations sur l'affaire. En outre, pendant la procédure d'audition, la Commission garantit les droits de la défense des parties de diverses façons, par exemple en organisant des audiences préliminaires ou en allongeant les audiences pour satisfaire le besoin des parties de développer leurs arguments.

La Présidente note que le système coréen, par conséquent, n'exige pas de documents écrits en amont, comme au Japon, mais autorise le dialogue tout au long de la procédure. Elle demande ensuite à la délégation de la Suède de commenter les avantages et les inconvénients de son système, qui permet d'accéder aux dossiers des affaires à un certain point de la procédure.

La délégation de la Suède précise que le système national comporte deux volets en vertu de la loi administrative (ci-après « la loi »), qui garantit la transparence des affaires de concurrence. Le droit d'accès des parties au dossier de l'affaire, qui exige des parties qu'elles sollicitent activement l'accès lui-même, constitue le premier volet. Des règles spéciales d'accès s'appliquent aux parties dans le cadre de l'enquête et sont moins restrictives que celles qui régissent l'accès des tierces parties. Les parties peuvent solliciter l'accès au dossier dès le lendemain du jour des perquisitions surprises, ce qu'elles font généralement. Dans les affaires de fusion, les parties demanderont et obtiendront l'accès à un stade très précoce. Si des règles de confidentialité interdisent l'accès, des généralités peuvent néanmoins être divulguées sur les types de documents figurant dans le dossier et les informations qu'ils contiennent (par exemple, il peut être révélé qu'un document est une étude de marché). Toutefois, dans les affaires d'entente ou d'abus de position dominante, l'accès au dossier est octroyé d'une manière beaucoup plus restrictive.

Le second volet consiste dans l'obligation qu'a l'autorité de la concurrence de transmettre aux parties ses observations sur les faits liés à l'affaire. Bien que la loi n'indique pas à quel moment cette transmission devrait avoir lieu, les tribunaux ont clairement fait savoir qu'elle devrait intervenir au plus tard au stade de la communication des griefs. Les observations peuvent donc être transmises plus tôt. Néanmoins, dans une récente affaire, une partie a demandé l'accès au dossier quelques semaines après une vaste perquisition surprise, et cet accès a alors été refusé au motif que l'affaire se situait toujours dans la phase d'enquête. Ce refus a été confirmé par le tribunal. À ce jour, l'autorité suédoise de la concurrence a toujours obtenu gain de cause lorsqu'un recours avait été déposé en justice pour qu'elle donne accès au dossier, bien qu'aucun cas de figure impliquant une tierce partie ne se soit encore présenté. Dans certaines affaires, en particulier celles qui portent sur des fusions, il peut être avantageux pour l'autorité de la concurrence de permettre aux parties de consulter les faits à un stade précoce, car les parties à la fusion ont alors tendance à se montrer plus volontaires dans le cadre de l'enquête, ce qui facilite celle-ci en général. Toutefois, l'évaluation individuelle de chaque demande engendre assurément un volume de travail non négligeable pour l'autorité. En ce qui concerne le contenu du dossier de l'affaire, la loi précise en quoi consiste un document officiel, les documents de travail de l'autorité de la concurrence tels que les notes et mémorandums internes n'entrant pas dans la définition des documents susceptibles d'être demandés.

La Présidente demande ensuite à la Bulgarie de commenter ses premières données d'expérience après l'introduction en 2008 de la communication des griefs, sur le modèle de l'Union européenne (UE), et d'indiquer dans quelle mesure cette évolution a influé sur les techniques et méthodes d'enquête de son autorité de la concurrence.

La délégation de la Bulgarie répond qu'en décembre 2008, une nouvelle loi sur la protection de la concurrence est entrée en vigueur dans le pays, modifiant sensiblement le déroulement et le cadre des procédures de droit de la concurrence conduites devant l'autorité nationale de la concurrence de sorte que le droit des parties à une procédure régulière soit pleinement respecté. Cette loi a instauré pour la première fois le recours à une communication des griefs, document décrivant l'infraction, ses caractéristiques, ses parties prenantes, sa durée et les principes économiques et juridiques qui sous-tendent les allégations portées contre les parties. La communication des griefs a été introduite dans un souci d'alignement sur la procédure adoptée par la Commission européenne aux termes des articles 101 et 102 du Traité sur le fonctionnement de l'Union européenne (TFUE). L'autorité bulgare de la concurrence applique donc désormais à la lettre les principes de régularité de la procédure en place à la Commission européenne. La communication des griefs doit être suffisamment explicite pour permettre aux parties de se défendre contre les griefs formulés par l'autorité de la concurrence. Les destinataires de la communication ont le droit d'y répondre par écrit dans un délai d'au moins 30 jours à compter de sa date de publication. Leur réponse doit inclure toutes les pièces justificatives. Ce droit de réponse fait partie des droits de la défense, la décision de l'exercer ou non revenant au défendeur. Afin de garantir les droits de la défense des parties, la communication des griefs comprend des dispositions explicites informant les parties de leur droit d'accès au dossier de l'affaire, et de leur droit à être entendues par l'organe décisionnel dans le cadre d'une audience, avant que la décision ne soit rendue. Les parties se voient accorder le droit de consulter l'ensemble du dossier de l'affaire, à l'exception des documents dans lesquels figurent des secrets commerciaux ou industriels et de tout document interne appartenant à l'autorité de la concurrence.

Étant donné que la nouvelle loi est entrée en vigueur seulement un an auparavant, les autorités bulgares ne sont pas encore en mesure de rendre compte de données d'expérience particulières concernant la publication de communications des griefs. En revanche, la délégation de la Bulgarie constate une corrélation intéressante entre le recours à ces communications et d'autres instruments de procédure dont dispose l'autorité de la concurrence, comme le pouvoir d'approuver les engagements proposés par les parties. Suite à la décision de publier désormais des communications des griefs, les parties ont commencé dans plusieurs affaires à offrir des engagements à l'autorité, les entreprises reconnaissant alors les allégations portées contre elles et proposant des engagements spécifiques pour mettre fin au comportement

anticoncurrentiel. L'autorité bulgare de la concurrence est donc en train d'élaborer des lignes directrices sur les décisions relatives aux engagements afin d'assurer le plein respect des droits des parties.

3. Possibilités de répondre et de présenter des preuves, et rôle des audiences et des conseillers-auditeurs

Passant au troisième thème de discussion, la Présidente note qu'il est important d'examiner dans quelle mesure les audiences contribuent à la protection et à la promotion des droits des parties préalablement à une décision. Elle demande à la délégation de l'UE d'expliquer le mode de fonctionnement du système d'audiences en Europe.

La délégation de l'UE cite un discours prononcé l'année précédente, lors d'une conférence à Fiesole (Italie), par la Présidente, qui a indiqué que des traditions juridiques différentes pouvaient parfaitement donner lieu à des procédures distinctes et, pourtant, permettre aux parties de bénéficier d'une procédure régulière. Le délégué de l'UE souscrit à cette déclaration, tout en ajoutant que les systèmes d'application du droit par la voie administrative ont récemment été mis en cause lorsqu'il était question de transparence et d'équité. S'il importe de veiller au respect de la régularité de la procédure, il faut néanmoins débattre sérieusement des moyens de renforcer l'équité et la transparence dans ces systèmes. C'est ce que vient de faire l'UE en publiant des lignes directrices relatives aux pratiques optimales. Ces lignes directrices ont pour objet de remédier aux problèmes de procédure propres aux actions en matière d'entente en instaurant des mesures de transparence supplémentaires pour garantir à la fois l'équité procédurale et une plus grande efficacité des enquêtes, grâce à l'explication du déroulement des procédures au jour le jour. Parallèlement, ces lignes directrices complètent le cadre juridique existant et les pratiques optimales en matière d'enquête sur les fusions qui ont été adoptées par la Commission européenne en 2004. Ainsi, les parties savent exactement à quoi s'attendre lorsqu'elles sont soumises à une enquête de la Commission. Les lignes directrices relatives aux pratiques optimales sont utiles pour assurer un traitement uniforme des procédures en matière d'entente et de fusion à l'échelle des différents secteurs, mais offrent également plus de souplesse que la jurisprudence, étant donné que de nouvelles façons d'envisager les pratiques optimales peuvent être proposées.

Le cadre juridique européen considère le droit des parties à être entendues comme un des droits fondamentaux de la défense, au nombre de quatre :

- Le droit des parties à recevoir une communication des griefs ;
- Le droit d'accès au dossier d'enquête de la Commission ;
- Le droit à soumettre des observations par écrit ;
- Le droit à une audience formelle.

Tous ces droits de la défense sont garantis par les conseillers-auditeurs qui, bien qu'étant des fonctionnaires de la Commission, se voient accorder un certain degré d'indépendance une fois nommés. Cette indépendance repose sur le fait que les conseillers-auditeurs ne relèvent pas des services de la Direction générale de la concurrence (DG Concurrence), mais directement du Commissaire chargé de la concurrence. De ce point de vue, les conseillers-auditeurs sont totalement indépendants. Bien qu'ils ne statuent pas sur le fond, ils rendent compte au Commissaire du plein respect ou non des droits de la défense et transmettent un rapport d'audience complet. Leur fonction principale consiste donc à faire observer la procédure, à protéger les droits de la défense des parties et à organiser et présider les audiences, ce qui suppose de concilier le droit des défendeurs à présenter leurs arguments avec celui de la Commission et des parties intéressées à soumettre des observations contradictoires. En outre, les conseillers-auditeurs ont le

pouvoir d'autoriser la participation de certains tiers et témoins, d'accepter la présentation de preuves dans le cadre de l'audience et d'interroger toute personne présente. Ils peuvent aussi être invités à se prononcer sur des litiges entre la Commission et les parties relatifs à des questions telles que le délai de réponse à une communication des griefs, les règles de confidentialité ou l'accès au dossier. La décision sur le fond incombera ensuite au Collège des commissaires dans son ensemble, une décision finale étant susceptible d'appel devant les tribunaux européens une fois adoptée.

Au-delà du rôle des audiences et des conseillers-auditeurs, les mesures de transparence supplémentaires comprises dans la série de pratiques optimales destinées à la consultation du public consistent notamment à :

- *Lancer officiellement une procédure de droit de la concurrence* à un stade précoce de l'enquête et l'annoncer publiquement. Cette pratique est déjà en vigueur pour les fusions et évite que des affaires soient engagées et demeurent en suspens. Après l'ouverture d'une enquête, les parties ont ainsi le droit de savoir si une suite est donnée à l'affaire ou si celle-ci est abandonnée ;

- Autoriser les parties, en plus des droits dont elles disposent déjà en matière d'accès au dossier, à *examiner et commenter les contributions clés* soumises par des tiers, par exemple les versions non confidentielles de plaintes ou autres documents de fond, ce droit étant acquis dès les premières étapes de la procédure ;

- Organiser des *réunions-bilans* (auxquelles on a déjà recours dans le cadre des procédures en matière de fusions) pour donner l'occasion aux parties, à des étapes prédéfinies de la procédure, de s'entretenir avec l'équipe chargée de l'affaire et les hauts responsables de la DG Concurrence, d'être informés des progrès de l'enquête et de discuter des griefs, au bénéfice de la transparence et de l'équité mais aussi dans un souci de gains d'efficacité, dans la mesure où l'examen des griefs avec les parties à un stade précoce permet à l'autorité de la concurrence de rejeter les arguments peu convaincants pour se concentrer sur ceux qui méritent d'être développés ;

- Introduire des mesures de transparence dans les *procédures d'engagement*, s'agissant en particulier des *résultats de la mise en concurrence*.

La Présidente demande ensuite à la Finlande de fournir des précisions sur les procédures qu'elle utilise en remplacement des audiences et sur les modalités concrètes de fonctionnement de ces procédures.

La délégation de la Finlande explique que dans le système national, l'autorité finlandaise de la concurrence instruit les affaires et les porte en justice, le tribunal jouant le rôle d'organe décisionnel. La procédure est écrite, et un élément important sur le plan de la transparence et des droits des défendeurs et des tiers réside dans le droit d'accès aux documents contenus dans le dossier de l'affaire. L'autorité de la concurrence est tenue de publier un document exposant les faits, la procédure étant donc semblable à celle employée dans l'UE, avec la publication d'une communication des griefs. Les parties peuvent alors formuler des observations sur ce document. Les audiences ne sont donc pas institutionnalisées au niveau de l'autorité finlandaise de la concurrence, mais les parties qui le souhaitent peuvent être entendues dans un tel cadre. Cependant, une fois que l'enquête se situe au stade de la procédure judiciaire, des audiences sont organisées. Elles sont publiques et consistent notamment dans l'audition des témoins, tiers et autres parties intéressées. Par conséquent, les audiences font partie du système finlandais, mais sont organisées seulement à partir du moment où l'affaire est jugée devant un tribunal (y compris la Cour administrative suprême).

La Présidente demande ensuite à l'Allemagne d'expliquer dans quelles circonstances le *Bundeskartellamt* (autorité nationale de la concurrence) décide de tenir une audience, étant donné qu'il n'existe pas d'obligation en ce sens, et comment les audiences sont organisées.

La délégation de l'Allemagne répond que l'équité procédurale y est un principe constitutionnel fondamental, dont le droit à être entendu est un élément essentiel, ce que réaffirme expressément la loi nationale sur la concurrence. Le droit à être entendu intervient de manière particulièrement décisive avant qu'une décision défavorable soit prise par l'autorité de la concurrence. Le *Bundeskartellamt* doit présenter les faits et ses conclusions préliminaires aux parties et leur donner la possibilité de soumettre leurs observations sur l'affaire et sur lesdites conclusions. Il s'agit de la procédure normale pour toute décision défavorable, à savoir dans les cas où le *Bundeskartellamt* prononce une interdiction ou impose des amendes (affaires d'entente ou d'abus de position dominante), ou se pose la question de savoir s'il convient de prendre une décision d'interdiction ou d'exiger l'application de mesures de réparation (affaires de fusion). Cette procédure est également valable lorsque des tierces parties sont autorisées à participer à la procédure et la décision de l'autorité de la concurrence est contraire à leur intérêt.

Le droit procédural allemand ne prévoit aucune formalité stricte concernant le droit d'une partie à être entendue, la procédure pouvant être conduite par écrit ou à l'oral, sous la forme de discussions entre les parties et le *Bundeskartellamt*. La portée de l'audience dépend de la complexité de l'affaire, et la décision doit tenir compte de tous les contacts antérieurs entre le *Bundeskartellamt* et les parties. Une audience peut être longue, si les parties ont eu peu de contacts, alors qu'il faudra moins de temps si de nombreux échanges et entretiens ont eu lieu et toutes les questions pertinentes déjà été examinées. Les affaires complexes justifieront généralement une procédure orale, l'absence de cadre rigide permettant d'adapter le système aux besoins liés à la conduite de cette procédure. Les audiences se déroulent entre l'équipe chargée de l'affaire et les parties et ne sont donc pas ouvertes au public, bien qu'à de rares occasions les parties puissent demander une audience publique ou l'autorité de la concurrence tenir d'office une audience de ce type. Afin de s'assurer que les droits des parties sont pleinement protégés, les tribunaux procèdent à un examen rigoureux à la fois de la décision et de la procédure.

La Présidente s'intéresse ensuite à la contribution de la Suisse et demande à celle-ci d'expliquer plus en détail comment fonctionne sa procédure d'audition, en insistant notamment sur l'interrogatoire des témoins par les parties.

La délégation de la Suisse explique que son pays ne dispose d'aucune réglementation particulière concernant les procédures en matière d'entente, la Loi sur la procédure administrative, de caractère général, s'appliquant par conséquent à toutes les procédures menées en vertu de la Loi sur les cartels. Une disposition permet aux parties d'assister aux auditions des témoins et des tiers et de poser des questions supplémentaires. Les parties ont le droit de soumettre des preuves contraires, le cas échéant. Les témoins peuvent être invités de plein droit par l'autorité de la concurrence ainsi que par les parties. Dans les deux cas, les parties sont autorisées à poser des questions supplémentaires. L'audience leur est notifiée au moins 30 jours à l'avance. L'invitation les informe de l'objet et des dates de l'audience, et de leur droit à poser des questions supplémentaires dans le cadre de celle-ci.

La Présidente interroge la Grèce sur le droit des parties à produire des données et éléments de preuve à décharge avant et pendant la phase de la communication des griefs.

La délégation de la Grèce explique qu'une distinction est faite dans le système national, semblable à beaucoup d'autres systèmes d'Europe continentale, entre l'enquête (qui est menée par la Direction générale) et la décision (qui est prise par le Conseil de la Commission de la concurrence). Le Conseil fonctionne à de nombreux égards comme un tribunal. Dans le système grec, le défendeur est autorisé à prendre connaissance de la plainte à un stade très précoce de l'enquête et bien avant la communication des

griefs. En revanche, les parties n'ont accès à aucun autre élément du dossier. Elles ont aussi la possibilité de discuter de l'affaire avec l'autorité de la concurrence dans le cadre d'entretiens informels, et le droit de soumettre des mémorandums ou des observations à n'importe quelle étape de l'enquête. Une fois la communication des griefs publiée, généralement dans un délai de deux à trois mois avant la tenue de l'audience, les parties ont le droit de soumettre une réponse écrite à ce document, d'ordinaire dans les 30 jours suivant l'audience. Une spécificité du système grec réside dans le fait qu'au cours de l'audience, les parties sont autorisées à se contre-interroger mutuellement et à soumettre les témoins et les experts des autres parties à un contre-interrogatoire, méthode qui a bien fonctionné et aidé le Conseil à former sa décision dans plusieurs affaires. Les parties sont alors habilitées à soumettre des contributions après l'audience, dans un délai de 15 jours à compter de celle-ci. Associée aux libres discussions tenues plus tôt, cette procédure facilite davantage l'examen des griefs par l'autorité de la concurrence.

Les parties à une enquête sont averties qu'une action est intentée contre elles par l'intermédiaire, par exemple, d'une demande de renseignements indiquant quels sont l'objet de l'action et le fondement juridique des allégations, et s'il s'agit d'une procédure d'office ou consécutive à une plainte. La partie mise en cause peut alors prendre connaissance de la plainte. Le système grec pèche par l'absence de distinction, dans la législation, entre la plainte elle-même et le droit à en prendre connaissance. Ainsi, la partie défenderesse pourrait théoriquement demander à consulter la plainte un jour après son dépôt. En pratique, néanmoins, l'autorité de la concurrence a tendance à autoriser l'accès une fois seulement que l'enquête a débuté.

La Présidente note que les parties ont souvent la possibilité d'être entendues de manière formelle ou informelle, que les juridictions soient officiellement tenues ou non d'organiser des audiences. Il existe tout un éventail d'échanges possibles entre les autorités de la concurrence et les parties, et un certain nombre de juridictions ont recours à des réunions-bilans ainsi qu'à des audiences officielles.

4. Possibilités de s'entretenir avec des agents des autorités de la concurrence, notamment les décideurs

La Présidente demande ensuite à la délégation du Canada de présenter un exposé d'introduction sur les possibilités offertes aux parties, au niveau national, de s'entretenir avec les agents de l'autorité de la concurrence en charge de l'affaire et avec l'organe décisionnel.

La délégation du Canada souligne que l'équité et la transparence en matière de procédure sont des priorités fondamentales du Bureau de la concurrence (ci-après dénommé « le Bureau »), qui veille à l'application des dispositions civiles et pénales de la Loi sur la concurrence (ci-après « la Loi »). Le Bureau est dirigé par un commissaire de la concurrence, qui a le pouvoir de mener des enquêtes mais pas de prendre des décisions. Si une violation de la Loi est constatée, le Bureau engage une action auprès des tribunaux.

Dans le domaine pénal, le Bureau collabore très étroitement avec le Directeur des poursuites pénales. Les accusations pénales sont notifiées aux « poursuivants », qui portent l'affaire en justice, où les dispositions constitutionnelles visant à protéger la régularité de la procédure s'appliquent à la lettre. L'article 29 de la Loi sur la concurrence comprend une disposition stricte concernant la communication de renseignements confidentiels, laquelle limite la capacité du Bureau à partager les informations dont il dispose. Toutefois, le Bureau s'attache à concilier transparence et protection des renseignements qu'il pourrait détenir de nature confidentielle et sensible sur le plan de la concurrence. Ainsi, malgré l'absence d'obligation quant à cet équilibre, le Bureau fait des efforts importants pour être transparent en associant les parties, en les écoutant, en leur répondant et en débattant avec elles des questions chaque fois que l'occasion se présente au cours de la procédure.

Les règles de fond sont essentiellement énoncées sous la forme de lignes directrices détaillées englobant tous les grands domaines d'activité du Bureau, en particulier ceux des fusions et des ententes entre concurrents. Le Bureau consulte amplement les parties intéressées sur ces lignes directrices et se montre toujours ouvert à d'éventuelles révisions, pour autant qu'elles s'avèrent nécessaires.

C'est dans les aspects informels de la procédure du Bureau en matière de concurrence que peuvent être réalisés les progrès les plus notables. Des entretiens informels sont organisés dès le début de l'enquête, notamment dans le cas des fusions. Il existe aussi une coutume profondément ancrée selon laquelle les parties s'adressent au Bureau avant de déposer une notification de fusion, ce qui montre bien la bonne réputation de l'organisme lorsqu'il s'agit de préserver la confidentialité des informations. Des échanges précoces permettent au Bureau de comprendre les questions dès l'origine et de décider en conséquence de l'affectation des ressources, qui sont limitées, outre le fait que ces contacts permettent aux parties de mieux appréhender les questions sur lesquelles le Bureau concentre ses efforts. La nouvelle procédure en deux étapes de contrôle des fusions, qui est entrée en vigueur en 2009, en offre un bon exemple. Cette procédure est expliquée expressément sous la forme de lignes directrices, qui encouragent les parties à prendre contact avec le Bureau avant de faire enregistrer une opération, voire avant l'envoi d'une demande de renseignements, l'objectif étant de déterminer les enjeux et d'économiser le coût d'éventuelles demandes de production de pièces.

Il incombe avant tout au directeur d'un organisme chargé de faire appliquer le droit de la concurrence d'assurer son engagement en faveur de l'affaire, par exemple en se manifestant lors des grandes étapes de la procédure. Ainsi, les parties disposent d'occasions valables de dialoguer avec le commissaire, qui doit participer à ces entretiens sans idée préconçue. Le Bureau axe ses efforts d'amélioration sur deux domaines. Le premier est celui des déclarations finales ou notes d'information technique. Le Bureau fait appel à des déclarations finales, mais pas de manière généralisée. Bien qu'il faille toujours trouver un juste milieu avec les questions de confidentialité, ce type de déclarations constitue un important moyen d'éclairer les tierces parties sur la façon dont le Bureau mène ses activités. Le second domaine d'amélioration est celui de l'examen des conventions d'expédient. Traditionnellement, on avait recours à une procédure plus formelle comprenant notamment une véritable audience, procédure qui avait tendance à s'allonger considérablement et s'étalait parfois sur plusieurs années. Par conséquent, lorsque le commissaire et les parties convenaient d'un règlement transactionnel du problème de concurrence, la mise en œuvre de ce règlement restait en suspens pendant une durée prolongée. En outre, les ressources du Bureau étaient épuisées. Compte tenu de ces problèmes, une modification de la Loi a été adoptée de façon à permettre l'enregistrement d'une convention d'expédient, et à empêcher toute inquiétude de la part des tiers, qui pourraient avoir l'impression qu'il a été décidé de conserver un minimum d'informations confidentielles. Les tiers ont le droit de contester une convention d'expédient, mais ils doivent savoir si celle-ci les concerne.

En résumé, la transparence et l'équité procédurale sont toutes deux des priorités du Bureau. Il existe un conflit naturel entre la transparence d'une part et la confidentialité d'autre part, mais le Bureau fait tout son possible, en particulier dans le cadre des fusions, pour éclaircir les modalités de fonctionnement de ses procédures. La volonté de s'engager en faveur d'un dialogue constitue l'élément déterminant, car c'est ce qui renforcera l'efficience, l'efficacité et la crédibilité des décisions du Bureau.

La Présidente remercie la délégation canadienne de son exposé et fait observer que la plupart des autorités nouent le dialogue avec les parties pour cerner les forces et les faiblesses de leurs positions. Néanmoins, les milieux d'affaires restent quelque peu sceptiques quant à l'existence d'une réelle volonté de dialogue chez de nombreuses autorités de la concurrence, et ils continuent d'avoir le sentiment qu'une discussion peut avoir lieu mais que les parties s'expriment souvent en vain. La Présidente invite le Comité consultatif économique et industriel auprès de l'OCDE (BIAC) à prendre la parole sur cette question précise.

La délégation du BIAC félicite tout d'abord le Groupe de travail pour le débat sur l'équité procédurale, en soulignant l'importance de ce sujet. Il a été rassurant de constater, pendant la plus grande partie de la table ronde, que les autorités de la concurrence s'accordaient sur le fait que l'équité procédurale garantissait de meilleures décisions et une procédure facilitée. Le BIAC prend note des récentes améliorations intervenues dans un certain nombre de juridictions, en particulier du fait que plusieurs autorités se sont déclarées disposées à dépasser les garanties légales et à faire usage de leur pouvoir discrétionnaire pour tenter d'améliorer l'équité en matière de procédure. Il semble toutefois qu'il faille redoubler d'efforts et progresser davantage. Toutes les parties concernées devraient œuvrer à l'instauration de règles minimales en faveur d'une procédure véritablement équitable, et les autorités de la concurrence devraient utiliser leur pouvoir discrétionnaire pour mettre en place une procédure équitable même dans les cas où la législation ne l'exige pas. Selon le BIAC, la transparence devrait être une composante essentielle des règles minimales de bonne administration. Cela étant, le BIAC souligne aussi que la transparence a différentes facettes. La transparence à l'égard des défendeurs est très différente de celle qui est requise à l'égard d'autres parties prenantes. Le BIAC note que certaines des contributions à la table ronde ne s'interrogent pas suffisamment sur le fait de savoir dans quelle mesure la différence des intérêts des défendeurs ou des parties devrait influer sur les mesures adoptées en matière de transparence. Cela ne signifie pas que les droits des tierces parties et du public ne doivent pas être reconnus, mais les intérêts à protéger sont différents.

Une question fondamentale, qui a suscité plusieurs commentaires très intéressants, réside dans l'ampleur du dialogue noué par l'autorité de la concurrence avec les parties afin que ces dernières sachent bien quels sont les griefs invoqués à leur encontre par la première. Plusieurs autorités de la concurrence ont adopté des procédures distinctes offrant aux parties le droit de connaître le fondement de l'enquête, ainsi qu'un droit de réponse. Le principal commentaire sur cette question consiste à souligner l'importance d'un dialogue précoce. Un certain nombre d'autorités ont expliqué la procédure selon laquelle elles autorisaient les parties à répondre à la communication formelle des accusations portées contre elles, que ce soit par la voie d'un projet d'ordonnance au Japon, d'une communication des griefs dans l'UE ou d'un rapport d'enquête en Corée. Néanmoins, les entreprises s'inquiètent de ce qu'en pratique, la communication formelle des accusations intervient très tardivement dans la procédure, à un moment où les enquêteurs ont déjà plus ou moins arrêté leurs conclusions. Les enquêteurs ont établi les faits, à leur convenance, et autorisent les défendeurs à répondre aux accusations formelles presque par formalité.

Le BIAC inciterait par conséquent les autorités de la concurrence à utiliser leurs pouvoirs discrétionnaires, le cas échéant, pour garantir un haut niveau de participation à un stade antérieur de la procédure. Des commentaires encourageants à cet égard ont été formulés par la délégation de la Suède, qui a indiqué que les parties étaient associées à la procédure dès les premiers stades dans le pays, et par la délégation de la Grèce, concernant la consultation précoce des plaintes. Néanmoins, il conviendrait de reconnaître de façon plus systématique la nécessité de fournir aux parties non seulement une description des allégations dont elles font l'objet, mais aussi un accès aux éléments de fait qui sous-tendent ces allégations avant que toute question préjudicielle soit réglée. Ainsi, les autorités pourront concentrer leurs efforts sur les bonnes questions, prendre des décisions plus éclairées et obtenir de meilleurs règlements pour les entreprises. En ce qui concerne les audiences, la situation a évolué, les parties n'étant plus simplement « entendues » en raison de leur présence dans la même pièce que les enquêteurs. Il faut néanmoins aller plus loin dans ce domaine, en commençant par s'accorder sur ce que l'on considère comme l'objet d'une audience. Selon le BIAC, il devrait s'agir de donner au décideur, ou tout au moins à son mandataire, la possibilité d'évaluer les preuves et, par conséquent, de permettre une procédure très poussée. Il est également encourageant d'entendre des manifestations d'ouverture accrue en faveur de l'audition des témoins dans les juridictions dont la politique normale ne prévoyait auparavant aucune procédure de contre-interrogatoire. Il faut mettre en place des audiences véritables et utiles, dans le cadre desquelles les preuves sont examinées en vue d'établir les faits et de déterminer si les allégations sont étayées par les éléments de preuve. Ces mesures ne devraient pas être considérées comme une menace pour

les autorités compétentes ou le respect du droit de la concurrence, mais comme un moyen d'en garantir l'application en bonne et due forme.

La Présidente ouvre le débat général.

La délégation du Royaume-Uni fait observer que la Commission nationale de la concurrence se distingue légèrement de certaines autres autorités dans la mesure où elle ne poursuit pas en justice les auteurs d'infractions, enquêtant plutôt sur la question de savoir si les marchés fonctionnent correctement ou si une fusion réduit notablement la concurrence. Toutefois, les principes élémentaires de l'équité en matière de procédure s'appliquent de la même manière dans ces cas. La nécessité de l'existence de règles de procédure repose sur l'hypothèse selon laquelle une décision formée à l'issue d'une procédure équitable a des chances d'être meilleure. On constate des paradoxes, cependant, et compte tenu de la disparité des autorités et des systèmes à travers le monde, l'équité peut avoir différentes significations selon le contexte. Il est parfaitement équitable de séparer l'enquête et les poursuites de la prise de décision, et dans le cadre des enquêtes de la Commission de la concurrence, il est fait appel à des groupes de commissaires à temps partiel, auxquels sont associés du personnel d'appui ainsi qu'un Président à temps plein. Néanmoins, ces commissaires participent dès le début à l'enquête, à l'établissement des faits et à la définition des enjeux. Ils entretiennent des relations et supervisent les audiences, auxquelles ils prennent part, organisées pendant l'enquête. Les commissaires ne doivent pas être dissociés de l'enquête et n'interviennent qu'à la fin, au moment de prendre la décision. En réalité, de nombreuses parties se disent préoccupées de ne pas avoir bénéficié d'un accès suffisant à l'organe décisionnel au cours de l'enquête.

C'est ainsi que les choses se déroulent dans le cas de la Commission de la concurrence, mais le concept d'équité peut varier d'une autorité à l'autre. Cela étant, les juridictions ne devraient pas envisager ces règles dans l'idée d'engager une procédure *a minima* pour éviter qu'il soit fait appel de leurs décisions. Il ne s'agit pas simplement de conduire une procédure équitable ; l'autorité de la concurrence doit aussi faire preuve d'équité et les décideurs écouter ce que disent les parties. Les enquêteurs peuvent entendre, et entendent fréquemment, des arguments grâce auxquels ils se rendent compte que la thèse actuelle est fausse, et que le raisonnement de l'autorité doit être revu en conséquence. Si une autorité modifie sa position de cette manière, les parties sont incitées à croire qu'une procédure associant les décideurs à l'établissement des faits n'en est pas moins équitable.

La délégation de la Hongrie prend la parole pour analyser le recours à des entretiens informels avec les parties. Cette question n'est pas évidente en pratique, et ce pour deux raisons. Tout d'abord, la culture juridique hongroise privilégie une rigidité procédurale plus classique, ainsi que le recours à des solutions formelles dans l'administration publique. L'usage du pouvoir discrétionnaire n'est pas entré dans les coutumes juridiques de la Hongrie autant que dans celles d'autres pays. Ensuite, les entretiens informels peuvent faire naître des soupçons de corruption. La corruption est un véritable problème en Hongrie, et il ne suffit pas que l'autorité de la concurrence soit épargnée dans les faits : elle doit aussi donner l'impression d'être « propre ». C'est pourquoi le recours à des échanges informels avec les parties lors d'une enquête en matière de concurrence peut susciter une inquiétude liée au manque de transparence à l'égard des tiers non conviés à ces échanges. Malgré cela, la Hongrie a sensiblement progressé en matière de cadres informels, notamment au stade de la notification préalable des fusions. Des pressions subsistent pourtant afin qu'il ne soit pas recouru à ce type d'échanges informels.

La Présidente répond que les soupçons d'irrégularité ne sont pas propres à la Hongrie et demande au Canada de faire connaître ses observations sur le fait que les échanges informels peuvent fonctionner dans certains pays, mais pourraient être considérés ailleurs comme s'inscrivant dans une problématique plus générale.

Le Canada répond que les tierces parties sont généralement sceptiques à l'égard des échanges informels, et les autorités de la concurrence devraient s'employer à mettre en œuvre une procédure qui ne se limite pas à paraître équitable, mais qui soit équitable par rapport au contexte. D'un point de vue historique, le Canada a fait appel relativement tôt à des audiences dans le cadre de sa procédure de contrôle des fusions, car en cas de non-publication d'une ordonnance dans un délai de 42 jours, les parties avaient le droit de sceller l'opération. Or, cette décision avait pour effet de durcir les relations entre l'autorité et les parties, qui s'articulaient désormais autour de la notion de litige, la procédure étant faussée et l'attention détournée du dialogue « sur le fond » aux tout premiers stades. L'introduction de la procédure en deux étapes de contrôle des fusions s'explique par la volonté d'établir un dialogue précoce et permanent avec les parties. Il convient d'organiser des audiences dans certains cas, mais l'intérêt des audiences formelles peut être mis en doute s'agissant de la phase d'enquête d'une affaire de fusion, c'est-à-dire avant que soit prise la décision d'enregistrer ou non la fusion.

La délégation des États-Unis prend la parole en référence au commentaire formulé par l'UE, selon lequel différents systèmes peuvent prévoir des mesures appropriées de protection de l'équité procédurale et assurer la transparence. Aux États-Unis, la Commission fédérale du commerce (FTC) dispose d'un système administratif, qui comporte des règles détaillées visant à garantir des droits de protection, tout comme le Département de la justice a sa propre série de dispositions en faveur de la protection de la procédure applicables dans le cadre judiciaire. Faisant écho aux remarques faites par la Présidente, le Canada et le Royaume-Uni, les États-Unis soulignent que le principal élément à prendre en compte est l'esprit dans lequel les règles et pratiques sont mises en œuvre. Aussi les autorités de la concurrence devraient-elles n'exclure aucune possibilité, et envisager la procédure dans un esprit de dialogue et être disposées à adapter leur position au fil de la procédure. Cette attitude non seulement profite aux parties, qui ont l'occasion d'expliquer leur position, mais permet aussi aux autorités de mieux cibler leur enquête et de renforcer leurs procédures décisionnelles. La FTC offre en permanence aux parties de multiples occasions d'échanger avec son personnel, sa direction et ses commissaires lors d'étapes successives de l'enquête. Les parties sont encouragées à tirer parti de ces possibilités et ne s'en privent pas.

Les enquêtes de la FTC débutent généralement par une première phase au cours de laquelle le personnel s'efforce de savoir si les preuves d'une violation du droit justifient la poursuite des investigations. Les parties en puissance sont souvent contactées à ce stade et invitées à s'entretenir avec le personnel de l'autorité pour expliquer leur position et tenter de le convaincre de l'inutilité de continuer l'enquête ou de procéder par voie de contrainte à ce stade. De nombreuses enquêtes ne vont pas plus loin, mais si les investigations se poursuivent, les parties peuvent intervenir à nouveau, parfois à de nombreuses reprises, pour s'entretenir avec le personnel chargé de l'enquête, notamment les avocats et les économistes. Il peut s'avérer particulièrement intéressant d'établir un dialogue entre les parties et les économistes, car il peut influer sur la nature et l'analyse des données recueillies par les économistes lors de l'enquête. Par exemple, si les parties s'appuient sur un modèle économique en vertu duquel la pratique visée par l'enquête ne devrait entraîner aucun préjudice concurrentiel, il est très utile de pouvoir le vérifier à ce stade précoce de l'enquête. Il pourrait en résulter une modification des griefs invoqués par l'autorité et des mesures de réparation souhaitables au terme de l'enquête.

S'il semble encore opportun, à ce stade, de poursuivre l'enquête, le personnel de l'autorité recommande au Bureau de la concurrence de donner suite à l'affaire. Les parties sont alors invitées une nouvelle fois à intervenir pour s'entretenir avec les Directeurs du Bureau de la concurrence et du Bureau de l'économie et faire valoir qu'il n'y a pas lieu de porter devant la Commission l'affaire dans laquelle elles sont impliquées. Néanmoins, si le Directeur du Bureau de la concurrence juge qu'il doit y être donné suite en recommandant à la Commission de prendre des mesures d'application du droit, les parties peuvent intervenir afin de s'entretenir avec les commissaires. Il s'agit souvent d'entretiens individuels avec chacun des commissaires, dont le Président. Les parties sont généralement représentées par leur avocat, qui peut être accompagné de responsables de l'entreprise. Elles peuvent également s'attacher, ce qu'elles font

souvent, des experts de l'économie et du secteur chargés de soutenir leur position et de répondre aux questions posées à chaque étape.

Conformément à son règlement, la FTC est tenue d'informer les personnes visées par l'enquête de l'objet et de la portée de celle-ci, de la nature du comportement susceptible de constituer une violation et des dispositions applicables du droit. Comme elles en ont la possibilité, les parties fournissent généralement un résumé de leur thèse sous la forme d'un document appelé « livre blanc », lequel expose leur version des faits ainsi que les arguments juridiques et économiques intervenant dans l'enquête. Elles peuvent faire valoir que la Commission ne devrait pas instruire l'affaire, ou plaider en faveur d'un règlement prévoyant des mesures de réparation bien précises. Elles peuvent convaincre le personnel de la Commission d'abandonner la totalité ou certains éléments de l'affaire compte tenu des lacunes sur le plan des faits ou de l'argumentation. Même en cas d'échec, les parties peuvent obtenir des informations sur les intérêts particuliers de l'autorité, et ainsi mieux affûter leurs arguments.

Le personnel de la Commission peut également, au cours de ces entretiens, convaincre les parties du sérieux et de la solidité de ses arguments concernant un aspect particulier de l'affaire et, ensuite, de la nécessité d'un règlement transactionnel, ainsi que de l'avantage qu'il présente par rapport à la résolution longue et coûteuse d'un litige. La possibilité d'échanger des idées et des informations n'est pas une faveur accordée par les autorités de la concurrence mais un instrument qui contribue à axer l'enquête sur un véritable différend et peut aussi aider les autorités à prendre la bonne décision.

5. Dispositions régissant la durée des enquêtes, la publication des décisions défavorables et l'examen des preuves fournies par les personnes visées par une enquête ou parties à celle-ci

Passant au thème suivant, la Présidente demande à la délégation de la Pologne d'aborder dans son exposé des questions telles que la durée des enquêtes et la publication des décisions défavorables.

La délégation de la Pologne explique que son pays applique aux procédures visant à faire respecter le droit de la concurrence un modèle de nature administrative. Il existe une autorité unique, l'Office de la concurrence et de la protection des consommateurs (ci-après dénommé « l'Office »), chargée des enquêtes, de l'adoption des décisions et de l'imposition des sanctions pécuniaires. La légitimité du mandat de l'Office repose sur la loi relative à la concurrence et à la protection des consommateurs (ci-après « la loi »). Chaque procédure de droit de la concurrence est ouverte par le Président de l'Office, les plaintes servant uniquement à fonder l'analyse.

La durée des enquêtes est stipulée dans la loi. Une enquête se divise généralement en deux phases : i) une *phase analytique*, qui dure entre 30 et 60 jours ; ii) une *phase anti-monopolistique*, qui intervient après l'exposition des griefs aux parties et peut durer jusqu'à cinq mois. Toutefois, la législation autorise la prorogation de ces délais lorsque l'affaire doit être instruite dans sa totalité. La majorité des affaires de fusion sont réglées en deux mois, et selon un calcul récent, le contrôle d'une fusion dure en moyenne 67 jours en Pologne. Cependant, si des informations supplémentaires sont requises, la période de contrôle peut être allongée. Les parties prennent une part active à la procédure ; elles ont accès au dossier à chaque étape de l'enquête et ont également la possibilité de solliciter des entretiens informels avec les agents de l'autorité. Ces entretiens peuvent être organisés à tous les stades de l'enquête. Les parties peuvent aussi demander à être entendues dans le cadre d'audiences formelles, bien qu'elles privilégient en règle générale une procédure écrite. Si des documents sont communiqués dans une langue étrangère, ils doivent être traduits en polonais, et certifiés par un traducteur assermenté, de manière à faciliter le contrôle judiciaire de la décision de l'Office.

La transparence est indispensable à la procédure et tout est mis en œuvre de façon que le principe de transparence s'applique à tous les aspects des activités de l'Office. Par exemple, des lignes directrices ont

été adoptées concernant les modalités de fixation des amendes par l'Office et le programme de clémence. En outre, une assistance téléphonique spéciale a été mise en place l'an dernier en vue de permettre aux entreprises de poser des questions sur ce programme. Tous les trois ans, l'Office prépare un document d'orientation sur sa politique en matière de concurrence, qui est soumis par la suite à l'approbation du gouvernement. Dans ce document, qui est rendu public, figurent les objectifs et les priorités relatives à l'application du droit pour les années suivantes. Avant l'introduction de tout nouvel instrument juridique non contraignant, des consultations et réunions avec le public sont organisées.

La publication des décisions est étroitement liée à la transparence. La majorité des décisions sont publiées au journal officiel de l'Office, que l'on peut consulter sur son site Web. Depuis 2009, une version actualisée de la base regroupant les décisions est disponible. Par ailleurs, la cohérence des décisions est une condition essentielle de l'équité procédurale. La structure de l'Office diffère de celle des autorités de la concurrence d'autres pays européens en ce sens qu'elle est décentralisée, le siège étant situé à Varsovie et neuf bureaux régionaux étant implantés dans le reste du pays. Les services de Varsovie sont chargés de protéger la concurrence sur le marché national, tandis que les bureaux régionaux s'occupent des marchés locaux et régionaux. La vérification de la cohérence des décisions est donc importante, c'est pourquoi chaque projet de décision publié par les personnes chargées de l'affaire, au siège comme dans les bureaux régionaux, est examiné par le service juridique et l'équipe de l'économiste en chef. Il importe que cet examen soit réalisé par des avocats et des économistes ne jouant aucun rôle dans la procédure.

La Pologne conclut que l'équité procédurale est un fondement de l'application du droit de la concurrence et un gage d'efficacité. L'Office continuera d'améliorer ses résultats sans porter atteinte aux droits des parties. La coopération internationale, la mise en commun des pratiques optimales et des données d'expérience ainsi que les enseignements tirés des succès des pairs peuvent s'avérer fort utiles à cet égard.

6. Règles concernant la notification de la clôture d'une enquête ou de l'intervention d'un règlement

La Présidente passe alors au dernier thème de la table ronde et demande à la délégation du Chili de présenter un exposé sur les annonces faites par les autorités de la concurrence lors de la clôture d'une enquête ou de l'intervention d'un règlement avec les parties.

La délégation du Chili explique que le pays compte deux autorités de la concurrence : i) le Tribunal de la concurrence, organe judiciaire doté de pouvoirs décisionnels en matière de concurrence ; ii) la *Fiscalía Nacional Económica* (Procureur économique national, ou FNE), organisme public en charge de la concurrence. Chacun suit des règles et procédures semblables concernant la notification de la clôture ou du règlement d'une affaire. La FNE publie désormais sur son site Web toutes les décisions relatives à la clôture d'une enquête, aux règlements intervenus avec les parties et aux poursuites engagées devant le Tribunal. Jusqu'à la mi-2008, la publication de ces décisions ne constituait qu'un usage. Aucune règle de droit n'obligeait l'autorité de la concurrence à rendre publiques ces informations étant donné que la disposition constitutionnelle sur la transparence, introduite par voie de modification en 2005, n'était pas encore directement applicable. La teneur du document publié peut varier en fonction de chaque affaire. Lorsque la FNE clôt une enquête et décide de porter une affaire devant le Tribunal de la concurrence, elle publie un résumé des motifs justifiant l'engagement de poursuites. Dans le cas d'un règlement, il est courant de publier un bref communiqué de presse, mais pas de divulguer le texte intégral du règlement avant que le Tribunal de la concurrence l'ait approuvé. Lorsque des entreprises importantes sont impliquées, c'est souvent la presse qui rend compte de la clôture de l'enquête ou de l'intervention d'un règlement. Ces procédures peuvent par ailleurs justifier la publication d'un communiqué de presse détaillé par la FNE.

En août 2008, le Chili a adopté une loi régissant la transparence des activités, mesures et actes du gouvernement et autres organismes publics. En vertu de cette loi, un nouveau conseil de la transparence a été créé et le gouvernement a été tenu de rendre publiques toutes ses activités, à quelques exceptions près. Des obligations de transparence active étaient notamment prévues, comme la mise à disposition permanente du public de certaines informations sur les sites Web pertinents. La loi comporte également une obligation de ce type en ce qui concerne l'ensemble des actes et résolutions ayant des incidences pour les tierces parties. Cette disposition oblige donc l'autorité de la concurrence à publier tous les actes et résolutions qui répondent au critère susmentionné, tels que la clôture d'une enquête ou le règlement d'une affaire. Le Tribunal de la concurrence publie sur son site Web, entre autres décisions et résolutions, toutes les approbations de règlement et autres décisions susceptibles de mettre fin à un différend (par exemple l'irrecevabilité des allégations). En général, l'ensemble des documents de procédure et décisions interlocutoires concernant une affaire peuvent être consultés sur le site Web du Tribunal de la concurrence.

En outre, de sa création en 2004 jusqu'à la mi-2008, le Tribunal de la concurrence a eu pour usage de publier sur son site Web ses principales résolutions (dans leur intégralité ou sous une forme résumée). En 2005, date à laquelle la disposition constitutionnelle sur la transparence et la publicité a été introduite, le Tribunal a élargi le champ des documents divulgués. Depuis l'adoption de la loi de 2008 sur la transparence, il est tenu, comme la FNE, de publier certains actes et résolutions, conformément à ladite loi. Le site Web du Tribunal de la concurrence affiche également un lien vers une « salle de presse » où il est rendu compte des procédures pertinentes concernant des affaires importantes.

La Présidente remercie le Chili pour son exposé et invite les délégations qui le souhaitent à formuler des observations finales sur l'équité procédurale.

Le Brésil prend la parole en faisant référence aux inquiétudes évoquées par la Hongrie s'agissant des entretiens informels. De l'avis général, ces entretiens jouent un rôle primordial dans le contrôle des fusions car ils procurent une connaissance approfondie des faits de la cause. Afin d'atténuer le plus possible les inquiétudes liées aux entretiens informels, le Brésil a instauré trois garanties : i) les entretiens informels sont menés par au moins deux agents de l'autorité de la concurrence ; ii) une partie souhaitant bénéficier d'un entretien doit en faire la demande officiellement de sorte qu'il en existe une trace écrite ; iii) l'emploi du temps de tous les commissaires est accessible au public sur Internet.

Le BIAC souligne que sa proposition d'adoption de règles minimales à l'échelle des juridictions ne repose pas sur l'idée d'une liste de contrôle toute faite. L'instauration de règles minimales au sein des autorités de la concurrence devrait tenir compte de la spécificité des différents systèmes et de l'objectif suprême d'équité procédurale. Il est évident, néanmoins, que des règles minimales s'imposent si les autorités veulent éviter que les poursuites soient faussées, ou perçues comme telles, du fait que les enquêteurs sont convaincus d'une argumentation avant d'entendre les parties et prennent alors une décision sur cette base. On s'est inquiété de ce que les audiences pouvaient conduire à un cadre plus axé sur les litiges dès les premiers stades, ce qui ne doit pas être encouragé. Une bonne audience doit compléter et non remplacer une procédure en cours à un stade précoce. Quant aux entretiens informels, le BIAC réitère l'avis selon lequel il s'agit d'un véritable problème qui n'est pas propre au système hongrois. Une démarche souhaitable, qu'un certain nombre d'autorités de la concurrence ont adoptée, consiste à assurer une collecte et une consignation rigoureuses de tous les éléments de preuve et d'information, notamment des éléments de preuve recueillis dans un cadre informel. Notant que la délégation de la Pologne a mentionné le nouveau service national d'assistance téléphonique aux fins de la transparence du programme de clémence, le BIAC exprime son soutien aux autorités de la concurrence qui mènent une politique de clémence appropriée. Par ailleurs, les études sur les moyens de faire converger les procédures de clémence afin qu'elles fonctionnent ensemble d'une manière plus équitable devraient être encouragées. Dans certains cas, une entreprise s'est dénoncée en faisant des aveux complets et sincères, mais s'est vue refuser l'entier bénéfice de la clémence en raison de l'incohérence et de la difficulté des procédures. L'objectif

fondamental des juridictions représentées au Groupe de travail est de veiller au caractère concurrentiel des marchés et de protéger la concurrence au profit des consommateurs et des acteurs du marché. Il convient de souligner que de nombreuses entreprises consacrent beaucoup d'efforts à se conformer du mieux qu'elles peuvent au droit de la concurrence. Il faudrait tenir compte de ces efforts et rendre hommage à leurs auteurs.

La délégation de la Grèce revient sur le commentaire de la Hongrie concernant la corruption, et souligne que si les entretiens informels peuvent éveiller des soupçons, les avantages l'emportent sur les inconvénients. Les entretiens informels sont des instruments très importants, non seulement parce qu'ils sont conformes au droit des parties à être entendues, mais aussi parce qu'ils permettent à l'autorité de la concurrence de développer une vision plus précise et objective de l'affaire. Toutefois, des garanties devraient être mises en place, et les agents des autorités faire du mieux possible pour ne pas susciter d'inquiétude. La procédure adoptée en Grèce ressemble à celle du Brésil, les entretiens informels étant conduits par au moins deux agents de l'autorité. En outre, les parties sont invitées à étayer par écrit leurs déclarations ou exposés, dans un certain délai à compter de l'entretien. Ces documents sont versés ensuite au dossier de l'affaire.

La Hongrie note que les commentaires des autres délégués concordent avec sa vision. En Hongrie, les échanges informels ne constituent pas un problème en soi mais pourraient être perçus comme tel. L'autorité de la concurrence ne verse pas dans de quelconques pratiques contraires à l'éthique, mais des affaires de corruption touchent d'autres pans de l'administration et ces scandales éclaboussent la réputation de tous les organismes publics, y compris l'autorité de la concurrence. Si les échanges informels présentent des avantages évidents dans les enquêtes en matière de concurrence, il peut être difficile de le démontrer eu égard aux enquêtes en matière de corruption menées en arrière-plan dans d'autres domaines. La solution consiste à introduire une certaine transparence dans cette situation, ou à la rendre plus formelle, au risque de se poser la question de savoir si, outre la signification du principe d'équité, celle du caractère formel ou informel d'une procédure ne varie pas elle aussi d'un pays à l'autre.

La délégation de l'Irlande fait des propositions sur la façon d'interpréter au mieux la diversité des cas de figure dans le monde. L'équité procédurale peut s'appliquer dans trois domaines : i) l'enquête ; ii) la prise de décision ; iii) le contrôle judiciaire.

- *Phase d'enquête* : presque toutes les juridictions disposent d'une procédure d'enquête de nature essentiellement administrative. La terminologie diffère d'un pays à l'autre, certains parlant de « phase I » et de « phase II » et d'autres employant les termes « phase préliminaire » et « phase finale », mais toujours est-il que, tôt ou tard, les parties ont le droit d'être informées qu'elles font l'objet d'une enquête. En revanche, on ne sait pas très bien à quel stade cette notification doit intervenir, étant donné que les organismes chargés d'enquêter ont besoin de temps pour examiner les preuves dont ils disposent. On s'interroge également sur les éléments contraignants de la procédure d'enquête. Certains pays exigent une décision de justice en vue de l'obtention de mandats de perquisition, tandis que les autorités de la concurrence d'autres pays peuvent émettre des demandes de renseignements de caractère administratif. En outre, des droits constitutionnels doivent être pris en compte, par exemple le droit de refuser de déposer.

- *Phase décisionnelle* : c'est la phase qui présente le plus d'enjeux, dans la mesure où il existe dans le monde deux grands systèmes d'application du droit, dont l'un est de nature administrative et l'autre de nature judiciaire. Le premier enjeu, commun à tous les systèmes, réside dans le fait que les parties doivent avoir le droit de connaître les éléments invoqués contre elles, de manière à pouvoir communiquer une réponse détaillée avant qu'une décision soit prise. Les questions de divulgation, d'accès au dossier et d'organisation de réunions-bilans sont toutes pertinentes à ce stade. L'enjeu suivant porte sur l'équité en matière de procédure décisionnelle. Si, dans le pays,

cette procédure relève d'un système judiciaire, comme c'est le cas au États-Unis, en Irlande et au Canada, la divulgation et la procédure sont généralement régies par les tribunaux. Cependant, ce n'est pas le cas dans les systèmes administratifs ; aussi des questions liées à l'équité procédurale ont-elles été soulevées. Néanmoins, même dans un contexte administratif, il n'y a pas nécessairement de lien entre les services d'enquête de l'autorité administrative et les services décisionnels. En Europe, par exemple, l'Autorité française de la concurrence dispose d'un service d'enquête qui travaille sans aucun contact avec la chambre statuant sur les affaires. Une semblable séparation existe aux Pays-Bas. Le modèle appliqué par l'UE, modèle que suivent beaucoup de ses États membres, est différent en ce sens que l'enquête et la prise de décision incombent à la même entité. Ce système a suscité un vaste débat en Europe.

- *Phase judiciaire* : quel que soit le système d'enquête et de prise de décision adopté, le contrôle judiciaire fait partie de la procédure dans tous les pays. Les questions de concurrence sont donc, en fin de compte, toujours tranchées par les tribunaux, qui disposent de leurs propres systèmes, lesquels ne font pas de différence de traitement, en règle générale, entre les affaires de concurrence et les autres affaires.

En conclusion, que la procédure soit de nature administrative ou judiciaire, ou encore mixte, le droit de la concurrence ne fait l'objet d'aucun traitement spécial et devra toujours s'inscrire dans le cadre juridique. Ainsi, tout projet de modification d'un système doit tenir compte de ce cadre dans son ensemble, étant donné que la prise de décision en matière de concurrence ne se voit généralement pas accorder une place à part dans la culture juridique.

La Présidente remercie l'ensemble des délégations pour ce débat fort intéressant et clôt la table ronde.

II.

PROCEDURAL FAIRNESS: ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT PROCEEDINGS -- JUNE 2010 MEETING

ISSUES PAPER

1. Introduction

In February 2010 the Working Party N. 3 (WP3) of the Competition Committee held a roundtable on procedural fairness. During that meeting, it was decided that a follow up roundtable on additional procedural fairness topics would be scheduled for the June 2010 meeting. The WP3 Chair asked the Secretariat to prepare a short Issues Paper identifying the key questions related to the topics for discussion that could be addressed in the WP3 roundtable on 15 June 2010. In her letter of 29 March 2010, the Chair invited the OECD members and observer countries to submit written contributions to the Secretariat by no later than 31 May 2010.

The February 2010 roundtable focused on transparency issues in civil and administrative enforcement proceedings (i.e. not criminal procedures) including both merger and non-merger antitrust proceedings (cartels and single firm conduct) and merger review. Specific topics for discussion included transparency relating to the law and agency procedures and practice, party contacts with the agency involved, notice and opportunities to be heard, hearings, publication and timing of decisions and closing statements. These topics raised a great deal of interest among the delegations and the key points to come out of the discussion included:

- All delegations considered transparency and procedural fairness as essential requirements not only for the parties involved in a competition proceeding, but also as a key part of efficient and effective case management by the competition authority.

- Transparency and fairness ensure a better understanding of the facts underpinning the investigation and help improve the quality of evidence and reasoning on which the agency bases its enforcement actions and decisions. They also assist agencies in allocating their resources more efficiently, focussing on cases really worth pursuing.

- Countries have very different enforcement systems. Common law countries tend to have court-based enforcement, while civil law countries tend to have an administrative-based system. Transparency rules are very different in the two systems.

- Two areas were discussed in more detail: (i) how and when the various jurisdictions make the parties aware of the existence of investigations and/or of the objections that the agency intends to raise against them; (ii) the degree to which the parties can interact with the officials handling the investigation and with the decision-making body.

- While all delegations recognised the importance of informing the parties of the allegations brought against them and of the need for the agency to be open to meeting with the parties, the ways in which this is accomplished in practice vary significantly. Some jurisdictions provide ample information on the case, its scope and its timetable at a fairly early stage of the investigation, while other countries postpone that communication to the formal closing of the investigation and opening of formal proceedings. While some countries have an open policy and welcome early and frequent contacts with the parties and a continued dialogue throughout the

proceedings, other countries only offer the parties the opportunity to discuss the case with the agency in a formal setting (e.g. oral hearing), and some countries opt for a more ad hoc approach.

- While differences do not necessarily indicate that one system is more transparent or fair than another, delegations recognised that this is an area where more work could be done by the OECD. Parties involved in multi-jurisdictional cases including different legal and cultural restraints should reasonably perceive the enforcement systems to which they are exposed as fair and transparent.

The follow up roundtable in June 2010 roundtable will include discussion of transparency issues in civil and administrative enforcement proceedings (i.e. not criminal procedures), and will focus on a variety of other topics including requests for information to targets of investigations, the decision making process, settlements, confidentiality, and judicial review.

2. Institutional design and decision making process

Convergence on the institutional design of antitrust enforcement agencies is often considered less important than convergence on the analysis of substantive policy issues. However, when it comes to ensuring that an agency's operations and decision- making processes are perceived to be transparent by the parties involved in the enforcement proceedings and by the public at large, institutional design matters a great deal. If transparency on the substantive, legal and economic standards applied by the agency is important, it is also key that procedures which support the decision- making process are designed to allow parties and third parties to take an active role in the process. Similarly, it is important that institutions are willing to interact openly with the parties involved regarding the legal and economic theories that they may apply, as well as underlying factual concerns in particular cases. In other words, a transparent and fair enforcement process requires a combination of effective institutional design, sound administrative practice and open legal culture.

Various procedures can be set up to encourage the interaction between the investigating team, the decision maker and the parties to an investigation. Similarly, various procedural mechanisms and internal checks and balances can be established to ensure that decision makers obtain comprehensive information and that such information is tested in a rigorous, evaluative process. Countries have adopted a number of measures to promote such sound decision-making processes. While such procedures and mechanisms may, to some extent, have an effect on a speedy resolution of the investigation, they also provide the necessary objective analysis and evidence to support sound competition decisions.

These procedures and mechanisms may include:

- The use of devil's advocate (or peer review) panels, i.e. internal review by a 'fresh pair of eyes' to ensure the theory of harm is supported in theory and in facts;

- The use of specialised economists to review and test the robustness of the economic analysis underpinning proposed decisions;

- The use of specialist legal advisors, such as internal or external legal departments, to help decision-makers;

- The use of external analysts or experts to address specialised / technical issues.

Questions and Issues for Discussion

1. *What procedures does your agency have in place to ensure that decision-makers consider all relevant evidence and remain open to considering different explanations for the conduct under investigation?*
2. *Are independent internal teams used during the decision making process? If yes, how are they composed? At what stage of the investigation do they get involved?*
3. *Is there an independent review of the case by specialised economists or legal teams? When do they become involved? Does the final decision depend on their approval?*
4. *Are there other channels of input directly to the decision-makers, aside from those responsible for the investigation of the case?*
5. *Are outside analysts or experts used to help decision-makers? When do they become involved and to what extent is their input relied on?*
6. *What other techniques or practices has your agency adopted to promote sound decision-making?*

3. Confidentiality issues

Many competition agencies have procedures to protect confidential information by regulating its internal use and public dissemination. These procedures provide companies involved in antitrust proceedings with the assurance of confidentiality they need to cooperate and share information with investigating authorities. Ensuring the protection of confidential information therefore improves the overall quality and public belief in the investigation process and strengthens the credibility of the enforcement decision. Confidentiality rules also prevent the antitrust investigation being used as a means to disseminate competitively sensitive information. Absent these necessary precautions and safeguards, there is a real risk that commercially sensitive information, such as investment plans or strategic goals, are inappropriately disclosed during the investigation process.

The protection of confidential information, however, needs to be balanced against the need to provide targets of competition enforcement proceedings with the evidence forming the basis of the case against them. Therefore, where competition authorities are relying on evidence seized from company A to make claims against company B, to what extent should company A be able to claim broad confidentiality for the documentation which forms the very basis of the argument against company B? Companies may also be concerned that information could be passed to another government agency, and with what happens to the information after the process is over. In order to allay these concerns it is important that competition agencies have clear and transparent procedures for the handling of confidential information.

Questions and Issues for Discussion

1. *How is confidential information defined? Is such information automatically considered to be confidential, or does the party have to identify it as such?*
2. *If confidential information is to be disclosed to other parties or made public, does the party have a prior right to object to the disclosure?*
3. *Are there special procedures available for disclosure necessary to protect rights of defence, e.g. by limiting the disclosure to legal representatives so as to ensure that business secrets are not divulged to competing businesses?*
4. *What are the legal frameworks in force for the protection of confidential information in the context of cooperation between Antitrust authorities? Is the protection afforded similar to that existing in a business's home country?*
5. *How does your agency balance a defendant's right to review and respond to evidence that will be used against it with the need to protect confidentiality?*
6. *How does your agency balance the benefits of public disclosure of ongoing investigations with the need to respect the confidentiality of targets of proceedings and possible effects on their reputation?*
7. *What are the penalties for negligent/intentional violation of confidentiality rules?*
8. *Who will have access to the information handed over? Is it susceptible to further disclosure? What happens to the information once the investigation is over?*

4. Requests for information to targets of investigations

During the course of an investigation competition agencies may issue requests for information (RFI), to parties and to third parties. RFIs may be used alone, e.g. to receive clarification on certain specific issues, or in conjunction with other forms of investigatory tools, e.g. information can be requested during the course of an inspection.

RFIs may be informal and voluntary or they may be formal and mandatory. Formal RFIs will usually be issued by decision, and the company to whom the RFI is addressed is required to respond to it. If a company fails to respond to a formal RFI, or provides information that is incomplete or misleading, fines can generally be imposed. The competition agency will generally have a relatively wide discretion as to what information it wishes to request provided that it falls within the scope of the investigation. However, agencies may not always provide sufficient reasons as to why specific information is required. RFIs usually include requesting the provision of confidential information and business secrets, although the dissemination and treatment of this information will be protected under confidentiality rules (see above).

Questions and Issues for Discussion

1. *What type of RFIs does your agency issue? Do you issue both formal and informal RFIs and how does the format differ?*
2. *What procedures, if any, does your agency have in place to review the requested information once it is received?*
3. *Is the party informed of the theory of the case and reasons for requesting the information?*
4. *Can the party ask for a reconsideration of the information requested and/or deadlines, or appeal to a reviewing office within the agency?*
5. *Do procedures and practices differ if the addressee of the request for information is not a party to the proceedings?*
6. *Are any penalties imposed for failing to comply with an RFI? Please provide details.*

5. Agreed resolutions of enforcement proceedings

Agreed resolutions of enforcement proceedings occur when parties to an antitrust investigation cooperate with investigating authorities by admitting their participation in the competition violation of which they are suspected. Resolving the case with the agreement of the parties involved allows the simplification of the agency's administrative procedure, and the freeing up of resources to concentrate on other cases. Agreed resolutions may also be referred to as settlements or consent decrees.[1] The advantages of agreed resolutions have resulted in an increase in their use to resolve cases. However, concerns are sometimes expressed regarding the lack of transparency in and guidelines about the settlement process; such a situation limits the ability of parties to assess effectively the policy goals of the agency, and therefore has triggered concerns regarding 'certainty' in the process.

5.1 European Commission Settlement Procedure

In 2008, the European Commission introduced a settlement procedure for cartel cases, under which parties admitting participation in a cartel may be able to obtain a 10% reduction in fines.[2] In the European model, the Commission has full discretion to decide whether a case is suitable for settlement and parties do not automatically have a right to settle. If the case is deemed appropriate for settlement, the Commission will inform the parties of the case against them and the relevant supporting evidence. If the parties wish to settle they must acknowledge liability and the duration and scope of the cartel in a 'settlement submission'. The Commission will then decide whether to accept the parties' settlement submission. If it does accept, the procedure will be abbreviated resulting in a decision which is shorter than usual. However, until the decision is taken the Commission retains the right to reject the proposed settlement and revert to the normal process. The European settlement procedure model is designed to achieve procedural savings.

5.2 United States Consent Decree Procedure

A consent decree is a settlement that is contained in a federal district court order. It reflects and agreement between the competition agency and the parties which concludes a lawsuit amicably, avoiding the need to resolve a case by trial. The consent decree requires court approval in government cases,

1 Plea bargaining is only relevant in criminal procedures. See also DAF/COMP(2007)38 on Plea bargaining settlement of cartel cases.

2 See Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (Text with EEA relevance), *Official Journal L 171, 1.7.2008, p. 3–5.*

following a public comment period under the Tunney Act, and has the legal effect of a judgment. The advantages of using a consent decree include (i) reduced enforcement costs, (ii) reduced use of agency staff, (iii) increased speed of relief and (iv) legal certainty. As a result, a large majority of all complaints filed by the Antitrust Division of US Department of Justice are settled prior to trial by consent decree..

Questions and Issues for Discussion

1. *At what stage or stages of an investigation and/or litigation can the parties resolve an enforcement matter by mutual agreement with your agency? Does your agency actively seek to settle cases?*
2. *Are there restrictions on the types of cases that can be settled in this manner? Do parties have an automatic right to settle or does the agency have discretion over which types of cases are suitable for settlement?*
3. *Do parties need to admit guilt before an agreed resolution?*
4. *Can conditions be imposed on the parties as part of the settlement procedure? If yes what type of conditions?*
5. *What is the main motivation for your agency to adopt agreed resolutions? Are factors such as procedural savings and evidence gathering taken into account?*
6. *Does a party lose its right to appeal if it agrees to a settlement?*
7. *Can third parties view or comment on the settlement agreement?*
8. *Does your jurisdiction provide any guidelines on the settlement process and content of any agreement? How long does a settlement last? Can they be terminated or modified? Have any ex-post evaluations on the impact of settlements been carried out in your jurisdiction?*

6. Judicial Review and Interim Relief

As was discussed at the February 2010 roundtable on procedural fairness, in many OECD jurisdictions competition agencies have dual investigatory and prosecutorial roles. In addition to the procedures put in place internally to ensure procedural fairness, decisions by these competition agencies are also subject to legal review by an independent judicial body. This judicial review is a comprehensive assessment of whether or not the conditions for the application of the competition rules are met. In some jurisdictions, competition agencies will be accorded a certain degree of deference by the judicial body due to the agencies 'expert skills' related to complex legal and economic analysis involved in competition cases. However, the scope and focus of the judicial review may still be wide and may include an assessment of the complex economic and factual assessments carried out by the competition agency. The judicial body will then decide if the relevant procedural rules have been adhered to, whether the facts have been accurately found, and whether there is any evidence of misuse of powers, or manifest error of assessment. In other jurisdictions, the competition agency itself has no power to make binding factual and legal conclusions, and must present its case to an independent judicial body to obtain any relief.

In addition to seeking judicial review of a competition authority's decision, parties may also be able to apply to the judicial body for interim relief, i.e. measures suspending the operation of an agency decision pending an appeal. Under European law, for example, three conditions must be fulfilled before interim relief will be granted; (i) a *prima facie* case that the Commission's assessment is unlawful must be established, (ii) there must be the risk of serious and irreparable damage to the party, and (iii) the balance of interests must favour the adoption of such measures. Similar conditions apply in many other OECD jurisdictions.

Questions and Issues for Discussion

1. *At what point in the competition law enforcement process does an independent judicial body have an opportunity to review the conclusions of your agency as to whether a violation of the law has occurred?*
2. *What level of deference does the judicial body grant to the agency's decision?*
3. *If the agency's decision has resulted in a sanction or remedy, what is the effect of the pending judicial review on that sanction or remedy?*
4. *Can the judicial body grant interim relief?*
5. *What is the timing of the review by the judicial body, and are there procedures for expedited review of time-sensitive business transactions or conduct?*

NOTE POUR DISCUSSION

1. Introduction

En février 2010, le Groupe de travail n° 3 (GT3) du Comité de la concurrence a organisé une table ronde consacrée à l'équité procédurale. A cette réunion, il a été décidé d'organiser une nouvelle table ronde lors de la réunion de juin 2010, qui porterait sur d'autres aspects de l'équité procédurale. La Présidente du GT3 a demandé au Secrétariat de rédiger un bref document d'orientation exposant les principales questions qui pourraient être examinées lors de la table ronde du 15 juin 2010. Dans sa lettre du 29 mars 2010, la Présidente a invité les pays membres de l'OCDE et les pays observateurs à transmettre au Secrétariat leurs contributions écrites le 31 mai 2010 au plus tard.

La table ronde de février 2010 a été centrée sur les questions de transparence dans les procédures d'application des lois de nature civile et administrative (c'est-à-dire autres que pénales) concernant les pratiques anticoncurrentielles dans le contexte d'une fusion et dans les autres contextes (ententes et comportements individuels) et concernant également le contrôle des fusions. Parmi les thèmes spécifiques qui ont été examinés, on citera la transparence des réglementations ainsi que des procédures et pratiques des autorités de la concurrence, les contacts des parties avec l'autorité concernée, les notifications et la possibilité d'être entendue, les audiences, la publication des décisions et des conclusions finales ainsi que les délais fixés pour ces décisions et conclusions. Tous ces aspects ont suscité un vif intérêt de la part des délégations et les principaux points suivants sont ressortis des débats :

- Toutes les délégations ont considéré que la transparence et l'équité procédurale étaient fondamentales non seulement pour les parties à une procédure relevant du droit de la concurrence, mais aussi pour une gestion efficiente et efficace des affaires par l'autorité de la concurrence, à laquelle elles contribuent grandement.

- La transparence et l'équité permettent de mieux comprendre les faits donnant lieu à enquête et d'améliorer la qualité des preuves et des motifs qui sont à la base des mesures et décisions d'application des lois prises par l'autorité de la concurrence. Elles aident aussi les autorités de la concurrence à répartir plus efficacement leurs ressources en ciblant les affaires qui justifient véritablement une action de leur part.

- Les pays ont des systèmes d'application des lois très différents. Les pays de common law ont généralement un système d'application des lois à base judiciaire, alors que les pays de droit civil ont généralement un système à base administrative. Les règles de transparence sont très différentes dans les deux cas.

- Deux aspects ont donné lieu à des discussions plus approfondies : (i) comment et quand, dans les différents pays, les parties sont-elles informées de l'existence d'une enquête et/ou des griefs que l'autorité de la concurrence se propose d'invoquer à leur encontre ; (ii) le degré auquel les parties peuvent interagir avec les responsables de l'enquête et avec l'organe décisionnel.

- Toutes les délégations ont reconnu qu'il était important d'informer les parties des allégations portées à leur encontre et qu'il fallait que l'autorité de la concurrence soit prête à rencontrer les

parties, mais les modalités pratiques à cet effet sont très variables. Dans certains pays, une abondante information est donnée à un stade relativement précoce de l'enquête sur l'affaire, sa portée et son calendrier, alors que dans d'autres pays cette information n'intervient qu'au moment de la clôture officielle de l'enquête et de l'ouverture de la procédure officielle. Certains pays se montrent très ouverts et favorables à des contacts précoces et fréquents avec les parties, dans le cadre d'un dialogue permanent tout au long de la procédure, alors que d'autres offrent uniquement aux parties la possibilité de débattre de l'affaire avec l'autorité de la concurrence dans un cadre officiel (par exemple, une audience), d'autres encore optant pour une démarche plus ponctuelle.

- Ces divergences ne signifient pas nécessairement qu'un système soit plus transparent et plus juste qu'un autre. Les délégations ont toutefois reconnu que l'OCDE pourrait étudier de plus près un aspect : les parties à des affaires multijuridictionnelles comportant des restrictions différentes d'ordre juridique et culturel devraient raisonnablement pouvoir considérer comme justes et transparents les systèmes d'application des lois auxquels elles sont soumises.

La nouvelle table ronde de juin 2010 portera sur les questions de transparence des procédures d'application des lois de nature civile et administrative (c'est-à-dire autres que pénales) et elle sera axée sur tout un ensemble d'autres aspects, notamment les demandes d'informations qui sont faites aux personnes qui sont l'objet de l'enquête, la procédure de prise de décision, les règlements transactionnels, la confidentialité et le contrôle juridictionnel.

2. Conception institutionnelle et procédure de prise de décision

La convergence quant à la structure institutionnelle des autorités chargées de l'application des lois sur la concurrence est souvent jugée moins importante que la convergence quant à l'analyse des questions de fond. Mais lorsqu'il s'agit de faire en sorte que l'action et la prise de décision d'une autorité de la concurrence soient perçues comme transparentes par les parties à la procédure d'application des lois et par le public dans son ensemble, la conception institutionnelle est très importante. Certes, la transparence des normes de fond, juridiques et économiques, qui sont appliquées par l'autorité de la concurrence est essentielle, mais il est tout aussi essentiel que les procédures sur lesquelles se fonde la prise de décision soient conçues de telle manière que les parties et les tiers jouent un rôle actif. De même, il est important que les institutions soient prêtes à interagir dans un climat d'ouverture avec les parties en ce qui concerne tant les théories juridiques et économiques qu'elles sont susceptibles d'appliquer que les problèmes qui peuvent se poser dans chaque cas d'espèce à propos des faits. Autrement, dit, une procédure transparente et équitable d'application des lois exige à la fois une conception institutionnelle efficace, de saines pratiques administratives et une culture juridique ouverte.

Diverses procédures peuvent être mises en place pour favoriser l'interaction entre l'équipe chargée de l'enquête, l'organe de décision et les parties à l'enquête. De même, divers mécanismes procéduraux et contrepoids internes peuvent être établis pour que l'organe de décision obtienne une information complète et que cette information soit validée à l'issue d'une rigoureuse évaluation. Les pays ont adopté une série de mesures pour promouvoir cette saine prise de décision. Ces procédures et mécanismes peuvent jusqu'à un certain point avoir un effet sur le délai d'exécution de l'enquête, mais elles permettent également d'obtenir les analyses objectives et les éléments de preuve qui sont à la base d'une saine décision de l'autorité de la concurrence.

Ces procédures et mécanismes peuvent être les suivants :

- la mise en place d'un groupe jouant le rôle de l'avocat du diable (ou d'un groupe d'examen par les pairs), c'est-à-dire d'un examen interne avec un « regard neuf », de façon que les griefs soient validés aussi bien en théorie qu'en fait ;

- l'intervention d'économistes spécialisés pour examiner et valider la robustesse des analyses économiques à la base des décisions envisagées ;

- l'intervention de conseillers juridiques spécialisés, notamment ceux des services juridiques internes ou externes, prêtant leur concours aux organes de décision ;

- l'intervention d'analystes ou d'experts externes pour certaines questions spécialisées/techniques.

Questions à examiner

1. *Quelles procédures votre autorité a-t-elle mise en place pour faire en sorte que l'organe de décision prenne en compte tous les éléments de preuve pertinents et se montre ouvert pour l'examen des différentes explications du comportement faisant l'objet de l'enquête ?*
2. *Fait-on appel à des équipes internes indépendantes pour la prise de décision ? Dans l'affirmative, quelle est la composition de ces équipes ? À quel stade de l'enquête interviennent-elles ?*
3. *L'affaire donne-t-elle lieu à un examen indépendant par une équipe d'économistes spécialisés ou de juristes ? Quand interviennent ces équipes ? La décision finale est-elle fonction de leur approbation ?*
4. *Y a-t-il d'autres canaux d'apport direct d'informations à l'organe de décision, en dehors des responsables de l'enquête ?*
5 *Fait-on appel à des analystes ou experts extérieurs pour aider l'organe de décision ? Quand interviennent-ils et dans quelle mesure s'appuie-t-on sur leur contribution ?*
6. *Quelles autres techniques ou pratiques votre autorité a-t-elle adoptées pour promouvoir une saine prise de décision ?*

3. Confidentialité

Un grand nombre d'autorités de la concurrence ont mis en place des procédures de protection des informations confidentielles en réglementant l'usage interne de ces informations et leur diffusion dans le public. Ces procédures donnent aux entreprises faisant l'objet d'une procédure d'application des lois sur la concurrence l'assurance de la confidentialité dont elles ont besoin pour coopérer et communiquer des informations aux autorités chargées de l'enquête. Préserver les informations confidentielles améliore donc la qualité d'ensemble de l'enquête et la confiance qu'elle peut susciter dans le public, tout en renforçant la crédibilité de la décision d'application des lois. Les règles en matière de confidentialité empêchent en outre que l'enquête soit utilisée pour diffuser des informations sensibles sur le plan de la concurrence. Faute des précautions et sauvegardes nécessaires, on court véritablement le risque que des informations sensibles du point de vue commercial, notamment des plans d'investissement ou des objectifs stratégiques, soient indûment divulguées lors de l'enquête.

Il faut toutefois mettre en balance la protection des informations confidentielles et la nécessité de faire connaître à ceux qui font l'objet d'une procédure d'application des lois dans le domaine de la concurrence les éléments de preuve sur lesquels se fonde l'action intentée à leur encontre. En conséquence, lorsque l'autorité de la concurrence s'appuie sur des éléments de preuve recueillis dans le cadre d'une perquisition auprès d'une entreprise A pour formuler des griefs à l'encontre d'une entreprise B, dans quelle mesure l'entreprise A pourrait-elle légitimement faire valoir que les documents qui sont à la base des griefs à l'encontre de l'entreprise B doivent rester confidentiels ? Les entreprises se trouvent également face à deux autres problèmes : l'information pourra-t-elle être transmise à une autre autorité publique, et qu'adviendra-

t-il de cette information après la clôture de la procédure. Pour remédier à ces préoccupations, il importe que les autorités de la concurrence aient des procédures claires et transparentes pour le traitement des informations confidentielles.

Questions à examiner

1. *Comment est définie l'information confidentielle ? L'information est-elle automatiquement considérée comme confidentielle, ou la partie doit-elle la désigner comme telle ?*
2. *Si des informations confidentielles doivent être divulguées à d'autres parties ou rendues publiques, la partie a-t-elle préalablement le droit de s'opposer à cette divulgation ?*
3. *Y a-t-il des procédures spéciales de divulgation destinées à protéger les droits de la défense, par exemple en limitant la divulgation aux représentants légaux, de façon que des secrets d'affaires ne soient pas divulgués à des entreprises concurrentes ?*
4. *Quel est le cadre juridique en place pour la protection des informations confidentielles dans le contexte de la coopération entre les autorités de la concurrence ? La protection accordée est-elle similaire à celle en vigueur dans le pays d'origine de l'entreprise ?*
5. *Comment votre autorité met-elle en balance, d'une part, le droit pour le défendeur d'examiner et de rejeter des éléments de preuve qui seront utilisés à son encontre et, d'autre part, la nécessaire protection de la confidentialité ?*
6. *Comment votre autorité met-elle en balance les avantages qu'il y a à révéler au public les enquêtes en cours et la nécessité de respecter la confidentialité à l'égard des personnes ou entreprises faisant l'objet d'une procédure et des effets possibles sur leur réputation ?*
7. *Quelles sont les sanctions en cas de violation, par négligence ou intentionnellement, des règles de confidentialité ?*
8. *Qui aura accès aux informations transmises ? Les informations transmises peuvent-elles donner lieu à de nouvelles divulgations ? Qu'advient-il des informations une fois l'enquête clôturée ?*

4. Demandes d'informations adressées aux personnes ou entreprises faisant l'objet d'une enquête

Au cours d'une enquête, l'autorité de la concurrence peut adresser des demandes d'informations aux parties ou à des tiers. Les demandes d'informations peuvent être utilisées isolément, par exemple pour clarifier certains points, ou en conjonction avec d'autres modalités d'enquête, par exemple une inspection.

Les demandes d'informations peuvent avoir un caractère informel et facultatif, ou un caractère formel et impératif. Une demande d'informations formelle sera généralement faite par voie de décision et l'entreprise destinataire devra y répondre. Si une entreprise ne répond pas à une demande d'informations formelle, ou fournit des informations incomplètes ou trompeuses, une amende peut en général lui être infligée. L'autorité de la concurrence aura généralement une assez grande marge d'appréciation pour déterminer l'information qu'elle souhaite obtenir, dès lors que cette information entre dans le champ de l'enquête. Mais l'autorité de la concurrence ne donnera pas toujours des justifications suffisantes quant à la nature de l'information qu'elle demande. Les demandes d'informations couvrent habituellement les informations confidentielles et les secrets d'affaires, la diffusion et le traitement des informations étant toutefois protégés en vertu des règles de confidentialité (voir ci-dessus).

Questions à examiner

1. *Quel type de demandes d'informations votre autorité peut-elle formuler ? Formulez-vous des demandes d'informations aussi bien formelles qu'informelles et en quoi les demandes formelles sont-elles différentes ?*
2. *Sur quelles procédures, le cas échéant, votre autorité s'appuie-t-elle pour examiner après leur réception les informations qui ont été demandées ?*
3. *La partie est-elle informée de l'argumentation de la cause et des motifs des demandes d'informations ?*
4. *La partie peut-elle demander que soient reconsidérés les informations demandées et/ou les délais impartis, ou peut-elle saisir à cet effet une instance de réexamen au sein de l'autorité de la concurrence ?*
5. *Les procédures et pratiques sont-elles différentes si le destinataire de la demande d'informations n'est pas une partie à la procédure ?*
6. *Y a-t-il des sanctions pour défaut de réponse à une demande d'informations ? Veuillez donner des indications détaillées.*

5. Règlement transactionnel d'une procédure d'application des lois

Il y a règlement transactionnel d'une procédure d'application des lois lorsque les parties à une enquête en matière de droit de la concurrence coopèrent avec les autorités chargées de l'enquête en admettant leur participation à la violation du droit de la concurrence dont elles sont suspectées. Régler l'affaire avec le consentement des parties permet de simplifier la procédure administrative de l'autorité de la concurrence qui, grâce aux ressources ainsi économisées, pourra centrer son attention sur d'autres affaires. Le règlement transactionnel peut être également désigné sous d'autres termes, notamment « règlement à l'amiable » ou « jugement d'expédient »[1]. Les avantages du règlement transactionnel font qu'il est de plus en plus utilisé. Mais on a pu parfois s'interroger sur le manque de transparence de la procédure de règlement transactionnel et sur les principes qui s'y appliquent ; en effet, les parties n'ont alors guère de possibilités d'évaluer correctement les objectifs poursuivis par l'autorité de la concurrence, ce qui crée des problèmes de « certitude » du procès.

5.1 La procédure de règlement transactionnel de la Commission européenne

En 2008, la Commission européenne a introduit une procédure de règlement transactionnel en matière d'ententes, en vertu de laquelle les parties reconnaissant leur participation à une entente peuvent obtenir une réduction des amendes de 10 %[2]. Selon le modèle européen, la Commission a toute discrétion pour décider si une affaire justifie un règlement transactionnel, et les parties n'ont pas automatiquement droit à un tel règlement. Si l'affaire est considérée comme pouvant donner lieu à un règlement transactionnel, la Commission informe les parties des griefs invoqués à leur encontre et leur communique les éléments de preuve pertinents. Si les parties souhaitent un règlement transactionnel, elles doivent reconnaître leurs responsabilités ainsi que la durée et la portée de l'entente au moyen de « propositions de transaction ». La Commission décide ensuite d'accepter ou de refuser les propositions de transaction des parties. Si elle les accepte, la procédure est abrégée et aboutit à une décision plus succincte qu'en temps normal. Mais tant qu'elle n'a pas pris sa décision, la Commission peut rejeter les propositions de transaction et en revenir à la procédure normale. La procédure européenne de règlement transactionnel obéit à des raisons d'économies procédurales.

1 La négociation des chefs d'accusation ne s'applique qu'au pénal. Voir également DAF/COMP(2007)38 en ce qui concerne le règlement des affaires d'entente par voie de négociation pénale.

2 Voir le règlement (CE) N° 622/2008 du 30 juin 2008 modifiant le règlement(CE) n° 773/2004 en ce qui concerne les procédures de transaction engagées dans les affaires d'entente (texte présentant de l'intérêt pour l'EEE), *Journal officiel de l'Union européenne L 171, du 1.7.2008,pp. 3 à 5.*

5.2 La procédure de jugement transactionnel aux États-Unis

Un jugement transactionnel est un jugement prononcé par une Cour fédérale de district par voie d'ordonnance. Il consigne l'accord entre l'autorité de la concurrence et les parties réglant à l'amiable un contentieux, ce qui évite le stade du procès judiciaire. Le jugement transactionnel doit être ratifié par la Cour lorsqu'une affaire concerne une autorité publique, à l'issue d'un délai fixé par la loi Tunney, qui permet au public de formuler ses commentaires, et il a tous les effets de droit d'un jugement. Le jugement transactionnel comporte les avantages suivants : (i) un coût plus faible d'application des lois ; (ii) un moindre temps de personnel pour l'autorité de la concurrence, (iii) un règlement plus rapide et (iv) la sécurité juridique. En conséquence, les actions intentées par la Division antitrust du Département américain de la Justice sont en majorité réglées de cette façon avant tout procès judiciaire.

Questions à examiner

1. *À quel(s) stade(s) de l'enquête et/ou du procès, les parties peuvent-elles régler un contentieux par accord amiable avec votre autorité de la concurrence ? Votre autorité de la concurrence mène-t-elle une politique active de règlement transactionnel ?*
2. *Y a-t-il certaines restrictions quant aux types d'affaires pouvant donner lieu à un règlement transactionnel ? Les parties ont-elles automatiquement droit à un règlement amiable, ou bien l'autorité de la concurrence décide-t-elle librement quels sont les types d'affaires qui justifient cette procédure ?*
3. *Les parties doivent-elles reconnaître leur culpabilité avant tout règlement transactionnel ?*
4. *Des conditions peuvent-elles être imposées aux parties dans le cadre de la procédure de règlement transactionnel ? Dans l'affirmative, de quel type sont ces conditions ?*
5. *Quelles sont les principales motivations de votre autorité de la concurrence lorsqu'elle choisit la solution du règlement transactionnel ? Différents facteurs, notamment les économies procédurales et la collecte de preuves, sont-ils pris en compte ?*
6. *La partie à un règlement transactionnel perd-elle ses droits de recours ?*
7. *Les tiers peuvent-ils prendre connaissance du règlement transactionnel ou le commenter ?*
8. *Y a-t-il dans votre pays des lignes directrices concernant la procédure de règlement transactionnel et le contenu de toute transaction ? Combien de temps faut-il pour conclure un règlement transactionnel ? Peut-on résilier ou modifier un règlement transactionnel ? A-t-on dans votre pays procédé à une évaluation ex post de l'impact des règlements transactionnels ?*

6. Contrôle judiciaire et mesures conservatoires

Comme on l'a vu lors de la table ronde de février 2010 consacrée à l'équité procédurale, les autorités de la concurrence de nombreux pays de l'OCDE ont un double rôle d'enquête et de poursuite. En plus des procédures internes visant à assurer l'équité procédurale, les décisions des autorités de la concurrence sont soumises au contrôle d'une instance judiciaire indépendante. Ce contrôle judiciaire consiste en un examen complet destiné à déterminer si les conditions d'application des règles de concurrence ont été réunies. Dans certains pays, l'autorité de la concurrence jouit d'une certaine déférence de la part des instances judiciaires en raison de son expertise dans le domaine des analyses juridiques et économiques complexes que nécessitent les affaires de concurrence. Néanmoins, le champ et l'objet du contrôle judiciaire peuvent être larges et ce contrôle peut comporter un examen des évaluations économiques et factuelles complexes auxquelles a procédé l'autorité de la concurrence. L'instance judiciaire contrôle alors si les règles de procédure applicables ont été respectées, s'il est rendu compte correctement des faits et s'il n'y a pas eu abus de pouvoir ou erreur manifeste d'appréciation. Dans d'autres pays, l'autorité de la concurrence ne peut elle-même tirer sur des points de fait ou de droit des conclusions à valeur impérative et elle est tenue de saisir une instance judiciaire indépendante pour obtenir une quelconque mesure.

Les parties doivent non seulement pouvoir obtenir le contrôle judiciaire des décisions de l'autorité de la concurrence, mais aussi pouvoir saisir une instance judiciaire en vue de mesures conservatoires, c'est-à-dire de mesures suspendant l'application d'une décision de l'autorité de la concurrence en attendant qu'un juge se prononce sur un recours. En droit européen, par exemple, trois conditions doivent être remplies pour que des mesures suspensives puissent être prononcées : (i) un commencement de preuve de l'irrégularité de l'évaluation faite par la Commission doit être apporté, (ii) il doit y avoir un risque de préjudice grave et irréparable pour la partie et (iii) la balance des intérêts doit pencher en faveur de l'adoption de telles mesures. Des conditions similaires s'appliquent dans un grand nombre de pays de l'OCDE.

Questions à examiner

1. *À quel stade de la procédure d'application des lois sur la concurrence, un organe judiciaire indépendant a-t-il la possibilité de contrôler la validité des conclusions de votre autorité de la concurrence concernant une violation du droit ?*
2. *Quel est le degré de déférence que l'organe judiciaire accorde à la décision de l'autorité de la concurrence .*
3. *Si la décision de l'autorité de la concurrence se traduit par une sanction ou une mesure correctrice, quel est l'effet de l'introduction de l'instance judiciaire sur cette sanction ou cette mesure correctrice ?*
4. *L'organe judiciaire peut-il accorder des mesures suspensives ?*
5. *Quel est le délai nécessaire pour le contrôle par l'organe judiciaire et y a-t-il des procédures accélérées pour les opérations ou pratiques des entreprises pour lesquelles le facteur temps est essentiel ?*

AUSTRALIA

1. Overview

In civil enforcement proceedings in Australia, a judge is required to determine whether a person has acted illegally based on evidence presented in open court. Confidentiality is balanced against the need for the respondent to see the case against it, and the interests of justice are paramount. Where information is confidential – however relevant to the defence of the respondent – arrangements can be made by the Federal Court of Australia (the Court) to ensure confidentiality is protected. Such claims however are rigorously tested.

Evidence obtained in an investigation by Australia's competition regulator, the Australian Competition and Consumer Commission (ACCC), is made available to the respondent in legal proceedings brought by the ACCC. Information may however be withheld from a respondent on public interest grounds.

This paper addresses the treatment of confidential information in the context of civil enforcement proceedings and does not consider disclosure requirements in respect of criminal proceedings.

2. Information disclosure in civil pecuniary proceedings

In the Australian legal system, the party bringing the proceedings (i.e. the applicant) bears the onus of proof and the respondent has the right to see and defend the case against it.

Procedural rules ensure that the allegations are set out with sufficient clarity for the respondent to know, and therefore defend, the case against it.[1] For example, the applicant in the proceedings must particularise allegations in a written statement of claim. Further, it may be required by the Court to provide further and better particulars of the matters referred to in its pleadings.

The 'discovery' process ensures that a respondent is not surprised by the case for the regulator/applicant at the time of the court hearing. The Court may require discovery of any document directly relevant to any issue raised on the pleadings (known as 'general discovery') or, more commonly, order discovery based on *categories* agreed as relevant by the parties. Orders for discovery may be made to both the regulator and respondent.

By requiring the provision of a statement of claim (as well as a response to any defence which may be filed) and discovery of relevant documents, the court process allows the respondent to see both the broader context in which proceedings are brought and the specific details of the case. Not only do these processes assist parties to prepare their defence, but from time to time may facilitate early settlement.

In addition to the court based discovery process, respondents to ACCC pecuniary penalty proceedings have a right under Australia's competition and fair trading law, the *Trade Practices Act 1974* (the Act), to

1 *Federal Court Rules.* Please note that all the legislative instruments referred to in this paper are accessible via http://www.comlaw.gov.au/.

request disclosure of documents obtained by the ACCC which tend to establish their case.[2] The ACCC may however refuse to disclose documents containing 'protected cartel information', that is, information given to it in confidence in relation to a breach or potential breach of the cartel prohibitions.[3] The issue of protected cartel information is further discussed below.

2.1 Privilege

The Australian legal system recognises client legal privilege as a fundamental right. Neither the respondent nor the applicant is required to produce legally privileged material in response to a discovery order, or a subpoena, however they may need to disclose the *fact that such advice exists* if the content of the advice would otherwise respond to the discovery order or subpoena. That right exists for both natural persons and corporations.

Natural persons may also decline to give discovery if the provision of documents could expose that person to a pecuniary penalty or criminal sanction. It is reasonably common for natural person respondents not to provide discovery to the ACCC in pecuniary penalty proceedings for this reason.

3. Confidentiality

Confidentiality may be claimed during the investigation and litigation phase. A general overview is provided in relation to both stages.

3.1 Prior to the court hearing

Competition law cases generally draw upon information and documents provided by suppliers, customers and competitors of the respondent. While sensitive deliberations on the circumstances relating to supply or acquisition may be relevant to the Court in assessing alleged anti-competitive conduct, public disclosure of such information may cause damage or distress to the person providing the information.

Confidentiality regimes are frequently employed by parties to antitrust litigation and, to a lesser extent, by witnesses to ensure that sensitive information is only disclosed to persons who need to know. Such persons may include the respondent, lawyers or investigative staff of the regulator. Express undertakings to the Court, the entity providing the information or both as to confidentiality provide the basis for such arrangements.

Additionally, the law imposes certain obligations upon a party receiving documents subject to compulsory court processes. The party will be subject to an implied undertaking not to make the contents public, communicate the contents to a non-party to the litigation, or to use the material for purposes unrelated to the proceedings.[4] Generally this undertaking will expire if the contents of the document are disclosed in open court.[5]

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2 *Trade Practices Act 1974*, section 157.

3 *Trade Practices Act 1974,* subsection 157(1A).

4 *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2008] FCA 391.

5 See for example *Federal Court Rules,* Order 15, Rule 18.

3.2 During the court hearing

The Australian legal system is shaped by the principle of open justice. In accordance with this principle, evidence is presented in open court, reasons for judgment are published and claims for confidentiality need to be solidly grounded.

The Court may restrict or prohibit the publication of information about witnesses and evidence to prevent prejudice to the administration of justice.[6] A confidentiality order can potentially forbid or restrict the publication of particular evidence, or the name of a party or witness.

In practice, confidentiality orders generally do not restrict access to evidence by parties to litigation.[7] Rather they operate to restrict access by third parties to the confidential material.

3.3 Protected cartel information

Australia considers that an effective immunity policy is integral to the detection, deterrence and prosecution of cartels.[8] The Parliament of Australia recognised that whistleblowers/informants would be more willing to provide information about cartel conduct to the ACCC if the protection afforded to that material was enhanced. Accordingly, the Act provides an enhanced degree of protection for information given in confidence to the ACCC relating to a breach or potential breach of the cartel prohibitions.[9]

Broadly, the ACCC is not required to disclose protected cartel information but may do so on the basis of the public interest considerations set out in the Act. For example, the ACCC may disclose protected cartel information to the Court after weighing the following public interest factors:[10]

- the fact that the protected cartel information was given to the ACCC in confidence
- Australia's relations with other countries
- the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation
- in a case where the protected cartel information was given by an informant:
  - the protection or safety of the informant or of persons associated with the informant, and
  - the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future, and
- the interests of the administration of justice.

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6 *Federal Court of Australia Act 1976*, section 50.

7 Noting that material may be accessible on a need to know basis rather than to all persons working for a party to litigation.

8 Under the ACCC's Immunity Policy for Cartel Conduct (July 2009), the first person who confesses their involvement in a cartel and who is not the clear leader in the cartel will be eligible for immunity.

9 *Trade Practices Act 1974,* sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK.

10 *Trade Practices Act 1974*, section 157B.

Further, the Court may require the ACCC to release protected cartel information after weighing the public interest factors above. A refusal by the Court to order the release of protected cartel information may be relevant to whether proceedings are stayed.[11]

If protected cartel information is disclosed to the Court there are limitations on the use of the material in other proceedings. For example, information provided to the ACCC by a foreign regulator which is used by the ACCC as evidence in one case, cannot be used as evidence in private proceedings without either the leave of the Court or agreement of the ACCC. In deciding whether to release evidence for this purpose, the Court and the ACCC would need to have regard to the public interest considerations set out above.

3.4 Penalties for wrongly disclosing information

As noted above, confidentiality obligations may be owed to the Court, a witness and/or a party to proceedings. In such circumstances, wrongful disclosure of confidential information could be viewed as a contempt of court and subject to criminal sanctions. Where the obligation is between individuals only, contractual remedies apply.

In addition, various legal obligations are placed upon the ACCC officials not to disclose information received in the course of their employment where the information was received in confidence. Inappropriate disclosure of such information may result in administrative or criminal sanction.

4. Conclusion

Australian law balances the ability of witnesses to give information to the ACCC in confidence with the respondent's right to see and meet the case against it. This assists the ACCC to obtain the information it needs to conduct – and for the Court to adjudicate – civil enforcement proceedings while affording procedural fairness to respondents.

11 *Trade Practices Act 1974,* section 157D.

CANADA

1. Introduction

As an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act*[1] (the "Act"), Canada's Competition Bureau (the "Bureau") recognizes the importance of carrying out its mandate in a principled and measured manner that promotes confidence in its decision-making and consistency in its enforcement approach.

"Procedural fairness" is a legal concept in Canada that arises from statute and common law. According to the Supreme Court of Canada[2], the duty of procedural fairness is "flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected."[3] Furthermore, "the purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker."[4] Factors deemed relevant to determining the content of the duty of procedural fairness include, among others: the nature of the decision being made and process followed in making it; the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; the importance of the decision to the individual or individuals affected; the legitimate expectations of the person challenging the decision; and the choices of procedure made by the agency itself.[5]

While certain of the practices outlined in this submission clearly fall within the scope of the Canadian interpretation of procedural fairness, others are more appropriately understood as proactive measures adopted by the Bureau to ensure transparency and predictability in its enforcement practices and policies.

2. Overview of Canada's civil competition law regime

The Act is a federal law that contains civil and criminal provisions designed to address anti-competitive business conduct in Canada. The civil provisions deal with competitor collaborations, abuse of dominance and other restrictive trade practices,[6] civil deceptive marketing practices and merger review. With the exception of the deceptive marketing provisions, the civil provisions are included in Part VIII of the Act.[7]

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1 R.S.C 1985, c. C-34.

2 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

3 *Ibid*. at 837.

4 *Ibid.*

5 *Ibid*. at 838 - 840.

6 Other restrictive trade practices include tied selling, exclusive dealing, market restriction, refusal to deal and price maintenance.

7 Pursuant to the request for written contributions for this roundtable [COMP/2010.60], the Act's criminal provisions and the civil deceptive marketing provisions are not addressed in this submission.

Subsection 10(1) of the Act defines circumstances in which the Commissioner may initiate a formal inquiry. Having commenced an inquiry, the Commissioner can apply, in appropriate circumstances, for use of formal powers, such as an order for a person to be examined on oath or solemn affirmation (paragraph 11(1)(a) of the Act), or an order compelling production of documents and information (paragraph 11)(1)(b) of the Act).

The Bureau is responsible for the enforcement of the Act, but has no adjudicative function. Rather, the courts and the Competition Tribunal (the "Tribunal"), a specialized body comprised of judicial members[8] and non-judicial members with expertise in economics and business, have the authority to make a final determination as to whether there has been a violation of the Act and to order remedies that may apply to the conduct in question. The Tribunal also has powers to issue interim orders to provide temporary relief in appropriate circumstances.[9]

During a civil investigation, if the Commissioner believes that there are sufficient grounds to initiate proceedings under the civil provisions of the Act, she can bring an application to the Tribunal.[10] The Tribunal has its own procedural rules,[11] which are similar to those that apply in civil cases before Canadian courts. They include procedural fairness protections, such as the right to be heard, to submit evidence and to respond to the other party's arguments and evidence. While the Tribunal's hearings and decisions are public, procedural safeguards also protect the disclosure of confidential information to the public. The Tribunal's decisions are publicly available on its website.[12]

3. Procedural fairness and transparency in civil investigations

This section provides an overview of certain procedural fairness protections, and proactive transparency initiatives undertaken by the Bureau, in respect of five key aspects of civil investigations: (i) the Bureau's decision-making process; (ii) information requests; (iii) confidentiality; (iv) agreed resolutions of enforcement proceedings; and (v) judicial review and interim relief. As discussed in greater detail below, these protections and initiatives play a fundamental role in ensuring that Bureau decisions are economically and legally sound, while appropriately respecting the interests of the parties throughout the investigative and adjudicative processes.

3.1 Bureau decision-making process

Upon receipt of a merger notification filing or a complaint alleging a violation of the civil provisions of the Act, case teams are assigned to conduct a preliminary examination.[13] Where the Commissioner has reason to believe that grounds exist for the making of an order under Part VIII of the Act, the Commissioner may order the commencement of an inquiry under section 10 of the Act. The existence of an inquiry is a legal requirement for the use of the information-gathering power available to the Commissioner under section 11 of the Act.

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8 Judges from the Federal Court.

9 The Tribunal's interim relief power includes interlocutory and interim injunctions. A discussion of the Tribunal's order-making powers is beyond the scope of this submission.

10 Note that the Bureau is represented in such proceedings by lawyers from (or retained by) the Department of Justice.

11 *Competition Tribunal Rules*, SOR/2008-141.

12 Competition Tribunal's website: http://www.ct-tc.gc.ca.

13 Case teams usually consist of two or more competition law officers, and Bureau economists and a legal advisor from the Department of Justice.

In the course of the preliminary examination and inquiry, the Bureau will pursue various avenues of investigation to obtain relevant information, including information in the possession of complainants, third party market participants (*e.g.*, consumers, competitors, suppliers), and the firm or firms that are the subject of the inquiry. This information is carefully analyzed within the legal and economic framework of the Act, and often with the assistance of external legal and economic advisors, and industry-specific experts, as part of the case assessment process.

A variety of measures ensures that the Commissioner considers robust information and sound analysis in all matters to determine the most appropriate manner to resolve them. In particular, the Commissioner is involved in regular briefings with case teams and experts, and may participate in meetings with the parties at various stages of the inquiry. The merits of pursuing complex matters, which often represent significant investments in Bureau resources, are also debated rigorously by senior managers to ensure that the Bureau develops viable theories of competitive harm and legal strategy before recommending that an order be sought from the Tribunal.

The final disposition of an examination or inquiry depends upon whether the evidence establishes that the elements of the relevant reviewable practice are satisfied or, in the case of merger review, that the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially. If the Commissioner concludes that the evidence is insufficient, the matter is discontinued.

In matters where the Commissioner is satisfied that the evidence supports an application to the Tribunal for a remedy, the Commissioner will, as a matter of practice, normally directly communicate to the parties the concerns regarding the alleged contravention of the Act. The Bureau provides parties that are the subject of a formal inquiry during the investigation with an opportunity to present arguments and evidence to senior Bureau decision-makers, including, in many cases, the Commissioner, and again immediately prior to the filing of a formal application with the Tribunal or the courts to obtain a remedy. These senior-level meetings generally include counsel for the parties, senior officials representing the parties (if a corporate entity) and, at times, economists retained by the parties to conduct an economic impact analysis of the alleged conduct or merger. Bureau counsel and staff present their views of the evidence to the parties, including the Bureau's economic analysis. While these meetings do not always resolve a particular case, they assist in understanding the other side's position and can help to narrow areas of contention likely to be litigated before the Tribunal or the courts.

3.2 Information requests

In all cases, the Bureau strives to maintain a consistent and appropriately disciplined approach to information requests that enhances the predictability and transparency of its enforcement activities. The Bureau regularly engages in discussions with parties and their counsel prior to making a request for information; however, the nature and timing of these discussions depend, to some extent, on the particular conduct at issue, the provision(s) of the Act under which the conduct is being investigated, and whether the case is at the examination or inquiry stage.

While the Bureau is equipped with formal tools to compel the production of information (described below), the Bureau can also gather information through informal, voluntary information requests. Voluntary information requests are often used in merger reviews, as well as in examinations under the competitor collaboration and restrictive trade practices provisions of the Act. Decisions as to whether to use formal or voluntary information-gathering techniques are made on a case-by-case basis depending on the circumstances, although the Bureau often uses both techniques in the same matter.

3.2.1 Formal information requests

Bureau officers and counsel for the Commissioner work closely together to produce clear and targeted orders for the production of documents, written answers or testimony. The Act contains safeguards that apply to information submitted in response to formal, court-authorized information requests. Section 19 of the Act establishes a mechanism by which a person ordered to produce a record may raise claims of solicitor-client privilege before the courts. Where a claim of solicitor-client privilege is made, the record is sealed in a package and placed in the custody of a person deemed acceptable under subsection 19(3) of the Act, pending judicial review of such claim(s). Further, subsection 12(3) of the Act affords persons ordered to attend an oral examination and persons whose conduct is being inquired into, with the right to be represented by counsel. A person whose conduct is being inquired into and that person's counsel are also entitled to attend the examination, subject to certain exceptions (subsection 12(4)).

3.2.2 Merger review: supplementary information requests

Particularly with respect to information requests contemplated in the context of merger review, the Bureau's *Merger Review Process Guidelines* promote early dialogue and cooperation between the parties and the Bureau to enhance the efficiency and effectiveness of the merger review process, as well as transparency to the parties. The Guidelines encourage parties to enter into discussions with the Bureau prior to, or as soon as possible after, submission of a merger notification. The purpose of these early discussions is to assist Bureau officers in identifying issues that could require further examination, and to dispense expeditiously with those that do not. The Guidelines also confirm that Bureau officers will communicate preliminary views on potential competition issues as soon as possible within the statutory initial 30-day review period.

During this initial period, the Bureau may issue a so-called "supplementary information request", or "SIR", when a proposed transaction raises significant competition issues and additional information is required to complete a review. While not legally required to do so, prior to issuing a SIR, the Bureau will generally provide a draft to the recipient party and engage in dialogue with that party's counsel regarding the information requests set out therein. The principal purposes for this pre-issuance dialogue include ensuring that the party understands the information request; identifying confidentiality concerns; determining whether there are sources and forms of information that may be more directly responsive to the Bureau's concerns; and ascertaining whether there are any other issues that might impair the ability of the party to comply with the SIR as a result of, for example, ambiguities or inconsistent terminology. The Guidelines also describe voluntary measures that the Bureau will take to limit the number of persons who must be searched, the time period the Bureau generally applies to documents for establishing their relevance to a merger review, and information that must be supplied in response to a SIR.

The Guidelines have also introduced an internal appeal procedure for parties who wish to contest the scope of a SIR or to contest the Bureau's decision that a party's response to a SIR is incomplete. All of these measures promote limiting the burden on parties in responding to a SIR so that it is no greater than necessary, while ensuring that the Bureau is able to obtain the information required to conduct its review in a timely way in the public interest.

4. Confidentiality

4.1 Protection of confidential information during examinations and formal inquiries

The general policy of the Bureau with respect to confidentiality is set out in the Bureau's *Information Bulletin on the Communication of Confidential Information under the Competition Act* ("Confidentiality Bulletin").[14]

Subsection 10(3) of the Act provides that inquiries must be conducted in private, while section 29 protects the disclosure of information that is provided to or obtained by the Bureau in the course of executing its mandate. Specifically, section 29 protects:

- the identity of any person from whom information was obtained pursuant to the Act;[15]
- any information obtained pursuant to the Commissioner's formal information-gathering powers;[16]
- whether notice has been given or information supplied in respect of a particular proposed transaction;
- any information obtained from a person requesting an advance ruling certificate;[17] and
- any information provided voluntarily pursuant to the Act.[18]

Subsection 29(1) includes exceptions whereby the Commissioner may communicate confidential information to a Canadian law enforcement agency or for the purposes of the administration or enforcement of the Act. The communication of confidential information usually takes place in the context of advancing an inquiry under the Act or ensuring that a matter that falls outside of the Bureau's mandate, including a possible violation of the Canadian *Criminal* Code or a regulatory statute, is addressed by the appropriate authorities. The Act also authorizes the Commissioner to communicate specific information to the Minister of Transport or the Minister of Finance if the Commissioner receives a formal written request for information. However, the Act restricts these Ministers' use of the information to specific purposes pertaining to their legislative mandates, to regulate transportation undertakings and financial institutions, respectively.[19]

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14 Available online at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01277.html.

15 Under Canadian common law, this protection includes information that could identify such a person.

16 Formal powers include: orders under section 11 of the Act to obtain information from persons who have or are likely to have information that is relevant to a matter under inquiry; search warrants under sections 15 and 16 of the Act; and notifications for mergers meeting certain financial thresholds under section 114 of the Act.

17 An advance ruling certificate ("ARC") may be issued by the Commissioner to a party or parties to a proposed merger transaction who want to be assured that the transaction will not give rise to proceedings under section 92 of the Act. Section 102 of the Act provides that an ARC may be issued when the Commissioner is satisfied that there would not be sufficient grounds on which to apply to the Tribunal for an order against a proposed merger. The issuance of an ARC is discretionary. An ARC cannot be issued for a transaction that has been completed, nor does an ARC ensure approval of the transaction by any agency other than the Bureau.

18 *Competition Act*, R.S.C. 1985, c. C-34, paras. 29(1)(a)-(e).

19 *Competition Act*, R.S.C. 1985, c. C-34, s. 29.1 and 29.2.

Pursuant to the Government of Canada's *Values and Ethics Code for the Public Service* (the "Code"), public servants have an obligation to not knowingly take advantage of, or benefit from, information obtained during the course of their official duties if that information is not publicly available. Disclosure of information contrary to subsection 29(1) of the Act would be a breach of this Code obligation, and could result in disciplinary action up to, and including, termination of employment. Such disclosure could also be considered as wrongdoing in the workplace and may be reported to, and considered by, the federal government's Public Service Integrity Officer.[20] Finally, where disclosure of information covered by section 29 confers an advantage or benefit of any kind on a public servant, this disclosure may be considered an offence under paragraph 121(1)(c) of Canada's *Criminal Code*, punishable by imprisonment for a term not exceeding five years.

Once an examination becomes a formal inquiry under the Act, disclosure of certain information is required in particular circumstances. Specifically, subsection 10(2) of the Act provides that, in response to a written request by a person whose conduct is being inquired into or any persons who have applied pursuant to section 9 to initiate a formal inquiry, the Commissioner shall inform that person as to the progress of the applicable inquiry. Also, pursuant to section 28 of the Act, the Minister of Industry may require the Commissioner to provide an interim report on the status of any formal inquiry.

In order to obtain a court order for the production of documents, testimony or written answers under section 11 or a search warrant under section 15 of the Act, the Commissioner is required to disclose sufficient information in a written application to satisfy a judge that the order should be issued. Such applications often require the disclosure of confidential information to the judge reviewing the application. The target is typically entitled to obtain this disclosure from the court file, although access to some confidential information may be restricted by a sealing order, where, for example, disclosure of the application would compromise the identity of a confidential informant or compromise the nature and extent of an ongoing investigation.

With respect to disclosure of information to parties who may be the subject of Tribunal proceedings, the Bureau takes steps to ensure that a target in a civil investigation has the right to review and respond to evidence that is as complete as possible, while respecting the need to protect the confidentiality of information in the Bureau's possession. The Bureau typically provides targets of civil investigations with an overview of the allegations against them, and an opportunity to respond to them as early as possible during the investigative process.

To comply with the requirements of the Act, the Bureau will not generally comment publicly on an ongoing investigation unless it has been made public through another source,[21] or the parties consent to the Bureau making a public statement. The Bureau recognizes that greater transparency helps to inform the public about the Bureau's work and encourages compliance with the law. Accordingly, the Bureau strives to provide meaningful guidance to the public, when appropriate, including by way of technical backgrounders that explain the Bureau's analysis of a particular investigation and the reasons underlying its final conclusions. The Bureau will typically allow the party or parties to review the technical

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20 The Office of the Public Sector Integrity Commissioner of Canada is an independent agency of Parliament. The Office offers a confidential and independent mechanism for public servants or members of the public to disclose potential wrongdoing in the federal public sector. The Office reviews disclosures of wrongdoing and reprisal complaints, conducts investigations as needed and makes recommendations for corrective measures.

21 Examples of other sources include an application to the Tribunal and a merger review that has been referenced by the parties in a press release or public securities filing.

backgrounder shortly before its publication in order to identify any confidential information that, in their view, should be removed and to correct any factual errors that, in their opinion, should be addressed.[22]

Other ways to announce the Bureau's findings include public statements (*e.g.*, news releases) that are available on the Bureau's website, and the Bureau's Annual Report to Parliament.

4.2 Protection of confidential information before the courts or the competition tribunal

In the case of formal proceedings before the courts or the Tribunal, when it is necessary to use confidential information, efforts to protect the information from disclosure will be taken if such action does not hinder the administration or enforcement of the Act. Measures include the use of sealing orders, confidentiality orders, confidential schedules to public documents, and *in camera* proceedings. These measures are ultimately under the control of the Tribunal or the courts, and necessarily subject to the generally public nature of the proceedings. Any such measures, as designed by the Tribunal or the courts, are necessarily informed by the fundamental concern that respondents have an opportunity to answer the case against them.

5. Agreed resolutions of civil enforcement proceedings

The Commissioner's approach to agreed resolutions under the Act is described in the Bureau's *Conformity Continuum Information Bulletin* ("Conformity Continuum").[23] The Conformity Continuum can best be understood as a system of compliance and enforcement instruments designed to complement one another and work interdependently to promote conformity with the Act.

Although the Conformity Continuum places emphasis on providing the business community with knowledge and tools to comply with the Act, where a remedy to a breach of the Act cannot be achieved by a consent agreement or, in limited circumstances, an informal compliance measure, the Bureau will not hesitate to apply to the Tribunal for an appropriate remedial order in a civil matter.

In circumstances in which the actions at issue represent less serious contraventions of the law, matters may be resolved on a consensual and less formalistic basis. For example, the Bureau may accept an undertaking from the party as an alternative to pursuing the investigation. Undertakings would typically be accepted in matters involving infrequent and inadvertent contraventions of the Act by cooperative parties willing to offset the damage to the marketplace.

Section 105 of the Act also permits the Commissioner and a party to sign a consent agreement with respect to matters under Part VIII of the Act. The consent agreement may then be filed with the Tribunal and, upon registration, has the same effect as if it were an order of the Tribunal.[24] The Act specifically contemplates the rights of third parties in the context of registered consent agreements. Pursuant to subsection 106(2) of the Act, a person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied.

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22 While consideration will be given to the comments of the party or parties prior to the publication of the technical backgrounder, the Bureau will make the final determination regarding the content of that document.

23 Available online at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01750.html.

24 Neither the Act nor the *Competition Tribunal Rules*, SOR/2008-141, places a time restriction on when a consent agreement may be filed with the Tribunal.

Factors that the Bureau may consider when assessing the propriety of a consensual resolution include: (i) the economic impact of the conduct under review; (ii) the pervasiveness of the conduct in the industry under review; (iii) the incentive or ability of the party to maintain its market power; (iv) the conduct of the party and case history; and (v) the level of general and specific deterrence sought. The Bureau determines the most appropriate response based on factors that are relevant to the circumstances at hand. The objective is to select the most effective and efficient instrument to address the specific situation and achieve lasting conformity to promote the public interest in competitive markets.

6. Judicial review and interim relief

The Act grants the Commissioner the power to make certain administrative decisions under the Act, such as causing an inquiry to be made (section 10) or discontinuing an inquiry (section 22). These types of decisions may be subject to judicial review. In this regard, the courts have stated that they will defer to such discretionary decisions in the absence of bad faith on the part of decision-makers, the exercise of discretion for an improper purpose, or the use of irrelevant considerations.[25]

Beyond these certain decisions of a purely administrative nature, and as discussed above, Canada's competition law and enforcement system reflects a bifurcated model: the Bureau has no adjudicative function, and may only secure formal remedies through proceedings before the courts or the quasi-judicial Tribunal. In respect of civil matters, the Commissioner conducts investigative[26] and enforcement functions (including acting as a plaintiff in matters where she has filed an application for an order before the Tribunal), while the Tribunal performs the adjudicative function.

The Tribunal's decisions, whether final or temporary, are subject to appeal to the Federal Court of Appeal. Each of the Commissioner and the party or parties subject to a Tribunal order may seek to appeal a decision of the Tribunal; however, an appeal on a question of fact is only possible with leave from the Federal Court of Appeal. The Federal Court of Appeal's decision may be further appealed, with leave, to the Supreme Court of Canada.[27]

Proceedings before the Tribunal and courts are transparent, while providing the reasonable degree of confidentiality with respect to competitively sensitive information deemed appropriate by the adjudicator. The involvement of judicial members of the Tribunal in civil matters[28] ensures appropriate attention to procedural fairness considerations. Overall, the Canadian adjudicative structure provides a high level of independence, while at the same time ensuring some degree of accountability in the performance of this function through the judicial appeal process.

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25 *Charette v. Commissioner of Competition*, 2003 FCA 426; *Cinémas Guzzo Inc. v. Canada (Attorney General)*, 2005 FC 691, aff'd 2006 FCA 160; *Ashley v. Canada (Commissioner of Competition)*, 2006 FC 459; *Nova Scotia (Attorney General) v. Ultramar Canada Inc*., [1995] 3 F.C. 713 at paras. 62-63, 65.

26 In respect of criminal matters, investigations are carried out by the Bureau, while prosecutions are undertaken by the Director of Public Prosecutions of the Federal Prosecution Service, who has independent discretion to determine the sufficiency of evidence and whether a prosecution is in the public interest. Adjudication is before the superior courts of the provinces or the Federal Court of Canada.

27 Under section 28 of the *Federal Courts Act,* the Federal Court of Appeal also has jurisdiction to judicially review decisions or orders of a judicial or quasi-judicial nature made by the Competition Tribunal.

28 Or, in criminal cases, judges.

7. Conclusion

Procedural fairness protections in the Act and proactive measures undertaken by the Bureau to enhance transparency in its practices and policies are key considerations for the Bureau in executing its enforcement mandate and promoting the legitimacy of its enforcement decisions.

The Bureau is involved in ongoing efforts to find new ways of enhancing even further the transparency and predictability to stakeholders, both through internal scrutiny of existing practices and procedures, and through various collaborative initiatives with external groups, including the Canadian Bar Association, and international dialogue, including this one undertaken by the OECD.

CHILE

1. Introduction

The Fiscalía Nacional Económica (hereinafter, the "FNE" or the "Agency") is an independent government competition agency in charge of detection, investigation and prosecution of competition law infringements, issuing also technical reports and performing competition advocacy activities.

The Competition Tribunal ("Tribunal de Defensa de la Libre Competencia", hereinafter, the "TDLC" or "Competition Tribunal") is the decisional body having exclusive jurisdiction over competition law and adjudicating in both adversarial procedures (such as cartels or dominance abuses) and non-adversarial ones (such as mergers).

The TDLC's rulings are subject to appeal before the Supreme Court which reviews the factual basis of the cases and the applicable law. The Competition Act is Decree Law N° 211, enacted in 1973 and its amendments[1].

The following insights represent the joint opinion of both the FNE and the TDLC unless otherwise stated. Each body complies with procedural fairness duties within its corresponding field or stage of the case.

2. Q&A

2.1 Decision making process[2]

2.1.1 What procedures does your agency have in place to ensure that decision-makers consider all relevant evidence and remain open to considering different explanations for the conduct under investigation?

The TDLC is legally bound to consider all the evidence gathered in the case to be decided, and must take care that a due process of law is carried on in every occasion. All parties involved have equal right to present their evidence and their arguments. Counterfactual evidence and alternative scenarios to the alleged anticompetitive practice are always considered by the TDLC in its decisions.

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1 The main amendments of the Competition Act in recent years have been Law N° 19.911/2003 which established the TDLC and Law N° 20.361/2009 which reinforced the law against cartels.

2 The FNE does not have a direct involvement in the "Decision Making Process", if it is understood as the outcome of an adversarial judicial process. However, the FNE intervenes in the investigation phase, conducting the investigations and collecting evidence subject to the administrative law. Once an investigation is finished, the FNE may submit charges against the defendants or close the case and file the records. If it submits charges, the FNE prosecutes the case in the adversarial procedure before the Competition Tribunal, representing the public interest, but in equivalent terms as any other party, with no particular procedural privileges. The TDLC does not have the power to initiate a procedure *ex – officio*.

2.1.2 Are independent teams used internally?

Being a judiciary body, the TDLC acts independently from the FNE –the body in charge of the investigation- and from any other authority. Thus, its decisions are based exclusively on the work of its judges and staff. Hence, independence is guaranteed by a functional division of tasks between the two institutions.

2.1.3 Is there an independent review of the case by specialized economists?

Two out of the five judges of the TDLC are economists who participate actively –and jointly with the other three judges, which are lawyers- in the discussion and drafting of the Tribunal's decisions. The *amicus curiae* institution is not used in Chile. Nevertheless, (a) in non-adversarial procedures any person interested in filing with the TDLC an opinion/comment on the matters being discussed in a specific case can do so, and (b) All non-confidential economic opinions/reports/data issued by economists or expert witnesses acting on behalf of the parties involved in a case are published in the TDLC's website for public scrutiny and academic discussion[3].

2.1.4 Are there other channels of input directly to the decision-makers?

All decision making carried on by the TDLC is based exclusively on the evidence gathered, filed and produced in a due process of law.

2.1.5 Are outside analysts or experts used to help decision-makers?

The parties may file with the TDLC the opinion of experts or analysts as documentary evidence, and the TDLC may appoint an expert in case it deems it necessary.

2.1.6 What other techniques or practices has your agency adopted to promote sound decision-making?

The TDLC and its members are permanently involved in training programs both in Chile and abroad. OECD and ICN guidelines, along with up-to-date legal and economic literature are also studied and analyzed when discussing and drafting a decision.

2.2 Confidentiality

2.2.1 How does your agency balance a defendant´s right to review and respond to evidence that will be used against it with the need to protect confidentiality?

The FNE during the investigation and the TDLC during the trial try to balance the defendant´s rights of defense with the need to protect confidentiality by making available public versions of sensitive confidential information.

2.2.2 Are there special procedures available for disclosure necessary to protect rights of defense, e.g. by limiting the disclosure to legal representatives so as to ensure that business secrets are not divulged to competing businesses?

Yes. Public versions must be made of all confidential/reserved documents. These public versions must have enough information available so that an adequate legal defense is possible. The TDLC decides

[3] See, in general, http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?GUID=&ID=341 and, i.e., http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=1829&GUID=.

whether the public version is sufficient. If it's not, the Tribunal will declare that the information be made available to the parties.

2.2.3 How is confidential information defined?

The law uses two different concepts. When it states that the information is reserved, it means that only the parties of the investigation or trial can have access to it. When the law states that the information is confidential, only the party that submitted it, can access it, along with the FNE and the TDLC. The issuing and submission of a public version can be order with respect to both confidential and reserved information.

2.2.4 What rules apply to the protection of confidential information obtained from parties by your agency?

Confidential information obtained by the FNE can be declared reserved or confidential *ex-officio* or by request of the affected party. The rule regarding confidentiality of the information when this is obtained by the agency can be found in letter a) of article 39 of DL 211. When the information is presented to the Competition Tribunal, it can also be declared reserved. The rule can be found in Tribunal´s Internal Regulation N° 11/2008 and general applicable civil procedural rules[4].

2.2.5 Is such information automatically considered to be confidential, or does the party have to identify it as such?

When the information is submitted to the FNE, it can be declared confidential/reserved *ex-officio* or at the request of the party. When submitted to the Competition Tribunal, the affected party must request that the information be declared confidential/reserved. The Tribunal will decide if it declares the information to be confidential/reserved if it finds that it may be detrimental for the party that submits the information.

2.2.6 If such information is to be disclosed to other parties or made public, does the party have a prior right to object the disclosure?

If the information is presented voluntarily, such party has the right to request the information to be declared confidential/reserved. If the Tribunal denies such request, then the affected party can withdraw the information. When the information is not submitted voluntarily to the Tribunal, the party can also request it to be declared confidential/reserved, request that will be decided by the Tribunal. If the Tribunal denies the request, the information is deemed to be public.

When the information is requested by the FNE, it can be declared reserved/confidential ex-officio or at the request of the party. If such motion is denied, then the affected party can challenge the decision before the same authority. This is not expressly established in DL 211, but it´s a general rule that applies to all public entities.

According to the Transparency Act[5], which applies to the acts and activities of administrative bodies such as the FNE, as a general rule, administrative acts, records and documents should be public. However, this Act considers exceptions that can be argued against a requirement of publicity, such as the protection of the efficiency of the investigation. Private parties who may be harmed by publicity requirements may also object such a requirement if this publicity affects their commercial interest.

4 See http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?GUID=&ID=328.

5 Law N° 20.285/2008 (Transparency Act).

2.2.7 How does your agency balance the benefits of public disclosure of ongoing investigations with the need to respect the confidentiality of targets of proceedings and possible effects on reputation?

The agency is very conscious of the risks and possible effects of public disclosure of information for private parties. Its policy is to protect as much as possible the confidentiality and reputation of the investigated parties, as long as it doesn´t interfere with the agency´s duty to prosecute illicit activities. According to section 39 a) the whole investigation period may be kept secret.

2.2.8 What are the penalties for negligent/intentional violation of confidentiality rules?

Officers of the Competition Agency are obliged to keep strict confidentiality of all information in accordance to article 42 of DL 211. The infringement of said obligation may be harshly punished with criminal sanctions.

2.3 Requests for information to targets of investigations

2.3.1 Does your agency have procedures to review information requests with the party?

At the FNE, a group of professionals composed by economists and lawyers analyze which information will be requested to the parties. This decision is later analyzed and approved by a senior officer, who authorizes the junior investigators to request the information to the private parties.

2.3.2 Is the party informed of the theory of the case and reasons for requesting the information?

As a general rule, subjects of enforcement proceedings are notified that an investigation by the FNE is being conducted, but at that moment only a general overview of factual basis of the case is exposed to them. Exceptionally, some investigations may be restricted, and not notified to the investigated party, prior authorization by the Competition Tribunal.

A full description of the factual basis, the economic theories and legal doctrines relevant to the allegations against subjects of enforcement proceedings are informed at the time the FNE submits charges before the Tribunal, which opens the trial or litigation stage.

2.3.3 Can the party ask for a reconsideration of the information requested and/or deadlines, or appeal to a reviewing office within the agency?

The party can request reconsideration to the Head of the Competition Agency. This is not expressly established in DL 211, but it´s a general rule that applies to all public entities. In addition, according to section 39 h), the party can request to the TDLC to limit, condition or invalidate the FNE's request of information if it successfully argues that harm can be derived if the request is satisfied in its terms.

2.3.4 Do procedures and practices differ if the addressee of the request for information is not a party to the proceeding?

The procedure is the same.

2.4 Agreed resolutions of enforcement proceeding

2.4.1 At what stage or stages of an investigation and/or litigation can the parties resolve an enforcement matter by means of a mutually agreed disposition with your agency?

Leaving aside immunity/leniency provisions for cartels, during the investigation, any party, according to article 39 ñ) can reach an agreement with the agency, which must be submitted to the approval of the Competition Tribunal. This is a new rule, introduced in 2009.

During litigation before the TDLC a party may also reach an agreement with the FNE. This opportunity will only arise if the Tribunal decides that the case can be settled. According to article 22 of DL 211, the TDLC shall approve the settlement if it is not against free competition.

2.4.2 Are there restrictions on the types of cases that can be settled in this manner?

In relation to article 39 ñ), there are currently no legal restrictions on the type of cases that may be settled. The Tribunal has only 15 days to approve the settlement.

The only restriction for settlements during the litigation phase before the TDLC is that they should not have an anticompetitive character, a requirement analyzed by the TDLC and even by the Supreme Court reviewing the settlement approval decision, if challenged. This provision has allowed the FNE to settle cases with all or only with some of the defendants in collective infringements and with the defendant in unilateral cases with or without the consent of private plaintiffs.

2.4.3 Does your agency actively seek to settle cases?

The agency does not have an explicit policy regarding this matter, although the FNE has settled some cases. Settlements has to be approved by the TDLC.

In a few cases, the TDLC has sought actively that parties settle. Even the Supreme Court has done it at least once.

2.5 Judicial review and interim relief

Considering that in the Chilean system decisions are made not by an administrative agency but by a judicial body with specific competence on competition law and whose decisions may be reviewed by the Supreme Court, in the following questions we assume *judicial review* as the role played by the Supreme Court reviewing TDLC's decisions.

2.5.1 At what point in the competition law enforcement process does an independent judicial body have an opportunity to review the conclusions of your agency as to whether a violation of the law has occurred?

After a decision has been notified by the Competition Tribunal, any party or the agency can challenge said decision before the Supreme Court according to the rules established in article 27 of DL 211. The Supreme Court reviews TDLC's decisions in broad terms such as whether due process was respected or not; whether the TDLC issued a decision within its field of competence; it analyses the factual basis of the ruling and the reasonableness of the sanctions or remedies imposed.

2.5.2 What level of deference does the judicial body grant to the agency´s decision?

The Supreme Court generally has a high level of deference for the Competition Tribunal´s decisions. It is uncommon that decisions are totally overturned by the Supreme Court. However, in some adversarial cases, generally related to regulated markets, it may be stated that this deference diminishes, as the Supreme Court has overruled some decisions invading the field of competence of the regulators. In addition, the amount of the fines imposed is frequently reduced.

2.5.3 If the agency´s decision has resulted in a sanction or remedy, what is the effect of the pending judicial review on that sanction or remedy?

The pending judicial review on the sanction delays the execution of the sanction or the remedy until the Supreme Court issues its decision.

2.5.4 Can the judicial body grant interim relief?

Yes, according to the general civil procedural rules, the judicial body can grant interim relief.

2.5.5 What is the timing of the review by the judicial body, and are there procedures for expedited reviews of time-sensitive business transactions or conduct?

The timing of the review by the judicial body varies from case to case. Nonetheless, the vast majority of the cases are decided in a timeframe of 6 months to one year.

CZECH REPUBLIC

1. Introduction

The issues of procedural fairness are becoming increasingly important in judicial review of decisions of the Office for the Protection of Competition of the Czech Republic (hereinafter referred to as the "Office"). In particular, questions concerning protection against self-incrimination, duration of the proceedings or impartiality have arisen lately.

Enforcement of competition law is predominantly administrative in the Czech Republic, with the Office conducting investigations and issuing decisions, while the courts only scrutinize its conduct. Since cartel agreements constitute a crime under the Czech penal law, individuals might in theory be found criminally liable and ultimately imprisoned for the period up to 8 years; the Office is however not aware of any criminal proceedings, either in the past or currently ongoing. Even though private enforcement is also possible in the Czech Republic, there have been only a few insignificant cases. This contribution will therefore further concentrate only on administrative enforcement.

The Office is a central administrative body,[1] meaning that it is not subject to any of the ministries, but is on a same level with them, and that the Chairman of the Office has the same statutory powers as ministers of the Government, but for regularly attending meetings of the Government. This position is not unique to the Office; other highly specialized agencies have it as well, for example the sector regulators responsible for electronic communications[2] or energy.[3]

Similarly to all the administrative authorities in the Czech Republic, proceedings before the Office are governed by the Administrative Proceedings Code;[4] special provisions, concerning in particular investigatory powers and fines, are contained in the Competition Act. It is worth mentioning that the Administrative Proceedings Code was not designed for the purposes of adversarial proceedings and investigation of infringements; it therefore does not contain any provisions concerning rights of the accused.[5] In order to guarantee fair process, the courts require the basic principles of criminal enforcement to be used.

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1 Art. 2 (1) of the Act No. 2/1969 Coll., on creation of ministries and other central administrative bodies of state administration of the Czech Republic, as amended.

2 Act No. 127/2005 Coll., on Electronic Communications, as amended.

3 Act No. 458/2000 Coll., on the Conditions for Undertaking and on State Administration in the Sector of Energy, as amended.

4 Act No. 500/2004, Administrative Proceedings Code, as amended.

5 According to the legislative plan of the Government, a specific legislation concerning administrative enforcement of infringements was to be adopted in parallel with the Administrative Proceedings Code; it has unfortunately not been done yet.

2. Decision-making process

As already indicated above, the decision-making process usually constitutes a two-step procedure within the Office – the first instance decision of the Office and, when appealed, the second instance decision of the Chairman of the Office.

The first instance decisions are issued by the head of the Competition Section, who is the Vice-Chairman of the Office, or his deputy. These decisions can be, and in most cases are, appealed to the Chairman.[6] Before the Chairman decides, the decision and the appeal against it is reviewed by the appellate committee (in Czech: *rozkladová komise*),[7] an advisory body composed of employees of the Office (other than the Competition Section) and experts on competition law and economics from outside the Office, including private lawyers and academics. The appellate committee recommends the Chairman how to decide; he is however not bound by the recommendation and may decide in any way he finds appropriate.

The Chairman may either confirm the decision and reject the appeal or overrule the decision and either stop the proceedings entirely or return the case to the Competition Section, which will continue in the investigation and eventually issue another decision, which may again be appealed; while drafting the "second" first instance decision, the Competition Section is bound by the Chairman's decision. If appropriate, the Chairman may also modify the decision, for example lower the fine or alter the legal qualification. The decision of the Chairman is final and may only be appealed to the courts.

Although the Chairman may himself collect additional evidence, conduct oral hearings etc., it happens only under exceptional circumstances, in particular when the extent of it would be very limited. If the evidence collected by the Competition Section is not sufficient, the case is usually referred back to it.

As a matter of principle, anybody who, due to their relation to the case under consideration, to participants to the proceedings or to their representatives, may be believed to have interests in the outcome of the proceedings casting doubt on their impartiality, shall be excluded from performing any acts which might influence the outcome of the proceedings.[8] This rule does, however, not apply to the Chairman, who may only himself issue the second instance decision and is therefore never deemed not to be impartial – he cannot be substituted by anyone else. An action is currently pending before the Constitutional Court, where a party to the proceedings claims that the Chairman had not been impartial and that the rule excluding the possibility of his substitutability is unconstitutional.

The objectivity and impartiality of decision-making of the Office is thus primarily guaranteed by the appellate committee, composed predominantly of experts not involved in the investigation and not connected with the Office.

The Competition Section has also adopted additional safeguards to guarantee quality of its decisions. First of all, it may ask outside analysts and experts for their views; this possibility is being increasingly exercised. Secondly, the "Devil's advocate" panels were established to scrutinise the first instance decisions before they are issued. The Devil's advocate panel is composed of the senior officials of the Competition Section, not directly involved in the investigation of the case, nor drafting of the decision.

6 Art. 152 (1) of the Administrative Proceedings Code.

7 Art. 152 (3) of the Administrative Proceedings Code.

8 Art. 14 of the Administrative Proceedings Code.

3. Confidentiality

Under the Czech law, parties to the proceedings (and their representatives) have an unlimited access to the Office's file and a right to make copies of documents contained therein during the whole course of the proceedings. In particular, they have the right to be acquainted with documents which will be used as evidence. The complainants, who are not considered to be parties to the proceedings, have no special procedural rights and they are dealt with in the same way as the third parties (see below).

As far as confidential information is concerned, the Czech law distinguishes between business secret and classified information. Classified information (e.g. state secret)[9] is excluded from the general right to access the file; if however it is to be used as evidence, the parties to the proceedings have a right to see it, but they cannot make copies nor take notes of it.[10]

The same regime applied with respect to business secrets in the period of 2005 – 2009. Currently, if it is possible to inform the parties to the proceedings about the content of a particular document without revealing the actual business secret, the access to business secret will not be granted at all. The Office takes the view that in this way, the right of defence on the one hand and the respect to business secret on the other is balanced. Such a system was in place before 2004, but was abandoned because of the new Administrative Proceedings Code, in force since 2005, which does not contain any provisions on protection of business secrets; an amendment to the Act on the Protection of Competition had to be adopted in order to guarantee it.

The undertakings need to identify which information constitutes their business secret; the Office is entitled only to check whether the defining principles of business secret, as set by the Commercial Code, are fulfilled. The law does not provide for any mechanism for resolving possible disputes concerning the nature of specific information; it has however not been needed so far.

When a decision of the Office is published (both on internet and in an annual publication), the business secrets are omitted and substituted with the sign of "[*business secret*]"; only the parties to the proceedings obtain full version of the decision.

There are no specific provisions concerning access to documents submitted by leniency applicants, in particular the corporate statements. There are two cases to be decided by the Chairman of the Office where the Competition Section refused to grant access to the leniency applications before the statement of objections. These problems have not yet been discussed by Czech courts.

Third parties (as well as the complainants) may also be granted access to the file if they can demonstrate sufficient legal interest or other serious reason; they would never be granted access to business secret. In the last five years, the Office did not enable third parties to access the file.

4. Requests for information

On the Office's request, the undertakings shall be obliged to provide the Office with complete, correct and truthful documents and information, including the books and other business records or other records which may be important for clarification of the subject of the proceedings in writing within the deadline

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9 According to Art. 38 (6) of the Administrative Proceedings Code, this is either state secret or information of similar character, as defined by the Act No. 412/2005 Coll., on the Protection of Secret Information, as amended, and information upon which the obligation of secrecy was imposed by a special legislation.

10 Art. 38 (6) of the Administrative Proceedings Code.

stipulated by the Office.[11] The Office may request such information not only from the parties to the proceedings, but from any undertakings which may have it in their possession. For failure to produce the requested information, the Office may impose a fine up to 1 % of the net annual turnover of the undertaking concerned.[12] The information may be requested in this way during sectoral inquiries, during the proceedings or even before it, while assessing whether there are sufficient grounds to open the proceedings.

When requesting the information, the Office shall state the legal grounds and the purpose of the investigation and advise that the failure to provide the information or to enable its verification may be subject to a fine imposed by the Office. The undertakings are, however, not briefed in detail about the case; on the other hand, if the information is requested from undertakings that are parties to the proceedings, they are informed about the proceedings and the theory of the case at the beginning thereof.

The law does not provide for any time limits concerning provision of the requested information; the deadline is set individually in every case, taking into regard the amount of information requested and difficulty of gathering it; on a request by the undertaking, the deadline may be prolonged.

As far as the extent and structure of the information requested are concerned, the undertakings may discuss their difficulties with the Office. On one occasion, the Office inspected a database of one undertaking in order to verify that it really does not store the information requested; thereafter, the request was modified to suite the structure of the database.

In one recent case, the Office requested specific information in writing and the undertaking concerned refused to provide it because, in its view, it would be contrary to the right not to incriminate oneself. Since the Office insisted on the provision of the documents, the undertaking referred the dispute to the court, seeking a court order prohibiting the Office to request these documents.

Te Regional Court, however, dismissed the motion, stating that if there is a legally conducted proceedings and the Office exercises its investigatory powers within the limits of the proceedings, the court will not interfere with it until the final decision is issued – only there may the participants claim that the evidence was collected in an unlawful way.

5. Agreed resolutions

There are no rules concerning settlements (direct resolutions) in the Competition Act; the Office has nonetheless closed 4 cases in this way in the last two years. Currently, the Office is finalising guidelines that would summarise the rules concerning settlements.

The settlement was so far reached in cases concerning abuse of dominance and vertical agreements. The Office takes the view that, in principle, the settlement is possible with respect to all kinds of anticompetitive infringements.

The settlement negotiations may, in principle, be commenced at any time in the course of the proceedings before the statement of objections; in the past, they were opened shortly after initiation of the proceedings. The proposal for settlements must come from the participants to the proceedings (and if there are more of them, from all), the Office may, however, indicate that certain proceedings are particularly suitable for it.

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[11] Art. 21e of the Act on the Protection of Competition.

[12] Art. 22c of the Act on the Protection of Competition.

The settlement programme, as so far exercised by the Office, pursues two objectives. The first is procedural effectiveness – the participants have to accept the qualification of facts and law done by the Office, and commit themselves not to propose additional evidence, nor insist on full extent of the statement of objections. The other is investigatory – if the Office is not fully aware of the full extent of the infringement and the participant provides additional information constituting significant added value, the fine will be further reduced. In the past cases, both objectives were fulfilled and the fine was reduced by 50 %.

6. Judicial review and interim relief

The power to review the final decisions of the Office (i.e. decision issued by the Chairman) is entrusted to the administrative courts; in general, there are no courts specialised to review decisions of the Office.

Decisions of the Office are scrutinised by the Regional Court in Brno (in Czech: *Krajský soud v Brně*); there are currently two panels (each composed of three judges) dedicated to competition law. The complaint (in Czech: *žaloba*) may be lodged with the court within two months after the decision was delivered.[13] The court has full jurisdiction, i.e. it reviews the questions of both the facts and the law.

The decisions of the Office are enforceable even when being reviewed by the court; the mere fact that a complaint was filed does not relieve the undertakings from their obligation to pay fines. Simultaneously with the complaint, the petitioner can, however, also ask for it to have a suspensory effect, thus removing (until the court finally decides) all the legal effects of the decision.[14] The courts are, however, extremely reluctant to grant such an interim relief – the claimants would have to prove that immediate fulfillment of the duties imposed by the Office's decision would cause them irreversible harm.

Against the decision of the Regional Court it is possible to file a cassational complaint (in Czech: *kasační stížnost*) to the Supreme Administrative Court (in Czech: *Nejvyšší správní soud*); both the Office and the other parties to the proceedings before the Regional Court may file it. In the past, there was one panel (composed of three judges) dedicated to competition law, that system has been, however, abolished and today, any of its panels can decide. The deadline for filing the plea is only two weeks;[15] only matters of law may be claimed.[16] As the formulation of the complaint requires a high level of legal experience, the petitioner must be represented by an attorney-at-law;[17] the Office, on the other hand, may be represented by its legal service. The petition for interim relief may be filed also with the Supreme Administrative Court, under the same conditions as described above.

Against the decision of the Supreme Administrative Court, it is finally possible to file a constitutional complaint (in Czech: *ústavní stížnost*) addressed to the Constitutional Court (in Czech: *Ústavní soud*), if fundamental constitutional rights of the parties were allegedly breached.[18] Such a complaint has been very rare in the past, however, their number has been increasing and there are currently three proceedings concerning the Office pending before the Constitutional Court.

13 Art. 72 of the Code of Administrative Justice.

14 Art. 73 of the Code of Administrative Justice.

15 Art. 106 of the Code of Administrative Justice.

16 Art. 103 of the Code of Administrative Justice.

17 Art. 105 of the Code of Administrative Justice.

18 Art. 72 *et seq* of the Act. No. 182/1993 Coll., on the Constitutional Court, as amended.

FINLAND

In the enforcement proceedings of Finnish competition rules, the principles of procedural fairness are implemented in the FCA's administrative proceedings on the one hand, and in the legal proceedings of the Market Court and Supreme Administrative Court on the other. In what follows, a brief introduction to the decision-making and jurisdictional issues in the Finnish competition law system:

1. Prohibitions of restrictive practices (101 and 102 TFEU and their counterparts in the national competition Act)

The provisions of the national Competition Act shall be applied when a competition restriction does not have an effect on the trade between the EU member States. The national prohibitions of restrictive practices correspond to the prohibitions in the TFEU.

The FCA shall investigate competition restrictions and take action when it detects a violation thereof. The measures within the FCA's powers include making an infringement fine proposal to the Market Court; ordering the termination of restrictive conduct; imposing an obligation to deliver a product or a service on an undertaking (to enforce the latter two, the FCA may impose a conditional fine); ordering that the commitments provided by an undertaking shall be binding if they are such that they may eliminate the restrictive nature of a conduct (cf. the implementing provision of EU competition rules 1/2003 Art. 5); imposing an interim injunction. In addition, the FCA has decision-making powers relating to the leniency system.

An administrative sanction by nature, a competition infringement fine for a breach of the prohibitions of restrictive practices shall be imposed by the Market Court on the proposal of the FCA. It should be noted that a competition infringement fine cannot be imposed in response to a claim by a third party.

2. Merger control

The mergers fulfilling the criteria specified in the Competition Act shall be notified to the FCA prior to the closing of a deal. For the present, mergers are assessed according to a so-called dominance test. The FCA shall approve the merger if the threshold for intervention is not exceeded. If the threshold is exceeded, the FCA shall negotiate with the parties, whether the competition problem may be removed by imposing conditions on its implementation. The FCA is empowered to order that the parties adhere to their commitments.

If the commitments by the undertakings are not sufficient to solve the competition problem, the FCA shall make a proposal to the Market Court to prohibit the deal. The deal may only be prohibited on the FCA's proposal, not for example based on a competitor's appeal.

The sanctions for implementing a merger without the FCA's approval or against set conditions shall be imposed by the Market Court on the FCA's proposal.

3. Appeal

The FCA's decisions can be appealed to the Market Court. Under the general rule of Article 6 of the Administrative Judicial Procedure Act, any person to whom a decision is addressed or whose right, obligation or interest is directly affected may appeal against the decision. Under the general rule of Article 5 of the Administrative Judicial Procedure Act, any measure by which a case has been resolved or dismissed may be challenged by an appeal. For example, the FCA's decision whereby a case is closed (e.g. no evidence of a competition restraint, a matter of minor importance) or a restriction ordered to be dissolved may be appealed. The decision to propose a competition infringement fine cannot be separately appealed, because the proposal will bring the matter before the Court in any case.

A decision by the Market Court may be appealed to the Supreme Administrative Court.

In merger cases, the appealability of the decision and the right of appeal are determined on the basis of the above-mentioned principles of administrative law. It should be mentioned that in merger cases, the issues which have brought about litigation include the question of whether those who have provided commitments may appeal the decision whereby the FCA has ordered the commitments to be followed, and whether a competitor can appeal a decision whereby the FCA has approved a case.

4. Decision-making process at the FCA

In a competition restraints case, whether it be own-initiative or based on a complaint, the unit under whose branch of industry the matter falls, as specified in the rules of procedure, shall be responsible for the handling of the case. The head of unit shall assign a team to the case, and the team shall be led by a head of research. S/he shall assign the responsible case-handler(s). In bigger cases, such a straightforward approach does not work, and the case-handlers and the head of research will be assigned irrespective of units so as that to secure the best possible expertise for the investigation, analysis and trial of the case.

Within six months, after a preliminary investigation of the case, matters of major importance shall be brought before the management board. In addition to the management board, experts in economic analysis and experts of the specific market and competition restraint shall participate in the discussion – the aim is thus to have the best possible expertise available to assess the need for further measures and the related strategy and tactics. During the investigations, the matter may again be brought before the management board, but prior to final decision-making the management board review shall be carried out at any rate in cases in which fines, an injunction or an obligation is imposed as well as in merger cases which are either approved conditionally or prohibited.

In major cases (incl. merger decisions, leniency decisions, infringement fine proposals), the decisions shall be made by the FCA’s Director General on the presentation of the responsible case-handler. The management board review described above preceding final decision-making acts as vehicle for the Director General to ensure that the different viewpoints will be taken into consideration in the decision-making.

Prior to decision-making, the parties affected by the competition restraints shall be heard (usually in the form of a draft decision) and given the opportunity to get acquainted with the case materials (usually copies of the materials). In the final decision, the main arguments of the parties and the possible counter-arguments of the FCA shall be presented. The FCA’s management can observe all the case-materials in FCA’s the electronic case management system.

In addition to the above-mentioned factors, one aspect of procedural fairness is the content of the envisaged decision. According to the Finnish Administrative Judicial Procedure Act, the decision shall clearly indicate the parties whom the decision immediately concerns, the contents of the decision (the matter that has been decided and means thereof), the reasons for the decision and the provisions applied. A

failure to supply these elements may lead to an annulment of the decision or the matter may be decided anew.

To summarize, the guarantee for the legal protection of the FCA's administrative enforcement proceedings is provided by the provisions concerning the administrative proceedings on the one hand, the right to appeal the FCA's decisions, and the position of the court as a first-instance decision-maker in the imposition of a penalty payment and the prohibition of a merger, on the other hand.

5. Decision-making process before the Market Court

The Market Court is a special court subordinate to the Ministry of Justice hearing competition, consumer and public procurement cases, cases relating to the energy market legislation and some market law cases.

The Market Court contains both legally qualified members and part-time expert members appointed by the State Council. In regular competition issues, the court has a quorum in a composition containing three legally qualified members and one to three expert members. The expert members are appointed by the Chief Judge for each case according to the Decree of the Ministry of Justice and the rules of procedures of the Market Court.

The hearing of cases at the Market Court is public; however, the business and professional secrets of the undertakings are protected under the Act on the Publicity of Court Proceedings.

Prior to the hearing of a case, a Market Court judge shall prepare the matter. When a case is being prepared, the interested parties are e.g. provided with an opportunity to respond orally or in writing, and the undertaking affected by the competition restriction may also be heard. Otherwise the proceedings at the Market Court are governed by the Administrative Judicial Procedure Act, which contains provisions e.g. on the conduct of proceedings in the case, the hearing of witnesses, the indemnification of witness costs and the casting of vote if the members of the court are divided.

A ruling by the Market Court may be further appealed to the Supreme Administrative Court.

6. Confidentiality

The party whose right, interest or obligation in a matter is concerned shall have the right of access to a document obtained, received or made by the relevant authority. Provisions to this effect are contained in the Act on the Openness of Government Activities pertaining to all branches of government. According to the provisions, the authority who has received a request for access to a document shall be obliged to grant it within two weeks from the receipt of the request. Refusal to grant access shall be made by a written decision which is appealable to a general court hearing administrative issues. Wide access to documents, in particular with reference to interested parties, naturally leads to situations in which the promotion of transparency, rights of defence, protection of privacy and the interests involved in investigating a competition restriction are in conflict:

6.1 Timing of right of access

In the decision on the access to file by interested parties relating to the documents of the timber cartel (12.4.2006), the Supreme Administrative Court approved the concept of "privacy of the investigation", according to which the agency was not obligated to submit the leniency documents to another suspect before the agency's investigations had come to an end. The access to a file by the interested party is hence possible only after it may be granted without jeopardising the investigation.

6.2 Protecting confidentiality

The FCA will not turn over any documents to an interested party if its disclosure would be contrary to a very important public interest (e.g. jeopardising the investigation, identification data of persons or undertakings who have given statements if they wish to keep them secret) or if they contain business or professional secrets or are otherwise confidential under the Act on the Openness of Government Activities. However, the interested party may have the right of access to information considered a business secret if it forms part of the grounds of the case or may affect it. Information obtained on the basis of the status of an interested party shall not be used for any other purpose than to defend oneself in the pending matter and it cannot be disclosed. A punishment for a violation of this prohibition is prescribed in the Criminal Code of Finland.

The Finnish law does not provide on a procedure whereby confidential information could be surrendered e.g. to attorneys so as to prevent them from disclosing the information to a client.

The principles relating to the protection of confidentiality change to some extent when the matter is brought before the court. The absolute principle is that the defendant shall be granted access to the trial documents which the FCA has delivered to the court and refers to in support of its claims, and the defendant shall have the right to express any comments on it. For example, during its own proceedings, the FCA may protect the identity of those giving statements or of other third parties, but when it uses these statements as evidence in court, the judicial custom has been that the FCA shall also disclose the identity of those giving statements.

6.3 Defining a business secret

The complainant and the defendant are asked to indicate any business secrets in the documents submitted by them and, where necessary, to deliver such a version of the document which can be accessed by the general public (where necessary, they shall also deliver such a version which can be accessed by interested parties). The procedure often leads to oversized claims of secrecy, which may harm the possibility of the opponents to acquaint themselves with the matter. The FCA shall then request that the claim for confidentiality be justified and make the final decision as to the business secrets in the documents at its own liability. The decision may be appealed to the administrative court, and the FCA will not disclose the document prior to a final judgement. The important point is that the authority (or a court) shall ultimately decide what is a business secret and in doing so is subject to public liability. It should be noted that making a complaint will not provide the complainant with the status of an interested party who would gain access to documents only available to interested parties. The complaint cannot hence be used successfully as a vehicle to pry into the business secrets of an undertaking.

6.4 Information on pending matters

At least for now the FCA does not actively inform the public e.g. on its web pages of pending matters, although this is likely to be the case in the future. Whereas in matters involving major undertakings and major competition restrictions the FCA may provide information at an early stage (social interest to provide information). In such a case, the FCA will only submit a minimum amount of information and will not take issue with the alleged guilt of an undertaking; instead, it stresses that investigations are underway. Additionally, an early press release usually describes the FCA's suspicions and the general provisions which have possibly been breached. Indicative information will be given on further proceedings in the case. Particularly if inspections have been made into major corporations (which usually becomes public at any rate) providing such preliminary information will be important to avoid speculations and to provide correct and uniform information to the markets.

6.5 Sanctions for disclosing confidential information

The breach of official secrecy is provided for in Chapter 40, section 5 of the Criminal Code of Finland. The penal scale for a negligent breach of official secrecy is fine or imprisonment for at most six months. The sanction for an intentional breach of official secrecy is fine or imprisonment for at most two years, in addition to which a public official may also be sentenced to dismissal.

7. Requests for information to targets of investigations

Under the Competition Act, a business undertaking shall provide the FCA with all the information and documents needed for the investigation of the content, purpose and impact of a competition restriction (or a merger) and clarifying the competitive conditions. The undertaking shall respond to such a request and a conditional fine may be attached to the request to enforce the fulfilment thereof.

The content of the request for information varies considerably depending on the nature of the matter, its investigatory phase and the FCA's needs for information. In addition, the content of the request for information is affected by the FCA's assumption as to which information the undertaking may possess and what it can produce without unreasonable complications (this will be assessed from the viewpoint of the undertaking's resources and the investigatory interest).

It should be pointed out that addressing requests for information to undertakings is official activity and civil servants do it subject to public liability, in which the principles of legality, specific purpose for the activities and proportionality shall be adhered to. Therefore there is no separate procedure known by the Finnish law with which to investigate whether the agency's activity has been appropriate but an order given by an authority within its powers shall be followed. However, compliance with the above-mentioned principles shall be supervised by the FCA's superiors and failure to comply with them may lead to a complaint to the authority overseeing the legality of the decisions and actions of the Government (the Parliamentary Ombudsman or the relevant Ministry) and disciplinary measures under the legislation concerning state officials. On the other hand, if these principles have been violated in the request for action, the FCA cannot effectively force the undertaking to submit information, because the Market Court would be unlikely to order that the conditional fine imposed by the FCA be paid.

In the administrative procedure, however, information will be sought to be provided on the competition problem which has led to the request for information and (depending on the case) an attempt will be made to act more or less flexibly in cooperation with the undertaking:

- Often prior to sending a request for information, the customs of the trade, the activities of the undertaking and the facts needed for the investigation of the restriction will be discussed with the undertaking in order to formulate the request for information in such a way that the undertaking understands which information is requested from it and may deliver the information within reason.

- As a rule, extra time may be granted to the undertakings for issuing a clarification.

- As a rule, attached to the request for information will be a clarification of the reasons for the request and the suspected competition restriction under investigation, and a reference to the provisions of the law on which the obligation to provide information is based.

- The request for information will contain the contact information of the civil servant who handles the case and supplies additional information.

- The FCA may arrange (and does arrange in practice) meetings with the undertakings that are the object of a request for information, if problems arise in fulfilling the request for action.

The provisions of the Competition Act do not make a distinction between whether the target of the request for information is an interested party or a third party. However, the above-mentioned proportionality principle changes the situation to some extent. Firstly, the complainant shall provide an account of the grounds for the request for action, i.e. the FCA will request that the undertaking provide an account of all the facts available and known to it which attest to a breach of the prohibition of restrictive practice, before a clarification in the matter is requested of the suspected undertaking (in major restrictions, this may differ). A minimum amount of administrative obligations will be imposed on third parties, and the requests for information will be sought to be directed to interested parties as a rule. However, in addressing the requests for information attention will be sought to be paid to the undertakings from which the retrieval of information will cause the least amount of trouble.

8. Agreed resolution of enforcement proceedings

There is no such settlement procedure used in Finland which has e.g. been adopted by the EU by Commission Regulation No 622/2008. The need for such an instrument was explored in 2009 by the working group considering the need to reform the Competition Act, but the procedure was not found necessary and the implementation thereof was found to contain problems of principle relating to procedural law.

The FCA may accept commitments provided by the undertakings and order that they are binding on the undertakings if the commitments are sufficient to remove the restrictive nature of a practice. The procedure corresponds to the one prescribed in Articles 5 and 9 of the EU implementing regulation 1/2003. The FCA does not actively seek such commitments from the undertakings but the initiative lies with the undertakings themselves.

9. Judicial Review

The FCA's decisions may be appealed to the Supreme Administrative Court. On the other hand, as has been described above, the FCA cannot impose a fine itself or prohibit a merger, but the first instance decision-maker in these matters is the court (Market Court), which shall consider the validity of the FCA's claim.

GERMANY

1. Introduction

Procedural fairness is a fundamental principle in the German legal system and therefore also plays a key role in the competition law regime.[1] Consequently, several rules that deal with procedural fairness have been included in the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter "ARC"). This submission seeks to provide an overview of the principle of procedural fairness in German competition law. Thereby, it will build on the corresponding contribution to the February Roundtable and will focus on procedural fairness in enforcement proceedings. In doing so, it will cover procedural fairness in the decision making process (2.), information requests (3.), confidentiality rules (4.), settlement procedures (5.) and judicial review (6.). Unless indicated otherwise, the same rules apply for cartel, abuse of dominance and merger proceedings.

2. Procedural fairness in the decision-making process

The decision-making process within the Bundeskartellamt is governed by Section 51 ARC which stipulates that enforcement decisions are made by so-called decision divisions (*Beschlussabteilungen*).[2] Currently, the Bundeskartellamt operates twelve such divisions.[3] Each of these decision divisions generally deals with cartel, abuse of dominance and merger cases and comprises a chairman, three to six members qualified to serve as rapporteurs (*Beisitzende*), one to four case officers (*Referenten*) and support staff (e.g., administrative staff).[4]

Any formal enforcement decision by the decision divisions is made by a decisional body that comprises a chairman, a rapporteur – who handles the case and prepares the decision – and an associate member.[5] Each member of the decisional body must be a civil servant appointed for life (*Beamter auf Lebenszeit*).[6] In addition, each member must be qualified to serve as a judge or a senior civil servant (*Höherer Verwaltungsdienst*), the latter of which – as the former – in principle also requires a university degree.[7] Case officers are generally entitled to serve as associate members if they meet these formal requirements and have successfully served as case officers for a certain period of time (usually four to seven years).

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1 See Germany's contribution to the February Roundtable, OECD Doc. DAF/COMP/WP3/WD(2010)6.

2 See Section 51 subsection 2 sentence 1 ARC.

3 For more information see the organizational chart of the Bundeskartellamt (available in English at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Organigramm/0110_Organigramm-E.pdf).

4 However, two divisions (the 11th and the 12th division) are primarily devoted to the prosecution of hard-core cartels, while another (10th division) has jurisdiction for abuse of dominance and cartel proceedings in the energy sector.

5 See Section 51 subsection 3 ARC.

6 See Section 51 subsection 4 ARC.

7 See Section 51 subsection 4 ARC.

As far as the internal decision-making process within the decisional body is concerned, there are no legal provisions that explicitly govern this process. According to the general rule of Section 51 subsection 3 ARC and to established agency practice, the nomination of the decisional body (i.e. the nomination of the rapporteur and the associate member in a specific case) falls within the full discretion of the chairman of the respective decision division.[8] In order to provide predictability, the chairman may issue internal guidelines according to which the decisional body is formed. These guidelines may, for example, stipulate that the nomination depends on the subject matter (e.g., in the transport division, specific rapporteurs may be assigned to deal with cases of specific modes of transport, e.g. railways, air transport, etc.). Once the decisional body is nominated, the chairman may also assign one or more case officers to assist the rapporteur or to prepare a draft decision.

Although there are no legal provisions that explicitly govern the internal decision-making process, it follows from Section 51 subsection 3 ARC that this process is in principle independent both of the leadership of the Bundeskartellamt (President and Vice President) as well as the Federal Ministry of Economics and Technology. Furthermore, the chairmen of the decision divisions may generally not issue orders to the members of the decisional bodies on how to decide a given case (they may, however, issue orders regarding certain procedural issues). This independence helps to shield the decision process from political interference and thereby contributes to achieving rule-based decisions subject only to competition-related criteria.

As demonstrated, the decision-making process within the Bundeskartellamt is – as far as enforcement-related decisions are concerned – governed by an independent decision-making body. The decision divisions may at their own discretion decide to have their draft decisions reviewed by the legal department as well as by certain units of the General Policy Division (e.g., Economic Issues Unit, Merger Control Unit, Cartels and Antitrust Unit). They may also decide to involve the legal division and the General Policy Division at any stage in the investigation process. In practice, the decision divisions regularly – at least in second phase proceedings – decide to benefit from input provided by the legal division and the General Policy Division. This not only helps to ensure the high quality standard of the decision divisions but also enhances the overall consistency of the Bundeskartellamt's enforcement practice. It also contributes to safeguarding an effective and fair enforcement process.

3. Information requests

Information requests are governed by Section 59 ARC. According to subsection 1 no. 1, the Bundeskartellamt may – to the extent necessary to perform its tasks and until its decisions have become final – request from any undertaking (and from undertakings associated with them) the disclosure of certain information. Thereby, it may direct such requests not only to the parties of an investigation, but also to third parties. Further, the parties are generally also obliged to disclose confidential information (for details regarding confidential information see section 4. below).[9]

Before issuing a formal information request, the Bundeskartellamt will often issue a (voluntary) informal request. Should a formal request prove necessary, this must be issued by the decisional body (see section 2.) as a formal decision. It must contain certain facts of the case as well as the reasons for the request.[10] A formal information request may also be appealed to the Düsseldorf Higher Regional Court

8 Accordingly, parties are not entitled to have their case dealt with by a particular rapporteur.

9 See *Kiecker*, in: Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, Volume 1, 10th edition, 2006, § 59, para. 22 and *Bechtold*, GWB, 4th edition, 2006, § 59, para 13 (both citing more references).

10 See Section 61 subsection 1 sentence 1.

(*Oberlandesgericht Düsseldorf*).[11] However, the appeal has no suspensive effect (*aufschiebende Wirkung*).[12]

The relevant undertakings are generally obliged to comply with formal information requests (Section 59 subsection 2 ARC). Should they refuse to comply, the Bundeskartellamt may impose monetary fines (Section 81 subsection 2 no. 6 ARC).[13] These rules in principle apply to all types of administrative enforcement proceedings (e.g., cartels, antitrust, merger). However, different rules – not covered by this contribution – apply to administrative *fine* proceedings.[14]

4. Confidentiality rules

In order to balance the relatively strong enforcement powers of the Bundeskartellamt (e.g., inspections, information requests) with the interests of undertakings subject to enforcement proceedings, the ARC contains several provisions that protect confidential information. For example, Section 72 subsection 2 sentence 2 ARC – which governs third party access in judicial proceedings – stipulates that access to files of the Bundeskartellamt may not be granted, if important reasons, in particular to protect trade or business secrets, constitute an obstacle thereto. Further, the Bundeskartellamt may not hold public hearings, if doing so might pose risks to the protection of confidential information.[15] In addition to these specific rules of the ARC, confidential information is also protected by general administrative law, e.g. by Section 30 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*; VwVfG).[16]

With regard to confidential information, the ARC does not contain a legal definition. However, confidential information will – at least in competition law proceedings – usually involve trade or business secrets. In the area of competition law proceedings, German courts have, as a rule, defined trade or business secrets (*Betriebs- oder Geschäftsgeheimnisse*) as follows:[17] A trade or business secret is any fact, circumstance or procedure that is (a) linked to a business undertaking, (b) relevant for the competitiveness of this undertaking, (c) not evident and (d) that the owner – for a just cause – intends to keep secret. The unauthorized disclosure of such information to third parties is a criminal offence under the German Criminal Code (*Strafgesetzbuch*; StGB).[18]

Before granting third parties access to its enforcement files, the Bundeskartellamt will usually hear the parties to the relevant proceedings. The parties can then inform the Bundeskartellamt of possible trade or business secrets which the file may contain. In order to facilitate this process, the Bundeskartellamt will usually request the parties to identify any confidential information their submissions may contain in

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11 See Sections 61 subsection 1 sentence 1 and 63 subsection 1 sentence 1 ARC.

12 See Section 64 subsection 1. The court may suspend the immediate effect, though (see Section 65 subsection 3 sentences 2-4).

13 Fines may be imposed both against the relevant persons as well as against the relevant undertakings (see Section 30 of the Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*; OWiG).

14 For administrative fine proceedings, the provisions of the German Criminal Code of Criminal Procedure (*Strafprozessordung*) apply accordingly (see Section 81 ARC and Section 46 OWiG).

15 Section 56 subsection 3 sentence 2 ARC.

16 See also Section 6 Freedom of Information Act (*Gesetz zur Regelung des Zugangs zu Informationen des Bundes*; IFG).

17 See e.g., OLG Düsseldorf WuW/E OLG 1881 (1887) – *Anzeigenpreise* and *Karsten Schmidt / Bach*, in: Immenga/Mestmäcker, GWB, 4th edition, 2007, § 56, para. 11 (citing more references).

18 See Section 203 StGB; available in English at http://www.gesetze-im-internet.de/englisch_stgb/index.html.

advance, i.e. when the parties submit any documents. Nevertheless, the initial decision on which parts of the file to grant access to (or which parts of the file to grant access to only after certain sections have been blackened out) rests entirely with the Bundeskartellamt. However, parties who are concerned that their confidential information would be unduly disclosed may seek preventive judicial relief before access is granted.[19]

In the context of protecting sensitive information, two questions – both concerning cartel proceedings – have recently figured prominently. The first question is, whether – and if so, to what extent – access to decisions in administrative fine proceedings may be granted to third parties. The second question concerns third party access to leniency applications. Both questions are – in case the third party has civil damage claims against the members of the cartel – closely related to Section 406e subsection 1 sentence 1 of the German Code of Criminal Procedure (*Strafprozessordnung*; StPO) [20] (which applies in administrative fine proceedings[21]). This provision stipulates, as a rule, that "an attorney may inspect […] the files […], if he can show a legitimate interest in this regard". It goes on to add that "inspection of the files shall be refused if overriding interests worthy of protection, [...] constitute an obstacle thereto".[22]

As far as third party access to decisions issued in administrative fine proceedings is concerned, the Bundeskartellamt has repeatedly decided that third party access to these decisions – which are generally not published[23] – may under certain circumstances be granted.[24] Access may in particular be granted to the facts concerning the relevant anticompetitive conduct. One important reason for granting access is that this may facilitate the advancement of civil damage claims. However, the Bundeskartellamt has denied access to information that is not needed to substantiate civil damage claims, e.g. to the total amount of the fine.

As far as access to leniency applications is concerned, the Bundeskartellamt has so far generally denied third party access.[25] The reason is that potential leniency applicants might be discouraged from submitting applications because they fear civil follow-on claims should third parties be granted access to their leniency applications. This could ultimately seriously hamper the effectiveness of leniency programs. In August 2009 the Local Court of Bonn (*Amtsgericht Bonn*) – which was called upon by private parties demanding access to certain leniency applications – referred the question of third party access to leniency applications to the European Court of Justice for a preliminary ruling in accordance with Article 267 TFEU (ex Article 234 TEC).[26]

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19 See e.g., OLG Düsseldorf, WuW/E DE-R 1070 – *Energie-AG Mitteldeutschland* and *Karsten Schmidt / Bach* (footnote 17), para. 11.

20 English version available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#StPO_000P406e.

21 See footnote 14.

22 Section 406e subsection 2 sentence 1 StPO.

23 See Germany's contribution to the February OECD Roundtable (footnote 1), paras. 12, 14.

24 BKartA B4-82/04, decision dated April 12th, 2010 (not published).

25 See para. 22 of the Bundekartellamt's Leniency Programme (available in English at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/06_Bonusregelung_e_Logo.pdf.

26 Decision No. 51 Gs 53/09 AG Bonn, dated 4 August 2008.

5. Settlement procedures

As the ARC does not contain specific rules for settlement procedures, the relevant procedures have been developed by agency practice.[27] In general, settlements can be concluded both in abuse of dominance as well as in cartel proceedings. However, they have played a more prominent role in the field of cartels in which the Bundeskartellamt has concluded several settlements over the past years.[28] This submission will focus on settlements in cartel proceedings.

Provided that the relevant decision division has gained a sufficient overview of the facts of a given case, settlements can generally be concluded at any stage of the enforcement process. However, the reduction of a potential fine will, as a rule, be greater the earlier the settlement is agreed upon. Thereby, a leniency application is no precondition for the conclusion of a settlement.

Where the relevant undertakings declare their willingness to settle, the Bundeskartellamt explains the allegations, estimates the maximum possible fine and sets the undertakings a time limit to accept a settlement proposal. Access to the most significant pieces of evidence is granted where this does not jeopardize other investigations in the proceedings.

In formal terms, the conclusion of a settlement requires the signing of a settlement declaration (*Settlementerklärung*), in which the relevant undertakings (1) declare that they accept the facts of the infringement as stated therein (2) agree with the Bundeskartellamt's assessment of the turnover related to the cartel and of their ability to pay the potential fine and (3) accept a maximum amount of a potential fine. A waiver of the right to appeal (*Rechtsmittelverzicht*) is not part of the settlement declaration. The fine is calculated based on the Bundeskartellamt's Guidelines on the Setting of Fines (*Bußgeldleitlinien*).[29] For horizontal cartels, the conclusion of a settlement may – in addition to reductions granted for using the Leniency Programme – lead to a reduction of the "regular" fine by a maximum of 10 percent.[30]

Additional components of a settlement agreement usually include a waiver of the right to fully access the file and a formal conclusion of the proceedings in the form of a so-called short decision (*Kurzbescheid*) which only contains the minimum information required under Section 66 of the Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*; OWiG). The right of the relevant undertakings to be heard is usually granted by releasing a draft decision for comments before the final decision is issued. The details of the settlement proposal and the fact of its acceptance/rejection by the relevant undertakings are noted in the Bundeskartellamt's file.

6. Judicial review

Under Section 63 subsection 1 sentence 1 ARC, any formal enforcement decision of the Bundeskartellamt can be appealed to the Düsseldorf Higher Regional Court which operates separate and

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27 The agency's practice has been described in the Activity Report (*Tätigkeitsbericht*) 2007/2008 of the Bundeskartellamt, page 35 (available at http://dip21.bundestag.de/dip21/btd/16/135/1613500.pdf; available in German only). For a recent settlement, see case B11-18/08 – *Fine proceedings against coffee roasters on account of price fixing* (English case summary, also including a description of the settlement practice, available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B11-018-08-Kafferoester_engl.pdf?navid=30).

28 See the Activity Report (footnote 27), page 35.

29 Available (in English) at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E_Logo.pdf.

30 See the Activity Report (footnote 27), page 35.

dedicated divisions for competition law proceedings.[31] For most decisions – in particular in the case of cease and desist orders in antitrust and cartel proceedings – the appeal has no suspensive effect (*aufschiebende Wirkung*).[32] However, the Düsseldorf Higher Regional Court may under certain conditions – in particular if the immediate enforcement would result in an undue hardship for the relevant undertakings – suspend the immediate effect of the decision.[33] Also, it may in some cases issue preliminary injunctions (*einstweilige Anordnungen*), most importantly in merger control cases.[34]

According to Section 63 ARC, enforcement decisions of the Bundeskartellamt can, as a rule, only be appealed *after* they have been issued. However, under certain – exceptional –circumstances, preventive judicial relief (*vorbeugender Rechtsschutz*) against imminent enforcement decisions is admissible.[35] In this context, German courts have ruled that preventive relief requires a *qualified* interest on behalf of the relevant undertakings.[36] More specifically, they have emphasized that such an interest could not be recognized, if the regular ex post relief would offer an effective and sufficient level of legal protection (*effektiver Rechtsschutz*).[37]

Decisions of the Düsseldorf Higher Regional Court can, according to Section 74 subsection 1 ARC, be appealed to the Federal Court of Justice (*Bundesgerichtshof*), if the Düsseldorf Higher Regional Court has prior admitted such an appeal. Section 74 subsection 2 ARC stipulates that leave to appeal shall be granted if a legal issue of fundamental importance is concerned or if a decision by the Federal Court of Justice is necessary to develop the law or to ensure uniform court practice.

As the court of first instance, the Düsseldorf Higher Regional Court may conduct a full review of the legal and factual assessment of the Bundeskartellamt's decision. Thereby, it may in principle fully review the discretionary elements of the decision (Section 71 subsection 5 sentence 1 ARC). Further, new evidence is generally admissible before the Düsseldorf Higher Regional Court.

By contrast, the Federal Court of Justice will only review the legal assessment of the Düsseldorf Higher Regional Court and new evidence is generally not admissible. Like the Düsseldorf Higher Regional Court, however, the Federal Court of Justice will in principle also fully review the discretionary elements of the decision appealed against (Sections 76 subsection 5 sentence 1 and 71 subsection 5 sentence 1 ARC).

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31 According to Section 63 subsection 3 ARC an appeal may also be made if the Bundeskartellamt fails to take a decision requested in an application and the applicant claims to be entitled to demand such a decision (*Verpflichtungsbeschwerde*).

32 See Section 64 subsection 1 ARC.

33 See Section 65 subsection 3 sentences 2-4 ARC.

34 See Section 64 subsection 3 sentence 1 ARC with Section 60 ARC.

35 See e.g., OLG Düsseldorf, WuW/E DE-R 2755 et seq. – *DFL-Vermarktungsrechte*. For preventive relief regarding the protection of confidential information see OLG Düsseldorf, WuW/E DE-R 1070 – *Energie-AG Mitteldeutschland* (cited in footnote 20).

36 OLG Düsseldorf (footnote 35), at 2759.

37 OLG Düsseldorf (footnote 35), at 2759.

7. Conclusion

As has already been emphasized in Germany's contribution to the February Roundtable, procedural fairness plays a crucial role in the German competition law system.[38] Consequently, several rules that deal with procedural fairness have been included in the German ARC. Procedural fairness in enforcement proceedings is, of course, not limited to the provisions mentioned in this contribution. Other provisions – like the right to be heard and the right of access to files – also play a vital role and have already been covered in the contribution to the February Roundtable.[39] In sum, the provisions on procedural fairness safeguard a fair and effective enforcement process and thereby contribute to the overall legitimacy and predictability of the German competition law regime.

[38] See Germany's contribution to the February Roundtable (footnote 1), para. 23.

[39] Germany's contribution to the February Roundtable (footnote 1), paras. 16-22.

GREECE

1. Introduction

The rules pertaining to proceedings and procedural rights before the Hellenic Competition Commission ("HCC") are laid down in Law 703/1977 "On control of monopolies and oligopolies and protection of free competition"[1] as well as in the Regulation on the Functioning and Management of the Hellenic Competition Commission ("Procedural Regulation").[2]

The HCC's procedural rules are prescribed in a clear and elaborate manner in the existing legislation and regulations and grant the undertakings that are subject to the investigation extensive defence rights.[3]

Nevertheless, the widely acknowledged need of modernisation and improvement of the existing national competition law framework, has led to the formal launch by the Hellenic Competition Commission in 2010 of an in-depth and extensive review of the substantive and procedural law framework.

In this context the Procedural Regulation of the Hellenic Competition Commission is currently being reviewed, taking into account the latest legislative, regulatory and case law developments at EU and at other Member States' level, with the purpose of enhancing due process and administrative effectiveness.

The following analysis on the issues of decision-making, confidentiality, settlements, judicial review and interim relief is based on the respective legislative provisions as they are currently in force.

2. Decision-making process

When an investigation of the HCC Directorate General[4] is almost complete, the case is introduced to the Board of the HCC by the President and the Board decides about its degree of priority. If the Board gives priority to a case, it assigns a Commissioner to the case following a draw. The Commissioner is responsible for finalising the investigations and for supervising the final drafting of a Statement of Objections or of a proposal to reject a complaint. This stage is concluded with the notification of the above document to the parties within 90 (or in exceptional circumstances 120) days from the assignment of the case to the Commissioner.

The Commissioner who is assigned with the case and signs the final version of the Statement of Objections or of the proposal to reject a complaint, also participates with full voting rights in the decision-making process, as a member of the Plenary or of the Chamber of the Board that will decide the case.

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1 Law 703/1977, i.e. the Greek Competition Act, was recently amended by way of Law 3784/2009 (Official Journal Issue A΄ 137/07.8.2009), which entered into force in September 2009.

2 It takes the form of a Joint Ministerial Decree that is issued following an opinion by the HCC.

3 See previous Greek submission on the topic of procedural fairness, DAF/COMP/WP3/WD(2010)23.

4 The HCC consists of two separate bodies: the Directorate General for Competition ("Directorate General") which is the body responsible for investigations, and the Board which is the decision-making body.

There is some criticism that this affects the impartiality of the decision-making body. However, it is clear that the Greek legislator has made a clear policy choice and proceeded to a balancing exercise between efficiency and justice. The participation of the Commissioners in the closing stage of the investigation renders the whole process more effective and speedier. The Commissioner's identity is not kept secret from the parties if a case has been assigned to him/her, and his/her intervention can be seen as another set of eyes that looks at the conduct in question (fresh look), before the finalisation of the Statement of Objections.

Following the submission of the Statement of Objections or of the proposal to reject a complaint by the competent Commissioner, the case file is passed on to the Board of the HCC. The file includes all of the documents and evidence invoked in the Statement of Objections, as well as documents not included in the latter. Furthermore, memoranda of the parties, testimonies, sworn affidavits and experts' opinions are all available to the Members of the Board of the HCC.[5]

The parties, 30 days prior to the hearing, are entitled to submit a written memorandum and present all evidence and procedural documents to be invoked.[6] Rebuttals are made by way of a Reply or "Supplementary Memorandum" and may be submitted at the latest 15 days prior to the hearing.[7] The Board of the HCC may require the submission by the parties of sworn affidavits or new evidence on a certain matter.[8] The HCC's President also grants a time limit for the submission of a final post-hearing memorandum at the parties' request.[9] The time limit, according to the law, can start only after the parties have been given access to the minutes of the hearing.[10]

Moreover, the Board of the HCC may also consult specialists and experts on particular issues, if it deems it necessary and expedient.[11] In such cases the Board adjourns the hearing and appoints an expert or may issue a so-called "preliminary ruling", ordering certain acts of discovery or further investigations.[12] The HCC may also refer to economic departments of universities as outside analysts.[13]

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5 At any procedural stage following the notification of the Statement of Objections, i.e. before, during and after the oral hearing, the subjects of the investigation are given the opportunity to present any type of exculpatory proof. All types of evidence including oral testimony of witnesses, experts' opinions, documents and depositions, are freely considered by the HCC Board; see DAF/COMP/WP3/WD(2010)23, paragraph 47.

6 See Article 11(2) of the Procedural Regulation.

7 See Article 11(4) of the Procedural Regulation.

8 See Article 20(6) of the Procedural Regulation.

9 See Article 23 of the Procedural Regulation.

10 See Article 8(13) of Law 703/77.

11 See Article 8d(4) of Law 703/77. According to Article 34 of the Procedural Regulation the Plenary of the HCC Board decides on the selection of the experts.

12 See Article 22 of the Procedural Regulation. The Board of the HCC has requested a specialist's opinion in the *BP HELLAS/Shell HELLAS* case; see HCC decision 421/V/2008, reported in the 2008 Annual Report on Competition Policy in Greece to the OECD (http://www.epant.gr/img/x2/news/news205_1_1254129627.pdf).

13 See HCC decisions 369/V/2007 and 373/V/2007 (dairy products). This possibility is usually applied in the context of sector inquiries. In such cases a special confidentiality agreement is signed with the respective institution.

Furthermore, the case handlers, who belong to the Directorate General, participate in the hearing, and put questions to the parties upon the Chairman's approval.[14] Case handlers may be also called to attend the deliberations of the decision-making body and may respond to questions and clarify matters, if asked by the Members.

If a case handler of the Directorate General has a dissenting opinion as to the final assessment of the investigated infringements by the Commissioner in the Statement of Objections or in the proposal to reject a complaint, his/her views may be recorded and attached to the final draft which stays within the Service. This practice of recording the possible dissenting views of the officials of the Directorate General enhances transparency and sound decision-making, as it permits a more comprehensive approach of the investigated infringements by the Members of the Board of the HCC.

All of the abovementioned procedures ensure that the Members of the Board of the HCC take into account all relevant evidence, while remaining open in considering different explanations for the conduct under investigation.

3. Confidentiality

The Greek Competition Act explicitly refers to the obligation of professional secrecy, while the conditions, the extent, the exemptions, the time and the procedure of access to the file are specified in the Procedural Regulation. For the rest, the HCC follows by analogy the European Commission's Notice on the rules for access to file[15] and the case law of the European Courts. Moreover, the HCC has a special procedure in place for the collection and processing of electronic files.[16] The New Procedural Regulation, which is being currently drafted, is expected to clarify and systematise these matters, thus enhancing legal certainty.

At all stages of the proceedings, the HCC grants confidential treatment to the submissions of parties, following a reasoned request. In some cases, the HCC protects the identity of parties, in order to protect their legitimate interests, in particular when there is fear of retaliation. It thus ensures that parties will not be discouraged from offering information to or co-operating with the HCC.[17]

Finally, information collected pursuant to the provisions of Law 703/77 may be used only for the specific purpose intended by the request for information, the investigation or the hearing in question.[18] In addition, the Procedural Regulation explicitly provides that documents that are made accessible to parties by the HCC may only be used by those parties for the purposes of judicial or administrative proceedings for the application of Law 703/77 and of Articles 101 and 102 TFEU.[19]

The confidentiality rules pertaining to HCC proceedings constitute *lex specialis* as to the rules of access to file pursuant to general administrative law. A specific problem arises when the HCC receives an

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14 According to Article 20(3) and (5) of the Procedural Regulation. The case handlers are not expressly entitled to ask questions to the parties. This issue is currently pending before the Council of State.

15 A separate Notice for access to the HCC file was to be issued covering detailed issues concerning confidentiality but has not been published yet.

16 See DAF/COMP/WP3/WD(2010)23, paragraphs 14-15.

17 As to complaints with a request of anonymity, see the recent Notice of the HCC on the handling of complaints, at http://www.epant.gr/news_details.php?Lang=en&id=89&nid=243.

18 See Article 27(1) of Law 703/77.

19 See Article 19(10) of the Procedural Regulation.

order of the public prosecutor to give access to certain information. In practice, when the public prosecutor by order requests access to the file, the HCC does not grant access prior to the notification of the Statement of Objections. Access may be granted only to the non-confidential version of the Statement of Objections and to the non confidential documents of the file. Likewise, following the rendering of its decision, the HCC grants access only to the non confidential documents of the file.

3.1 Definition of confidential information

Confidential information is part of the administrative case file.[20] The right of access to the file, even for the parties under investigation, in principle, does not extend to business secrets, internal documents or other confidential information of any person or undertaking. Greek competition law does not define which information is confidential.[21] In light of the European practice and case law, the HCC considers as confidential information business secrets, internal documents and possibly other sensitive information.

Any information about an undertaking's business activity constitutes business secrets, if its disclosure could result in serious harm to that undertaking. Thus, undisclosed sensitive information such as market shares, quantities produced and sold, lists of customers and distributors, and commercial strategy documents constitute business secrets. Confidential treatment is also granted to any information enabling the subjects of the investigation to identify the complainants or other third parties, when those persons have requested to remain anonymous. Then, access is granted to the content of completed questionnaires and sworn affidavits but not to the identity of the persons that have replied or made depositions.[22]

Moreover, access is denied to the internal documents of the European Commission's Directorate General for Competition and of the competition authorities of the Member States, as well as to correspondence between the HCC and other public (including, competition) authorities.[23]

3.2 Treatment of confidential information

The procedure on the granting of confidential treatment varies depending on the stage of the proceeding. We can identify two distinct stages: (a) the investigation stage, before the completion of the Statement of Objections or the proposal to reject a complaint, and (b) the decision stage, running from the completion of the Statement of Objections or the proposal to reject a complaint to the publication of the decision.

3.2.1 Treatment of confidential information during the investigation

In all cases of collection or submission of information pursuant to the provisions of Law 703/77, the persons providing the requested information should clearly identify, in a reasoned request, any material which they consider to be confidential; to this end they have to provide a separate non-confidential version of the material in question.

Within a reasonable time-limit, the HCC may also require that persons concerned identify the documents or parts thereof containing business secrets or other confidential information and submit a separate non-confidential version. These persons are obliged to specifically explain the reasons for confidential treatment of the information provided.

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20 See Article 27(3) of Law 703/77.

21 The Procedural Regulation currently in force makes a reference solely to the internal documents.

22 See Article 19(9) of the Procedural Regulation.

23 See Article 19(8) of the Procedural Regulation.

In so far as the persons concerned do not provide the HCC with a non-confidential version or do not submit a reasoned request of confidentiality, the HCC assumes that the documents do not contain confidential information.[24]

The Directorate General of the HCC accepts provisionally the claims for confidentiality that are adequately reasoned.[25] Nevertheless, the Directorate General of the HCC retains the right to reverse the provisional granting confidentially in whole or in part, throughout the process.

Where the Directorate General does not agree with the claim for confidentiality or where it takes the view that the provisional granting thereof should be reversed, it informs the person concerned in writing of its intention to disclose information, giving its reasons and setting a time-limit within which that person may communicate its views in writing. If, following the submission of those views, the disagreement as to the confidentiality persists, the dispute is resolved by the President of the HCC, who decides on the treatment of the confidential information. Such decisions are considered as preparatory acts and can be challenged only at the stage of the review of the main decision of the HCC.[26]

Information which is necessary to prove an infringement and therefore has to be included in the Statement of Objections may be disclosed to the parties according to a specific procedure. More precisely, such information is notified to the President of the HCC, who ultimately decides if it should be included in the Statement of Objections.[27] Again, the President's decision on this matter is not directly challengeable.

3.2.2 Treatment of confidential information following the Statement of Objections

The Statement of Objections or the proposal to reject a complaint is notified to the interested parties in a non-confidential version. The Directorate General prepares different versions for each addressee.

Provided that access to documents containing confidential information or business secrets is indispensable, in order for the subject of the investigation to exercise its right of defence, the HCC President may, by reasoned decision, at the request of the party concerned, grant access in whole or in part to the documents in question. In this case, the HCC President exercises powers similar to those of the European Commission's Hearing Officer; this constitutes an additional procedural safeguard.[28] Such HCC decisions are not subject to appeal before the Athens Administrative Court of Appeal, as they constitute preparatory administrative acts.

The confidential version is given only to the Members of the Board of the HCC. The Members of Board have also full access to the file following the submission of the Statement of Objections or the proposal to reject a complaint. The final saying on the treatment of confidential data rests with the Board of the HCC, which may decide to grant access to this information to the accused parties, so that they can effectively exercise their rights of defence.[29]

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24 See Article 19(1) of the Procedural Regulation.

25 See Article 19(2) of the Procedural Regulation.

26 Athens Administrative Court of Appeal 4432/2007; President of Athens Administrative Court of Appeal 38/2007.

27 See Article 19(7) of the Procedural Regulation. The case handlers of the Directorate General and the Commissioner in charge submit a report with the specific data to the President of HCC.

28 See Article 19(4) of the Procedural Regulation; see also DAF/COMP/WP3/WD(2010)23, paragraph 26.

29 See HCC decision 369/V/2007 (dairy products), paragraphs 77-79.

Parties have access to the non-confidential versions of the other parties' memoranda and rebuttals. Sworn affidavits or new evidence presented during the hearing must also be submitted in a non-confidential version.[30]

HCC decisions[31] are published in non-confidential version in the Official Journal of the Government. Upon the Commissioner's proposal, the President and the Member of the Board that is designated as author of the decision jointly decide which data constitute business secrets that are not indispensable for the reasoning of the decision; the latter are left out from the text of the decision to be sent for official publication.

The confidential information included in the administrative case file of the HCC, which is submitted to the Athens Administrative Court of Appeal and to the Council of State, loses its confidential nature.[32]

3.3 Violation of confidentiality rules

The officials of the Directorate General and the Members of the Board of the HCC are bound by the obligation of professional secrecy, which is set out in Law 703/1977[33] and in the HCC Code of Conduct,[34] without prejudice to the provisions of article 37(2) of the Code of Criminal Procedure.[35] They are thus prohibited from disclosing any information which they have acquired or exchanged in the context of their duties.

Any breach of these duties by the officials of Directorate General of the HCC may lead to criminal sanctions, in particular custodial sentences pursuant to Article 252 of the Criminal Code,[36] as well as fines of one thousand (€1,000) ten thousand Euros (€10,000). It may also give rise to disciplinary action. A breach of the above duties by the President and the Members of the Board of the HCC may also lead to criminal sanctions, in particular custodial sentences pursuant to Article 252 of the Criminal Code, as well

30 See Articles 11(3), (4) (memoranda and rebuttals), 20(6) (affidavits and new evidence) and 23 (final memoranda) of the Procedural Regulation; see also DAF/COMP/WP3/WD(2010)23, paragraphs 27-28, 32 and 35. Articles 11(4) and 23 of the Procedural Regulation, concerning rebuttals and final memoranda, do not explicitly require for a non-confidential version thereof to be submitted; in practice, however, the HCC requires by analogy the submission of a non-confidential version also in these cases.

31 The identity of the Member of the Board who drafts the decision remains confidential until the issuing of the decision (see Article 26(2) of the Procedural Regulation). Deliberations of the decision-making Board are secret. Moreover, the results of the deliberations remain confidential until the entry of the operative part of the decision in the HCC Decisions' and Opinions' Book of Register (see Article 25(6) of the Procedural Regulation).

32 See Article 27(3) of Law 703/77.

33 See Article 27 of Law 703/77.

34 Article 27(3) of Law 703/77 refers only to the officials of the Directorate General and does not expressly provide that the Members of HCC are bound by the obligation of professional secrecy. Nevertheless, in the following paragraph 5, in case of breach of the professional secrecy obligation, sanctions are threatened also against the HCC President and Members of the Board. The HCC Code of Conduct in Article 5 expressly binds with the obligation of professional secrecy both the Members of the HCC Board and the officials of the Directorate General.

35 According to Article 37(2) of the Code of Criminal Procedure, the civil servants should report to the Public Prosecutor every criminal conduct, which is prosecuted *ex officio*, when they are informed of such a conduct during the discharge of their duties.

36 Article 252 of the Criminal Code provides for at least three months imprisonment in case of breach of professional secrecy.

as fines of as one thousand five hundred (€1,500) to fifteen thousand Euros (€15,000). In addition, the above persons forfeit their HCC office.

Finally, the above sanctions may also be imposed upon any person either commissioned by the HCC to produce a study[37] or participating in a working group, provided that the respective contract with the HCC contains a confidentiality clause; the same applies to the lawyers responsible for the legal representation of the HCC before the courts.[38]

4. Professional privilege

Priests, lawyers, technical consultants, notaries, doctors, pharmacists and civil servants (holding military or diplomatic secrets) are not obliged to disclose information to the HCC.[39] The above are obliged to testify that they cannot provide evidence to the HCC, because they are bound by professional privilege. Criminal sanctions are imposed in case of false testimony.

As far the specific case of lawyers is concerned, communications between lawyers and clients are protected by the legal professional privilege, provided that they are made for the purposes of the exercise of the client's rights of defence and they come from independent (i.e. not in-house) lawyers. Any undertaking claiming that a given document is privileged, must provide the HCC with appropriate justifications to substantiate its claim; the undertaking is not obliged to disclose the contents of such a document.

In practice, in cases of documents collected following an on the spot investigation, where the undertaking has claimed that certain documents are privileged, the officials of the Directorate General place the documents in a sealed envelope. The undertaking is afterwards invited to the premises of the HCC and the Head of the Legal Service decides on the dispute.

5. Settlements and consensual resolutions of enforcement proceedings

The parties subject to the investigation may consider offering commitments suitable to address the competition concerns arising from the investigation. In that case, the HCC may decide to engage in a procedure leading to a commitment decision.[40]

The parties concerned can propose such commitments through their Reply to the Statement of Objections. The adverse parties are then informed of this fact and offer their views. Thereafter, the Directorate General prepares a specific assessment of the commitments and makes a proposal to the Board of the HCC. If the latter finds satisfactory the proposed commitments, it takes a decision rendering them binding on the parties concerned and the case file is closed. If, on the other hand, the Board of the HCC rejects the commitments, it can either proceed to the hearing of the case on the basis of the initial Statement of Objections, or give a period of 10 days to the parties concerned, in order to modify their commitments.

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37 The aforementioned sanctions may also be applied to agents of the contractors of the study, provided that they had knowledge of the confidentiality clause.

38 See Article 27(6) of Law 703/77.

39 According to Article 25(1) of Law 703/77 "those exempt from examination at criminal trials pursuant to article 212 of the Code of Criminal Procedure shall be under no obligation to disclose information, provided they observe the obligations outlined in paragraph 3 of the said article. The provisions of the present paragraph shall not prejudice the provisions on bank secrecy".

40 The HCC's procedure on accepting commitments is currently under amendment.

6. Judicial review and interim relief

HCC decisions can be challenged before the Athens Administrative Court of Appeal within 60 days from the date they are served to their addressees. The Greek law, in other words, entrusts with the review of the HCC decisions, not the civil courts, which happens in French or German law, but with the administrative courts, following the example of Italy. The fact that the HCC Board takes decisions as a quasi-judicial body, explains that such decisions are challenged directly before the second-instance administrative court, the Administrative Court of Appeal, instead of the Administrative Court of First Instance.

A further appeal on points of law (cassation) can be brought before the Council of State, which is the Supreme Administrative Court.

Standing is accorded to the addressees of the decision, the complainant before the HCC, the Minister of the Economy, and any other third party having a legitimate interest. Such third parties, as well as undertakings that were contracting parties with the addressees of the decision, can be admitted as interveners.

When the challenged HCC decision has imposed fines and other pecuniary sanctions, the appeal is admissible on condition that a fee is paid by the Applicant, corresponding to 20% of the fine imposed by the HCC. This fee can never be higher than a hundred thousand (100,000) Euros.

The judges of the Athens Administrative Court of Appeal are generalist administrative judges and there is no specialised chamber hearing competition law cases. The Greek Competition Act has always provided for the possibility of a Presidential Decree founding specialised chambers dealing with the review of HCC decisions.[41] This power has never been exercised before, although there is currently discussion about this question in the legislative drafting committee that is preparing a new Competition Bill.

The Athens Administrative Court of Appeal exercises a full review of the merits of the HCC decision, not limited to its legality. Indeed, the appeal is not called "application for annulment", but rather "challenge of the merits". If the court reverses the HCC decision, it can rule on the case itself and does not have to refer the case back to the HCC, unless it has reversed a decision rejecting a complaint and has found itself a violation of the competition rules. In that case, the court cannot impose on the undertakings concerned any penalties or fines and cannot order any measures to bring the infringement to an end (remedies). Instead, only the HCC is competent to adopt such measures and in those cases the court must refer the case back to the HCC, which decides on any injunctive or punitive measures.[42]

The vast majority of HCC decisions are upheld on appeal before the Athens Administrative Court of Appeal, albeit with – sometimes – a considerable reduction of fines (i.e. partial annulments limited to the calculation of fines and/or duration of the infringement committed by each participating undertaking).

As far as interim relief is concerned, almost all HCC decisions are challenged before the courts and usually the parties seek interim relief. The court may wholly or partially suspend the effects of the HCC decision, including the fine.

41 Article 16(4) of Law 703/77.

42 See Council of State 903/1998.

HUNGARY

This contribution discusses procedural fairness aspects of the competition law enforcement activity of the Hungarian Competition Authority (Gazdasági Versenyhivatal, GVH). It follows the structure of the questionnaire of the OECD Secretariat. Though it has already been outlined in our submission for the February roundtable (February submission), for a better understanding of our detailed answers, this contribution repeats and starts with the brief description of some features of GVH procedures that are relevant in a procedural fairness context. Furthermore, in case the present contribution touches topics already addressed in the submission of February, we repeat the relevant parts thereof.

GVH law enforcement proceedings are administrative procedures and – adjusted to the organisational structure of the agency – consist of two phases: first the phase of the case handler and then the phase of the Competition Council. The case handler (or a team of case handlers) is responsible for initiating the proceedings in case of suspected infringements, and for taking the necessary investigative measures to clarify the facts of the case. After completing the investigation, the investigator prepares a report, summarising the facts established and the supporting evidence, and submits the report, together with the files, to the Competition Council. Investigators are organised in sector- or case-type specific units. All the investigatory units are supervised by one of the vice presidents of the GVH whose consent is required to launch a case. Formally, the investigation is initiated by an order which specifies the suspicion (with reference to the competition law provision(s) involved), the circumstances and practices that have triggered the proceedings. In the course of the proceedings the investigation can be extended by an order (similar to the initiating one), to further relating conducts or to further competition law provisions.

After the phase of the case handler, the Competition Council receives the case for decision making. (The Competition Council may return the case for further investigation if it finds the files and the report of the case handler inadequate.) The Competition Council is a separate decision-making body within the authority, led by the other vice president of the GVH (who is the chair of the Competition Council). When bringing a case, the Competition Council is made up of three or five members, appointed by the chair of the Competition Council, and one of them acts as the *rapporteur* of the case. Pursuant to the provisions of the Hungarian Competition Act (Competition Act),[1] the members of the Competition Council are independent in their competition supervision proceedings: when they adopt a decision, they are subject only to law, no instructions can be given to them. The decisions of the Competition Council – both on substance and on the procedural aspects, including the fairness of the procedure – may be subject to judicial review.

Both the investigator and the Competition Council can terminate the proceedings if the circumstances that have triggered the case turn to be non-existent, or if the evidence collected in the course of the proceedings is insufficient to prove the infringement and further investigation is not expected to produce any results. A decision on the substance of the case can only be made by the Competition Council.

1 Act LVII of 1996 on The Prohibition of Unfair and Restrictive Market Practices.

1. Decision-making process

"What procedures does your agency have in place to ensure that decision-makers consider all relevant evidence and remain open to considering different explanations for the conduct under investigation? Are independent teams used internally? Is there an independent review of the case by specialized economists? Are there other channels of input directly to the decision-makers? Are outside analysts or experts used to help decision-makers? What other techniques or practices has your agency adopted to promote sound decision-making?"

As it has already been touched upon by the February submission (para. 24), the burden lies with the agency to ascertain the relevant facts of the case in the decision-making process. Any evidence are admissible if suitable to facilitate the ascertaining of the relevant facts of the case. Those facts are deemed to be relevant that are substantial for deciding the case. The method and extent of collecting evidences are specified by the agency, independent of the requests of the parties, still it rests upon the agency to take into consideration all the circumstances that may be of importance. However, the parties can offer evidence or propose the collection of evidence, but – as mentioned before – the agency is entitled to select the evidence it deems admissible at its own discretion, including that it decides what facts are considered relevant and what evidence or investigative measures are needed to support them. It does not preclude that considerations raised by the parties may be taken on board when they are thought to be relevant and contribute to the proceedings (see also paras 32-33 of the February submission). The authority assesses each piece of evidence separately and on the aggregate, and establishes the facts of the case according to its persuasion based on this assessment.

A further aspect in determining the borders of fact-finding, is that the GVH, as all administrative authorities according to the Public Administrative Procedures Act,[2] is required to act in an efficient and cost-effective way in the course of its proceedings. As the court confirmed, this requirement does not mean that the agency can refuse or ignore relevant procedural measures because they are costly, but a reasonably economical attitude in order to cause the lowest possible costs both to the parties and the GVH itself, and to close the proceedings as soon as possible. In this sense, cost-effectiveness plays a role when the agency (the case-handler or the Competition Council) concludes to terminate the proceedings, because the evidence collected is insufficient to prove the infringement, and further investigation is not expected to produce any results (i.e. it is doubtful that the investigation produces even any results or any value-added results, compared to the costs).

Besides the responsibilities vested in the authority to ascertain the facts of the case, the parties are required to act in good faith in the course of the proceedings. The courts also confirmed that parties should act cooperatively with the agency in finding the relevant facts of the case. According to the Competition Act and the Public Administrative Procedures Act, parties are obliged, at request, to supply the data which are necessary to decide on the substance of the case. This obligation does not cover the admittance of an infringement of the law, the parties may however not refuse to supply incriminating evidence of any other kind.

1.1 The role of the support units

Procedures to "test" cases, or would-be cases, internally through independent teams, either ad-hoc or permanent – like devil's advocate exercises –, do not exist within the GVH. Nevertheless, support units and certain procedures involving them have a function which is similar to some extent. Support units – like

[2] Act CXL of 2004 on Public Administrative Procedures, it serves as background legislation for the Competition Act in procedural aspects.

the Chief Economist Section, or the Legal Section – are independent from those of the case handlers', and may be involved in enforcement directly or indirectly.

One tool to be mentioned in this context is the consulting process on concept memos before a formal proceedings is launched. Concept memos are brief internal documents prepared by the case handler when she/he intends to initiate a case. A concept memo describes the theory of harm of the particular case (including its legal aspects), a "plan" about how to check the theory of harm (including standards to prove), and how the investigation would be structured "logistically" (including the composition of the case team and need of assistance from the support units and of outsourcing needs throughout the investigation). It is circulated within the GVH and support units (as well as the Competition Council) make comments on it as a whole (i.e. not only about their possible contribution), as a default, in writing. They are shared with all participants of the process and the GVH management. Further verbal discussion or meeting(s) to clarify issues and opinions and to develop a common understanding are possible, but rare in practice. Comments by support units are non-binding, nevertheless it is not typical that a case handler would ignore them. As a result of the consulting process, a final concept memo is prepared if needed, and serves as a framework for the investigation. The whole process – including participants, their roles, time-frames – is governed by the Manual of the GVH[3] in a relatively flexible way and covers all significant cases. In principle, a similar exercise is used in the course of the investigation if the case handler believes that certain basic directions of the case should be changed. A status report memo can initiate this latter procedure, and it can be regarded as a review of the substantive points of the concept memo.

The primary objective of these consulting procedures is to put (and keep) the proceedings on the right track at an early stage (possibly when they are still at the "launching pad"), by making sure through collective effort that the directions (e.g. the theory of harm) of the case are appropriate. They provide a framework for pooling ideas from various parts of the organisation and for interactions between them. This way they channel the perspective, knowledge and experience of the support units into the case. By the same token, paradoxically, they also have a quality control aspect by involving a "fresh eye" of the support units, which makes them somewhat similar to review processes by independent teams.

Beyond a consultative role, support units may be involved more deeply in proceedings, at any stage of a case. Members of the support units can be part of the case team, but it is rare and not related to the subject. It is more frequent that they make a part of the analysis on their own. This tends to be the case with the analysis carried out by the chief economist, or with surveys. This is again, not a typical fully independent review process of the whole case. Moreover, the main idea is to be integrated into the case and to co-operate with the case handler – even the particular analysis might be requested originally by the case handler. The case handler also tends to be involved in designing such analyses (e.g. surveys). Nevertheless, a particular analysis of this kind is both controlled and ultimately designed by the support unit in question and the case handler is not in the position to have a final word about what its professional conclusions should be. According to the Manual, the conclusions of these analyses are non-binding on the case handler, but she/he has to reason if she/he does not incorporate them into the report to the Competition Council. Whether or not those conclusions are incorporated into the case handler's report, the analyses themselves move together with the file and are readily available for the Competition Council. It follows from the general principles of assessing evidences in the Hungarian legal system (mentioned also in para. 5) that the Competition Council is not obliged to accept their conclusions either, however it is expected to reason when doing so.

[3] The Manual of the GVH describes the internal procedure, with internal deadlines and other requirements (e.g. rules for in-house consultation). This regulation contains the rules for share of labour between the investigator and the Competition Council (e.g. division of time limits, involvement of the Competition Council in the preparation of a case). The Manual is not available for the public.

Outside experts and analysts may be involved at any stage of the proceedings. Informal consultations with them are rare and only occur regarding industries that are new to the GVH. In these cases the subject of the meeting is general issues that are relevant in that particular industry, rather than any particular would-be proceedings or allegation. These consultations are primarily aimed at the better understanding of the dynamics of competition in the given area and are more likely to be held in the context of a sector inquiry than of a law enforcement proceedings.

The GVH sometimes outsource certain tasks to outside experts or analysts in proceedings. For surveys this is the general practice, while for other tasks – like sophisticated statistical or econometric analysis – it depends on factors like whether the required skill and expertise is more available at the particular time of need outside of the GVH than inside of it. Outsourcings of these kinds are controlled either by a support unit or the case handler (or in special cases by the Competition Council). According to the manual procedure, the results of these outsourcings are non-binding on the case handler, but she/he has to reason if does not incorporate them into her/his report to the Competition Council. Whether or not those conclusions are incorporated into the case handler's report, the analyses themselves move together with the file and are readily available for the Competition Council. It follows from the general principles of assessing evidences in the Hungarian legal system (mentioned also in para. 5) that the Competition Council is not obliged to accept their conclusions either, however they must reason when doing so.

A subcategory of external experts are the "forensics experts" listed in the register of the Ministry of Justice. (In the Hungarian system the legal term "expert" applies indeed only to them.) There are some specificities related to their use and role, but neither the GVH nor the parties use them regularly due to the characteristics of, and expertise related to antitrust.

2. Confidentiality

> *"How does your agency balance a defendant's right to review and respond to evidence that will be used against it with the need to protect confidentiality? Are there special procedures available for disclosure necessary to protect rights of defense, e.g. by limiting the disclosure to legal representatives so as to ensure that business secrets are not divulged to competing businesses? How is confidential information defined? What rules apply to the protection of confidential information obtained from parties by your agency? Is such information automatically considered to be confidential, or does the party have to identify it as such? If such information is to be disclosed to other parties or made public, does the party have a prior right to object to the disclosure? How does your agency balance the benefits of public disclosure of ongoing investigations with the need to respect the confidentiality of targets of proceedings and possible effects on their reputation? What are the penalties for negligent/intentional violation of confidentiality rules?"*

As regards confidentiality, first it should be noted that confidential information and dealing with such information in administrative procedures are important for two reasons. One being the protection of legitimate interests of the person (and other persons) owning the data concerned to restrict access to such information by others, the other being the interest of other persons (most importantly the parties' right to review) and the public who also have legitimate interests in getting to know the decisions of the authorities and – an extent as large as possible – the underlying reasons (ie. proofs). Both (or rather three) types of interest have to be taken into consideration when deciding on disclosure of any data provided by the parties. This need for balance of interests also results in that the scope of disclosure of any data is defined relatively, and in many cases depends on the concrete persons and their position in the procedure (parties, witness, third person concerned, etc.).

It should also be mentioned, that although there are several types of information that need to be protected from access by third persons (beside business secrets personal data, classified information and professional secrets[4] worth mentioning) and the handling of which in administrative procedures are largely regulated in the same manner, in our contribution we concentrate on business secrets since these are those that most frequently occur in the GVH's practice and in handling of which the legislative provisions permit some margin of discretion to the agency. Besides, internal documents that are produced in the course of the proceedings as well as leniency applications, and information or documents provided by applicants for leniency within the framework of the GVH's leniency programme, are also worth mentioning. Protection of personal data which also constitute an important part of confidentiality will not be discussed in this paper thoroughly, yet will be mentioned where relevant.[5]

2.1 Definition of business secrets

Business secrets are defined in the Hungarian Civil Code[6] as facts, information, conclusions or data pertaining to economic activities the publication, release to or use by unauthorized persons of which is likely to imperil the rightful financial, economic or market interest of the owner of such secrets – other than the State of Hungary –, provided the owner has taken all of the necessary steps to keep such information confidential. As a general rule such data are eligible for full protection from unauthorized access. Yet it is important to note that the law explicitely contains an absolute exception in as regards business information, namely data that relate to use of public finances[7] shall not be deemed business secrets; thus these data lie outside the scope of legal protection, even if otherwise would constitute business secret, which may well have significance in particular in cartel cases involving bid rigging in public procurements or bids for a concession. This exception well demonstrates the relative nature of confidentiality itself and that even the relevant legislation defining business secrets substantively creates a balance between the competing interests of private parties and of the public.

2.2 Personal data

According to the Data Protection and Public Data Access Act[8] personal data comprise any information relating to a specific natural person identified or identifiable directly or indirectly (e. g. by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity) and any reference drawn, either directly or indirectly, from such information.

2.3 Access to confidential data by the GVH

As a general rule public authorities – except for the case of classified information – are authorized by the law itself to have access to all protected information the knowledge of which is necessary to conduct

4 Secrets entrusted to doctors, lawyers, notaries public when acting a professional capacity, and to the clergy.

5 In this part we use the term 'parties' to the parties against whom, or (in case of merger control) to the request of whom) the procedure is conducted by GVH and the term 'other party to the proceeding' to those, who are formally involved in a proceeding, yet not as clients (e.g. witness, holder of a document or other thing subject to investigation, experts).

6 Act IV. of 1959 on Civil Code, Art. 81.

7 These are data relating to the central budget, the budget of a local government, the appropriation of money received from the budget of the European Union, any subsidies and allowances in which the budget is involved, the management, control, use and appropriation and encumbrance of central and local government assets, as well as the acquisition of any rights in connection with such assets.

8 Act LXIII. of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest.

the given proceedings, as well as personal data deemed absolutely necessary to discharge their duties. Although Public Administrative Procedures Act restricts this right of access of the authority in some cases (e.g. a witness, or a third person holding a document inspected by the authority is not obliged to provide business secrets if not authorized by the data owner), the Competition Act gives the GVH a broader, almost full access to such data (actually only information under LPP is an exception), at the same time making it the obligation of the parties and other parties to the proceeding to provide the required data to the GVH. This means that in the GVH's practice such protected information may come from various sources and providing access to such data is a core issue in our procedures as well.

2.4 Legislative framework

The protection of business secrets and personal data is on the one hand enshrined in the rules of civil law which states that any abuse of these data constitutes a violation of civil rights, and on the other hand the legislation on legal procedures, in particular the Public Administrative Procedures Act recognises this protection and makes it a general obligation of the authorities to restrict access to such information obtained by them in the course of their procedures.

The rules governing handling of business secrets and disclosure thereof by the GVH are provided for in the Public Administrative Procedures Act with some special rules contained in the Competition Act. According to the Public Administrative Procedures Act in the course of its proceedings any authority shall ensure that protected information[9] (including business secrets) are not disclosed to the public, cannot be obtained by unauthorized persons, and that all personal data is sufficiently safeguarded. There is an important exception provided by the same Act, providing that compliance with the regulations relating to data protection may not result in any restriction of right to review.

At the same time the relevant legislation – in order to allow transparency of public administration, as well as to exercise parties' right to review and public control – provides as large publicity as possible, while trying to balance between the competing interests referred to above. According to these rules, hearings of parties and witnesses are public, but the authority may decide (upon request or ex officio) to hold the hearings in closed sessions and bar the public from any stage of the hearing in order to ensure the protection of protected information and confidential personal data. Similarly, during the proceedings the authority has to let access to the documents in the file of the case for the parties, and even third persons[10] may require access to these documents if it is necessary for the enforcement of their rights, or for the fulfilment of their obligations conferred upon them by the relevant legislation or an official ruling.

At the same time this right of access is restricted in that any document containing protected information (including business secrets), may not be accessed, unless the lack of knowledge of such information would impair the person requiring access in exercising his rights conferred by law. (This means that on the other hand access to protected information necessary for the exercising of the right to review by the parties or that are necessary for a third person for the enforcement of his right, or for the fulfilment of his obligation conferred upon him by the relevant legislation or an official ruling cannot be denied.) Nevertheless, normally in GVH proceedings, that neither the parties, nor any other persons are allowed to have access to the internal documents of the GVH (draft decisions, internal consultation papers – like the ones related to the concept memo discussed in paras 9-10 –, correspondence between the GVH and other authorities or between the latter), unless it is to be presented as evidence when making the case.

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9 These are: classified information, professional secrets, as well as business, trade, bank, insurance and securities secrets, fund secrets, and private secrets.

10 In GVH practice, such request has not occurred yet, although this possibility cannot be disregarded in principle.

The same is true for the internal documents of the European Commission, the competition authorities of Member States of the European Union, and the correspondence involving them.

As a special rule – partly with regard to the extremely high occurrence of information comprising business secrets in GVH proceedings – the Competition Act provides that the parties' right to have access to the documents and to make copies and notes thereof shall be open only following the conclusion of the investigation by the GVH, as of the time specified by the Competition Council allowing ample time for the parties to prepare for making a statement. In the GVH's practice, Competition Council generally sets this date as the date of communication of its preliminary statement ("statement of objection") to the parties. This means that, unless there are some exceptional circumstances, where the Competition Council authorizes a party to inspect certain specific documents before the conclusion of the investigation,[11] the documents cannot be accessed by the parties or any third persons, which ensures that any protected information or confidential personal data can be accessed only by officials of the GVH acting in the case as investigators, the members of the Competition Council and the president and vice presidents of the GVH.

As for personal data, it is worth mentioning that personal data of a witness or an other party to the proceeding not being a party is generally disclosable only to parties in a proceeding (all other's access is prohibited), yet in special cases a person – claiming that he could be exposed to extreme danger or harm on account of his taking part in the proceedings – may require his personal identification data and address to be handled confidentially. If this request is accepted, even the parties are denied to access these data, yet this of course may have an impact on the probative value of the information provided by such person.

A related issue is that of complainants who notify alleged infringements of competition law to the GVH and the informants, who are individuals providing the GVH with evidence or information that is essential in proving hard core cartels and who are eligible to a special fee for this. From a procedural point of view, the the same rules apply to them as to witnesses. The only but significant difference related both to the handling of their personal data and parties' right to defend is that such persons can request anonimity without the need to justifying any possibility of danger or harm and the GVH has to accept such a request automatically. Therefore if they so request their identity cannot be disclosed to the parties.

2.5 Special procedures regarding business secrets

In the GVH's procedures there are no special rules regarding the persons who can get access to a document on behalf of a party or other party to the proceeding (both the person itself, or his/her legal representative are eligible for access if other critera are fulfilled), yet there are special procedures both for requesting restriction of access by others and for auhorizing access to documents containing protected information and/or confidential personal data. On the one hand, any party or other party to the proceeding providing information to the GVH may request that free access to the documents (inspection or making copies or notes thereof) containing business secrets be restricted, while on the other hand the GVH may in a separate ruling reject or restrict access to a document containing such protected information that the requesting person has no right to know (see also paras 22-23). In both cases the separate ruling of the GVH denying the request is subject to a separate review either by the Competition Council (in case of rulings by the investigator in the case) and/or (in case of rulings adopted by the Competition Council) by judicial authority.

This also means that the GVH does not decide ex officio on whether a piece of information comprises business secret or not; it is always the relevant party that has to apply for it. Such an approach is in a way a consequence of the fact that it is always the owner of the data that can establish the relevant legitimate interests and who is responsible for keeping these data confidential (see the legal definition in para.17) The

[11] If this is unlikely to adversely influence the outcome of the proceedings.

relevant legislation does not contain any special conditions for such a request. Yet it is an established practice of the GVH that only those requests can be accepted that are specifying the piece of information concerned concretely enough and in case of each piece of information is duly justified. (Of course in most cases the type of information is such that a general justification can be accepted – e.g. detailed data of incomes and buyers etc.). Similarly other parties or any third persons have to duly justify either that the knowledge of the given piece of information is necessary to exercise their right to review or for enforcement of their right or for the fulfilment of any obligation conferred upon them by law.

2.6 The GVH's margin of discretion, considerations taken into account on deciding on business secrets

When deciding on a request for restricting access to business secrets, as well as on request for access to document containing such information, the GVH has a margin of discretion in determining whether the given piece of information can be treated as a business secret as such and consequently whether other persons have a well justified legitimate interest in knowing such information and if yes, to what extent it is absolutely necessary. It is clear that data contained in publicly available databases or those otherwise have became public, as well as data prescribed by law as public interest information cannot be eligible to protection as business secrets. In all other cases if restriction of access is requested with regard to a given piece of information the GVH, as a general approach, is to provide protection for information pertaining to economic activities of the party. Although requests for access by other parties or third persons can be treated in a separate ruling, determining in each case individually whether the relevant interest (especially right to review) justifies access and the extent of such access, in practice the GVH is to take these interests into consideration also when deciding on the original request for limiting access. Generally speaking the GVH is to give protection to information as business secret as broadly as possible, within the limits prescribed by law and with the considerations outlined bellow, while it is to give access to third persons to protected information as narrowly as possible. Naturally the concrete set of protected information may vary from case to case.

Of course the GVH's ruling on protection of business secrets, the potential parties and their interests taken into consideration may significantly differ depending on the type of the case. While in the course of a merger control only the merging parties with the same interest are the parties who have right to review the decision, in cartel or abuse of dominant position cases each, otherwise competing parties' interests may significantly differ, especially in the case of a review procedure, so business secrets of other parties could be more at danger. Moreover in both cases there may be other parties to the proceeding who themselves are not targets to the proceeding yet obliged to provide sensitive business information to the GVH or who have special interest in the outcome of the proceedings of the GVH (e.g. in the case of action for damages in cartel cases or in consumer protection cases); as for the former it is clear that their business secrets have to be highly protected, while in the latter case it should be ensured that such persons could gain access only to such and so much information that are inevitable for exercising their rights.

Another aspect of such a determination (which strongly correlates with parties' right to review as well as the public interest of general prevention) is that in its decisions the GVH has to show in details the grounds for the decision and the pieces of evidence considered, among which pieces of protected information may well be found. In most of the cases the competing interests can be well balanced and protecting a given piece of information as business secret does not constitute an obstacle of referring to it as an evidence. For example, instead of using concrete detailed data, referring to a range of quantities may be sufficient (a method that can be used both when referring to the information as evidence and for the purpose giving acces to other parties for the purpose of exercising their right for review). Nevertheless there are cases where parties request for protection as business secret of information that under normal circumstances would be eligible for such protection, whereby the information necessary in proving an infringement or justifying the decision can lose its status as an evidence if not revealed or is made obscure.

With regard to this latter aspect in such difficult situations (which in fact rarely occur) the GVH considers such information as not eligible for protection as business secret for the reason that keeping in secret information that themselves are results of an infringement or constitute a substantial element of the infringement cannot be considered as a rightful financial, economic or market interest (see the legal definition in para. 17).

Partly due to the complex considerations behind rulings on requests in connection with access to business secrets, it is an established practice within the GVH to adopt rulings accepting protection of information as business secrets at as late phase of the procedure as possible, but in any case before anyone could gain access to the documents concerned (as referred to in para. 24 as a general rule it is relatively close to the end of the procedure), thereby ensuring that when adopting the ruling the GVH is in good position to consider both the parties' interests and the function of the given information among the pieces of evidence.

2.7 Leniency applications, and information or documents provided by applicants for leniency

Until the GVH has not decided on a leniency application,[12] the application and documents provided by applicants for leniency are fully confidential; the Competition Act provides for that leniency documents can only be used by the GVH for the evaluation of the application, and – if that is the case – for requesting a court order for search of premises without advance notification (dawn raid) and only the investigator of the case, the Competition Council and the court may have access to them. In case of refusal or withdrawal of the application the GVH, if the applicant for leniency so requests, shall return the application and the documents submitted, together with any copies made. If this is not the case (e.g, the application is accepted, or the applicant does not require returning the documents), after the ruling has been taken on the application for leniency, the documents pertaining thereto fall under the general confidentiality regime outlined above.

2.8 Public access

According to Public Administrative Procedures Act after the conclusion of the proceeding the general public, unless provided otherwise by specific law, may get access to the texts of final decisions,[13] not containing any protected information and any personal data. As a special rule the Competition Act provides that final decisions of the Competition Council in every case shall be made public. (It is worth mentioning that this obligation of publishing final decisions is also taken into consideration when ruling on access – see paras 29-31). In the case of other rulings, publication is at the discretion of the GVH. As a general rule, the GVH publishes only rulings closing the procedures. Beside these, the GVH systematically publishes a short communication on each new case it has started to investigate, containing the names of the parties and a short description of the case (without any protected information) together with a short disclaimer stating that initiating a procedure does not automatically entail that the firm in question has actually committed the infringement or does not otherwise prejudge the final decision of the GVH.

None of these publications impair the right of parties as regards confidentiality. The published version of the decisions and rulings do not contain any data that could not made public. The same is true for the short communications about launching a case, since the names of the parties cannot be treated as personal data.

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12 The acting Competition Council decides on these applications in a separate ruling in the course of the proceeding without undue delay, allowing enough time for consideration, after hearing the applicant, but at any time before communicating its statement of objection to the parties.

13 As well as any rulings of second instance annulling the decision of the first instance and ordering the authority of the first instance to reopen the case.

In the GVH's view the practices to provide public access include reasonable safeguards to prevent undesirable damage in the reputation of the parties. First, not only GVH decisions, but also their judicial reviews are published at the GVH website. Secondly, GVH practice to make certain documents and information available to the public is fully neutral (e.g. there is no selection among cases whether to publish or not, publication policy is applied in a uniform manner instead).

2.9 Burden of preparing confidential versions

As a general rule it is the authority, that has to prepare the version of the document not containing any data that are undisclosable to the person requesting access to the document. It is always the case with the authorities' decisions, while as regards other documents in the file, the GVH is authorized by the Competition Act to order the party requesting to restrict the access by third persons to certain information obtained from him during the investigation to prepare a version that can be disclosed to third persons. According to the Public Administrative Procedures Act a decision should be drafted in such a way that it contains only that kind of protected information which can be made available to the person to whom the decision is communicated. The decision must be phrased without revealing the protected information to which as an evidence it contains any reference. Furthermore, the decision shall be phrased without making any implication as to the identity of the person, whose natural identification data and home address is considered confidential information. As regards other documents in the file, the GVH quite often orders the party requesting restricted access to de information, to prepare a disclosable version. The GVH uses this opportunity mostly with parties, while other parties to the proceeding are usually required to do so only when preparing a disclosable version would entail a disproportionately high surplus workload by the GVH.

2.10 Sanctions of violating confidentiality

In case of violating confidentiality rules there are different type of sanctions in our national legal system. In any case such a violation could give rise to an action for damages under the Civil Code, if the damages caused couldn't be abated by ordinary legal remedies in the course of the administrative procedure or if this is not the case, the available remedies were used by the aggrieved person. In exceptional cases, if commited intentionally for financial gain or advantage, or causing pecuniary injury to others, violation of confidentiality can constitute a criminal offence. It must be noted that in the practice of the GVH there has not been any cases where violation of confidentiality would have arised.

3. Requests for information to targets of investigations

> *"Does your agency have procedure to review information requests with the party? Is the party informed of the theory of the case and reasons for requesting the information? Can the party ask for a reconsideration of the information requested and/or deadlines, or appeal to a reviewing office within the agency? Do procedures and practices differ if the addressee of the request for information is not a party to the proceeding?"*

Data request issues in merger cases may come up first at the pre notification phase. Parties when notifying a merger to the GVH have to provide data that are described by a general notification form issued by the GVH. (The function of this form is similar to that of form CO of the European Commission.) Parties sometimes turn to the GVH for clarification regarding the notification form data request. The GVH is open for consultations to clarify issues like the aggregation levels of data, or the exact meaning of certain questions in the form. However, the GVH do not check preliminary the accuracy or the appropriateness of data intended to submit by the parties as part of the notification. Neither the GVH reconsider the data request coming from the form. If parties indicate difficulties about data availability, they are advised to submit (the closest) what they have and include explanation for absence of data in the notification. Notifications that do not fulfil the data request built into the notification (or do so without an explanation

accepted by the GVH) are regarded incomplete, and given back to parties to complement. This matters also in terms of deadlines, since the formal proceedings starts only at the day when the GVH receives a complete notification. Providing data required by the notification form goes usually smoothly, especially if parties are represented by law firms with substantial experience in merger cases.

Data requests by the GVH may happen in cases involving either mergers, abuse of dominance allegations, or agreements. Broadly speaking the practice and the law governing it are the same, with some differences due to variations in the timeframe or some other characteristics in substance or procedure.

GVH data requests specify the kind of data, including aggregations levels, scope and time period of the data, the deadline for providing the data, and also the format the data is supposed to be provided. Data requests are designed by the case handler, on the basis of the underlying theory of harm, the GVH's knowledge about the industry, and data issues within the industry, and the time frame (depending on procedural deadlines) of the proceedings. Experience also plays an important role when designing a data request. In non-merger cases the procedural time frame has no effect on the substance of the data request. In merger cases such a link is not impossible, and becomes more relevant towards the end of the proceedings.

The GVH may ask data (and by the Public Administrative Procedures Act) several times in the course of a proceedings. This applies also to merger cases, where multiple data requests are rare, in larger merger cases one major and perhaps and one or two smaller complementary or refinery data requests occur after notification. The time required for providing the requested data extends the procedural deadlines of the proceedings by law (i.e. data requests stop the clock according to the Public Administrative Procedures Act). This provides a motivation for parties to fulfil the data request, especially in merger cases, but in practice, the GVH usually close cases within the original deadlines.

The document outlining the data request mentions – or the case handler informs the parties verbally about – the opportunity of consultation, and parties sometimes use this opportunity. These consultations are not specifically regulated by law, so the GVH can be flexible and practical and to follow its own policy, keeping in mind of course the general legal framework. Data request consultations are not informal in the sense that a minutes of the meeting or a memo about the results is prepared for the files of the proceedings. The consultations usually serve as a tool for clarification, including to make the parties understand what exactly they need to submit and why. Sometimes consultations result in reconsidering certain parts of the data request (either substance, time frame or deadline). This can be just a technical reconsideration (e.g. when the parties can provide only a different kind of data which is nevertheless equally, or almost equally good for the original purposes) or material reconsideration (e.g. the data are not available, or not within reasonable time or at a reasonable cost). The latter happens very rarely, no more then 5-10% of the cases. Parties sometimes ask for longer deadlines for submitting data. The time frame to fulfil a major data request is usually 30 days, but the GVH usually allows 5-10 extra days, provided that the parties' request is explained and indicated in time.

GVH experience suggests, that parties are both more willing and more able to provide relevant data and to consult on the issue if they understand the proceeding and it purposes. In this context, the theory of harm of the case is not regarded as a secret. Indeed, disclosing reasons behind data needs can facilitate co-operation, especially, if the parties – perhaps after communications – think that the data is required for an analysis, which might rule out a particular theory of harm, e.g. remove an obstacle from clearing the merger. At the same time, in this respect the GVH can go only so as not to disclose the strategy of the investigation or endanger it another way. These two considerations require careful balancing in certain cases.

As a default, in law enforcement proceedings the parties are supposed to initiate data request consultations and they are bilateral. There was one occasion when the consultation was initiated by the GVH and was multilateral. This happened in the MIF (Multilateral Interchange Fee) case, which was a unique one because of the extremely high number of parties (including 23 banks), and because the GVH knew that while the banking sector produce a large amount of ready made data, many of them either not directly appropriate for the purposes of the proceedings, or not compatible between the parties themselves. Since these characteristics resembled that of a sector inquiry, so did the consultation (conference) on data request.

The GVH has the power to fine, with a procedural fine, those who do not fulfil the data request (including providing the data with delay). In mergers – where the parties motivation to co-operate is usually higher – the GVH has to use this power very rarely and mainly regarding third parties. In non-merger cases it tends to be the other way around.

4. Agreed resolutions of enforcement proceedings

"At what stage or stages of an investigation and/or litigation can the parties resolve an enforcement matter by means of a mutually agreed disposition with your agency? Are there restrictions on the types of cases that can be settled in this manner? Does your agency actively seek to settle cases?"

As it has already been touched upon by the February submission (para. 25), parties can offer the agency – in abuse or restricting agreement cases[14] – commitments or – in merger cases – remedies to eliminate the possible competition problem, thus avoiding the prohibition decision (and fines).

Concerning commitment decisions, the Competition Act renders that "where, in the course of competition supervision proceedings started ex officio, parties offer commitments to ensure, in a specified manner, compliance of their practices with the provisions of the Hungarian Competition Act or of Article 101 or 102 of the TFEU[15] and if effective safeguarding of public interest can be ensured in this manner, the Competition Council proceeding in the case may by order make those commitments binding on the parties, terminating at the same time the proceeding, without establishing an infringement of law".[16]

Under the Competition Act, commitment decisions (described above) provide for resolving the enforcement matter by means of a mutually agreed disposition between the agency and the party (parties), the Act does not provide the possibility of settlement procedure or any other similar solution. It has to be noted that the GVH has no legal obligation to apply this outcome for the case, it is in discretion of the Competition Council whether it accepts the commitment proposal of the alleged infringer(s) or not. When the party offers a proposal, the Competition Council needs to assess whether the competition problem can be solved by a commitment or the effective safeguarding of public interest can – rather – be ensured by a prohibition decision, and whether the commitment in question is adequate and fulfils these requirements, and even – from a procedural point of view – whether the public interest requires the continuation of the proceedings (involving further possible time-consuming and costly investigative measures) when the authority is already in possession of the commitment offer. If there is more than one party to a case, all parties have to commit themselves (either by one or more commitments) enabling the GVH to close the case with a commitment decision, as the proceedings cannot result in different outcomes (commitment / prohibition) for different parties.

14 The GVH can adopt commitment decision in consumer fraud cases as well.

15 TFEU: Treaty on the Functioning of the European Union.

16 Article 75.

Deriving from the share of labour between the investigator and the Competition Council defined by the Competition Act (see the introductory remarks of our submission), it is the Competition Council that can accept and decide on the terms of the undertakings concerned, though the discussion on the undertakings may be started anytime in the course of the investigation. The investigators may test the parties' willingness to undertake commitments, and may take steps to clear the details, however, the parties typically submit their undertakings following the receipt of the "statement of objections" of the Competition Council. The "statement of objections" of the Competition Council is the first document to define and clarify for the parties the position of the agency's decision-making body (see also paras 21-22 of the February submission), and in case the "statement of objections" suggests a prohibition decision, it gives incentives for the parties' to propose commitments. The "statement of objections" contains indirectly the main elements how the parties could ensure compliance of their practices with the law. In case the parties file in their commitments in the investigative phase, the investigator prepares a memo to inform the Competition Council on the content of undertakings, the data necessary for assessing them and its position (and presents the files of case to the Competition Council as well). The proceedings shall be continued according to the guidance given by the Competition Council in response to the memo. However, the response of the Competition Council does not constitute a decision on the proposed commitments, the Council may even later conclude – after receiving the report of the investigator and the files – to bring a prohibition decision (this may require the files to be referred back to the investigator for further investigation). As it has already been mentioned in the February submission, it results from the wording of the Competition Act that the parties, not the agency, propose and elaborate the commitment, the GVH may – and sometimes does – suggest or even encourage this solution for the parties (draw their attention to this possibility), but itself does not compile any particular commitment package for / instead of the parties.

The Competition Act allows the GVH to terminate the proceedings by commitment decision in all ex officio antitrust cases, providing that the requirements (i.e. the commitment can ensure the compliance of the practices of the parties with the law and the effective safeguarding of public interest relating to competition) are met. There are no restrictions by types of cases, but in practice certain cases are generally considered to be inappropriate to be closed by commitment decision. E.g. cases of great weight (which provide appreciable competition benefits to the infringer or which is appreciably detrimental to the competitors or the consumers), or when a decision has to be made in a completely new issue of law and legal certainty is better ensured by sending an explicit message to the market by expressing a clear position of the authority on the issue. The GVH tends to refuse a commitment offer, when a behaviour is against a well-formed expectation. The Competition Council is also reluctant to accept meaningless commitment offers i.e. if the controversial behaviour has already been terminated (e.g. a predation already finished) or if the undertaking merely aims at refraining from unlawful conduct in the future.

Concerning remedies in merger decisions, the Competition Act renders that "in order to reduce the detrimental effects of a concentration, the GVH may attach to its decision pre- or post-conditions and obligations. It may, in particular, demand by its decision the divestiture of certain parts of the firms or certain assets or the relinquishment of control over an indirect participant, setting an appropriate time limit for the carrying out of these requirements."[17] If the authorisation by the GVH is subject to condition, the Act sets that a pre-conditioned authorisation takes effect from the date when the condition is fulfilled, while a post-conditioned authorisation takes effect when being granted, but cease to have effect should any of the conditions not to be satisfied.[18]

Contrary to commitment decisions, which are even formally made on initiative of the parties (and accepted by the GVH), in merger cases the conditions or obligations attached to the authorising decision of

[17] Article 30 (3).

[18] Article 30 (4).

the agency, are formally defined by the authority in response to the competition problem identified in the course of the investigation. This does not preclude – moreover, it can be considered a typical attitude –, that the merging parties recognising the competition harm expected to be raised by the post-merger situation, propose possible conditions or obligations even at the earliest stage, when submitting the notification form. In this case, the GVH (especially the case handler, though there is room for it in the phase of the Competition Council as well, while in complex cases "negotiation" with the Competition Council plays an equally important role) consults with the parties on the content of the remedy, but it is finally specified and prescribed in the decision according to the considerations of, and as regarded appropriate by the GVH (and formally regardless of the proposal or opinion of the parties).

5. Judicial review and interim relief

"At what point in the competition law enforcement process does an independent judicial body have an opportunity to review the conclusions of your agency as to whether a violation of the law has occurred? What level of deference does the judicial body grant to the agency's decision? If the agency's decision has resulted in a sanction or remedy, what is the effect of the pending judicial review on that sanction or remedy? Can the judicial body grant interim relief? What is the timing of the review by the judicial body, and are there procedures for expedited review of time-sensitive business transactions or conduct?"

As outlined in our introductory remarks, the competition supervision proceedings of the GVH can be terminated (either by the investigator or the Competition Council) if the circumstances that have triggered the case turn to be non-existent, or if the evidence collected in the course of the proceedings is insufficient to prove the infringement and further investigation is not expected to produce any results. A decision on the substance of the case (as to whether a violation of the law has occurred) can only be made by the Competition Council. Judicial review can be sought when this final decision of the Competition Council is brought on the merits of a case.

Any request for the judicial review of the final decision of the Competition Council adopted in the proceedings has to be submitted to the Competition Council within thirty days from the date when the written decision has been communicated. The Competition Council arranges for forwarding the claim, together with the files and its comments concerning the claim, to the court (namely the Metropolitan Court of Budapest) within thirty days of its receipt. It has to be mentioned that a recent amendment of the Code of Civil Proceedings,[19] applicable for lawsuits concerning GVH decisions, restricted the group of possible applicants to the parties to the case and other participants of the proceedings in respect of the provisions relating to them (practically appeal is only allowed to the parties since then).[20]

The statement of claim may contest the decision of the Competition Council for violating either a substantive or a procedural legal provision, or for the improper interpretation of the law applied in the decision. However, the violation of a procedural provision can only lead to the annulment of the decision if the violation is serious and affects the merits of the case so that it cannot be eliminated or remedied in the procedure of the judicial body. In case a decision is annulled for this reason, it has as a consequence that the GVH has to initiate new proceedings. In competition cases the court has the possibility to overrule the contested decision. Though, according to the Code of Civil Proceedings, if the court concludes that the decision should have been based on different legal grounds, it cannot alter the decision of the

19 Act III of 1952 on the Code of Civil Proceedings.

20 Before this amendment, any person, whose rights or lawful interests were directly affected by the contested decision, was entitled to ask for judicial review thereof. On this ground complainants or third parties could challenge a decision of the GVH, if the court had found that the decision in question directly and personally affected their interests.

administrative body, but has to annul it and order new administrative proceedings to be initiated. When the decision of the authority is annulled for any reasons, in the new proceedings the agency abides by the ruling of the court and shall proceed accordingly.

The Code of Civil Proceedings specifies that a discretionary administrative decision is deemed to be lawful if the authority has ascertained the relevant facts of the case, the procedural rules have been kept, and the decision contains the reasonable assessment of facts. It entails that when the court establishes that these conditions of lawfulness of an administrative decision are met, the judicial body shall not overrule the decision of the authority. When the court overrules a decision of the GVH, it occurs more often in respect of the amount of fine imposed (and the relevant facts relating thereto). Considering the scope where an authority decision is allowed to be overruled by the court, it has been recently declared by the Supreme Court (in respect of fine) that, if the court admits that the decision is deemed to be lawful under the above mentioned conditions, and the authority assessed a certain fact reasonably in the contested decision, but its own assessment would differ from that of the authority, the court shall not alter the authority decision and adopt its own decision (and its own assessment) instead.

The decision of the Competition Council is final (while it can be subject to judicial review) and enforceable. The fact that the decision has been challenged before the court has no automatic suspensory effect on the sanction or remedy involved therein. The appellant may request the suspension of enforcement in its statement of claim, or anytime later in the course of the judicial procedure. In case the statement of claim contains a request for the suspension of enforcement, the claim and the files of the case has to be referred to the court within fifteen days (instead of thirty days) from the receipt of the claim. Once the suspension of enforcement has been requested, enforcement of the decision may not be carried out. Practically it entails that the GVH takes no measure to enforce the decision within the time limit when the statement of claim is due to be submitted against the decision, the enforcement is ordered only if no request for suspension is filed in or if the court dismisses the request. If – upon the request – the court orders the suspension of enforcement, the sanction or remedy involved in the decision cannot be enforced till the judicial review is pending. Though, in case the GVH gets to know that liquidation proceedings has been opened against the appealing firm (because of insolvency), it notifies and registers the claim for fine to the liquidator, even if the judicial review is still pending.

In the request for suspension the appellant is expected to give detailed reasoning and justification, often requests are refused for lack of sufficient justifiable reasons. The court decides on the request considering whether the former status quo can be reinstated after the enforcement, or whether the potential harm caused by the postponement of enforcement is more serious than the opposite situation. It has to be noted that if the court finally rules for the appellant and establishes that the GVH has violated any legal provision resulting that the firm can reclaim the fine (or a part of it), it has to be reimbursed with an interest corresponding to twice of the central bank base rate. For this reason, and in case the appellant cannot prove by documents that the enforcement of fine endangers its current financial situation, the request is likely to be dismissed. (We notice that in consumer fraud cases – which are not covered by this roundtable – the GVH is entitled to order a corrective announcement to be published in respect of the deceptive information. When the request for suspension of enforcement relates to this type of sanction, the court is more likely to agree with the appellant and accept that enforcement might cause non-reparable harm for the firm if the decision of the Competition Council (and the sanction therein) finally does not attain confirmation by the court.) In our practice requests for suspension of enforcement of these two kinds of sanctions have occurred, so we have no experience in how requests for the suspension of enforcement of other types of sanctions or remedies would be judged by the courts.

Considering the timing of the judicial review, the decision of the Metropolitan Court of Budapest (court of first instance) can be appealed before the Court of Appeal of Budapest (court of second instance). Both courts have exclusive jurisdiction on appeals concerning the decisions of the GVH. The courts have

no timetable or deadline for procedural measures or for closing the judicial procedure, they are only required to adopt a decision within a reasonable period of the time. There are no procedures for expedited review neither generally in competition cases, nor in certain ones. Due to the workload of courts, as a general phenomenon, and not specifically in competition cases, judicial procedures may last for years. As an extraordinary remedy, the appellants may turn to the Supreme Court against the decision of the Court of Appeal of Budapest, which (as of 1 January 2009) is required to rule on the appeal within 120 days.

ISREAL

The following report summarizes the issue of procedural fairness in civil and administrative enforcement proceedings under Israeli law. While surveying procedural rights in these proceedings, this report discusses the legal framework of the procedural aspects of antitrust administrative enforcement acts. This framework is determined in both law and the Antitrust Tribunal (hereinafter: "AT") case law. A special emphasis is given to the topics mentioned in the "WP3 - Request for Written Contribution" paper issued by the OECD.

Though some of the issues discussed in this paper are also relevant to the criminal enforcement acts, there are significant differences between the administrative and criminal treatment of the issues. This paper discusses these topics only with respect to administrative/civil enforcement proceedings.

1. The statutory framework

The statutory framework of the procedure of administrative and civil antitrust enforcement acts is set in the Restrictive Trade Practices Act, 1988 (hereinafter: "RTP Act") and in Administrative Tribunals act, 1992 (hereinafter: "ADT Act"). The first Act deals specifically with the operation of the Israeli Antitrust Authority (hereinafter: "IAA") and the AT, whereas the second Act regulates administrative tribunals in general, including the AT as such. Also relevant are the Restrictive Trade Practices Regulations (Procedures in the Antitrust Tribunal and in the Appeal), 1988 (hereinafter: "RTP Regulations").

The RTP Act establishes both the IAA and the AT, and while doing so sets out a few basic rules with respect to procedure, e.g. the AT's authority to issue interim orders, the right to appeal the IAA Director General's decisions to the AT, and the right to appeal the AT's decisions to the Supreme Court, including time frames for these appeals. The RTP Act also clarifies that the AT is not bound by the standard admissibility and civil procedure rules, excluding rules regarding immunities and testimonial immunity. Furthermore, the RTP Act regulates the publicity of IAA Director General's decisions.

The ADT Act sets out a more general statutory framework with respect to antitrust proceedings, dealing with issues such as confidentiality of information. Both the ADT act and the RTP Regulations frame the proceedings before the AT.

2. Decision-making process

The consideration of all relevant information and open-mindedness takes place for different reasons: according to Israeli administrative law, no enforcement acts can be taken by the IAA unless a hearing was conducted beforehand. Prior to the execution of an enforcement act, the IAA informs the relevant parties of its possible intentions and gives them the opportunity to elaborate on their arguments in the matter. The parties are not bound to any special kind of arguments and are invited to argue against the factual basis, the legal framework or the economic analysis. Moreover, the parties are free to challenge the possible enforcement act on the merits as well as the procedure taken by the IAA. As already stated, the hearing is done in writing. Nonetheless, when the parties ask for an additional oral hearing such request is being considered on a case by case basis.

It is noteworthy that the abovementioned hearing is conducted only with respect to enforcement acts which are executed by the IAA, and not to acts which are taken by the AT upon a request of the IAA. In the later case the parties have their day in court, and are free to present their arguments to the AT before a decision is made.

According to AT case law, during the hearing parties are obliged to present every argument they have concerning the enforcement act which is being considered.

Prior to the hearing the relevant parties receive a detailed notice regarding the possible enforcement act, as well as limited access to relevant information gathered by the IAA (on issues of access to information and confidentiality see below).

A hearing is a formal process, and the most significant opportunity for the IAA to reevaluate its position regarding an enforcement act. Nevertheless, while looking into a possible antitrust violation, the IAA sends detailed requests for information to the firms whose actions are being investigated, as well as third parties, e.g. suppliers of those firms, their customers, competitors etc. Giving correct and complete answers to requests for information issued by the IAA are mandatory under the RTP Act.

The IAA's insistence on receiving the information required for the investigation does not preclude the parties from presenting additional information as they see fit, along with arguments, legal and economic, which present their point of view. In fact, in most cases there is ongoing dialog between the IAA and the parties, which allows them to bring any relevant information and to argue any relevant argument during the process of investigation.

Furthermore, third parties who wish to present their view with respect to an investigation are usually given the opportunity to do so. Moreover, the IAA may take part, or even initiate, exchange of ideas concerning the investigation with relevant governmental bodies when such a dialogue is necessary to the decision-making process.

Generally speaking, the IAA does not use the services of outside experts or analysts. Nonetheless, where a certain investigation requires expertise which goes beyond the capabilities of the IAA, e.g. conducting market surveys, outside assistance is used. In any case, outside experts or bodies do not take direct part in the decision-making process, but rather in providing specific professional support.

3. Confidentiality

Whether it is blocking a merger, issuing a statement regarding a breach of the RTP Act, or instructing a monopoly on steps it must take in order to stop abusing dominant position, the foundation stone of every decision made by the IAA is information. The gathering of information usually starts with information provided by the parties, but it rarely ends there. In most cases the IAA will receive information from competitors of the concerning parties, their suppliers and costumers. Naturally, a significant part of the information gathered by the IAA is confidential, and the IAA takes all precautionary measures necessary to keep it that way. Before passing any information to third parties or making it public (in any of the matters mentioned hereinafter), the party who provided the information is always asked for its position in the matter.

The IAA sees itself as fully committed to preserving the secrecy of confidential business and commercial information. Nonetheless, the IAA sees a great value in making its decisions and enforcement activities public. And indeed, according to the RTP Act the IAA's decisions are public. Typically, the more reasoned and detailed a decision is, the higher is the chance for it to contain confidential information. Thus, the RTP Act, while obliging the IAA to make it decisions public, gives the AT the authority to preserve the

confidentiality of a IAA decision or any parts of it on certain grounds including its containment of business secrets.

The issue of information confidentiality becomes acute also during litigation between the IAA and parties against whom enforcement measures were taken, or on appeal of IAA's decisions regarding issues such as the approval or blocking of mergers. According to section 30(a) of the ADT Act, every party who is entitled to appeal the IAA's decision is also entitled to disclosure of the materials (documents, reports etc.) upon which the IAA's decision was based. Nevertheless, section 30(b) of the Act limits the right to disclosure on several grounds, such as third parties confidential business information.

Naturally, the IAA's adversaries wish full disclosure, while the sources of the confidential information whish to obtain the information as confidential as possible. When there is a dispute regarding the disclosure of information, the final word is this of the AT, which holds the authority to decide which items shall be disclosed and which shall stay confidential. When doing so the AT balances the interest of the owner of the information against the significance of the information to the proceedings.

A common solution to the confidentiality conflict is limiting disclosure to the concerning parties' legal representatives and their economic consultants. This arrangement was described by the Supreme Court as one that creates a balanced settlement between the parties' conflicting interests.

As already mentioned, disclosure issues might also arise during the hearing phase, where the concerning parties are given the opportunity to present their position before a final decision is made. According to Israeli administrative law, pre-hearing disclosure rights do exist but occupy a more narrow character. Thus, complicated conflicts involving disclosure and confidentiality are usually not dealt with at the hearing phase, but rather being left to the decision of the AT, if such decision is eventually needed.

4. Requests for information to targets of investigations

Requests for information are issued according to section 46(b) of the RTP Act. Failing to reply fully and truthfully to an information request is a criminal offense under the Act.

As already mentioned, the gathering of information usually starts with information provided by the parties, but it rarely ends there. Accordingly, although the relevant parties are always main sources of information, hardly ever are they the only sources. As the parties usually have clear interest regarding the outcome of the IAA examination, information received from them is always scrutinize carefully and checked against information gathered from various other sources.

When information request is done in the process of an investigation (and not the examination of a proposed merger, for example) the IAA does not inform the relevant parties, as well as third parties which are being asked for information, regarding the purpose of the information. Nevertheless the requested information might in itself reveal the nature of the investigation, at least in general terms.

As a matter of policy the IAA does not enter into negotiations with parties regarding their answers to the information requests. Since the IAA only asks in the first place for information which is needed for its investigation, it would not compromise the depth and scope of the investigation due to unwillingness of third parties to answer to information requests. Having said that, the IAA is generally willing to extend the standard deadline (which is two weeks), when such extension does not harm the investigation.

Generally speaking, the same policy applies to the parties relevant to the investigation as well as to third parties with respect to information requests.

5. Agreed resolutions of enforcement proceedings

Before considering ending an enforcement act with any kind of mutual understanding, the IAA must first establish with high level of certainty that the law was breached, along with the scope of the breach. In any phase after the establishment of such conclusion the IAA is open to the possibility of resolving the matter in mutually agreed disposition, either before or after litigation has begun. In most cases however the IAA does initiate such agreed resolutions.

According to section 50B of the RTP Act, enforcement acts, either criminal or administrative, can be replaced by a consent decree. A consent decree usually includes behavioral commitments of the relevant parties to stop certain suspected activities, or to take certain actions which are needed in this aspect. It might also include an obligation by the parties to pay a fine. In most cases, though agreeing to the consent decree, the parties will do so without admitting to a breach of the law.

6. Judicial review and interim relief

Administrative enforcement procedures are divided into two groups. Enforcement acts of the first kind, which include procedures such as a statement regarding a breach of the RTP Act and instructions to monopolies, are executed exclusively by the IAA General Director, but are subject to EX-POST judicial review of the AT. The AT reviews all aspects of the decision, procedural and material. When a mistake is found in the IAA's decision, the AT is authorized to reverse the decision or to change it as is sees feet.

Except for the instructions to a monopoly procedure, an appeal to the AT does not postpone the validity of the IAA Director General's decision.

The second group of enforcement acts includes, inter alia, the separation of an illegal merger, the splitting of a monopoly and the issuing of an injunction prohibiting a breach of the RTP Act. These acts are subject to the sole authority of the AT. The IAA Director General is obliged to submit a request to the AT when she concludes that the law is breached in a manner which justifies the AT execution of such enforcement acts.

The AT has the authority to grant interim relief as part of any procedure which is taking place before it.

Though the legislative framework which regulates the activity of the AT lacks any specific treatment to the duration of the procedure, according to the case law the procedure in time-sensitive cases, e.g. appeals on the Director General's decision to block a merger, ought to be quick and efficient.

JAPAN

1. Procedures for administrative investigations

1.1 Initiation of a case investigation

With regard to the initiation of a case investigation, Section 7 of the Rules of Administrative Investigation by the Japan Fair Trade Commission (the Investigation Rules) stipulates as follows.

- When the Director General of the Investigation Bureau has found a fact that will be the basis of a case, he/she shall report it to the Commission by attaching his/her opinions on the necessity of an investigation and by clarifying (i) a preface, (ii) a summary of the facts, and (iii) relevant law as much as possible.

- In cases where the Commission has found that a case needs to be subject to an administrative measure, such as a submission order, etc., it shall designate investigators to be in charge of that case.

1.2 Collection of evidence by investigators

The principal means of collecting evidence employed by the investigators of the Japan Fair Trade Commission (JFTC) include (i) the issuing of orders to submit physical evidence or to keep such evidence through onsite investigations, (ii) recording of statements through interviews, and (iii) issuing of orders to report, etc.

The authority to make compulsory measures concerning these means of investigations is stipulated in Article 47 of the Antimonopoly Act (AMA). However, this authority concerns an indirect compulsory execution, with which the party's obligation to tolerate the investigations is secured by the existence of a penal provision, instead of direct compulsory execution that is conducted irrespective of the intentions of the party concerned. Therefore, a court warrant is not required for such investigations.

In addition, with respect to the means of investigations (i) to (iii) above, voluntary cooperation is also made by the parties concerned, mainly for (ii) recording statements through interviews, instead of invocations of the authority to perform compulsory execution.

1.2.1 Order to submit physical evidence or detention through on-the-spot investigations

Article 47, paragraph (1), item (iv) of the AMA defines the area of on-the-spot investigations by the JFTC as "any business office of the persons concerned with a case or other necessary sites," and investigators are allowed to undertake, and actually do undertake, on-the-spot investigations not only to the persons concerned with a case but also to their trading partners, etc.

When an on-the-spot investigation is undertaken, a document showing the name of the case, the gist of the alleged facts, and relevant articles is issued for the persons concerned with the case and due explanations are given to them.

Where documents or other materials are deemed necessary for a case investigation as a result of an on-the-spot investigation, investigators order the representative of the party concerned to submit the said documents or materials and keep them, pursuant to the provisions of Article 47, paragraph (1), item (iii) of the AMA.

Where an investigator gives an order for the submission of a material, he/she shall send a written order of submission to the party concerned. (Section 9, paragraph (1), item (iv) of the Investigation Rules)

Even where a "trade secret" is included in the physical evidence to be kept for a case investigation, the investigator keeps the said evidence as long as it is deemed necessary for the said case investigation.

A "trade secret" herein is construed as information that meets all of the following requirements: (i) the information is not within the public domain, (ii) the entrepreneur concerned with the case desires to keep the information confidential, and (iii) there is deemed to be a rational reason for keeping the information confidential from an objective point of view (Judgment of Tokyo District Court rendered on July 28, 1978).

Concretely, "production cost, purchasing cost, names of business partners, know-how on sales activities, etc." are deemed to fall under "trade secrets" ["Criteria concerning measures made in accordance with the Act on Access to Information Held by Administrative Organs" (April 2001, JFTC)].

A person who received an order to submit documents or materials may inspect or copy the said documents or materials unless doing so gives particular obstructions to the case investigation (Section 18 of the Investigation Rules).

- Investigators may, and actually do, order persons concerned with cases or witnesses to submit materials, other than through onsite investigations. Examples of such materials include physical evidence brought to interviews described in the section B below.

- Investigators may receive documents or other materials submitted voluntarily by persons concerned with cases or witnesses.

1.2.2 Recording of statements through interviews

Appearance order and compulsory interrogation

Article 47, paragraph (1), item (i) of the AMA authorizes investigators of the JFTC to order persons concerned with a case or witnesses to appear for interrogation.

When issuing an order for an appearance, the investigator shall send a written appearance order to the person concerned with a case or the witness. (Section 9, paragraph (1), item (i) of the Investigation Rules)

The investigator shall create a record of the interrogation after interrogating the person concerned with a case or a witness. The investigator shall read the record clearly to the person being interrogated or have the person being interrogated inspect the record, and request the person to sign and seal the record if he/she acknowledges that it contains no error. (Section 11 of the Investigation Rules)

Voluntary interview

Investigators may also request persons concerned with a case or witnesses to appear voluntarily to conduct voluntary interviews, and create records of the interview. The investigator shall read out the record to the person or witness being interviewed or have him/her inspect the record, and request the person or

witness to sign and seal the record if he/she acknowledges that it contains no error. (Section 13 of the Investigation Rules)

In actual investigations, voluntary interview is conducted more frequently than an appearance order or compulsory interrogation mentioned in (A) above.

Presentation of physical evidence to persons being interrogated or interviewed

During an interrogation or interview mentioned in (A) and (B) above, respectively, the investigator may present physical evidence to the person being interrogated or interviewed for the purpose of aiding his or her memory, for example. In such cases, where required for the investigation, the physical evidence may be from sources other than the person's own company. However, where evidence from another company is presented and the evidence contains "trade secrets," investigators are careful to mask the relevant portions or take any other necessary measures so as not to reveal such secrets.

Such physical evidence is usually not assumed to include secrets regarding the private life of an individual, but if it should, such secrets are naturally maintained.

1.2.3 Issuance of order to report, etc.

Order to report

Article 47, paragraph (1), item (i) of the AMA authorizes investigators of the JFTC to order persons concerned with a case or witnesses to submit their opinions or reports.

To issue orders for the submission of opinions or reports, the investigator shall send a written order to report to the person concerned with a case or the witness. (Section 9, paragraph (1), item (ii) of the Investigation Rules)

Request to report

Investigators may also request persons concerned with a case or witnesses to submit their opinions or report voluntarily.

However, when investigators intend to collect opinions or reports from persons concerned with a case, they usually issue an order to the persons. Requests for voluntary submissions are made mostly to witnesses.

Objection to measures taken by investigators

Any persons who were subject to either of the measures mentioned in A, B-(A), and C-(A) above by investigators pursuant to Article 47 of the AMA may lodge an objection with the JFTC in writing, describing the reasons for the objection, within one week of the measure being taken.

Where the JFTC acknowledges that the objection has sufficient grounds, it shall order the investigators to revoke, rescind, or modify the measure against which the objection was filed and notify the petitioner to that effect. (Section 22 of the Investigation Rules)

1.3 Reporting the results of investigations

When an investigation of a case has been completed, the Director General of the Investigation Bureau reports the result to the Commission.

The report shall include (i) a preface, (ii) a history of the investigation, (iii) a summary of the facts, (iv) relevant articles, and (v) the opinions of the investigators. (Section 23 of the Investigation Rules) The summary of the facts shall also include supporting evidence, namely contents of records of interviews with persons concerned with the case and/or witnesses and physical evidence collected as part of the investigation.

There is no system under which teams that are independent of the investigators in charge of the case review the result of the investigation or external specialists give opinions directly to the JFTC. However, investigators may request external specialists to give opinions about specific points of a case on a voluntary basis, when this is deemed necessary.

1.4 Prior explanations of the content of cease and desist orders, etc., and statement of opinions and submission of evidence, etc., by the person subject to the order

1.4.1 Prior notice

If the JFTC finds it appropriate to issue a cease and desist order given the result of investigation described in (3) above, it shall notify the person subject to the order of the content of the cease and desist order in advance, by sending a document describing (i) the content of the cease and desist order to be issued, (ii) the facts found by the JFTC, and the application of laws and regulations thereto, and (iii) the opportunity to express opinions and to submit evidence with regard to the matters listed in (i) and (ii) to the JFTC and the deadline for same. (Article 49, paragraph (5) of the AMA, Section 24 of the Investigation Rules)

When the issuing of a surcharge payment order is deemed appropriate, the JFTC shall notify the person subject to the order, in place of (i) and (ii) above, (i) the amount of the surcharge intended to be ordered to be paid and (ii) the basis of calculation of the surcharge and the violation pertaining to such surcharge. (Article 50, paragraph (6) of the AMA, Section 29 of the Investigation Rules)

1.4.2 Prior explanation

When requested by a person who received the notice mentioned in A. above or by his/her agent, the investigators shall give explanations about (i) the content of the cease and desist order to be issued, and (ii) the facts found by the JFTC, and the application of the AMA thereto. In this case, the investigators shall also explain the evidence required to provide the bases for the facts found by the JFTC concerning the person to which the explanations are given. (Section 25 of the Investigation Rules) Explanations are also given about the prior notice of the payment order. (Sections 29 and 25 of the Investigation Rules)

In principle, prior explanations shall be given separately to each company. Evidence other than record of interview or physical evidence from the company to which the explanations are given are also disclosed and explained as necessary, when that evidence proves the violation of the said company. In this case, however, investigators are careful not to reveal the "trade secrets" of companies other than the one subject to the order, by masking the relevant portions or taking any other necessary measures. (The same applies to information that is likely to permit identification of persons who gave statements or provided information and who may be targeted by related persons if identified, and to secrets regarding the private life of an individual.)

1.4.3 Statement of opinions and submission of evidence by person subject to the order

A person who received the notice mentioned in A. may submit written opinions or evidence to the JFTC by a specified date. When submitting evidence, the person shall clarify the matters he or she is seeking to prove. The JFTC may also allow the person to express his/her opinions orally where doing so is

deemed particularly necessary. (Article 49, paragraph (3) of the AMA, Section 26 of the Investigation Rules)

A person who received the notice mentioned in A. may have an agent express opinions or submit evidence on his/her behalf. (Section 27 of the Investigation Rules)

1.5 Cease and desist order, etc.

The JFTC finally issues a cease and desist order or surcharge payment order after giving sufficient consideration to the opinions and evidence from the person subject to the order concerning the prior explanations in (4) above.

2. Revisions concerning judicial review to the orders issued by the JFTC, etc.

2.1 Background

Currently, any persons who are dissatisfied with administrative measures taken by the JFTC may request the JFTC to initiate a hearing regarding the said administrative measure. The hearing is conducted under the JFTC. However, it has been pointed out that this system of hearings could be lacking fairness because the JFTC, which took the administrative measure, determines the appropriateness of the measure itself.

2.2 Submission of the amendment bill of the AMA to the Diet

In response to the criticism about the fairness of the procedures described in (1) above, an amendment bill of the AMA was submitted to the Diet in March 2010. The content of the bill is as follows.

- The JFTC's hearing procedure for administrative appeal will be abolished and the provision that jurisdiction in the first instance over appeals against decisions made at the JFTC's hearing shall rest with the Tokyo High Court will also be abolished.

- To ensure expertise in the court and for other purposes, jurisdictions over appeals against cease and desist orders, etc., shall rest exclusively with the Tokyo District Court, and at the Tokyo District Court, a panel of three or five judges shall hear trials and hand down judicial decisions.

- Concerning the procedures for hearings pertaining to cease and desist orders, etc., provisions, etc., will be developed for explanations of the content, etc., of the cease and desist order to be issued and inspections and copying of evidence, in order to ensure due process.

3. Business combination reviews

3.1 Ensuring transparency with guidelines, etc.

To further ensure the transparency of the application of laws concerning business combination reviews and to improve predictability for entrepreneurs, the JFTC has published the "Guidelines on the Application of the AMA to Reviewing Business Combinations." These Guidelines show (i) the types of business combinations subject to reviews, (ii) the criteria for determining relevant markets, (iii) the interpretation of the stipulation that "the effect may be substantially to restrain competition," (iv) the frameworks and criteria for determining whether competition will be substantially restrained or not, and (v) examples of measures taken to solve problems.

Meanwhile, companies involved in a business combination may ask for consultations prior to sending notification of the business combination to avoid cease and desist orders and any other risks. Thus, there are many cases in which business combination reviews are undertaken at the phase of prior consultation. The JFTC has published "Policies dealing with prior consultation regarding enterprise combination plans" (hereafter, the "Prior Consultation Guidelines") to (i) ensure that procedures for prior consultations be taken with the same level of transparency and fairness as legal procedures and (ii) improve the predictability of the JFTC's judgment to be made after business combination reviews.

In addition, the JFTC publishes its reviews of business combinations about which the JFTC has accepted notifications or prior consultations, where the content is deemed informative for entrepreneurs planning business combinations.

3.2 Prior consultations

3.2.1 Initiation of a prior consultation

When a prior consultation concerning a planned business combination has been requested and no additional material concerning the plan was deemed necessary, the JFTC shall notify the company to that effect within 20 days of the submission of materials showing the specific plans for the said business combination, in principle. Where additional materials are deemed necessary, the JFTC shall present a list of the required additional materials in writing by the said deadline. To ensure that prior consultation is commenced smoothly, it is stipulated that the companies involved may inquire with the JFTC, before the commencement of prior consultation, about the outline of the AMA, the content of materials showing specific details of the business combination plan, and other matters. (Section 3-(1) of the Prior Consultation Guidelines)

A company involved may submit any materials or written opinions, etc., it believes it should submit at any time during the review as well as at the time it requests a prior consultation. (Section 3-(2)-C of the Prior Consultation Guidelines)

3.2.2 Primary review

Where the JFTC has notified a company involved that no additional material is necessary in the case of A. above, it shall commence the business combination review as of the date of the said notification, and where the JFTC has presented a list of additional materials to the company involved, it shall commence the said review as of the date when the said additional materials were submitted (this review is called the "primary review"). The JFTC shall notify the company involved that the proposed combination is not problematic in light of the AMA or that a more detailed review (this review is called the "secondary review") is necessary, within 30 days of the commencement of the primary review, in principle. (Section 3-(3) of the Prior Consultation Guidelines)

It is stipulated that where the JFTC notifies a company involved that a secondary review is required, it shall explain specific points of contention in light of the AMA after identifying the commodity or service and geographical area in question, and shall request the submission of specific materials deemed necessary for the secondary review. (Section 4-(1) of the Prior Consultation Guidelines)

3.2.3 Secondary review

It is stipulated that after the JFTC has notified the company involved that a secondary review is necessary, the JFTC shall undertake a review on whether the planned business combination is problematic in light of the provisions of the AMA, give a written response concerning the result of the review including reasons, and make public the result within 90 days, in principle, of the submission of specific materials

deemed necessary for the secondary review, which was requested in the process described in B above. (Section 4-(2)-E of the Prior Consultation Guidelines)

Where a business combination subject to a review is not to be made public by the JFTC, it may not undertake hearings, etc., with business partners, etc., of the companies involved in the business combination, to protect confidentiality.

However, secondary reviews require hearings, etc., with business partners, etc., by the JFTC. Therefore, where the business combination subject to the secondary review is not to be made public by the JFTC, the company involved is required to make public the said business combination itself. (Section 4-(2)-B of the Prior Consultation Guidelines)

The JFTC shall announce that it will conduct a secondary review of a business combination plan after it has notified the companies involved to that effect and after the companies involved have made an announcement to that effect, and this applies where the matter is not to be made public by the JFTC. Any persons who have opinions they wish to state about the said business combination plan may submit written opinions to the JFTC within 30 days after it has announced that it would undertake detailed reviews of the said plan. (Section 4-(2)-C of the Prior Consultation Guidelines)

It is stipulated that where the JFTC intends to point out, in the process of a secondary review, that the business combination plan under review is problematic in light of the provisions of Chapter IV of the AMA, it shall present the grounds for having judged it to be problematic (such as findings concerning facts advocated by the companies involved and the results of surveys, analyses, or questionnaires conducted by the JFTC) excluding portions showing trade secrets of other entrepreneurs. (Section 4-(2)-E of the Prior Consultation Guidelines)

3.3 Legal procedures

It is stipulated that when the JFTC has accepted a notification of business combination such as the acquisition of shares or a merger, it shall request additional reports, etc., required for the review or judge whether the proposed business combination is problematic in light of the AMA or not within 30 days of the date of acceptance of the said notification, or judge whether the proposed business combination is problematic in light of the AMA or not within 90 days of the date of acceptance of additional report, etc., required for the review or within 120 days of the date of acceptance of the first notification, whichever is later. (Article 10, paragraph (9), Article 15, paragraph (3), etc., of the AMA) Also, where a business combination is deemed problematic in light of the AMA, the JFTC shall issue a cease and desist order to demand the suspension, etc., of the said business combination after giving the companies concerned prior notice and an opportunity to state opinions and submit evidence. (Article 17-2 of the AMA) The provisions covering prior notification, statement of opinions, and submission of evidence are identical to those covering the procedures for the investigations of cases other than business combination reviews. (See 1-(4) above.)

KOREA

1. Introduction

The decision-making procedure of the Korea Fair Trade Commission (hereinafter "KFTC") is not strictly the same as the judicial procedure governed by the court. But it can be seen as quasi-judicial one in that the KFTC decides infringement of the competition laws[1] through hearing process, and imposes corrective measures against violations. In addition, in a case a respondent dissatisfied with the KFTC decision wants to file an appeal to the appellate court, the person shall file a lawsuit to the Seoul High Court. This distinguishes KFTC measures from other administrative measures which are generally subject to three-level court system. Therefore, the decision-making process of the KFTC, which is quasi-judicial process of an independent agency in its nature, can be practically considered as having function of the first instance trial. Given the quasi-judicial nature of the KFTC's decision making and its great impact on the people's lives, it is fair to say that the decision process of the KFTC is required to ensure further scrutiny than general administrative adjudication procedure.

With this in mind, the KFTC has made consistent effort to improve transparency, fairness and efficiency of its case-handling system. Rules related to the case-handling system and various institutions to ensure fairness and transparency in the system were already introduced in the report submitted to the February 2010 Roundtable on Procedural Fairness, DAF/COMP/WP3/WD(2010)25. This report, therefore, will focus on main discussion topics of this roundtable in June; KFTC's decision making process, protecting confidentiality of respondents' business secrets, the process of requesting examinees to submit documents, consented resolutions of enforcement proceedings, and judicial review on the KFTC decision.

2. Decision-making process

2.1 Submission and delivery of Examination Report

The decision making process of the KFTC begins as an Examiner[2] draws up an Examination Report and files it to the Committee of the KFTC[3]. Upon filing the report to the Committee, the Examiner should send a respondent the Examination Report including attached materials and a list of the attached materials,

1 Other than the "Monopoly Regulation and Fair Trade Act (MRFTA)", 11 laws are enforced by the KFTC. However, case handling procedures are governed by the MRFTA, which regulates essential parts of the competition law such as market dominance abuse or cartel conspiracy. The procedures applied to violations of other laws are the same as the MRFTA. The MRFTA is hereinafter referred to as the "Act".

2 Secretary General designates a director general of the headquarters or a head of a regional office as an Examiner in charge of a case investigation and the designated Examiner produces an Examination Report on the allocated case.

3 The Committee of the KFTC consists of the Chairman (ministerial level), Vice Chairman (vice-ministerial level), three standing commissioners and four non-standing commissioners. There are 2 kinds of sessions in KFTC proceedings. One is the "plenary session" attended by all of the nine commissioners and the other is the "chamber session" involving three commissioners including one standing commissioner as a chair. The plenary session convenes for cases of significant economic impact, cases involving different legal application and re-hearing cases while the chamber session is for other cases not handled in the plenary session.

and notify the respondent to reply to the report within at least two weeks after the receipt of the report. [Article 29. 10 of the Regulation on Operation of KFTC Meetings and Case-handling Procedures (hereinafter referred to as the "Regulation")]

2.2 Designation of chief commissioner and prior review

When the Examination Report is filed, the chair of the designated chamber session, or a chief commissioner of the plenary session designated by the Chairman of the KFTC among standing members for the case, is decided to be in charge of steering the Committee proceedings. The designated chief commissioner or the chair of the chamber session conducts prior review of the case to decide whether it can be referred to the committee proceeding (hearing). If the chair (or the chief commissioner) considers the submitted Report is insufficient, he/she orders the filing Examiner in charge to supplement or revise the materials of the report. (Article 30 of the Regulation)

2.3 Preparatory procedures for hearing

Once the replies from the respondent on the Examination Report are submitted, a chief commissioner (plenary session) or chair (chamber session) may allow preparatory procedures for hearing to be conducted, if deemed necessary for a more efficient and focused hearing. [4] (Article 30-3 of the Regulation). The preparatory procedure is conducted either by way of submitting written explanation on arguments and evidence or in the manner of preliminary hearing (Regulation Article 30-2.2). During the preparatory procedure, both Examiner and respondent have to submit all the arguments and evidence needed for the hearing.[5]

If one of the two parties, either an Examiner or a respondent, is not present, preliminary hearing cannot be opened. Also, the preliminary hearing process should be made public in principle. (Article 30-5 of the Regulation)

When a respondent requests for examination on evidence, a chair (or chief commissioner) may decide whether to grant the request (Article 30-6.1). If deemed necessary, the chair can request expert opinions or submission of necessary materials. (Article 30-6.5)

In order to conduct the preparatory procedure in a fair manner, a chair (or chief commissioner) is required;

- to provide opportunity to the parties to submit rebuttal or counterevidence for the argument and evidence presented by the opposing party;
- to ensure impartiality in the process and provide equal opportunity to the both parties in submission of argument and evidence; and
- not to have ex parte contact without legitimate reasons. (Article 30-7.1 ~ 3 of the Regulation)

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4 If the preparatory process is not conducted, the case shall be presented to the Committee within 30 days from the date of the receiving replies from the respondents or the deadline of the submission (Article 31.1 of the Regulation). The case may be withdrawn or belatedly presented to the Committee at the request of the concerned Examiner or by the authority of the Committee (Article 32 of the Regulation).

5 However, insufficient submission of arguments or evidence cannot be a ground for disadvantage, as there are no legal backgrounds.

The chair (or chief commissioner) may end the preparatory procedure of hearing process in the case where;

- three months have passed after the opening of the procedure;
- opinions or other required materials are not submitted without any legitimate reasons;
- either an Examiner or respondent is absent from the preliminary hearing; and
- it is deemed unnecessary to continue the process.

After the preparatory procedure is ended, General Counsel reports the summary of the preparatory procedure to the Committee on the first day of the hearing.

The chair (or chief commissioner) may refer additional agenda to the preparatory procedure after the official hearing is opened, if considered necessary to clarify arguments and evidence. Moreover, when deemed necessary, the preparatory process may be resumed even after it is ended. (Article 30-8 ~ 30-11 of the Regulation)

2.4 Case filing to the Committee and the extended hearing system

A chair of the session is required to refer the case to the Committee for hearing within 30 days from the date of receiving replies from the respondents, the designated deadline of submission, or the date the preparatory process is ended. (Article 31.1. of the Regulation) The case may be withdrawn from the committee proceeding, or belatedly referred to hearing at the request of the Examiner or by the authority of the Committee if there is a specific reason. (Article 32 of the Regulation)

Once the date of hearing is set, a chair of the session shall give written notice on the date, venue and title of the concerned case to both the commissioners participating in the session and the respondent at least five days before the opening of the hearing process. Where there is inevitable circumstance, for example, when the case is urgent, oral notice is allowed. (Article 33.1 of the Regulation)

If the respondent who receives the hearing notice cannot attend the hearing on the designated date for unavoidable reasons, he/she may request to reschedule the hearing, specifying the reasons. The chair shall decide whether the rescheduling request is approved or not and notify the respondent of the decision immediately. (Article 33.3 of the Regulation)

Generally, the hearing concludes with one round of the process. However, if it is deemed that hearing is needed more than one time because the concerned case is complicated or requires thorough economic analysis or forensic review, the chair shall decide to proceed to the next round by fixing the date of the next hearing. ("Extended hearing system") (Article 33.6 of the Regulation)

This extended hearing system has been in active use at the KFTC. For instance, the cases of market dominance abuse by Microsoft (2005) and Qualcomm (2009) went through seven and six rounds of hearing respectively.

2.5 Assistance of deliberation by General Counsel

The General Counsel of the KFTC is a person who reviews the case referred to the plenary or chamber session from the neutral perspective and assists the standing commissioners in the proceeding.

Under the General Counsel, the director-general level, there are five Committee Assistance Officers, director-level, each of whom are assisted by five to ten staff members. Two of them are in charge of enacting or revising notification and guidelines on operation of Committee proceeding, case handling and surcharges, and litigation proceedings respectively.

The rest of the three are directly responsible for assisting the standing commissioners for deliberation. For the chamber session[6], the Committee Assistance Officer assigned to assist the chair of the session with the whole decision-making process of every case filed to the session. For the plenary session, the Committee Assistance Officer assigned to the chief commissioner takes the responsibility of assisting the commissioner in managing the procedure.

Once an Examination Report is filed to the Committee, the assigned Committee Assistance Officer reviews the report in terms of format, factual evidence, application of laws, etc. If the report is found to be insufficient in its formality, the Officer reports to a chair (or chief commissioner) of the session, and requests the concerned Examiner to complete the formality of the report.

If the report has adequate formality, the Committee Assistance Officer reviews contents of the report. If the Officer found that the concerned case includes many contentious issues and is expected to take much time to make the final decision, the Officer should consider whether to conduct preparatory procedures and reports to a chair (or the chief commissioner) of the session, who then makes a decision.

Regarding a case not subject to the preparatory procedure, the Officer looks into an Examination Report and replies from a respondent in an impartial manner and produces his/ her written opinion in order to present it to the commissioners participating in the session. For the purpose of making the written opinion, the Officer examines main points at issue, refers to relevant precedents or similar cases, and assesses illegality of the concerned behavior and adequacy of the level of measures. When necessary for fact-finding, the Officer in charge of the case may make direct communication with the Examiner or respondent on factual evidence of the report, or request the additional documents.

2.6 Assistance from Economic Analysis Division and independent experts

As antitrust cases get complicated with ever-growing impact on national economy, economic analysis to prove anti-competitiveness, define the relevant markets and assess consumer harm is becoming an essential part of the case-handling process.

Respondents especially in controversial antitrust cases on M&A, cartel and abuse of dominance actively defend themselves by hiring economists and submitting economic analysis reports supporting their arguments. In response to this movement, the KFTC established the Economic Analysis Division in 2006.

The Economic Analysis Division is responsible for providing economic analysis for cases presented to the committee proceeding. It conducts economic analysis such as regression analysis mostly for large scale M&A cases to enhance objectivity and thoroughness of case examination. In addition, the Division verifies validity of the economic analysis report presented by respondents and reports the result to the Committee.

Moreover, the KFTC seeks advice from its "advisory network" comprising outside economic experts. In a big case, both respondents and Examiners submit opinions based on consultation with recognized economists and legal experts, and participation of these experts is recently becoming more active. For instance, for major cases such as market dominance abuse by Microsoft, Intel and Qualcomm and eBay-

6 The Committee Session of the KFTC consists of three chamber sessions and one plenary session.

Auction merger, experts in and outside of Korea have been actively participating in the decision-making process of the KFTC by submitting their written opinions or attending the hearing process.

2.7 Hearing process

The Act provides for the respondent's rights to attend the hearing by stipulating in its Article 52.2 that the respondents and interested parties may attend the hearing of the KFTC to state their opinions or present relevant materials. The Regulation (Article 34.1) provides that the hearing process cannot be opened without the attendance of respondents in order to fully ensure their rights to attend the procedure.

The hearing proceeds in the following order of identification questioning, opening statement, interrogation, Examiner's suggestion on corrective measures and closing statement by respondents. The respondent may attend the process in person or send legal representatives, such as lawyers.

Even though a respondent hires legal representatives for hearing participation, a chair of the session may order the respondent to be present in the hearing to take his/her responsible answers or statements. (Article 36 of the Regulation)

Commissioners may directly question the Examiner or a respondent regarding factual evidence or legal application with permission of the chair of the session. The Examiner or a respondent also may ask questions to each other with permission of the chair when the meaning of the counterparties' statement deemed not clear.

Evidential examination such as interrogating the person of reference may be conducted at the request of the respondent or Examiner, or by authority of the hearing session. When needed, the chair may order attendance of expert witnesses to seek their opinions. Before closing a hearing, the chair shall let the Examiner present his/her suggestion on penalties against the respondent such as corrective order, surcharge, or filing to prosecution. Respondents shall also be given opportunity to give closing statement to the hearing session. (Article 41 ~ 43 of the Regulation)

2.8 Determination

After the hearing process, participating commissioners deliberate on the case to make a decision. In the case of a plenary session, verdict is made through a majority vote. In a chamber session, a decision is made in the presence of all of the members by a unanimous vote of the members present. (Article 42 of the Act)

While the final decision is made public, the deliberation process should be kept undisclosed. This is aimed to make sure the members freely express their opinions on the case. (Article 43 of the Act)

If the KFTC concludes that the case is in violation of antitrust law, a written decision shall be made, which specifies the grounds for such conclusion. The written decision shall be signed and sealed by the commissioners who have participated in the decision-making process. (Article 45 of the Act)

3. Protecting confidentiality of respondents' business secrets

To protect confidentiality of respondents' business secrets, the Examiner should exclude or delete business secrets of other business enterprisers or take other measures deemed necessary when sending the Examination Report to the respondents. (Article 29.12 of the Regulation)

The Regulation prescribes that, in antitrust cases, the definition of business secrets from the Unfair Competition Prevention and Trade Secret Protection Act shall be applied. This act defines business secrets

as information that is not open to the public and has independent economic values. Under the definition, the information includes production or sales methods that have kept secrets through considerable efforts, or other information on technology or business operation useful for business activities. Although this law defines business secrets strictly as it is aimed to criminally prosecute confidentiality infringement, in practice, the KFTC implements relatively mitigated definition of business secrets and widely protect the confidentiality.

Respondent or interested parties may request permission to read or copy the documents excluded in an Examination Report. Reading or copying the excluded documents is allowed when the provider of the documents agrees or the KFTC finds it necessary for public benefits. (Article 52-2 of the Act)

The KFTC also have regulations on prevention of the business secret infringement that could occur in the course of hearing. If the respondent wants to make statements including confidential information, he/she may present written statements which specify the scope of the confidential information and desirable measures for its protection at least five days prior to the opening of the session[7]. If the request is accepted, necessary measures will be taken, for instance, ordering other respondents to leave the room temporarily while the protected information is presented to the Committee. The information regarded as confidential is excluded from the publicized decision later on. (Article 40-2 of the Regulation)

The hearing can be conducted separately for each respondent in the case where there is a need to protect confidential business information or identity of leniency applicants (Article 44 of the Regulation). This system has been actively utilized with the increased leniency application for cartel after 2005.

Moreover, the KFTC official who divulges business secrets of a company or business association obtained in the course of law enforcement, or uses them for other purposes, can be sentenced to imprisonment of up to two years or maximum fines of two million won ($1,680). (Article 69 of the Act)

4. Request of document submission

When it is deemed necessary for enforcement of the Act, the KFTC can summon the concerned parties, interested parties or person of reference to hear the testimony. In a specialized case, the KFTC can designate an expert witness to seek their opinions. In addition, it can request an enterpriser or business association to submit reports on cost, current business status or present other necessary information or materials, and detain them. (Article 50.1 of the Act)

When considered necessary, the KFTC may have its officials enter an office or a business place of the concerned enterpriser or business association to investigate business and management state, account books, documents, electronic documents, voice-recording materials or video materials. The officials may take statements from the concerned parties, interested parties or person of reference at an office, a business place or other places designated in the summons produced by the KFTC

Where there is a possibility of evidence destruction, officials conducting the investigation may order an enterpriser, business association or its employees to present necessary documents or things, and detain them. (Article 50.2~3 of the Act)

To ensure due protection for an examinee, the Act prohibits abuse of investigative authority. The Act articulates that the officials should conduct an investigation within the minimum scope, and should not abuse his/her investigative power for other purposes. (Article 50-2 of the Act) Also, to protect the rights of

[7] In practice, the request is accepted even if the request is not made within the designated period.

an examinee and ensure fairness and transparency of an investigation, KFTC ordered the investigating officials should notify in advance an examinee of period, purpose and scope of an investigation. An investigation shall be conducted within the minimum scope and time needed. The KFTC also ensures the examinee's rights-to-know by informing on the progress of the case examination within three months after the end of a specific investigation.

Also, the Act also has clauses on the postponement of investigation. An enterpriser or business association subject to an investigation or corrective measures of the KFTC may request postponement in conducting an investigation or taking measures in the case where the examinee has difficulties in receiving investigation or complying with the imposed measures for any of the following reasons;

- natural disasters;
- the concerned company's involvement in the process of M&A, court mediation, court receivership or bankruptcy or other similar procedures;
- seizure or detainment of account books or evidential documents by other competent authorities; or
- fire or other incidents that cause severe problems in business operation. (Article 50-3 of the Act)

5. Agreed resolutions of enforcement proceedings

5.1 Recommendation of correction

Even though an investigation of an Examiner finds violation of competition law, recommendation of correction can be issued to the concerned enterpriser or business association if;

- there is not enough time to correct anticompetitive practice through the Committee proceeding, or the harm caused by the concerned practice is expected to increase as time passes by Committee proceeding;
- the violator admits breach of the law and reveals clear intention to correct the concerned practice immediately;
- the effect of violation is negligible, or does not cause serious anti-competitiveness; or
- the violating company has introduced and managed Compliance Program and committed the offence for the first time after the introduction of the program.

A violating company subject to recommendation of correction undergoes simplified procedure instead of an official decision-making process. The purpose of recommendation of correction is to end anticompetitive practice by consulting with the concerned company on an equal footing, rather than to impose compulsory penalty.

The person who has received recommendation of correction shall notify the KFTC within ten days from the date of receiving the recommendation whether he/she will agree with the recommendation. If the recommendation is accepted, it shall be treated as a corrective measure has been taken under the Act. However, where the person notifies that he/she does not agree with the recommendation of correction, or does not give written notice within ten days after the recommendation is received, the Examiner of the

concerned case has to produce an Examination Report and present it to the Committee for a hearing. (Article 51 of the Act, Article 58 of the Enforcement Decree, Article 51 of the Regulation)

5.2 Simplified procedures

In the case where an Examiner finds that the concerned case can be subject to the chamber session under the Regulation (except for the cases subject to prosecution complaint and surcharge imposition) and that there is a need to ask the respondent on whether he/she admits the violation indicated in the Examination Report and agrees with the corrective measures suggested by the Examiner, the Examiner may request the respondent to give written notice on whether he/she will comply with the measures. (Article 28 of the Regulation)

If the respondent replies that he/she admits the violation and will comply with the suggested measures, the Examiner submits the Examination Report including the reply of the respondent to the session. Then the decision-making process of the chamber session is conducted in a simplified manner based on written review without respondent's presence.

If the respondent replies of not accepting the suggested measures, the case is referred to the chamber session and undergoes official committee procedure. Even if the measures are agreed upon, the case can be brought to the official decision-making process in the case where the chamber, during written review procedure, considers different measures than what are originally suggested by Examiner need to be taken against the violator. (Article 59~63 of the Regulation)

5.3 Consent order

The consent order system which terminates case-handling process through an agreement between competition authority and offender on measures to correct anticompetitive practice has yet to be introduced in KFTC. The consent order system would save time and economic costs incurred in the usual one-sided process of case handling. Moreover, as the system enables various corrective measures, if adequately utilized, it can be mutually beneficial for both the company and competition authority. Based on the recognition of its need, the KFTC is considering its introduction of the consent order system.

6. Judicial review on the KFTC decision

The respondent who is dissatisfied with the decision of the KFTC may appeal to the Seoul High Court within 30 days after the written decision or the re-hearing result is received according to Article 54.1 and 55 of the Act.

For ordinary administrative measures, the first instance trial should be filed to the administrative court and can be appealed to the high court. For the measures decided by the KFTC, however, it should be appealed to the Seoul High Court. It is based on the consideration that the KFTC serves as the court of the first instance as it is quasi-judicial agency which handles cases based on adversary proceeding and prolonged litigation on a case of business activity is not desirable for the national economy.

If a respondent would like to appeal against the decision of the KFTC, he/she shall file the suit within 30 days after the written decision or the result of the re-hearing is received. This is based on the regulation in Administrative Litigation Act, saying that an administrative appeal shall be filed within 30 days after receiving the administrative decision or result of re-hearing. The person therefore may skip the re-hearing process and directly file a lawsuit.

Administrative lawsuits on the KFTC decisions proceed in the court through the same process as other administrative suits. But several unique features can be found in lawsuits on the KFTC decisions.

First, a plaintiff tends to move for preliminary injunction on the measures like surcharge orders or publication orders taken by the KFTC when filing an administrative suit.

In principle, execution of surcharge order, which is a kind of monetary penalty, cannot be suspended, as it is not regarded as causing "irrecoverable damage." However, if the amount of the surcharge is so enormous to the extent that it can determine the survival of the concerned company, the execution can be suspended exceptionally.

Since the publication order in its nature is irredeemable once executed, the court usually grants preliminary injunction. The request for suspension of execution of publication order, however, is sometimes dismissed when the court finds that it is very unlikely that the plaintiff has his/her case.

Also, if the pending issue is on whether the concerned behavior is anticompetitive or not, the court tends to closely examine the case on both questions of fact and issues of law. But once the concerned practice is found to be anticompetitive, it is understood that the court respects the KFTC decisions by giving it great discretion as to whether the level of sanction is adequate.

Lastly, the court sometimes encourages settlement between the KFTC and a plaintiff on the amount of surcharges and other matters in the course of the lawsuit. Though the KFTC rejected the recommendation of settlement from the court in 1999 on the case of false advertisement by six installment financing companies, it followed the court's recommendation in the case of six vending machine sellers violating Door-to-door Sales Act of 2004 and the 2009 case against LG Electronics for unfair coercion of transaction. The recommendation of settlement of the court is expected to be on a steady increase.

MEXICO

1. Decision-making process

1.1 What procedures does your agency have in place to ensure that decision-makers consider all relevant evidence and remain open to considering different explanations for the conduct under investigation?

Investigation procedures of the Mexican Federal Competition Commission (CFC or Commission) are conducted by independent teams that are obliged to include into the case file all relevant information obtained/provided during the course of the investigation.

Once a Statement of Objections is issued, parties under investigation gain access to the case files and may present evidence supporting their claims. During this stage, they also have access to information presented by third parties and have the chance to present their view before the General Counsel´s office, which do not participate directly in the investigation phase.

The Plenum of the CFC makes its decision once the case file has been fully compiled by the General Counsel, who is not subordinate to the commissioners and makes an independent recommendation to them.

1.2 Are independent teams used internally?

Yes, see response to Question 1.

The Commission is organized in specialized divisions, each of them with a different area of responsibility (cartels, abuse of dominance, mergers, regulated sectors, economic studies, legal and litigation affairs). Cases are handled by investigative teams formed in each of these divisions. Divisions, meanwhile, are coordinated by the Executive Secretary. Investigative decisions are taken by the Executive Secretary and the corresponding "lead division". Depending on the complexity of the case "lead teams" can include members from the economic or legal division.

1.3 Is there an independent review of the case by specialized economists?

Yes, in complex cases the Direction General for Economic Studies normally reviews the soundness of the economic analysis used by the investigative teams. However, there is a single recommendation submitted to the Plenum by the Executive Secretary.

1.4 Are there other channels of input directly to the decision-makers?

Yes, during any stage of an investigation interested parties can have informal meetings with case handlers. It is common practice, moreover, that before their case is decided by the Plenum, they meet with the commissioners.

1.5 Are outside analysts or experts used to help decision-makers?

Assistance from outside experts is rarely used by the Commission. However, interested parties may submit expert evidence, which the CFC must review and analyze.

1.6 What other techniques or practices has your agency adopted to promote sound decision-making?

The CFC has implemented an electronic filing system (SIIC by its acronym in Spanish) that allows full simultaneous access to all the information included in a case file. The system also enables case handlers to review relevant previous investigations and decisions.

Another practice that has encouraged sound decision-making inside the Commission is the internal peer review of investigations before the statement of objections is issued.

2. Confidentiality

2.1 How does your agency balance a defendant's right to review and respond to evidence that will be used againts it with the need to protect confidentiality?

Under the Federal Law of Economic Competition (FLEC), parties must submit a summary along with the information they might consider to be confidential.

Confidentiality will only be granted if the information in question negatively impacts, upon disclosure, the market position of the submitting party. Any information classified as confidential cannot be disclosed.

In some cases, access to classified information may be given to outside legal counsel subject to confidentiality. Also, if a case is subject to judicial review, a judge may eventually grant access to classified information in order to ensure due legal process and proper defense.

2.2 Are there special procedures available for disclosure necessary to protect rights of defense, e.g. by limiting the disclosure to legal representatives so as to ensure that business secrets are not divulged to competing businesses? how is confidential information defined?

Yes, see response to Question 7.

2.3 What rules apply to the protection of confidential information obtained from parties by your agency?

Confidential information must be kept separate from public information and must be secured.

2.4 Is such information automatically considered to be confidencial, or does the party have to identify it as such?

According to the FLEC, the economic agent submitting the information must identify which information shall be kept as confidential. This submission is reviewed by the CFC to guarantee that it meets the requirements established in the law.

In addition, the CFC must observe the criteria established in the Federal Law of Transparency and Access to Government Public Information regarding the confidentiality of personal information.

2.5 If such information is to be disclosed to other parties or made public, does the party have a prior right to object to the disclosure?

In the FLEC it is stipulated that once the information has been classified as confidential, it cannot be made public by any means.

To protect confidential information CFC´s resolutions are always notified along with a draft public version for review and possible objections.

2.6 How does your agency balance the benefits of public disclosure of ongoing investigations with the need to respect confidentiality of targets of procedings and possible effects on their reputation?

The FLEC severely limits the CFC´s room of maneuver in this regard. Indeed, it provides that during the proceedings details of the investigations cannot be made public except for the identification of the market and that parties do not have access to the file until a Statement of Objections is issued. Moreover, it establishes that public statements can be made by the Commission once the Plenum has taken a final decision and the resolution has been notified directly to the parties involved. Finally, the FCEC stipulates that public versions of the resolutions must be published within 15 days.

2.7 What are the penalties for negligent/intentional violation of confidentialtiy rules?

Any negligence from the CFC's personnel when handling information can be subject to an administrative sanction, which can range from a fine, or/and up to a temporary or definite suspension from his/her position. The aggrieved parties can claim civil damages in a legal dispute and the offender can also be subject to a criminal sanction, depending of severity and intention of the violation.

3. Requests for information to targets of investigations

3.1 Does your agency have procedures to review information requests with the party?

Yes. Although the FLEC and the bylaws do not contemplate a formal procedure to review information requests with the party, it is common practice that case handlers discuss them with the party both before and after they are issued.

3.2 Is the party informed of the theory of the case and reasons for requesting the information?

Not during the investigation. Parties are informed as to whether they are the object of the investigation or if they are only being asked for the information because of their participation as a client/supplier/expert in the relevant or a related market.

The Executive Secretary will engage the parties involved as to what its conclusions are before making recommendations to the Plenum. Parties are given full chance to respond and argue their case after the Statement of Objections is issued.

3.3 Can a party ask for a reconsideration of the information requested and/or deadlines, or appeal to a review office within the agency?

The FLEC does not contemplate the possibility of a party asking for a reconsideration of the information request. In practice, however, the CFC normally adopts a flexible approach to this issue in those cases where the demands of the party are justified. It should also be noted that parties are not required to submit information that they do not have.

Following the FLEC, the CFC is allowed to extend the deadlines of an information requirement upon request.

3.4 Do procedures and practices differ if the adressee of the request for information is not a party to the proceeding?

No, the FLEC does not make any difference in this regard. That is, regardless of their status in the proceeding, addressees of a request for information have the obligation to respond or face possible fines for non-compliance.

4. Agreed resolutions of enforcement proceedings

4.1 At what stages or stages of an investigation and/or litigation can the parties resolve an enforcement matter by means of a mutually agreed dispositon with your agency?

Parties can resolve an enforcement matter by means of mutually agreed disposition with the CFC generally after a Statement of Objections or after a resolution (before an appeal before the CFC). In merger cases, moreover, parties can submit "commitments" before the CFC during the investigation phase. To be accepted by the CFC, these commitments need to meet the following requisites: a) restore the process of competition and free access to market by suspending or suppressing the anticompetitive practice, and b) be economically viable.

4.2 Are there restrictions on the type of cases that can be settled in this manner?

The "commitments" only apply to abuse of dominant position and merger cases (not for cartel cases).

4.3 Does your agency actively seek to settle cases?

The CFC would like to employ this remedy more often to solve enforcement procedures. However, due to lack of precision of the law, the CFC currently faces some constraints to adopt this strategy.

5. Judicial review and interim relief

5.1 At what point in the competition law enforcement process does an independent judicial body have an opportunity to review the conclusions of your agency as to whether a violation of the law has occurred?

After the initial decision, parties may appeal directly to the CFC. Once the appeal has been decided, they may challenge legality of the decision before administrative or judicial tribunals *("amparo").*

5.2 What level of deference does the judicial body grant to the agency's decision?

Since competition law is relatively new in Mexico (it was introduced in 1993), the judiciary is not yet very familiar with the substance of the work of the CFC and, therefore, its review of cases has been mostly on procedural grounds. In recent years, however, the courts have expanded their interest on the substantial part of the proceedings and, as a result, the level of deference granted to the CFC´s decision has increased substantially.

5.3 If the agency's decision has resulted in a sanction or remedy, what is the effect of the pending judicial review on the sanction or remdy?

Depending on the nature of the case, a stay may be imposed on the sanction or remedy. In general, however, while fines are not collected until after a judicial decision has been made, stays on conducts deemed to be anticompetitive are limited during judicial review.

5.4 Can the judicial body grant interim relief?

Yes. See above.

5.5 What is the timing of the review by the judicial body, and are there proceudres for expedited review of time-sensitive business transactions or conduct?

In Mexico, the legal system does not consider expedite procedures. The judicial review could take place in a two stages process. In the first stage ("*amparo"* review"), resolutions can be reached in an average of nine months. If the resolutions from the first stage are sent into a "*revision process"*, this second stage lasts in average 11 months[1].

[1] The revision process can be conducted by a collegiate tribunal or the Mexican Supreme Court.

NETHERLANDS

Prepared by the Netherlands Competition Authority (NMa) for the OECD Roundtable on procedural fairness issues in civil and administrative enforcement proceedings in June 2010. The paper will specifically focus on 1) the decision-making process at the NMa and 2) judicial review. In addition, some attention will be given to 3) confidentiality issues; 4) NMa's requests for information from targets of investigations; and 5) alternative means of handling (and ending) enforcement proceedings.

For further information on the subject procedural fairness, reference is made to the NMa's paper for the OECD roundtable on procedural fairness.[1]

1. Decision-making process

Procedures at the NMa contain several safeguards which ensure that decision-makers consider all relevant evidence. This chapter will lay out the characteristics of the decision-making process of the NMa which safeguards a thorough and impartial process.

In order to explain the decision making process of the NMa, it is necessary to outline its internal management structure. The NMa is comprised of six core departments – Competition Department, Legal Department, Stategy and Communication Department, Office of Energy and Transport Regulation, Office of the Chief Economist, Chief Legal Counsel – and three service units. Overall responsibility for the organisation rests with the NMa's Board of directors (NMa's Board).

The NMa's Competition Department is responsible for the selection of cases and does so using the guidance of the implementation plan developed by the NMa's Board of Directors the adopted by the. The Competition Department is headed by a director and is split into sector-specific units headed by managers (e.g. 'food and agriculture'; 'health care'; 'industry and construction'). Within these units, 'program managers' are responsible for certain sections of each sector. The program managers possess and gather special knowledge and expertise in a certain sector and are involved in setting priorities in that sector. Program managers inform and advise the case handlers and their managers on the state of the market and the use of instruments (which instrument ought to be utilised in which market in order to ensure healthy competition across the sector).

The Office of the Chief Economist of Economic Bureau (EB) provides input of an economic nature. The EB advises on current investigations as well as advising the Board on issues regarding the general outcome of the NMa's work'. The EB also provides feedback on sectors under investigation where it is deemed necessary to evaluate whether the NMa has set its priorities right and in order to ensure that the NMa takes on cases/sectors that generate measurable results.

The progress in each case and its chances of success of a case are tested at different moments during the investigation phase in a so-called 'tollgate procedure'. During this phase, a case is examined thoroughly at several (pre-determined) moments by an independent panel (which consists of, among

[1] NMa's contribution to the OECD roundtable on procedural fairness: Transparency issues in civil administrative proceedings (DAF/COMP/WP3/WD (2010) II issues in 16 February 2010.

others, unit managers within the Competition Department). This leads to so-called 'go/no-go-decisions', in which it is decided whether a case will be pursued further or not, and in practice guarantees that cases which are unlikely to lead to a positive result are terminated in a timely fashion.

The Competition Department furthermore has a so-called 'expert unit'. One of the tasks of this unit is to act as a fresh pair of eyes or a 'devils advocate' by reviewing the project team's work before a Statement of Objections is issued to the parties.

In several cases, the NMa has requested an external research agency to conduct a market analysis. For example, during an investigation into violations of competition law in the 'home care' sector, the NMa hired an economics bureau in order to investigate the 'scope of competition' in this sector. In addition, the assistance of external agencies is also occasionally requested (in particular during so-called 'second phase investigations merger investigations') in order to, for example, analyse or investigate the market circumstances and or dynamics of the market.

In order to protect the rights of the parties, the NMa has constructed a fire wall between i) the team investigating a case (part of the Competition Department); and ii) the team which hears the parties, subsequently drafts the decision and decides on the sanction (part of the Legal Department). This fire wall is prescribed by article 54a of the Netherlands Competition Act. Its function is to safeguard the impartiality of the entire decision-making process as well as the objectiveness of the decision making process within the NMa.[2]

During the administrative appeal phase, an 'external' advisory committee made up of independent experts ('*Bezwaaradviescommissie*') advises the NMa regarding the legal and factual issues under appeal. These independent experts come from the judiciary, university (jurists or economists) andother government bodies [3]

To increase knowledge retention and strengthen the organizational learning ability, major cases are normally evaluated together with all NMa stakeholders, including the Board. During the evaluation, an evaluation of the initial estimation of risks and expectations is assessed. In addition, the 'appeal centre' of the NMa analyses court cases and provides advice with regard to several aspects of the NMa's decision-making process. These analysis, take the duties of the NMa (based on Dutch court decisions) into account.

Lastly, the NMa employs an official complaints officer who handles parties' complaints concerning (for example) an infringement of a party's legal rights or unjust treatment of a party during the investigation phase or sanctioning phase. The complaints officer seeks to ensure a fair treatment of parties as well as a fair outcome of enforcement proceedings at the NMa.

2. Confidentiality

The Legal Department is responsible for every aspect of the confidentiality . The Legal Department hears the parties following the Statement of Objection (which is drafted by the Competition Department) and drafts the Decision in the case. Before access to the file is granted, all information in the file, including

2 For more information on the fire wall between the Competition Department and Legal Department of the NMa, reference is made to the NMa's contribution to the OECD roundtable on procedural fairness: Transparency issues in civil administrative proceedings (DAF/COMP/WP3/WD (2010) II issues in 16 February 2010.

3 For more information about the administrative appeal phase, see chapter 5 of this paper. This chapter contains also information about the appeal phase at the Rotterdam District Court and at the Netherlands Trade and Industry Appeals Tribunal.

documents from the parties and third parties, are examined as to whether it should be regarded as confidential.

The Dutch Administrative Transparency Act (‘*Wet openbaarheid van bestuur’*) contains regulations regarding the way confidential information must be dealt with by the Dutch government and Dutch (independent) governmental agencies (like the NMa). As a rule, the aforementioned Act requires the protection of confidential and/or commercially sensitive information, however, leaves room to balance interests. In practice, the Legal Department will balance the interests of a party (to keep confidential information out of the file) against the (general) interests of enforcing the competition law and the rights of defence involved. Before the check is carried out, the relevant parties who have submitted information (which has been added to the file) are given the opportunity to submit ‘confidentiality claims’.[4]

The decisions made in the confidentiality check may influence the outcome of the ‘main procedure’. In 2002, the Rotterdam District Court (District Court)ruled that the rights of defence require that all the evidence proving the infringement, as well as discharging evidence, must be accessible to the alleged infringers. Confidential documents to which the alleged infringers do not have access may not be used to prove the infringement (or determine the level of the fine).[5]

3. Requests for information to targets of information

Neither the Netherlands Competition Act nor the Dutch General Administrative Act (‘*Algemene wet bestuursrecht’)* contains a duty of the NMa to keep parties informed of developments during the NMa’s investigation. In general, during the investigation phase, the NMa’s Competition Department will control the amount of information provided to the parties under investigation and the intensity of contacts with such parties. However, information obtained during an investigation (or a ‘theory of harm’ case) may be provided to a party, for example during an interview.

An interview with a party under investigation is a regularly used means of investigation. At the beginning of such an interview, the party’s attention will firstly be drawn to its rights. Even if the party under investigation is an undertaking, it is not obliged to answer any question if, by doing so, this would amount to self-incrimination. In the Netherlands, a debate currently exists as to whether a former employee of a company (who is not under investigation) is entitled to remain silent if answering a question could (solely) incriminate the company.

The Netherlands Trade and Industrial Appeals Tribunal (the Tribunal) recently ruled (in a telecom case) that if the investigation team assumes that a party has committed a violation, the party must be ‘read its rights’ first, if questions are posed to that party, also when such questions/requests (that might be inculpating) are posed only in writing (and not verbally).[6]

4. Agreed resolutions of enforcement proceedings

The NMa uses a variety of alternate enforcement tools to achieve healthy competition.

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4 For more information on the way the confidentiality check is carried out by the NMa, reference is made to the NMa’s paper for the OECD roundtable on procedural fairness issues in February 2010.

5 District Court of Rotterdam 26 November 2002, *Samenwerkende Elektriciteit Producenten* vs *NMa*, case MEDED 00/1002 SIM, LJN: AR4219.

6 Netherlands Trade and Industry Tribunal 2 February 2010, *Tele2 Nederland B.V.* vs *OPTA*, case AWB 08/923, LJN: BL5463.

Article 49a of the Netherlands Competition Act provides that a party may make commitments in order to 1) prevent a violation of the Netherlands' restriction on cartels or prohibition to abuse a dominant position on the market, or 2) end such a violation. One of the factors taken into account by the NMa's Board in deciding whether commitments offered will be accepted, is whether accepting the parties' commitments will lead to a more efficient resolution of the case than imposing a fine. Under the current policy of the NMa, commitments may, in principle, only be accepted prior to the NMa's issuance of a report (Statement of Objections). Furthermore, if behaviour under investigation may be regarded as 'having as its object a restriction of competition', such case will not be deemed suitable for commitments.[7]

The initiative in providing a commitment solution to a competition concern always lies with the companies involved. The commitment that they propose must imply that the companies will unequivocally end their forbidden practices and that they alter their behaviour accordingly. Furthermore, a commitment should be formulated in such way that the NMa is able to monitor that the companies abide by the offered commitment. When the NMa accepts the commitment, it will issue a decision detailing the harmful effects of the practices. However, there will be no formal statement that an infringement has taken place and no financial penalty will be imposed.

To date, the NMa has only used commitments in one case, namely a case of information exchange between childcare institutions in Amsterdam.[8] When the discussion started, the NMa demanded that all the parties involved would participate in it, which was initially not the case. A peculiarity of the case was, that this child care activity had traditionally been outside the reach of market forces (it can thus be considered a sector in transition).

Settlements are an alternative method of enforcement. A settlement means that the NMa will, in contrast to commitments, issue a formal Statement of Objections and impose a fine. In the case of an authorized settlement, the NMa will only reduce the fine on the condition that the undertakings concerned waive certain rights. In the NMa's most notable cases which have been settled to date, the Dutch construction cases, the companies waived the right to individual hearing and an individual access to file. The companies also accepted not to challenge the Statement of Objections in so far as it described the facts and their legal classification.

In a recent investigation in the home-care sector, the NMa was willing to follow an alternative approach in order to increase the competition law awareness in a sector in transition. During this investigation, a collective regulation came under discussion which could have resulted in the finalisation of several 'pending' cases (and multiple investigations) into violations in this sector. Should the parties have accepted this alternative approach, the companies under investigation (or involved in the sanctioning procedure) would have been required to make a 'contribution' to a fund. Money collected in the fund would then be spent on projects on behalf of clients in this sector. The level of the contribution would have depended on the 'gravity' of the violation and the point in time at which the parties ceased participating in the violation. Should the parties have accepted this approach, the NMa would have also required the companies involved to set up a compliance program as a prerequisite for joining the collective regulation. The parties have recently rejected the proposed alternative enforcement procedure and have elected to continue with a regular fining procedure.

5. Judicial review and interim relief

Since the entry into force of the Dutch Competition Act on January 1, 1998 NMa decisions applying Community and national competition law are subject to a three-stage appeals process.

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7 Handhaving door de Nederlandse Mededingingsautoriteit, Staatscourant 1 april 2009, nr. 63, p.4.

8 Decision of the Board of the NMa case nr. 5709, *Kinderopvang Amsterdam*, of 30 June 2008.

First, it is possible for addressees of decisions (persons/undertakings) to lodge an internal administrative appeal with the NMa within six weeks. This administrative appeal allows the parties to request the NMa to review its decision. A complete review of the case will then be carried out by the NMa whereby a different outcome of the case is possible. In cases where appellants are subject to a sanction, the NMa will review its decision in the light of advice received from the independent advisory committee mentioned above. The independent advisory committee also hears the appellants and the NMa. The committee's advice is published together with the decision on the administrative appeal. the NMa is legally obliged to state reasons for any deviations from the advice. Should appellants be dissatisfied with the result of this administrative appeal procedure, they may - within six weeks - appeal the decision to the administrative law chamber of the District Court. The decision of the District Court may be appealed to the Tribunal. These courts are exclusively authorised to rule in appeals against NMa decisions.

Both specialised administrative courts review the legality of the decision, by fully reviewing the facts, the legal qualification of the facts and the level of the fine. These courts may annul a decision (in whole or partially) and decide that the NMa must take a new decision or rule on the case themselves.[9] The courts may impose a lower fine but may not impose a higher fine or find an infringement which the NMa has not found in its decision. Moreover, there is a general rule of law which entails that the appealing party may not end up in a worse position than before the appeal (legal prohibition of *reformatio in peius*). Besides the power to review the merits of the case, the Rotterdam District Court and the Tribunal also review the lawfulness and proportionality of the exercise of public law powers by the NMa.

Since 1 January 2010, these courts may - by interlocutory judgment - grant the NMa the opportunity to correct a failure in its decision.[10] By using such a judgment, a 'formal' annulment of the decision of the NMa and a 'repeat decision' of the NMa may be prevented, thereby achieving a (substantial) reduction in the time involved in the entire (administrative) appeal procedure. It is important to note that an interlocutory judgement cannot be utilized if third parties will be disadvantaged as a result. At the time of writing, the NMa had yet made use of this new regulation. It remains to be seen whether such measures will also be suitable for use in sanction procedures.

Given the 'time-sensitivity' of business transactions, no administrative appeal procedure exists regarding decisions of the NMa on concentrations which have been notified to the NMa. Such decisions may be directly appealed to the District Court. In certain (ie in situations where there is an urgent need") the District Court and the Tribunal may apply an accelerated procedure.[11] In such circumstances, several time frames during the appeal procedure may be shortened. So far, the courts have not applied such an accelerated procedure in appeal in competition law cases. In addition, in urgent cases the courts may also grant interim relief by imposing interlocutory injunctions ('voorlopige voorziening').[12] To date, there have only been a few cases in which interim relief has been granted.[13]

Based on article 63 of the Netherlands Competition Act, an NMa decision in which a fine is imposed will be 'suspended' during the appeal phase. However, article 67 of the Netherlands Competition Act

9 Under article 8:72 of the General Administrative Law Act.

10 Under article 8:51a of the General Administrative Law Act.

11 Under article 8:52 of the General Administrative Law Act.

12 Under article 8:81 of the General Administrative Law Act.

13 See e.g. judgment of the Rotterdam District Court in case MEDED 00/0903, *Nederlandse Omroep Stichting* v. *director-general of the NMa* of 22 June 2000; judgment of the Netherlands Trade and Industry Appeals Tribunal in case AWB 03/240, *Nederlandse Omroep Stichting* v. *director-general of the NMa* of 9 April 2003 and judgment of the Rotterdam District Court in case MEDED 04/1243, *Nuon N.V.* v. *director-general of the NMa* of 3 June 2004.

provides that a fine must be paid within thirteen weeks after the fining decision has been published. The Supreme Court ('Hoge Raad') has decided that these provisions must be interpreted in such way that a decision becomes effective thirteen weeks following its publication and that (legal) interest is due if a fine has not been paid within this time frame.[14] The NMa may not, however, demand payment of the fine during the appeal phase.

As far as the duration of the different phases is concerned, it is first of all important to note that Article 6 of the European Convention on Human Rights applies to sanctioning procedures regarding a violation of the Netherlands' prohibition of cartels or an abuse of a dominant position. This means, among other things, that the decision in these kinds of cases must be given within a reasonable time frame. According to case law, the starting moment of the reasonable time frame is, in principle, the moment when a Statement of Objections has been handed to the parties by the NMa; from this moment on, an undertaking may reasonably expect a fine to be imposed for a violation of competition rules. The Tribunal additionally ruled that the maximum duration of the reasonable time frame depends upon the factual and legal complexity of the case and of the 'behaviour' of the NMa as well as of the parties. As a 'basic rule', the Tribunal pointed out that a combined duration of two years of the sanctioning phase and the administrative appeal phase thereafter, cannot be regarded as unreasonably long. The Tribunal in addition pointed out that a time frame of 1,5 year for the procedure in appeal at the District Court, and two years for the procedure at the Tribunal, can be regarded as reasonable.[15]

6. Conclusion

An impartial assessment of a case as well as a fair and solidly founded outcome of such case in (administrative) competition law procedures in the Netherlands is achieved by:

- internal review, in particular regarding the 'tollgate procedure' applied by the NMa during the investigation phase and regarding the existing fire wall between the Competition Department and Legal Department of the NMa, and

- judicial review, especially regarding the full assessment made by the appeal courts in the Netherlands of the facts and legal aspects of a case, as well as of (the level of) the fine imposed.

14 Supreme Court of the Netherlands, case nr. C07/140HR, *Nederlands Electriciteit Administratiekantoor* v. *State of the Netherlands*, 11 July 2008.

15 Judgment of the Netherlands Trade and Industry Appeals Tribunal of 3 July 2008 in case AWB 06/526 and AWB 06/532, *AUV Dierenartsencoöperatie U.A.* and *Aesculaap B.V.,* para. 7.18 en 7.20.

SLOVAK REPUBLIC

1. Decision-making process

1.1 General information

The Antimonopoly Office of the Slovak Republic (hereinafter only "the Office") is the national competition authority of the Slovak Republic. It is an independent central state administration body and is the only body entrusted with application of competition rules in the Slovak Republic. The judicial review of decisions of the Office is ensured via general courts. In case of claiming damages for breach of competition rules a particular general court is competent.

The Act on Protection of Competition[1] and the Decrees[2] define the status of the Office, its powers and duties and proceedings. The procedures are subsidiary regulated by the general Administrative Code of Procedure[3] (hereinafter referred to as "Administrative Code"). The Office issues also guidelines[4] on different issues which further explain the procedure and practice of the Office.

Slovak administrative enforcement procedure is defined as two instance procedure.

The Office has three executive divisions – first instance decision making bodies- dealing with the three main types of conduct defined in the Act on Protection of Competition (agreements restricting competition, abuse of dominant position, control of concentrations). These are responsible for investigation and for issuing the first-instance decisions, thus these divisions accumulate both investigatory and decision making powers.

A party to the proceedings has a right to lodge an appeal against the decision of the Office issued in the first-instance proceedings. The appeal is decided by the Council of the Office consisting of 7 members – the Chairman of the Office, the Deputy Chairman of the Office and 5 external experts – lawyers and economists. The Council of the Office will review the entire procedure of the first-instance body, complete evidence if necessary and issue a decision. The Council of the Office may change, uphold or annul the first-instance decision in full extent or stop the proceedings for procedural reasons stipulated by the Act on Protection of Competition.

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1 Act No. 136/2001 on Protection of Competition and on Amendments and Supplements to Act of the Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic as amended (http://www.antimon.gov.sk/files/30/2009/Act%20136-2001-novela-aj.rtf).

2 Decree No. 204 of the Antimonopoly Office of the Slovak Republic laying down details of particulars of a notification of concentration, Decree No. 269 of the Antimonopoly Office of the Slovak Republic laying down details of the calculation of turnover.

3 Act No. 71/1967 Coll. on Administrative Proceedings (Rules of Administrative Procedure).

4 http://www.antimon.gov.sk/574/directives-and-guidelines.axd; http://www.antimon.gov.sk/165/smernice-a-usmernenia.axd.

If the party to the proceedings disagrees with the decision of the Council of the Office, they may file an action against it to the Regional Court Bratislava and subsequently to the Supreme Court of the Slovak Republic. Both of them are general courts not specialised in competition matters. The court may uphold the decision or annul it and return the case to new proceedings, or modify the sanction that was imposed.

Pursuant to Act on Protection of Competition the Office initiates administrative proceedings ex officio in antitrust cases. With regard to merger control, the notification of concentration opens the administrative proceedings.

1.2 What procedures does your agency have in place to ensure that decision-makers consider all relevant evidence and remain open to considering different explanations for the conduct under investigation? Are independent teams used internally? Is there an independent review of the case by specialized economists? Are there other channels of input directly to the decision-makers? Are outside analysts or experts used to help decision-makers? What other techniques or practices has your agency adopted to promote sound decision-making?

Every case is investigated by the team of case handlers which process the case throughout the proceedings from the beginning of the proceedings (investigation) to the decision, i.e. opens proceedings, is involved in every investigatory measure, is involved in drafting of Statement of Objections, participates in hearing, drafting of the decision which is issued by their division. The decision on investigatory measures to be taken, procedural steps and the final decision itself is fully in competence of the director of the relevant division.

Since the first instance decision body, as mentioned above accumulates both investigatory and decision making powers, the Office has to ensure the objectivity of the decision making process. One of the guarantees is the already mentioned possibility of the appeal of the decision of the first instance body to the Council of the Office.

Last year, the Office has also introduced the multi-stage assessment of cases. Within the first phase the case handlers prepare the report in uniform structure which is discussed with the economic collegium in order to ensure the gradual enforcement of more economic approach. Within the second phase, the case handlers consult the case with the economic collegium and with the Legal Division prior issuing the decision. After completing the case the case handlers make short conclusions (lessons learned) together with economic collegium and with the Legal Division.

The economic collegium was established with the aim towards more effect based approach to avoid formalistic approach in the decisions. The multi-stage assessment of cases should ensure “second pair of eyes” during cases – and it is supposed to be one of the Office’s checks and balances.

Such system also ensures that the team of case handlers considers all relevant evidence and remains opened to considering different explanations for the conduct under investigation.

It might be worth mentioning with regard to the issue of decision-making process, that this issue was challenged before court, in particular the issue of concentration of powers in one division that investigates cases, decides and imposes the sanction. However, the court did not follow the opinion of the party. The decision-making process is established by law and the review of the independent court is considered as sufficient mechanism in line with the ECHR.

Since the decisions of the Council of the Office can be further appealed to the court, the procedure and investigatory measures taken are examined by the court. Within the judicial review court also examines whether the Office has heard the opinion and arguments of the party to the proceedings and the reasons why these were rejected. Office is therefore very careful already during the administrative

proceedings and reacts to all of the objections of the parties as well as observes their rights, namely the right to be heard in this regard.

Outside analysts' or experts' views are used in the proceedings pursuant to Administrative Code when it is necessary for consideration of facts inevitable for the decision. These might be expert views from specific industries to consider particular questions.

With regard to economic analysis of the Office, these are provided by the economists of the Office (economic collegium). So far, the Office has not outsourced any economic work.

2. Confidentiality

2.1 General information

The information necessary for the purposes of the market investigation or administrative proceedings often contain information which the undertaking concerned strives to protect because of its possible business value.

There is no general definition of confidential information. In the Slovak legal system, business secret is protected and the definition is stipulated by the Commercial Code. According to this definition, the business secret encompasses all information of business, production or technical nature related to undertaking, having real or possible material or immaterial value, not generally available in the respective business circles, and which the undertaking wants to protect and whose protection is secured by the undertaking. All these conditions must be fulfilled in a cumulative way in order to enjoy the protection guaranteed by the Commercial Code. The business secret is an institute of private law and belongs to the proprietary rights. The protection pursuant the Commercial Code contains the right to require the transgressor to refrain from the illegal conduct and the right to compensation. If the infringement is of serious intensity, it can constitute a crime defined by the Penal Code.

The Office is entitled to ask undertakings to provide also information having the nature of business secret. The Act on Protection of Competition provides guarantees for the undertaking that its business secret will be protected by the Office against the other parties to the proceedings, third parties and the public. In addition, the Act on Protection of Competition enables to protect also confidential information. This category of information is not defined, however, all sensitive information other than business secret, disclosure of which would be able to harm the undertaking, will be characterised as confidential.

The Office protects information which confidentiality it has been asked to maintain. Confidentiality of such information shall, however, constitute no obstacle to its disclosure if this is necessary for a decision and if a party to the proceedings does not provide any other wording of the information and documents that does not contain business secrets or is not confidential. However, it is necessary to note, that the special legislation on free access to information does not provide the same standard of protection of the information in administrative file as the Act on Protection of Competition which, as mentioned further, causes practical problems.

The Administrative Code states that when granting access to a file an administrative body is obliged to take measures to ensure that a business secret is not violated.

In any stage of proceedings any person has right to ask the Office to provide information under the Act No. 211/2000 Coll. on Free Access to Information (“Information Act”). Under this law the Office is obliged to provide any information that it has at its disposal. But under the Information Act the Office shall protect business secret. The Information Act is generally applicable to all administrative bodies and ensures the constitutional right to information. The Office does not dispute the general aim of this Act,

however, due to the nature of the proceedings before the Office it does not seem to be appropriate to give the public the general access to the file and it poses practical problems in ensuring the course of the investigation. The Information Act recognizes the protection of business secret but not the protection of confidential information in general.

So far there was quite formal approach employed by the Office putting more stress on the protection of the business secret due to the abovementioned wording of the Administrative Code.

Recently, in order to reflect the issues occurred during the decisional practice of the Office, the objections raised by the undertakings and their legal representatives as well as the constantly increasing stress on standards of procedural rights emphasised also by the courts, the Office started to apply a more flexible and balanced approach. The Office revised the internal rules and adopted new measures which it believes could ensure both the procedural fairness and the protection of private interests and the public interest on revealing the violation of competition law. The way the Office intends to balance these opposing interests is modelled after the European commission's approach taking into account the particularities of the national substantive and procedural rules.

There is not much practical experience in this field so far and also no judgments of the relevant court concerning this matter. However, in this regard especially the judgments of the relevant courts are considered to be decisive in adjusting the approach of the Office.

2.2 How does your agency balance a defendants´ right to review and respond to evidence that will be used against it with the need to protect confidentiality?

If the confidential information constitutes the basis for the decision or is of inculpatory or exculpatory nature, the Office has to assess the conflict between the protection of the private claim on protection of business secrecy, the undertaking's right to fair proceedings and the public interest in bringing into light the infringement of competition law. This is done on a case-by-case basis. The following aspects are taken into consideration:

- the evidential significance of the information for proving the infringement
- the sensitivity of the information, it means to what extent the disclosure of the said information is able to harm the undertaking
- the seriousness of the infringement under investigation.

2.3 Are there special procedures available for disclosure necessary to protect rights of defence, e.g. by limiting the disclosure to legal representatives so as to ensure that business secrets are not divulged to competing businesses?

There are no special procedures established so far with regard to the disclosure of documents inevitable to exercise rights of defence (in the meaning of exculpatory evidence, where other manners of disclosure mentioned above are not possible, such as description of the relevant issue without direct disclosure of confidential information,). The Office holds the opinion that it is preferable to limit the disclosure to the legal representatives so as to guarantee the most possible protection against the other parties to the proceedings or third parties. However, the Office can not force by any means the undertakings to appoint a legal representative and also such cases, where the undertaking acts on its own during the proceedings, may occur. These cases will be dealt on a case-by-case basis so as to ensure the maximal possible protection of the confidential information on one hand and the observance of the rights of defence on the other one.

2.4 How is confidential information defined?

As described above, there are two categories of protected information, the business secret defined in the Commercial Code and confidential information recognized by the Act on Protection of Competition.

2.5 What rules apply to the protection of confidential information obtained from the parties by your agency? Is such information automatically considered to be confidential, or does the party have to identify it as such? If such information is to be disclosed to other parties or made public, does the party have a prior right to object to the disclosure?

The Office is entitled to ask for all information necessary for performing its duties under the Act on Protection of Competition. The Office is required to inform a party to the proceedings at the beginning of the proceedings that they may indicate which of the information or documents provided to the Office they consider being subject to business secret or which of the information or documents they consider confidential.

Firstly the Office examines whether the information designed as confidential/business secret really fulfils the characteristics of such information as defined in the Commercial Code. The party to the proceedings must substantiate in writing the confidentiality of information or documents or their designation as business secrets. If, on the basis of the preliminary assessment of the Office, the information really is of such nature that merits protection, the Office may ask the party to the proceedings to provide a different wording of information or documents that does not contain business secrets or does not have a confidential character (non-confidential version).

The business secret and confidential information are kept separately from the file accessible to the parties to the proceedings. If the access to these documents is required the Office will proceed as described above and balance the possible opposing interests.

If the Office comes to the conclusion that although the information contains business secret or is confidential, other interest prevails and it is necessary to give access to the information, the Office informs the undertaking concerned and asks for disclosure of the document, a more meaningful non-confidential version or granting access only to the legal representative without the possibility of making copies of the document.

2.6 How does your agency balance the benefits of public disclosure of ongoing investigation with the need to respect confidentiality of target proceedings and possible effects on their reputation?

The Office is obliged under the Act on Protection of Competition to publish information on all initiated proceedings. This obligation relies on general information on the proceedings and the parties concerned without the need to deal with detailed aspects of the case. In general the Office does not consider the public disclosure of the particularities of the investigation to be beneficial for the course of the proceedings. On the other hand, as described in the introduction, there is the Information Act which enables any person without the need to demonstrate any legal interest to get access to all information which the Office has at its disposal, i.e. all information contained in the file except for some exceptions (business secrets, personal information etc.). It has already happened that some undertakings subject to investigation claimed their reputation being distorted due to the information on the proceedings published or disclosed, but the Office referred to its duties under the Act of Protection of Competition. There have been no legal proceedings concerning such claims so far.

2.7 What are the penalties for negligent /intentional violation of confidentiality rules?

Office employees are required to maintain confidentiality of information subject to business secret or designated as confidential, of which they become aware during the course of the proceedings, subject to some exceptions stated by the Act on Protection of Competition or other legislation (criminal prosecution etc.). Violation of this duty may be subject to penalties under labour law.

On the basis of the provisions on business secret contained in Commercial Code the undertaking whose business secret has been endangered or violated, may require the transgressor to refrain from the illegal conduct and has the right of compensation. The assessment is subject to private litigation before the court. Afterwards, if the Office is obliged to pay compensation it is required to ask for recompensation from the particular employee/employees responsible for the damage.

Under the Criminal Code the one who intentionally violates the business secret is subject to custodial sentence.

3. Requests for information to targets of investigation

3.1 General information

The Office is entitled to ask for all information it considers to be necessary for the performance of its tasks stated by the Act on Protection of Competition. Undertakings are required to submit to the Office the requested information and documents, allow an examination of this information or these documents, cooperate with the Office in their examination, and to allow employees of the Office, employees of another national competition authority, and employees of and persons authorized by the European Commission to enter all buildings, premises and means of transport of the undertakings.

Information or documents obtained by the Office may only be used for the purpose of the proceedings according to the Act, unless special legislation provides otherwise.

The procedure concerning requests for information does not differ depending on whether the requested body is party to the proceedings or other undertaking.

Undertakings not complying with the obligation to supply the requested information are subject to fines under the Act on Protection of Competition.

The Office has power to impose sanction for procedural violation in separate proceedings of up to 1% of total turnover of undertaking (“stand- alone”) or to consider obstruction in proceedings as an aggravating circumstance, i.e. increase the fine that is being imposed.

Before June 2009, the legislative maximum of fine for procedural breaches was of up to 5 mil SKK, which was about 166 000 EUR. Since amendment to Act on Protection of Competition in June 2009, the legislative maximum is 1% of the total turnover of the undertaking.

However, concerning requests for information in sector inquiries, the Office does not request information under the sanction of non-cooperation.

3.2 Does your agency have procedures to review information requests with the party?

No formal procedures exist. However, if a request for information is sent to the undertaking, the undertaking may contact the respective case-handler or director of the division and ask for clarification,

additional explanation etc. if necessary and thus avoid the risk of submitting incomplete or incorrect information.

3.3 Is the party informed of the theory of the case and reasons for requesting the information?

Yes, in the introduction of the information request the Office describes in general the purpose and subject-matter of the investigation. The description of the case depends on the stage of the investigation/proceedings at which the information is requested.

3.4 Can the party ask for reconsideration of the information requested and /or deadlines, or appeal to a reviewing office within agency?

Once the request for information is sent to the undertaking (irrespective of whether it is a party to the proceedings or other undertaking) the Office stipulates also the period within which the information has to be supplied. As stated above, the undertaking may contact the respective case-handler or division and ask for clarification, additional explanation etc. if necessary and so avoid the risk of submitting incomplete or incorrect information. This can be done formally in writing or also in an informal way. If the undertaking is not able to submit the information within the stipulated period, it can formally ask for prolongation of the period but has to substantiate it. Such request is handled by the division of the Office carrying out the investigation/proceedings in question.

In terms of formal proceedings on imposition of fines for procedural breaches, the procedure is identical to those concerning the substantial breaches, i.e. the first-instance decision is issued by the respective division of the Office and can be appealed to the Council of the Office. Afterwards, the decisions can be subject to judicial review.

3.5 Do procedures and practices differ if the addressee of the request for information is not a party to the proceeding?

No, the procedures are identical for parties to the proceedings and other requested undertakings. As regards fines for submitting incomplete, incorrect or misleading information, these can be imposed in separate proceedings on parties to the proceedings and also on undertaking which are not parties to the proceedings. In addition, concerning the party to the proceedings, the Office can consider obstruction in proceedings as an aggravating circumstance, i.e. increase the fine that is being imposed for substantial breaches.

4. Agreed Resolutions of Enforcement Proceedings

At what stage or stages of an investigation and/or litigation can the parties resolve an enforcement matter by means of a mutually agreed disposition with your agency? Are there restrictions on the types of cases that can be settled in this manner? Does your agency actively seek to settle cases?

Pursuant to Act on Protection of Competition, once the Office establishes that the Act on Protection of Competition was infringed, it must impose the sanction on undertaking.

However, the Act on Protection of Competition provides also for possibility for commitment decisions where the finding of the infringement is absent and the sanction is not imposed.

4.1 Commitment decisions

Art. 8a of Act on Protection of Competition introduces the possibility for undertakings to submit voluntarily commitments that are intended to address the competition concerns identified by the Office. Pursuant to Art. 8a of Act on Protection of Competition the Office may end proceedings started for the possible violation of antitrust rules (agreements restricting competition and abuse of dominant position) by means of a decision imposing on an undertaking the requirement to fulfil the commitments submitted by the undertaking to the Office for the purpose of elimination of possible restriction of competition. The Office may issue this decision for a specific time period. The main advantage for undertakings in this regard is the absence of finding the infringement and thus the absence of fine. Since the commitments are proposed by the undertaking and accepted by the Office, the proceedings are shorter and the remedies are quickly implemented in the market to the benefit of the competition and consumers.

The Act on Protection of Competition does not set any time limit as to when the commitments should be proposed; therefore the undertakings may contact the Office at any stage of the proceedings. The Office encourages that the undertakings communicate their will to discuss the possibilities of the commitment procedure at the earliest stage of the proceedings. On the other hand, the undertaking should propose the commitments until the date of the issuance of the decision at the latest, this means they should react to the Statement of Objections.

The Office may modify or reverse a commitment decision on its own incentive if:

- the conditions that were decisive for issuing the decision substantially changed after the issuance of the decision;
- the undertaking fails to fulfil the commitments imposed by the Office's decision; or
- information provided by the undertaking, which was decisive for issuing the decision, was incomplete or false.

4.2 Settlement procedure

Although, the procedural legal framework lacks specific provisions on settlement procedures, the Office, approached by the undertakings with requests for settlement, has implemented this institute in practice, and has applied it so far in cases of vertical agreements restricting competition.

However, possible legislative amendment that would allow establishing similar direct settlement regime to the European Commission's proceedings[5] is being contemplated by the Office.

5. Judicial Review and Interim Relief

At what point in the competition law enforcement process does an independent judicial body have an opportunity to review the conclusions of your agency as to whether a violation of the law has occurred? What level of deference does the judicial body grant to the agency's decision? If the agency's decision has resulted in a sanction or remedy, what is the effect of the pending judicial review on that sanction or remedy? Can the judicial body

[5] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2.7.2008, p. 1–6.

grant interim relief? What is the timing of the review by the judicial body, and are there procedures for expedited review of time-sensitive business transactions or conduct?

5.1 General information about the legal framework

The decision of the Council of the Office is the final and enforceable decision of the Office. An action against the decision of the Office can be filed to the Regional Court in Bratislava. The court *can grant a stay of execution of the decision* of the Office upon a request of applicant until the final decision of the court.

The court has power to dismiss the action and uphold the decision of the Office, to annul the decision of the Office or modify the sanction that was imposed by the Office.

The decision of the Regional Court in Bratislava can be further appealed to the Supreme Court of the Slovak Republic. The appellant may appeal always against the decision of the Regional Court when it does not meet all his complaints, the Office's right to appeal is limited, depending on the reasons for which the contested decision was annulled.

The judgment of the Supreme Court is the final decision.

5.2 Jurisdiction of the court. Deference to the agency's decision. Possibility to hold the trial de novo

In the past, the Code of the Civil Procedure as well as the case law established that the courts, reviewing administrative decisions of the public authorities have only the competence to review the legality of the decision and cannot challenge the decision on facts, i.e. the full jurisdiction was not applied. Therefore, it was repeatedly held by courts that the only public authority that can make conclusions whether *the violation of competition law has occurred* is the Office.

However, after some amendments to the Code of Civil Procedure, the courts were empowered to amend the decision of public authorities, in the case of the Office – the court was empowered to reduce the sanction that was imposed. The court was also empowered to propose and weigh new evidence in this regard and therefore the new approach started to be applied by courts, giving different opinions on the question of full jurisdiction. In some cases the decision of the Office was challenged on facts and law, as the court held the opinion that it has the full jurisdiction. Although, this opinion was overruled lately in one case by Supreme Court, this question is still being discussed.

If the court annuls the decision of the Office, it returns the decision of the Office for further proceedings. The legal opinion of the court should be reflected in further proceedings. Thus, the Office has the duty to continue in proceedings, however this can also mean that the Office might stop the proceedings for lack of evidence, etc., depending on the reasons that were given by court for the annulment.

In most cases, the court usually annuls the decision of the Office for procedural reasons, although these sometimes have also the fact – finding background – in other words, also the decision on merits was challenged. So far, there hasn't been a case where the Office would stop the proceedings after the case was returned by court back to the Office. Although, in one case (against Slovak Bar Association[6]) the Office continued proceedings only partially, i.e. the Office did not continue proceedings on question where court expressed different opinion and did not see the breach of competition rules – had different legal opinion, but agreed with the rest of the decision (three types of restriction were covered by one decision). Since the

6 2S 380/2006-100, 2 Sžh 3/2007.

court cannot uphold or annul the decision of the Office only partially, the whole case was returned to the Office. The decisions of the Office were annulled in most cases for procedural reasons; however there has never been a case where the decision of the Office would be annulled because the rights of the parties to the proceedings were not observed. The procedural reasons for the annulment of the decision of the Office were mostly the insufficiently reasoned decision, inarticulacy of the decision and the operative part of the decision, insufficient indication of the place time and manner of the conduct in question in the operative part of the decision, etc.

5.3 Timing of the review

Concerning the *timing* of the review, the courts are not limited in time on their judicial review of the decisions of public authorities due to independency of the courts.

Review proceedings before courts in competition matters last from 1 year up to 5 years.

This is on the one hand understandable as the court reviewing the decisions of the Office is the court of general jurisdiction for the review of all decisions of all administrative/public authorities which means deciding cases in the environmental law, social security, tax law, etc. On the other hand, if the judicial review proceedings take too long, the interventions of the Office do not promptly reflex the situation in market, which has negative social and economic effects - market lacks the remedy. The remedies are however needed especially in lately liberalized markets such as telecommunications, energy, etc.

SWITZERLAND

1. Introduction

In Switzerland, the Secretariat of the Swiss Competition Commission (hereafter Secretariat) is the investigative body and the Swiss Competition Commission (hereafter Competition Commission) is the decision-making body (together the Competition authorities). The relevant legislation is the Federal Act of 6 October 1995 on Cartels and other Restraints of Competition (Cartel Act; CartA). This contribution deals with three main topics suggested by the OECD in its call for contributions: the decision-making process (I.), the confidentiality issues (II.) and the judicial review and interim relief (III.).

2. Decision-making process

Internally, the statement of objections prepared by a case-team of the Secretariat goes through a two-tier "control" before it is sent to the parties and decided by the Competition Commission: firstly, the Chief economist and the Head of legal, who are not involved in the investigation, comment on the draft orally or in writing. Secondly, the drafted statement of objections is discussed within the board meetings including the director of the Secretariat and the three vice-directors. .

In order to ensure a sound decision-making, the Competition Commission can assign external experts (Article 12 of the Federal Act on Administrative Procedure (Administrative Procedure Act). The external expert can give its opinion in writing and can also be heard by the Competition Commission in presence of the parties. External experts were used in antitrust as well as in in-depth merger control proceedings.

3. Confidentiality

3.1 Confidentiality – disclosure to other parties and to the public

As mentioned in the contribution for the previous roundtable, the right to be heard grants the parties to take notice of all essential documents on the proceedings (Article 30 Administrative Procedure Act) but at the same time the parties and other persons participating in the proceedings may request a restriction to access to the documents or to the making of copies or to the taking of notes thereof, with reference to the need of protection of business secrets. These leads to the legally demanding and important question whether and to what extent documents will be disclosed, which the Competition Commission as the decision-making body has to adopt (see below).

Regarding business secrets in civil procedures Article 16 CartA addresses to the judge in civil litigation cases that "the parties' manufacturing or business secrets shall be preserved in all disputes concerning restraints of competition". Evidence that could reveal such secrets shall only be made available to the opposing party to the extent that it is compatible with the preservation of the secrets." And Article 25 para. 4 CartA addresses to the competition authorities clearly that "publications shall not reveal any business secrets."

The duty to keep "manufacturing or business secrets" applies to all evidence provided to the Competition authorities, with no difference made between parties to the proceeding and third parties.

In analogy to Article 162 Swiss Criminal Code and in accordance with the case-law[1], a fact must fulfill the following conditions to be qualified as a business secret:

- The fact is not **publicly known**, i.e. it is only known to the person providing it or to a limited number of persons. A fact that is accessible on a website or published by the media does not fulfill this condition.

- The person providing the fact has a **subjective interest to keep this information secret**, i.e. that he considers that the information is not known, he wants to keep it secret and has informed the agency thereof.

- There is an **objective interest to keep the information secret**. This interest is examined on a case by case basis by the agency. An interest to keep an information secret exists if:

  – this fact has an economic value for this enterprise, also is important for its economic success and

  – this fact concerns only one enterprise and not a group of enterprises. This fact enables others to draw some conclusions about the enterprise in question.

The Competition authorities ask automatically all parties providing information in a proceeding to submit a version without business secrets which will be part of the file accessible to the parties. However, the Competition authorities can decide about the way to eliminate the business secrets in advance in the answers of third parties in order to avoid a discussion on business secrecy with each respondent, in case of a very large amount of questionnaires.

When the Competition authorities decide that a fact which was claimed as a business secret is legally relevant (that is it want to use it as evidence against a party), it contacts the provider of the information and decides with him about the way to **circumscribe the piece of information**, i.e. for instance a range for market shares, turnover, etc, or a more general description. This general description should enable the accused undertaking to exercise its rights of defense. This way of doing was upheld by the former Appeals Commission in a leading case in 2002.[2] Since then, the Competition authorities have rarely encountered difficulties to reach an agreement with a provider of information. If there is a limited number of undertakings in a certain market and it is therefore very easy to identify the enterprise which provided the information, the Competition authorities usually aggregate the information.

Before publication, the Competition authorities always give the parties the opportunity to review the publication text in order to eliminate any business secrets. In the recent past, the Competition authorities have more frequently encountered problems with the disclosure of business secrets in publication of decisions because these decisions include facts that lead to pecuniary sanctions. The parties claiming business secrets are in reality afraid from disclosure of information due to follow-up civil actions or reputation damage. If there is a disagreement about the qualification of a business secret or the manner a business secret should be circumscribed and if the disagreement cannot be settled informally, the Competition Commission makes **a separate decision on this specific point**. **This decision then is subject to the ordinary way of appeal.** In order to avoid undue postponement of publications, in this case the Competition authorities will publish their decisions in a temporarily manner on its website. This published

1 Distribution of veterinary products; publication of the Swiss Competition authorities (DPC) 2002/4, p. 698-730.

2 See footnote 1.

version will include no business secrets in the way as mentioned by the parties until the appeal decision is rendered.

3.2 Confidentiality – disclosure of information to other authorities

The provisions of the Cartel Act on confidentiality protect the party concerned not only from disclosure to competitors, but also from transmission to other authorities.

In addition, disclosure of business secrets, violation of official secrecy as well as communication of business secrets to foreign bodies are prohibited under the Swiss Penal Code (Art. 162, 320 and 273)[3]. In the past, Article 273 has been interpreted broadly by the Federal Supreme Court in the field of competition[4]. However, today, Swiss commentators insist on a restrictive interpretation and application of that provision.

The provisions of the Criminal Code limit the ability of the Competition Commission to communicate information to foreign competition authorities. The transmission of confidential information is thus only possible if there is a legal basis for it, or if the enterprise concerned authorises it. Presently, in the absence of a specific provision in the Cartel Act and of international agreements allowing for the exchange of confidential information on competition matters, the Competition Commission is not entitled to provide a foreign competition authority with business secrets, unless the enterprise concerned grants a waiver. Waivers are often granted in relation with mergers, but rarely in proceedings on unlawful agreements.

Recognising the limited possibilities for information exchange, the Evaluation Group that comprehensively assessed the Cartel Act between 2007 and 2008 recommended the creation of a provision on information exchange in the Cartel Act and the conclusion of cooperation agreements with major partner countries. A provision on information exchange is currently under consideration in the context of a possible revision of the Cartel Act.

As to the transmission of information to other national authorities, according to Article 25 para. 3 CartA the Competition Commission may communicate information to the Price Supervisor (the authority who controls prices and may recommend or order price reductions), if such information is necessary for the fulfillment of his or her tasks.

4. Judicial review and interim relief

According to Article 17 Cartel Act in order to protect the rights arising from a restraint of competition, the courts may order any necessary interim measures at a party's request. Besides the civil judge, according a settled case-law, the Competition Commission can grant at a party's request or ex officio interim relief. The Competition Commission has used this possibility many times. Both the Federal Administrative Tribunal and the Federal Supreme Court may also grant interim measures.

An independent judicial body has the opportunity to review the conclusions of the agency as to whether a violation of the law has occurred at the end of the proceedings. For specific procedural issues, which can be judged separately as for instance the lack of competence, a separate decision can be required before the end of the proceedings, which is separately challengeable.

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3 See Articles 162 and 320 PC.

4 BGE 104 IV 175. In that case dating from 1978, the Federal Supreme Court considered that the transmission of information on anticompetitive practices by an employee of a company to a foreign authority was punishable under Article 273.

An appeal against a decision of the Competition Commission has to be lodged with the Federal Administrative Court . The Federal Administrative Court is the ordinary appeals court for federal administrative matters, which include, but are not limited to, competition matters. The Federal Administrative Court has the same power of decision as the Competition Commission, which means that it can review and, if necessary, re-establish the relevant fact, review the application of the law, and review the way the Competition Commission has used its discretionary power. Decisions of the Federal Administrative Tribunal are subject to appeal to the Federal Supreme Court. The Federal Supreme Court can only review the application of the law and, as a matter of principle, not the relevant facts.

Pending judicial reviews against the decisions of the Competition Commission have suspensive effect unless the agency has removed this effect. The appellate body can re-instore the suspensive effect at the party's request. However, and this is important, appeals against pecuniary sanctions have always suspensive effect (with no possibility to remove the suspensive effect, see Article 55 Administrative Procedure Act).

TURKEY

This contribution aims to explain the rules concerning confidentiality and will be based on the relevant provisions of the Act No. 4054 on the Protection of Competition (the Competition Act), and the secondary legislation adopted by the Competition Board, the decision making body of the Turkish Competition Authority (TCA).

The Competition Act[1] prohibits the staff of the TCA from using trade secrets of the undertakings and associations of undertakings that they learned during the implementation of the Competition Act even if they have left their office[2]. Moreover, decisions of the Competition Board are published on the internet page of the TCA in such a way not to disclose the trade secrets of the parties.[3]

Moreover, the parties which are notified of the initiation of an investigation against them may, until their request for enjoying the right to hearing, ask for a copy of any paperwork drawn up within the TCA in connection with themselves, and if possible, a copy of any evidence obtained.[4]

By taking these provisions in the Competition Act, the Competition Board recently adopted the Communiqué No 2010/3[5] on the Regulation of the Right of Access to the File and Protection of Trade Secrets (Communiqué No. 2010/3).

According to the Communiqué No. 2010/3, the parties can have access to any document and evidence in the file prepared within the scope of investigation except for internal correspondences of the TCA and those including trade secrets and other confidential information about other undertakings, associations of undertakings and persons.[6]

The Communiqué No. 2010/3 provides for definition of trade secrets and certain examples that may constitute trade secrets. For instance, trade secret is defined as "*any information and document relating to the field of activity of undertakings, that undertakings have the freedom to keep secret, that is known to and can be obtained by only a certain and restricted group, and that is likely to result in serious damage to the undertaking concerned when disclosed to third persons, especially competitors, and to public.*"[7] Depending on the characteristics of the incident and the undertaking, following information and documents may be considered as trade secrets:

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1 Article 25(4) of the Competition Act.

2 Despite the fact that the Competition Act does not envisage a specific sanction in case of not respecting confidentiality, the General Law on State Officials no:657 and Criminal Code envisage administrative and criminal sanctions respectively.

3 Article 53(2) of the Competition Act.

4 Article 44(2) of the Competition Act.

5 The Communiqué was published in the Official Gazette dated 18.4.2010 and numbered 27556.

6 Article 6(1) of the Communiqué No. 2010/3.

7 Article 12(1) of the Communiqué No. 2010/3.

- the internal institutional structure and organization of undertakings,
- their financial, economic, credit and cash position,
- research and development activities,
- operational strategy,
- raw material resources,
- technical information related to production and manufacturing,
- pricing policies,
- marketing tactics and costs,
- market shares,
- wholesale and retail customer potential and networks,
- contractual connections that are subject to or not subject to authorization.[8]

It should be said that information and documents relating to contracts, agreements, settlements and actions violating the competition law legislation are not considered trade secrets even if their disclosure is likely to result in damage to the relevant undertaking or its competitors.[9] Furthermore, information that has been published, made public, or included in official registers or balance sheets as well as annual reports, together with information that has lost its trade significance due to causes such as the fact that it is five years old or more, may not be deemed trade secret.[10]

Essentially, it is the responsibility of the undertakings to determine whether information or documents in the records of the TCA include trade secrets and to put forward the justifications for them.[11] The undertakings have to notify the TCA of the information and documents including trade secrets, the grounds explaining the trade secret nature of such information and documents, and the versions of documents that do not include trade secrets.[12] The undertakings claiming secrecy should indicate trade secrets one by one in the relevant documents.[13] Statements that the documents about which secrecy claims have been filed have the nature of trade secret as a whole are not accepted.[14] Undertakings can file secrecy claims only for those trade secrets that have been obtained from them or that relate to them.[15]

8 Article 12(2) of the Communiqué No. 2010/3.

9 Article 12(3) of the Communiqué No. 2010/3.

10 Article 12(4) of the Communiqué No. 2010/3.

11 Article 13(1) of the Communiqué No. 2010/3.

12 Article 13(2) of the Communiqué No. 2010/3.

13 Article 13(5) of the Communiqué No. 2010/3.

14 Article 13(5) of the Communiqué No. 2010/3.

15 Article 13(6) of the Communiqué No. 2010/3.

Although the relevant information and documents are deemed not to include trade secrets if the undertakings do not claim secrecy, the TCA may ask the undertakings for an assessment, by allowing time, or make an ex officio assessment for possible trade secrets likely to be included in the information and documents.[16] The TCA may also call the undertakings to its premises to screen the documents obtained from them and related to them for trade secrets if it deems necessary.[17] The undertakings can not file trade secrecy claims if they have not made trade secrecy assessment upon request of the TCA.[18]

In case the TCA accepts the claims for the confidentiality of trade secrets, they are not disclosed.[19] In case the information and documents are indispensable to be used as evidence to prove an infringement of competition, the TCA may not take into account secrecy claims related to them.[20] Therefore, the TCA can disclose such information and documents that have the nature of trade secret, respecting the balance between public interest and private interest and in accordance with the proportionality criterion.[21] However, it should be said that trade secrets, which are not indispensable to prove an infringement, cannot be disclosed merely for the purpose of strengthening the grounds of the decision of the Competition Board.[22] However, depending on the nature of the information, methods such as giving approximate values or ranges can be adopted.[23]

Finally, provisions of the Communiqué No. 2010/3 in relation to trade secrets are applicable, by comparison, to other confidential information that does not have the nature of trade secret but is likely to result in significant damage to the relevant parties or third parties when disclosed, to the extent that their nature allows.[24]

16 Article 14(1) of the Communiqué No. 2010/3.

17 Article 14(2) of the Communiqué No. 2010/3.

18 Article 14(3) of the Communiqué No. 2010/3.

19 Article 15(1) of the Communiqué No. 2010/3.

20 Article 15(2) of the Communiqué No. 2010/3.

21 Article 15(2) of the Communiqué No. 2010/3.

22 Article 15(3) of the Communiqué No. 2010/3.

23 Article 15(3) of the Communiqué No. 2010/3.

24 Article 16(2) of the Communiqué No. 2010/3.

UNITED KINGDOM

1. Introduction

The UK's submission for 16 February 2010 Working Party 3 roundtable discussion on procedural fairness ("UK contribution Feb 2010"), provided an overview of procedures used by the OFT for competition enforcement, mergers and market studies, and by the CC for both merger and market investigations. This paper describes the following aspects of the OFT's and CC's procedures that are raised in the call for contributions:

- Institutional design and the decision making process
- Confidentiality issues
- Request for information
- Judicial review and interim relief

It should be noted at the outset that due process issues cannot be discussed in isolation but need to be discussed alongside the need for quality decision making, effective and timely enforcement and efficient use of resources of the agency and parties. These factors can create tension. In addition, there is a need to balance and reconcile the rights of different persons with each other. For example, the rights of defence of the parties with parties' rights not to have confidential information disclosed.

2. OFT Transparency consultation

The Office of Fair Trading (OFT) recognises the importance of being transparent and of engaging effectively with parties and stakeholders. The OFT conducted a consultation in July 2009 exploring how it can become increasingly open and transparent in the way it conducts its work and engages with parties ('Transparency consultation')[1]. This section provides an update on some of the commitments that OFT will make as a result of the responses it has received to this consultation, as set out in its statement published in May 2010 entitled 'Transparency: A Statement on the OFT's approach'[2]. In addition, this section sets out:

- How the OFT engages with parties when requesting information;
- What type of information is made available to parties; and
- How the OFT ensures sound decision-making.

1 http://www.oft.gov.uk/shared_oft/consultations/oft1101.pdf.

2 http://www.oft.gov.uk/shared_oft/consultations/668117/OFT1234.pdf.

3. Sharing of provisional thinking in OFT competition enforcement cases and merger reviews

The extent to which the OFT can and does share its provisional thinking in enforcement cases and merger reviews, either with those immediately involved in the project or by publishing information on its website for wider review, is one important aspect of how transparent the OFT is as an organisation, and how it engages with those involved in its work.

In the OFT Transparency consultation, the OFT asked for views about the sharing of provisional thinking in competition enforcement cases. The feedback from respondents was mixed with some welcoming the sharing of provisional thinking whilst others felt that such disclosures did not sit well within our procedural rules. While the OFT acknowledges the difficulties in this area it will keep an open mind about when and how it can share its provisional thinking and the OFT's case teams will consider any requests from parties or proposals from parties.

When undertaking projects such as market studies it has become OFT practice where possible to share research and preliminary findings.

In respect of OFT merger cases, case teams keep in close contact with the acquiring company throughout the life of a case. OFT's merger case teams provide informal feedback and articulate theories of harm as they arise and at the earliest possible opportunity. In addition, the OFT is willing throughout its merger reviews to engage in discussion with the parties on potential remedies on a 'without prejudice' basis. Indeed, in a number of cases such consideration has occurred as early as in pre-notification discussions.

The OFT case team will generally have a 'state of play' discussion with the parties around the mid point of a merger review in order to give them as detailed an indication as possible of what competition concerns (if any) are being examined and whether the case is likely to go to a 'case review meeting'.[3] If a case is a candidate for reference for second phase investigation or to be remedied at the phase one stage) the OFT sends the parties an issues letter. This document articulates the OFT's concerns in writing, substantiated by evidence, and invites the parties to respond to the theories of harm set out in the paper. The parties are able to respond to the issues letter in writing and/or in person at an 'issues meeting'. This meeting, held with the case team and senior OFT Mergers staff, gives the parties the opportunity to discuss the OFT's competition concerns and to try to persuade the OFT as to why the concerns are unfounded.

4. OFT Requests for information

The OFT's ability to obtain relevant information and evidence has a direct bearing on the quality of its decision-making and on the timescales for completion of its work. However, the OFT is equally mindful of the burden on companies of complying with information requests and of the need to minimise that burden. The OFT's approach is set out in further detail below.

4.1 Draft information requests

A notice to provide information must state the subject matter and purpose for which the information is sought but it does not need to give extensive detail. In addition, it must specify or describe the documents

[3] A case review meeting is held for those cases that have such potential competition concerns that render them candidates for a second phase investigation.

or information, or categories of documents or information, required, and set out the nature of the offences that may be committed if a person fails to comply when the powers of investigation are exercised[4].

The OFT routinely discusses the range of questions or the format of the response with parties. Following the OFT's consultation on transparency, it has made a commitment to provide formal information requests in draft where it is practical and appropriate to do so, particularly where legal rules do not lay down a different procedure.

The provision of formal information requests in draft in appropriate cases can have several benefits:

- Providing a request in draft allows the OFT to take into account comments on the scope of the information and/or documentation that it has asked for, making it easier for notice recipients to comply with the information request. Those who receive information requests can be clear of what information is of relevance to the investigation and, therefore, where they might need to look for it.

- Providing a request in draft allows the OFT to take into account comments the timeframe that we have specified for responding to the request. Then once a final request is issued the OFT can be confident in enforcing the deadline – which leads to better project planning and faster cases.

The timescale specified in the final request will differ according to the nature and the amount of information that the OFT has requested. It is not possible for the OFT to apply uniform, set timescales for responses to information requests. If a request has been provided in draft, and the timescale for response to the final request has been discussed, the OFT will only agree to any extension in exceptional circumstances.

There are of course times when sending a draft information request would be inappropriate. The OFT's key considerations in assessing whether or not it would be appropriate to provide an information request in draft are: whether or not it would prejudice the investigation to do so or, because the request is for a small amount of information, whether it would be inefficient to do so. The desire to be open and transparent must therefore be balanced against the need to avoid obstruction and evidence destruction, especially in 'hardcore' competition enforcement cases. In reality, there may therefore be a difference as to how open the OFT can be with parties depending on the nature of the case.

4.2 Advance notice of information requests

In appropriate cases, the OFT will seek to give recipients of significant information requests advance notice, so that they are able to manage their resources accordingly. For example, significant information requests often take some time to prepare and there may be no reason why the case team should not tell the intended recipient that they are preparing to send an information request.

There will however be instances where it is inappropriate to give advance notice, such as where the request is for a small amount of information, the need for the information was unexpected, or where giving notice would prejudice the investigation.

5. Confidentiality in OFT procedures

The OFT discloses information for many different reasons. The OFT may, for instance, disclose information:

4 http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft404.pdf.

- to assist parties under investigation to clearly understand the case against them so that they can properly defend themselves;

- to enable third parties to provide the OFT with informed input into investigations;

- where the OFT is required to publish information in relation to specific cases (for example, infringement decisions) or more generally (for example, guidance to educate business about Competition Act).

The OFT is sensitive to issues of confidentiality and, in particular, to the need to balance and reconcile different procedural rights with each other around the disclosure of information, for example the need to balance parties' rights of defence with the rights of parties not to have confidential information disclosed. The following sections discuss what information the OFT may disclose, and the circumstances in which disclosure may take place.

5.1 Restrictions on what may be disclosed and in what circumstances

The rules on disclosure are set out in statute, under the Enterprise Act 2002 (EA02), and in the OFT Rules[5]. They serve an important purpose in ensuring that information which is provided to the OFT, whether this is done voluntarily or in response to a statutory requirement, in connection with the exercise of the OFT's functions under statute is protected from unnecessary or disproportionate disclosure. This is particularly important where the information is commercially or personally sensitive[6].

The EA02 therefore sets out a general restriction on the disclosure of information that the OFT has obtained in connection with the exercise of its statutory functions ('specified information') and which is commercially or personally sensitive. For example, information on a company's latest business plan that the OFT receives from a party in connection with a merger review.

The general restrictions on disclosure of specified information does not apply where there is a duty to disclose[7] or where disclosure is permitted under one of the 'gateways' set out in the EA02.

The gateways for disclosure which permit disclosure of specified information (but do not require it) include:

- **Disclosures for the purpose of facilitating the exercise of any of the OFT's statutory functions.** The following disclosures would facilitate the exercise of the OFT's statutory functions: the disclosure of the investigation file to parties under investigation; the disclosure of a Statement of Objections to an interested third party who will assist in testing the OFT's case before infringement decision; and the publication of a Decision.

- Disclosure of information which has previously been disclosed to the public already, provided that the previous disclosure would not now be prohibited.

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5 Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2000/293 (OFT's Rules).

6 Restrictions on disclosure will apply in such cases during the lifetime of the individual in question, or while the undertaking in question remains in existence.

7 For example, where disclosure is required by a court order. In such cases, however, it is still necessary to assess whether any of the information is confidential in nature under s.244.

- **Disclose of information where the consent of all relevant persons is given**. This means that consent must be given by: the person who provided the information, and (if different) the undertaking and/or individual to whom the information relates.

- Disclosure which is required for the purpose of fulfilling a Community obligation.

- **Disclosure for the purpose of criminal proceedings.** This means that the OFT may disclose information to any person in relation to any criminal investigation or proceedings in the UK; and decision whether to start or end a criminal investigation or proceedings.

- Disclosure of information to overseas public authorities in certain circumstances where it facilitates the exercise by that person of any functions they have. This gateway is most likely to be relevant where the OFT is asked to disclose information by overseas competition authorities who are investigating breaches of their domestic competition legislation.

In addition to the general restriction on disclosure of 'specified information', further considerations must be given before disclosing any 'confidential' information. These additional considerations are intended to provide a safeguard against the unnecessary or disproportionate disclosure of confidential information, which by its nature is likely to be particularly sensitive. The practical consequence is likely to be that if these considerations operate to prevent disclosure, confidential information will have to be redacted, or replaced by aggregated figures or ranges, before disclosure takes place.

In addition, it may be *against the public interest* to disclose particular information. For that reason there are additional safeguards protecting such 'confidential' information from disclosure.

5.2 Representations on disclosure and decision-making

It is the OFT which ultimately makes the decisions as to whether:

- information is confidential, and

- if it is, whether it should be withheld from disclosure.

It does not however follow that the views of the persons to whom the information relates should be ignored. Firms operating in the market will, for example, generally be better placed than OFT case teams to explain why the disclosure of particular information would be harmful to them.

The importance of such input to the assessment of confidentiality is recognised by the OFT Rules, which give persons providing information to the OFT an opportunity to explain the extent to which it is confidential, and which require the OFT to seek their views if it is proposing to disclose that information under the OFT Rules. Notwithstanding the above, the assessment of confidentiality must still be carried out even where the parties have made no representations about it.

In addition, the OFT is under a duty to consider whether any specified information is confidential even where the parties providing it (or, if different, third parties to whom the information relates) have made no representations as to its confidentiality. The assessment of confidentiality must be carried out for all specified information.

There are three types of confidential information:

- Commercial information whose disclosure might significantly harm legitimate business interests. Examples of information which may fall into this category include:
  - current cost information;
  - current pricing information;
  - board papers setting out future commercial strategy.
- Personal information whose disclosure might significantly harm the individual's interests. Examples of such information might include:
  - employment records;
  - health records;
  - private address and contact details.
- Information whose disclosure would be contrary to the public interest. A draft defence contract obtained by the OFT from the Ministry of Defence might, for example, fall into this category, on the basis that its disclosure could give rise to issues of national security.

Making the decision as to whether confidential information should be disclosed is a complex assessment. By accepting that a piece of information is confidential, the OFT is accepting that disclosure of that information is likely to cause significant harm to an undertaking's business interests, to the affairs of an individual, or to the public interest. Moreover, unnecessary or disproportionate disclosure of confidential information carries a significant reputational risk for the OFT, which may in turn have an adverse impact on future investigations.

The OFT assesses whether it is necessary as a matter of evidence that confidential information must be disclosed for the purposes of a particular case considering, in particular:

- whether the information in question directly establishes the infringement;
- even if it does, whether there are other means of establishing the infringement to the requisite standard;
- whether the information must be disclosed to protect the rights of the defense.

Even where it is established that disclosure of confidential information is necessary as a matter of evidence in order to proceed with a particular case, an assessment should still be made as to whether the aim to be achieved by disclosure as a matter of broader policy outweighs the likely harm which disclosure will cause.

Where a person who has provided information to the OFT has identified it as confidential, and the OFT subsequently proposes to disclose that information under the OFT's Rules, the OFT must take all reasonable steps to inform that person of its proposed action, and allow them to make representations on it.

If a case team is proposing to disclose information which has been provided by one person but which relates to a third party, and the case team considers that it might be confidential in nature, the views of the third party in question should be sought prior to disclosure on:

- whether they consider the information to be confidential (if their views on this have not already been sought), and

- if so, whether it should be disclosed.

5.3 Penalties

It is a personal criminal offence (leading to the possibility of imprisonment or fine) to disclose information in breach of the provisions described above.

6. Procedural fairness vis-à-vis targets of enforcement proceedings

Procedural steps are undertaken by a case team formed for the purposes of a given investigation. Such steps may include gathering and analysing information and the production of any Statement of Objections or decision. Roles and responsibilities within an OFT case team include the Senior Responsible Owner, the Project Director and the Team Leader. The Senior Responsible Owner is accountable for the delivery of the case, whereas the Project Director directs the case and is the person accountable for delivery of high quality, timely output. The Team Leader leads the case team and works closely with the Project Director to support them in their role.

At the OFT, decisions to commence, continue or discontinue a competition investigation and decisions to approve the issue of a Statement of Objections, infringement decision or non-infringement decision are taken by the case Senior Responsible Owner, where necessary in consultation with the Chief Executive.

The OFT Board: The OFT Board can be a decision-making body in specified cases, particularly in commencing and completing projects. For example, Market Investigation References to the CC require the approval of the OFT Board. The Chairman oversees such decisions.

In addition, case teams can also benefit from external input into their decision-making, through a number of channels including:

Executive Committee (ExCo): ExCo is regularly consulted on projects and cases at major milestones. It is responsible for ensuring best practice in decision-making across the OFT's work. The Senior Responsible Owner can consult with ExCo when considering making key decisions. Exco is chaired by the Chief Executive.

Steering Committee: A Steering Committee, constituted differently for case, provides guidance and consists of senior officials from across the OFT who can add value by advising the case team. While not a decision-making group, the Steering Committee supports and challenges the case team and acts as a sounding board.

The Chief Economist Office advises on the economic robustness of cases. In addition, economists in the OFT meet regularly to discuss their analyses and receive peer review.

The General Counsel's Office advises on the legal robustness of cases, and case teams. In addition to internal advice, case teams often seek the advice of external counsel or external economists on particular points arising in cases.

The Policy Group advises case teams on how to handle steps in an investigation and ensures consistency of approach between cases.

In addition, case teams often seek the advice of external counsel or external economists on particular points arising in cases.

In addition, at the OFT, all merger cases are peer reviewed by another member of the mergers team. In more complex merger cases, where an Issues Paper is sent, a formal case review meeting will follow the Issues Meeting. The case review meeting will comprise the case team, senior officials within the Mergers Group, and other officials within the OFT that have relevant sectoral experience. One person in the review group is charged with playing 'devil's advocate' in respect of any case team recommendation to ensure that the majority view is thoroughly tested.

6.1 Judicial review

Decisions by the OFT as to whether there has been a breach of the prohibitions in the Competition Act 1998 or the Treaty on the Functioning of the European Union (or imposing a penalty for breach of those prohibitions) are appealable by parties whose conduct is the subject of the decision and also, in respect of some decisions, by third parties with a sufficient interest, to the Competition Appeal Tribunal (CAT) under sections 46-47 of the Competition Act 1998.

The CAT must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal. The power of the CAT includes the power to:

- confirm or set aside the decision in question;
- remit the matter to the OFT;
- impose or revoke or vary the amount of any penalty;
- give such directions, or take such other steps, as the OFT itself could have given or taken; and
- make any other decision which the OFT could itself have made.

In respect of appeals concerning the acceptance, release, non-release or variation of commitments, the CAT must determine such appeals in accordance with judicial review principles. That is, the CAT's review must be confined to assessing whether the OFT's decision was:

- ultra vires,
- unreasonable,
- procedurally flawed or
- disproportionate.

In such cases, the CAT may dismiss the appeal or quash the whole or part of the decision to which it relates. Where it quashes the whole or part of that decision, remit the matter to the OFT with a direction to reconsider and make a new decision in accordance with the ruling of the CAT.

The Enterprise Act 2002 (by sections 120 and 179) confers the judicial review jurisdiction in relation to the OFT's merger and market investigation reference decisions on the CAT. Otherwise, the High Court (in England and Wales) and the Court of Session (in Scotland) have jurisdiction to judicially review decisions of bodies exercising public functions on the application of parties affected by or with an interest in such decisions.

Procedural errors have occasionally led to decisions of the OFT being quashed and/or reconsidered. For example, the CAT's judgment in *Pernod Ricard SA and Campbell Distillers Limited* v *Office of Fair Trading* [2004] CAT 10, where the CAT clarified the requirements of procedural fairness in respect of complainants and these requirements were taken into account when preparing OFT451.

Similarly, mergers procedures were modified following the CAT's judgment in *Unichem Limited* v *OFT* [2005] CAT 8, where the CAT quashed an OFT decision in which the OFT had not fully checked facts with a third party that pertained to that third party. Please refer to the response to question 4e above.

7. CC merger and market investigations- background

The CC is a decision making body applying competition tests (in the form of statutory questions).[8] The CC does not select cases to investigate but conducts in-depth inquiries into mergers and markets referred to it, its role being characterised as a Phase II body[9] In addition to being determinative on the competition test, it determines and implements remedies (ie. following both merger and market investigations). Investigations must be completed within a statutory timetable, only merger references are capable of cancellation in the event that the proposed merger does not proceed.

Some distinct features of the CC are relevant to the consideration of the CC's approach to the procedural issues as described more fully in the paras below:

- the responsibility of the CC is to investigate a case referred to it and reach a decision on the basis of the evidence before it. It is not a prosecutorial body and approaches cases on an objective de nova basis;

- the CC decides cases and publishes an indepth report (including when no adverse findings are reached);

- the decision makers are closely involved in the investigation, having first hand knowledge of the evidence and responsibility for the strategic direction of the investigation;

- parties that are the subject of a decision and many third parties have access to the decision makers at hearings (and through written submissions);

- the statutory regime and the CC's procedures establish a transparent process (the parties are aware of the issues raised by the referring body and the issues under consideration by the CC, the

8 For mergers, whether there is a relevant merger situation and whether the merger is expected to result in an SLC. For markets, whether there are features of the market that have an adverse effect on competition. Additionally, if the CC determines that there are adverse effects on competition, it must decide whether action should be taken by it or others by way of remedy.

9 The CC also acts as an appeal body in relation to various regulated industries, an area outside the scope of this paper. The majority of merger and market investigations are referred to it by the OFT although some sector regulators may make market references and the SoS has limited powers to refer public interest cases.

state of play of the investigation, the evidence submitted and analytical approach of the CC in addition to being consulted on the CC's proposed decision); and

- the CC has published both procedural and analytical guidance relevant to merger and market investigations, including guidance on disclosure.

Judicial scrutiny of the CC's decisions is on judicial review rather than appeal basis, to the specialist tribunal, the Competition Appeal Tribunal (CAT).

7.1 Institutional design and the decision making process

7.1.1 Role of decision makers and review of evidence

Decisions are made by a Group of Members which perform the functions of the CC for the particular case. The decision makers are closely involved with a case (from the point of reference, throughout the evidence gathering and decision-taking stages and until its conclusion). The Group is supported by a staff team. The involvement of the decision makers and staff are explained more fully below.

The Group comprises 3 to 5 Members (the minimum is 3 members) who are appointed for an individual case by the CC Chairman at the beginning of the investigation (ie when a case is referred to the CC). With the exception of the CC Chairman and the Deputy Chairman (there are presently 4) all other members of the CC are part-time and engaged by the CC as and when cases are referred to the CC and Groups are formed. Some members combine their role at the CC with academic posts while others hold public or other positions elsewhere. A distinct feature of the CC is that it is able to attract members who have high standing in their particular field of practice. In general a Group will, through the expertise of individual members, represent the economic legal, financial and business areas.

Throughout the investigation the parties have the ability to respond to questionnaires and CC requests for information as well as submitting further comment and evidence on their own initiative. This material is drawn to the attention of the Group, both by circulating the parties' key submissions and in the form of working papers which identify and analyse the evidence received. These are discussed at meetings with the Group and staff, such discussions shaping the analysis and ultimately informing the decision and reasoning.

Main parties in both merger and market investigations will have access to the decision makers at hearings arranged by the CC. Typically in a merger investigation the Group will hold a hearing with the main parties prior to publication of its provisional findings (the proposed decision) and following such publication, particularly if the Group's decision at the provisional stage is that there is an SLC. Similarly in market investigations the Group will hold hearings with the main party's prior to provisional findings and again after publication of provisional findings. Third parties may also attend hearings with the Group or staff.

7.1.2 Staff teams

The Group works alongside a multi-disciplinary staff team, led by an Inquiry Director (typically with a project management consultancy background or a professional in the field of legal, finance or economics). Other members of the staff team will include representatives from the CC legal, economics, business and financial divisions as well as administrators. Both staff and members are involved throughout the case, ie from the early stage at which theories of harm, requests for evidence, are discussed and decisions made as to which parties to hear from, to the later stages when evidence is required leading to the final decision take stage. There is regular contact between the staff team and the Group (mainly through

meetings or teleconferences) which ensures that the Group members are aware of the evidence and also set the strategic direction of the case.

7.1.3 Independent review and external scrutiny

As explained, both the Group and the staff team will include economists and lawyers amongst their membership. There are a number of methods which the CC uses to ensure that evidence based quality decisions are reached.

The Chairman and Deputies liaise on a weekly basis. The economics division at the CC also meets weekly to discuss substantive issues arising in individual cases. This allows for issues to be addressed as they arise and for guidance to be sort or provided on all aspects of the case, not merely at the later stage when the decision is being formulated.

The CC also places importance on the use of Peer Review (multi-disciplinary review by CC staff economists, lawyers and where appropriate financial analysts and business team), the outcome of such reviews being reported to and discussed with the Group and staff team. Such reviews will however be less helpful in identifying procedural deficiencies in an investigation (the ability for parties to raise procedural issues is discussed at para 17.

Additionally, the CC might instruct external Counsel to review the CC's decision as well as provide discreet advice on aspects of the case that arise during the investigation. Such external scrutiny is more likely in market investigations but may be used also in contentious and complex merger cases.

A number of practical issues affect the effectiveness of internal or external review. In the context of a fixed statutory timetable, the period allowed for review is short and fairly rigid– the reviewer's availability can affect the contribution. The review needs to be sought at a time when it is not too late for those views to be considered, and yet at a time when the Group's views are formed. In the context of a case where there is continuous engagement with parties on the evidence and analysis, this can be particularly tricky. Another issue is whether the reviewer has sight of submissions as well as the draft decision. The former is preferable since it can inform the reviewer of the issues that have been raised and so identify gaps or weaknesses in the analysis, though the review may take longer.

7.1.4 Other practices used to improve the quality of decision taking and address procedural concerns raised by parties

Additionally the CC has nominated a number of leading academic economists to a panel to which the CC refers for comment on individual cases. They advise the economist staff team, being used to provide external scrutiny on the theories of harm and analysis and ensure that the CC is aware of the latest developments in economic technique and theory.

In some cases, Groups have made use of round tables to explore issues at an early stage of the investigation to improve their understanding of the issues raised by the case. In the past it has invited industry specialists and commentators to improve the CC's understanding of a particular industry and invited leading academic economists to discuss discrete aspects of the case (e.g in the Groceries Market Investigation, it held roundtables on Local Competition and Buyer Power).

Procedural issues and concerns raised by parties are discussed by the party with the staff team which has the ability to escalate the issue to the Group chair and the Group if appropriate. In practice many of the issues are resolved at the staff level. For resolving disputes between parties and a Group over a proposed disclosure of information that the party concerned objects to, the CC's procedures entitle parties to bring their objections to the attention of the CC's Chief Executive for him to advise the Group. Ultimately the

decision on all matters relating to a particular case is for the Group to decide, with recourse being available to the Tribunal (see paras 41 onwards).

7.2 Confidentiality issues

In the UK contribution Feb 2010 (see paras 107-108, 118-120 and 130) the CC described the key documents which are disclosed to the main parties and others and the extensive use made by the CC of publication on the CC website. The CC's policy on transparency recognises that transparency contributes towards the fairness of the CC's processes by main parties having a better understanding of the case against them and also aids the effectiveness of the investigation, enables interested parties (including main parties, other firms and consumers) to understand the issues the CC is considering and then to form effectively their input to the process and aids the efficiency and quality of the CC's decisions. The CC's policy as regards disclosure to parties affected by its decisions and transparency more generally is influenced by the statutory considerations which are relevant to disclosure. These are described below.

7.2.1 Information protected by statutory restriction on disclosure

The Enterprise Act 2002 (the Act) imposes a general restriction on the disclosure by the CC of "specified information". "Specified information" is information which the CC receives in connection with its functions under the Act (or subordinate legislation).

The Act prohibits the CC from disclosing specified information during the lifetime of the individual or while the undertaking to whom the information relates continues in existence, unless the disclosure is permitted by the Act. However, the Act does not prevent the disclosure of any information which has on an earlier occasion been disclosed to the public provided such earlier disclosure was lawfully made. A person who discloses information in contravention to the Act commits a criminal offence (liable to a fine and/or imprisonment).

7.2.2 Disclosure permitted by the Act

There are a number of circumstances prescribed by the Act which permit disclosure including:

- with consent of the party concerned;
- if disclosure is required for the purpose of a Community obligation;
- if disclosure is made for the purpose of facilitating the exercise by the CC of its functions;
- if the information is disclosed to another person for the purpose of that person exercising any other number of prescribed functions; and
- if the information is disclosed in connection with an investigation of a criminal offence in the UK.

The first and the third of the above circumstances are most frequently used.

If one of these circumstance applies, the CC must have regard to three considerations before it decides to make a disclosure[10]:

[10] Section 244.

- the need to exclude from disclosure (so far as practicable) any information whose disclosure the CC thinks is contrary to the public interest;

- the need to exclude from disclosure (so far as practicable):

  – commercial information whose disclosure the CC thinks might significantly harm the legitimate business interests of the undertaking to which it relates; or

  – information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual's interests; and

- The extent to which the disclosure of the information mentioned in paras b(i) or b(ii) is necessary for the purpose for which the CC is permitted to make disclosure.

  In practice the public interest consideration seldom arises[11].

7.2.3 CC procedures when handling sensitive information

Whenever providing information to the CC, parties are asked to indicate whether they are concerned about the sensitivity of information provided by it. While there is no formal commitment to consult the party before making a disclosure, the CC's procedures typically lead to the party having the opportunity to make representations before disclosure is made.[12] As explained at para 17, a party has the opportunity to make representations to the Chief Executive.

The party making a request for redaction on the basis of legitimate business interest is asked to substantiate its claim. Parties are advised to identify sensitive information at the time they submit the evidence and have further opportunities to flag the CC's use of such information as the CC prepares documents for publication on its website (i.e. submissions, working papers, provisional findings and the final report). Through experience and its knowledge of the market being investigated the CC is generally able to ascertain the strength of the claims and often also able to find an alternative means of disclosing information that would be acceptable to the person concerned. The need to find a solution would be particularly important if the CC decided that it was necessary to make a disclosure to ensure fairness.

7.2.4 Balancing the rights of defence with the need protect confidentiality

Though parties responding to an information request by the CC might seek to secure a commitment by the CC that it will not disclose the information, the CC does not give such a commitment. The CC considers it important that it should have the ability to conduct its investigation in a fair way, and make disclosure as it considers necessary.

In the case of particularly sensitive information (for example if the CC found validity in a claimant's concern that the information was a business secret) the CC would seek to find alternative means of

11 The recent challenge by SDI Sport of the CC's decision to withhold information did exceptionally involve the withholding of information that the OFT had sought to prevent from being disclosed on the basis it would jeopardise an ongoing cartel investigation. (http://www.catribunal.org.uk/files/1116_Sports_Direct_Judgment_14.12.09.pdf).

12 Parties are invited to indicate whether information should be redacted from submissions before they are posted on the website. A party will typically have the opportunity to make representations in relation to information about it which is to be included in a CC document (e.g. working paper or proposed decision or final Report) before it is published.

conveying the nature of the evidence the CC was reviewing so that the party affected by the CC's decision might be able to comment. In the case of financial information this might entail the CC providing a range, or aggregate figures as opposed to disaggregate figures. On other occasions, providing the gist of the issue that the CC was considering may be suitable.

7.2.5 Confidentiality rings, data rooms and restrictions against further disclosure

Occasionally requests are received for confidentiality rings though this is a procedure which is available typically to a court or tribunal and is less suited to the CC. On occasions the CC has formed a type of confidentiality ring by utilising the Act which prescribes that if disclosure is made for the purpose of facilitating the CC's functions but when doing so the information is not made available to the public, the person receiving the information is prevented by the statute from making further disclosure. Parties have suggested to the CC that it might place greater reliance on this. However, in practice the CC has been concerned that to allow the party concerned the opportunity to respond, the confidentiality ring could not be confined simply to, for example, legal and economic advisers but would require the disclosure of senior management and officials within the corporation which are involved in the company's business.

The CC has occasionally allowed access to data rooms. For example, it did so when considering an appeal to it in relation to a periodic price setting review carried out by the water regulator which was disputed by a water company. In that context limited disclosure was allowed to the water company's advisers. In a regulated industry where firms are sole licensed providers for a defined geographic area, it is comparatively easier to address such information concerns that arise while allowing access to sensitive information.

7.2.6 Co-operation between anti-trust authorities

Disclosure to the OFT is permitted by the Act in either of the circumstances (a) (b) (c) or (d) described at para 21, the OFT being a named person whose competition functions are specified for the purpose of circumstances described at (d). When considering whether to make a disclosure of information to an overseas competition agency, the CC would consider the application of the circumstances described at (a), (b) or (c) of para 21. In practice, the CC has not found that the restrictions on disclosure of information and the limited circumstances in which disclosure may be made has prevented useful discussions with other agencies.

7.2.7 Public disclosure of ongoing investigations

Neither merger nor market investigations involve an assessment of actions against prohibited conduct or agreements so that there is little sensitivity to public disclosure of the existence of such investigations. The CC places some importance on the use of its website, in particular to disclose information to main and other interested parties and publishes submissions, working papers and proposed decisions on the website. When doing so it addresses the tension within the statutory scheme which both prohibits unlawful disclosure subject to certain information gateways and requires the CC to consult on its proposed decision and to give reasons when doing so. In practice, the CC finds that a relatively small amount of material needs to be excised.

7.3 Request for information

7.3.1 Information gathering powers and enforcement

The CC has information gathering powers enabling it, for the purpose of its investigation, to require persons to attend hearings and provide evidence (which may be taken on oath) and to submit documents. It does not have the power to inspect premises or carry out dawn raids.

These powers are enforceable by the CC if it considers that a person (main or third party) has not complied "without reasonable excuse" by the imposition of a financial penalty. In the case of a main party to a merger investigation, the CC also has power to suspend the statutory timetable (whether or not the party had reasonable excuse).

While the incidence of making formal requests for information has increased in recent years, there has as yet been no occasion on which the CC has sought to impose a penalty. In practice, discussions prior to making information requests (formal or informal) has led to the party and CC being able to resolve concerns (both on content of the request and timing) about information requests. However, in a relatively small number of merger cases (four since 2002) the CC has used its powers to suspend the statutory timetable in conjunction with making a formal request for information.

The majority of the CC's information requests are made on an informal basis, though the ability of the CC to exercise formal information powers will be a contributing factor to the high incidence of compliance.

7.3.2 Design of information requests

Requests are bespoke to the case and can take the form of a questionnaire, written request or be made orally though the possible need to frame the request formally in a notice will influence the content of the request.

Requests are targeted to the issues the CC is considering and will take into account likely burdens on the recipient. Particularly if the request is to a small firm that is a third party, the CC will consider how best to obtain the information without imposing unnecessary burdens (this may for example involve a staff member receiving the information in a phone call and providing a written report of the evidence for the firm to confirm as correct).

The CC's power to request information are wide, subject only to the fact that the CC must consider the information requested to be relevant "for the purpose of the investigation" and it may not compel information that a court could not compel (e.g. self-incriminating evidence and legally privileged information). Parties do often wish to discuss requests and the CC's procedures provide for this both before an information request is finalised (ie. before a questionnaire is sent to the parties for completion) and after a request is received. The issues most commonly raised include the relevance of the information requested, timing for production of the information, availability of the information (most commonly, they suggest that the information can more easily be produced in an alternative form) (see paras 39 to 40). Ultimately discussions with staff led to satisfactory and practical resolution. In the CC's view the open engagement often improves the quality of the information request and the suitability of the information provided.

7.3.3 Parties' awareness of issues considered by the CC

Requests for information by the CC are made in the context of the case as formulated by the referring body (such body will already have engaged with the party on the issue and published a reasoned decision for making the reference) and the issues identified by the CC in an issues statement published at an early stage of the investigation. The issues statement will incorporate the theories of harm that the CC considers is relevant and these are likely to build upon the matters raised in the CC relevant published guidance[13].

The UK contribution Feb 2010 referred to the various occasions on which the CC staff and members meet with the main parties (paras 109-114). At the beginning of the investigation the staff team (including

[13] The CC has published merger guidance and market guidance.

the economists and financial analysts) meet with the main parties both to discuss the overall administration of the investigation, to establish contact and also to explore with the party concerned the information that it holds and how such information is held. This initial meeting is helpful to the staff team as they begin to develop questionnaires tailored to the investigation based upon their understanding of the market, the availability of information and the theories of harm formulated by the CC following discussion with the Group.

At the initial meeting and subsequently the CC explores with the party the availability of information to be requested with a view to understanding factors affecting the delivery of the information once requested and to help shape the questionnaires and information requests so that they are well suited to the party (therefore avoiding unnecessary burden).

7.3.4 Review of information requested

The evidence received following a request is reviewed by the staff team and the Group (see para 7).

7.4 Judicial review and interim relief

7.4.1 Judicial review

In respect of both merger and market investigations the Competition Appeal Tribunal has the power to review the decision of the CC. Challenges may be made by an interested person (which could be a third party). The jurisdiction of the Tribunal derives from the Act which provides that when determining such an application the Tribunal (which is a specialist tribunal) shall apply the same principles as would be applied by a court on an application for judicial review. Such a provision is unique in national law and the implications of the Tribunal being a specialist tribunal but applying the same principles has been the subject of judicial consideration (see paras 43 to 45). The Tribunal may dismiss the application or quash the whole or part of the decision to which it relates and where it quashes the whole or part of a decision it may refer the matter back to the CC with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal. Significantly, and in contrast to an appeal mechanism, the Tribunal may not make the decision itself.

7.4.2 Standard of review by a specialist tribunal

The intensity of review by the Tribunal has been considered in a number of judgments. The most recent judgment of the Court of Appeal (to whom judgments of the Tribunal are appealed on points of law) was in *BSkyB v CC* and *Virgin Media v CC*[14]. In this case the Court of Appeal considered whether the Tribunal should apply the same principles as would be applied by a court on an application for judicial review.[15] BSkyB had argued that the Tribunal was obliged to apply judicial review principles with a greater intensity of review because it is a specialist tribunal body. The Court noted that it is well established that Courts apply judicial review principles in different ways according to the subject matter under consideration and that there are some cases in which Courts apply greater intensity of review than in others.

The Court of Appeal referred to an earlier decision[16] in which it had observed that the spectrum of approaches on judicial review principles ranged from at one end, a "low intensity" of review, applied to

14 [2010] EWCA Civ 2, Judgment 21 January 2010.

15 The principles were recently confirmed by the CAT in Stagecoach Group PLC v Competition Commission [2010] CAT 14 Judgment 21 May 2010.

16 Office of Fair Trading v IBA Health Ltd [2004] EWCA Civ 142.

cases involving issues "depending essentially on political judgment" where the Court would not intervene outside of "the extremes of bad faith, improper motive or manifest of absurdity" and, at the other end of the spectrum, decisions infringing fundamental rights where unreasonableness is not equated with "absurdity" or "perversity" and a "lower" threshold of unreasonableness is used, namely whether a reasonable decision maker, on the material before it, could conclude that the relevant interference was justifiable.

As to the use of a specialist court, the Court of Appeal found in BSkyB that the Tribunal was to apply the normal principles of judicial review and to apply its own specialised knowledge and experience to enable it to perform its task with a better understanding and more efficiently. However, the possession of that knowledge and experience did not in any way alter the nature of the task. Accordingly the Court of Appeal rejected this aspect of BSkyB's application.

7.4.3 Timing of challenges

Applications for judicial review must be made within, in the case of merger investigations, 4 weeks of the decision which the applicant wishes to challenge and, in the case of market investigations within a maximum 2 month period. As is indicated by the speed with which the Tribunal responded to the application for interim relief in respect of Morrisons (see para 50) the Tribunal is capable of responding rapidly dependent on the circumstances. Similarly in the case of *Sports Direct International v CC*, the Tribunal was able to consider and give judgment during the course of the investigation. Notably, it made oral judgment on the day of the hearing handing down a written judgment shortly afterwards. Unless specifically directed by the CAT, the Act provides that the CC's decision that is the subject of the challenge is not suspended. In practice, the CC will suspend final implementation of affected remedies dependant upon the outcome of the challenge (and subsequent appeal), putting in place interim measures if appropriate.

To date the majority of applications made to the Tribunal have been following the CC's publication of its report on the case referred to it. However, on one occasion the the application was made during the investigation.

In *Sports Direct International v Competition Commission*[17] Sports Direct, a main party in a merger investigation sought an order from the Tribunal to quash the decision of the CC not to disclose certain information which had been redacted by it in working papers. The case management conference and hearing were heard while the investigation was ongoing. The Tribunal considered whether the CC's decision was capable of review as contemplated by the Act or whether the challenge was premature. The redactions had been made to working papers produced by the CC and at the time the application was lodged the CC had not taken even a provisional decision on the merits of the acquisition.

At the main hearing the Tribunal considered the question of pre-maturity prior to the substantive issues and found that the application for review was not premature. The Tribunal, having reviewed the principles of judicial review generally, considered the legislation (ie the Act) noting that "context is everything". The Tribunal considered that there were three elements to an application under the statutory provision enabling judicial review in the context of merger investigations (section 120 of the Act). Those elements are (i) "any person aggrieved" by (ii) "a decision of the CC" (iii) "in connection with a merger reference". The Tribunal found that all these elements were met and that the fact that the merger investigation was still at a pre-provisional stage did not mean that Sports Direct should be required to wait for the publication of the CC's provisional finding before it could make a challenge. The Tribunal stated that the CC must act fairly to the parties affected by the carrying out of their inquisitional function. The Tribunal was influenced by the fact that Sports Direct was to attend a hearing with the CC and that

17 [2009] CAT 32, judgment of 14 December 2009.

questions would be asked of it without it having full knowledge of the underlying material or issues forming provisional propositions. The Tribunal stated that it was persuaded that at least potentially Sports Direct was adversely affected by the suggested findings of facts and conclusions contained in working papers and that real injustice could have resulted from the CC's decision to withhold material information and/or analysis supporting those findings. The Tribunal did not go on to consider whether in fact the decision to withhold the information was unfair, because the CC chose to withdraw its decision once the CAT had found that the application was not premature.

7.4.4 Interim relief

In *WM Morrisons Supermarkets PLC v the CC*[18] Morrisons made an *exparte* application for interim relief to the Tribunal in respect of the CC's decision to approve another competitor grocery retailer (Sainsbury) as the purchaser of a site for a supermarket that the CC had required Tesco to divest following a merger investigation.[19] The CC's Order made in April 2009 set out the process for disposal of the site to a purchaser approved by the CC. In accordance with the Order and following the receipt of bids, the CC gave Tesco the choice of which of the bids to accept. Tesco elected to accept Sainsbury's bid and the CC subsequently wrote stating that Sainsbury had been approved as the purchaser and directing Tesco to proceed with the exchange of contracts for the sale of the freehold site. Tesco and Sainsbury exchanged contracts on 23 November 2009 with a view to completion on 7 December. Morrison's application was lodged on 3 December 2009 and the Tribunal sat the same day (until 7.00pm) it having had the opportunity to see a draft of the application lodged with it on 2 December. The Tribunal decided that interim relief to suspend the CC's decision was not appropriate and the application was refused.

In reaching its judgment the Tribunal acknowledged that the draft application suggested that there was likely to be a ground of challenge which was properly arguable. As such it was necessary to consider whether in the absence of interim relief and on the basis that Morrisons were to succeed in this challenge, Morrisons would suffer loss or damage for which damages would not be an adequate remedy.

The Tribunal noted that in the absence of interim relief being given it was probable that the sale would be completed and that this might affect the usefulness of Morrisons' substantive challenge. The Tribunal acknowledged that predicting what would happen if Morrisons was granted interim relief and then won the case was extremely speculative. However, the Tribunal assumed in Morrisons' favour that there may be some loss to Morrisons which would not be recoverable in the absence of interim relief. As part of its decision the Tribunal also acknowledged that the preparedness of Morrisons to offer cross-undertakings to other parties which would be likely to compensate them for losses they might suffer through the delay pending the resolution of the substantive application did militate in favour of the Tribunal granting interim relief.

The Tribunal took into account the fact that Morrisons had delayed in seeking interim relief and in doing so had allowed Tesco and Sainsbury to alter their position by entering into a legally binding contract for the sale of the site. Morrisons was fully aware that unless Tesco and Sainsbury were notified at the earliest opportunity they would almost certainly change their position by exchanging contracts for sale.

In considering whether or not to grant relief the Tribunal also considered the consequences both of making an order and not making an order for interim relief on competition. However, in either case, the Tribunal did not consider this factor to be determinative. Without prejudging the substantive issue in a potential challenge, the Tribunal noted that the CC had after careful inquiry found an SLC and decided that

18 [2009] CAT 33, judgment of 4 December 2009.

19 Report published November 2007. Order requiring divestment made April 2009 (http://www.competition-commission.org.uk/inquiries/ref2007/tesco/index.htm).

divestiture was an appropriate remedy. The Tribunal noted that the CC's decision in this respect had not been challenged nor that Morrisons was suggesting that acquisition by Sainsbury would render the SLC worse than before. On this basis the Tribunal did not consider that it would be detrimental to competition if it did not make an order for interim relief.

UNITED STATES

1. Introduction

The United States has two antitrust enforcers – the U.S. Department of Justice ("DOJ"), through its Antitrust Division ("Division"), and the Federal Trade Commission ("FTC" or "Commission") (together, "Agencies"). DOJ is part of the executive branch, while the FTC is an independent agency. Of the three primary antitrust statutes in the United States, DOJ enforces one, the Sherman Act;[1] the FTC enforces another, the FTC Act;[2] and both enforce the third, the Clayton Act.[3]

The Agencies use different enforcement procedures, both of which comport with fundamental fairness. To enforce the statutes assigned to it, the DOJ must initiate an action in an appropriate U.S. district court, which determines whether the law has been violated and, if so, orders appropriate remedies. By contrast, to enforce the FTC Act, the FTC may use its own administrative processes, codified in its rules. Under this process, the FTC, following a full investigation, issues an administrative complaint, which initiates an enforcement proceeding that is overseen and resolved by an administrative law judge, subject to review by the full Commission, and, ultimately, a U.S. court of appeals. Thus, unlike DOJ, the FTC exercises both prosecutorial and judicial functions.[4] The FTC also may seek a preliminary injunction in U.S. district court in aid of the administrative proceeding, *e.g.*, to block a merger before it is consummated. In cases in which the FTC seeks monetary relief, the FTC may, like DOJ, seek final relief in a court proceeding and forego the administrative process. Whether DOJ is enforcing the law in court or the FTC is enforcing the law administratively, the processes offer respondents similar procedural rights.

The submission of the United States for the February 2010 roundtable on procedural fairness[5] addressed issues related to transparency, including: how substantive standards and agency policies and procedures are made transparent; how frequently and openly the Agencies have a dialogue with firms under investigation; how the Agencies inform parties of the allegations against them; what opportunities parties have to respond to agency concerns and to be heard prior to an adverse decision; and how the Agencies publicize their decisions. This submission focuses on the Agencies' decision-making processes, information requests to targets, confidentiality protections for information submitted to them, opportunities for settlement, and the availability of independent judicial review and interim relief.

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1 15 U.S.C. § 1, *et seq*.

2 *Id*. § 45, *et seq*. Section 5 of the FTC Act encompasses violations of the Sherman Act. *Id.*

3 *Id*. § 12, *et seq*.

4 As our February submission to the OECD pointed out, Rep. James Covington, who authored the bill that led to the FTC Act, emphasized that the agency would have specialized experience and expertise, and should have both prosecutorial and judicial functions. *See* 51 CONG. REC.14,931-33 (Sept. 10, 1914).

5 *See Submission of the United States to the OECD Roundtable on Procedural Fairness: Transparency Issues in Civil and Administrative Proceedings*, DAF/COMP/WP3/WD(2010)24, *available at* http://www.ftc.gov/bc/international/docs/transparency_us.pdf.

2. Decision-making process

The Agencies are both law enforcement agencies with the authority to investigate and enforce U.S. antitrust statutes. Both Agencies conduct a thorough pre-complaint review that considers all available evidence and legal issues, including any submissions by the parties. The FTC has the discretion either to adjudicate antitrust actions itself, which is appealable to federal court of appeals, or to seek relief from a federal district court. The DOJ ultimately is required to prove any case it files in federal court before a district judge, who will examine the matter *de novo*. Given the potential for independent judicial review, there is a strong incentive throughout the Agencies' review processes to consider all relevant evidence and remain open to persuasive arguments by parties and third parties. In addition, the Agencies employ many internal practices and procedures to promote sound decision-making.

First, both Agencies' policy is to seek regular informed substantive input from the parties at all stages of an investigation in an effort to ensure that the agency is fully aware of counter-arguments and evidence that might support factual and legal theories inconsistent with enforcement action. Thus, agency staffs at both FTC and DOJ routinely encourage companies under investigation to present evidence or arguments, both orally in informal meetings and through written submissions sometimes known as "white papers."[6] While this procedure does not involve formal witness testimony, business executives and industry or economics experts, as well as the parties= lawyers, often participate to explain their views directly to agency officials.

These discussions are a two-way street. As discussed in detail in the U.S. submission on procedural fairness for February's roundtable, the Agencies' civil staffs are quite open with the parties regarding how an investigation is proceeding and when major landmarks are approaching, and the subjects of civil investigations have ample opportunity to interact with staff and senior officials to discuss the theories the agency is pursuing during the investigational stage. This openness enhances the ability to investigate and

[6] For example, the DOJ's Antitrust Division Manual provides that "in civil matters, staff should engage the parties in discussion early in the investigation, obtain the parties= substantive evaluation of the matter, and share its own substantive evaluation with the parties." ANTITRUST DIVISION MANUAL III-14 (4th ed. July 2009), *available at* (*hereinafter* "DIVISION MANUAL"). Similarly, the DOJ's Merger Review Process Initiative provides that "[b]oth the Division and the parties to a transaction benefit from the frank exchange of ideas and evidence . . . . In appropriate circumstances, the Division may agree to meetings or teleconferences with the parties on a regular basis (*e.g.*, every other week) throughout the investigation to promote a continuing dialogue and provide a regular opportunity to discuss progress made on both sides." MERGER REVIEW PROCESS INITIATIVE IV.A.1-2, *available at* http://www.justice.gov/atr/public/220237.htm (*hereinafter* "MRPI"). Also, the FTC has long "encourage[d] the parties to engage the staff in a dialogue on substantive issues, beginning at the earliest possible date," including on "the theories and issues that are being considered" by the Commission's staff, and these discussions are "on an ongoing basis as the investigation proceeds and concerns evolve, change, or are refined." *Statement of the Federal Trade Commission's Bureau of Competition On Guidelines for Merger Investigations* (Dec. 11, 2002), *available at* http://www.ftc.gov/os/2002/12/bcguidelines021211.htm; *see also Best Practices for Data, and Economic and Financial Analyses in Antitrust Investigations* (Nov. 7, 2002), *available at* http://www.ftc.gov/be/ftcbebp.pdf ("In the early stages of an investigation . . . [Bureau of Economics] staff will discuss with the parties and their economic consultants, economics, financial, and data issues, including theories that are being considered . . . . This conversation should begin a dialogue (generally conducted with the presence of attorneys) between the FTC economists and the parties that can continue throughout the investigation.").

prosecute successfully by focusing energies on the real areas of dispute. More important, this type of transparency ultimately contributes to making the right enforcement decision.[7]

Second, management at both Agencies, including senior decision-makers, is actively involved at all key stages of an investigation. At both Agencies, staff is required to present memoranda to management that include the factual, legal, and theoretical bases for the action it is recommending, with information on expected arguments by the parties and how they will be countered, at key decision points, such as the opening of a preliminary investigation, the issuance of compulsory process to obtain information, and the filing of a court case. Senior agency officials closely monitor the progress of investigations and periodically obtain detailed briefings from the investigative staffs throughout the investigation.

Prior to filing a case, senior Division officials, including the Assistant Attorney General, typically meet with the companies and individuals under investigation, explain the Division's concerns, and provide an opportunity for the companies and individuals to present their best arguments. It is not unusual for the agency to alter or refine its thinking in response to those meetings.

Similarly, during an FTC investigation, respondents are free to request meetings with the agency management, and ultimately, Commissioners of the FTC, to express concerns and present their positions. Once the FTC files an administrative complaint against a respondent, the agency's Part 3 rules ensure that the respondent continues to have the opportunity to present its arguments and views formally into the record of the enforcement proceeding for consideration by the administrative law judge and any review by the full Commission or a court. For example, as explained in our prior submission, pursuant to the Part 3 rules, respondents "have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing."[8] In short, from investigating staff to the highest levels of agency decision-makers, the FTC's investigatory process is open and transparent and designed to give respondents every opportunity to develop and present their views on relevant issues in an investigation.

The Agencies employ a number of additional informal practices to ensure that the arguments opposing enforcement action, as well as the arguments in favor of it, are always seriously considered and evaluated. For example, in the most significant investigations, DOJ assigns a group of staff attorneys and economists to argue the parties' case internally before a final enforcement decision is taken.[9] The FTC has also used this practice in several of its merger investigations.

Third, staff economists at both Agencies are involved at all stages of all antitrust investigations, except for some DOJ criminal investigations involving hard core cartels.[10] In a competition matter before

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7 Christine A. Varney, Assistant Attorney General, *Procedural Fairness, Remarks as Prepared for the 13th Annual Competition Conference of the International Bar Association* (Sept. 12, 2009), *available at* http://www.justice.gov/atr/public/speeches/249974.htm.

8 16 C.F.R. § 3.41(c).

9 When staff recommends the filing of a merger case, "it should be prepared to demonstrate mock closing statements for the government and the defense and mock direct and cross examination of the government=s expert economist." DIVISION MANUAL III-122.

10 According to the Division Manual, "[s]taff should include the economist assigned to the investigation in all relevant aspects of the investigation, such as interviews, team meetings about the direction of the investigation, and the distribution of 'hot' documents." *Id.* III-40. "The Division=s Economic Analysis Group assigns one or more economists to each merger and civil nonmerger matter to assist the legal staff in investigating, developing, and analyzing the competitive effects of the proposed acquisition or other conduct being investigated. Among other things, the legal staff in civil matters should include such Division economists as participants in formulating theories to investigate, drafting HSR Second Requests

the FTC, investigating staff typically includes members from both the Bureau of Competition (professional staff consisting mostly of lawyers) and the Bureau of Economics (professional staff consisting mostly of Ph.D. economists); the staff in these bureaus coordinate and work with one another during an investigation, bringing their own expertise to the decision-making. While the attorneys evaluate the investigation from a legal perspective, the economists both assist in the investigation and provide an independent view regarding the economic circumstances of the investigated conduct and potential actions by the FTC.

In the DOJ process, an economist is assigned at the beginning of every civil investigation. Very early in the investigation the economist writes an issues memorandum that anticipates competitive concerns and arguments the parties will likely make. The memorandum also proposes methods for securing data and other information that will bear on those concerns and arguments. The views of both staff economists and management economists are included in recommendations forwarded to senior decision-makers.

In addition, investigative staff at both Agencies retain outside experts, including non-agency economists, technology experts, and other individuals as potential witnesses at trial and to provide additional assistance during the investigation and valuable independent assessments of the strength of the case.

3. Request for information from firms under investigation

The Agencies are always available to discuss a respondent's concerns about the scope of a particular request. They also seek to obtain the information they need without imposing an undue burden on a respondent.

When the Agencies issue compulsory requests for information, either in the form of a Second Request in a merger investigation or a subpoena or CID, they typically encourage the recipient to discuss the request and, indeed, recipients almost always engage the Agencies' staff in a compliance negotiation. Staff and counsel for the recipient often have extended discussions and agree to modifications and/or deferrals that ensure that the Agencies obtain the information they need for their investigations, while minimizing – to the extent possible – the cost and burden on the recipient.[11] Typically, staff and the recipient's counsel will examine the recipient's organizational chart and come to an agreement on a set of individuals whose files must be searched for responsive documents. The number and position of the search group individuals varies depending on the nature and complexity of the investigation. The process is generally the same whether the recipient is a potential defendant or a third party; however, the Agencies recognize that third parties are differently situated than potential defendants and therefore strive to an even greater extent to minimize their burden.

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and interrogatory and document CIDs, creating an investigatory plan designed to maximize the potential of developing a triable case, and drafting and asking interview and CID deposition questions. Also, Division economists should participate fully in developing and implementing quantitative analysis of anticompetitive effects of mergers and other business conduct and in providing or securing expert economic testimony." *Id.* III-115-16.

[11] For example, in some situations, the Agencies will use a "quick look" review for non-complex investigations, which can further minimize burdens on the parties. *See* DIVISION MANUAL III-45 ("When staff believes that the resolution of discrete issues through the examination of limited additional information could be sufficient to satisfy the Division that the transaction is not anticompetitive, staff may arrange a 'quick look' investigation. In a 'quick look' investigation, the parties refrain from complying fully with the Second Request and instead provide limited documents and information, and staff commits to tell the parties, by a particular date, whether full compliance will be necessary."); *Horizontal Merger Investigation Data, Fiscal Years 1996-2007* at 3-2 & n.6 (FTC Dec. 1, 2008); *available at* http://www.ftc.gov/os/2008/12/081201hsrmergerdata.pdf.

Regarding timing, Second Request compliance is in the hands of the merging firms – there is no deadline for parties to comply with Second Requests, but they cannot close their merger until a specific number of days following substantial compliance with the Second Request. With regard to subpoenas and CIDs, the demand includes a deadline for response, but often that date is subject to negotiation and the Agencies can extend it if circumstances warrant. Regardless of the form of the information request, it is often helpful to the Agencies if the recipient agrees to produce materials on a staggered basis and if it prioritizes early production of the most critical information. Subpoenas and CIDs are subject to judicial review, although the grounds for successfully objecting to either are limited, and court challenges are rare.

Although Second Requests are not subject to judicial review, the Agencies have practices and procedures that effectively provide an internal appeals process in merger investigations. Second Requests inform respondents that they may discuss clarifications and modifications with the FTC and DOJ staff;[12] the Agencies instruct their staffs to discuss the Second Request and modify the request if they determine that a less burdensome request will elicit the information needed. If a respondent believes that compliance with any part of a request should not be required, and thereafter exhausts efforts to obtain modifications from staff, the respondent may, in the case of the DOJ, appeal the matter to a Deputy Assistant Attorney General, and in the case of the FTC, the Commission's General Counsel.[13] These officials must review and act on the matter quickly. The FTC's General Counsel must set a conference date with the petitioner and the investigating staff within two business days of receipt of the petition; the conference must take place within seven days, unless the respondent agrees to a longer period or waives the conference; the petitioner and the investigating staff may submit written briefs to the General Counsel no later than three business days before the conference; and the General Counsel must decide the matter within three business days of the conference.[14] DOJ procedures for appealing Second Requests are detailed in the Second Request Internal Appeal Procedure.[15]

The FTC also provides an additional avenue for parties to object to an information request -- the opportunity to file with the Commission a motion to quash or limit a subpoena or CID. If the Commission does not grant the motion to quash or limit, the party is required to comply with the subpoena within a set period of time. Should the party not comply with the subpoena, the Commission would be required to petition a federal district court for an order enforcing and requiring compliance with the subpoena or CID. The party then would have the opportunity to make any objections to the subpoena or CID to the court to convince it to deny the Commission's petition for enforcement.

4. Confidentiality

As noted, the Agencies highly value open communication with the subjects of antitrust investigations. At every stage, parties are encouraged to meet with the lawyers and the economists charged with investigating the conduct at issue. These discussions encompass the procedural course of the investigation (including the scope of document requests) and staff's substantive theories of the case. They are, of course, subject to appropriate confidentiality constraints. Effective protection of confidential information provided to the Agencies by parties and third parties is essential to creating an environment in which the Agencies can efficiently obtain the sensitive information they need to evaluate conduct and, if necessary,

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12 *See generally* 16 C.F.R. § 2.20; MRPI, pt. III.

13 *See*16 C.F.R. § 2.20(b)(4); *Second Request Internal Appeal Procedure* (2001), *available at* http://www.justice.gov/atr/public/8430.pdf.

14 For more information on Second Requests, see COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 2 (2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.pdf.

15 *See supra* note 13.

prove the case in an adjudicative forum. It is, of course, also important to prevent competitively sensitive information from being shared among competitors.

Consistent with the practice in other jurisdictions, the same U.S. federal statutes that provide authority for the Agencies to obtain information from parties and third parties in civil investigations also provide for confidential treatment of submitted information.[16] Thus, the Agencies have developed rules and policies for the treatment of information to ensure that, while they obtain comprehensive information regarding the topic of the investigation or action, they also balance the need to protect confidential information obtained in enforcement matters against the need to provide targets of competition enforcement proceedings with the evidence forming the basis of the case against them to allow them fairly to defend themselves. During the course of an investigation, information provided by parties under investigation or by third parties is generally treated as confidential by the Agencies, both as a matter of policy and pursuant to statutory restrictions.[17] The Agencies are especially careful to protect the identities of any complainants. Thus, although the Agencies will often share the nature of their concerns with potential defendants, as well as their general understanding of the facts and evidence, throughout the course of their investigations they will not – and, indeed, cannot – share specific confidential information submitted by third parties.

First, during the course of an investigation, the Agencies may obtain information through compulsory process (*e.g.*, CIDs or subpoenas) or through voluntary cooperation. In the case of the FTC, for materials obtained through compulsory process,[18] the FTC takes physical possession through a designated custodian, who generally must not allow members of the public to have access to the materials without the permission of the submitter, and must return the materials upon request at the conclusion of an investigation or after a reasonable period of time has elapsed and the material has not been received into the record of a proceeding. The custodian may copy materials submitted as necessary for official use, and may permit them to be used in connection with obtaining oral testimony. DOJ confidentiality requirements for CID materials are governed by statute, and summarized in section III.E.6 of the Division Manual.[19]

The FTC must also treat information obtained outside of compulsory process (*i.e.*, voluntarily)[20] as confidential when so marked by the submitter. The FTC may release such information if it determines that it is not a trade secret or confidential or privileged commercial or financial information, but it must provide the submitter 10-day advance notice to bring an action in federal court to restrain and stay disclosure of information based on the submitter's contention that the information constitutes a trade secret or

16 *See, e.g.*, 15 U.S.C. § 18a(h).

17 For investigations of notified mergers, section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h), prohibits public disclosure of any information provided to DOJ pursuant to the Hart-Scott-Rodino ("HSR") Act, *except* "as may be relevant to any administrative or judicial action or proceeding" to which the FTC or DOJ is a party, or to Congress. Information obtained from CIDs is governed by the Antitrust Civil Process Act, 15 U.S.C. § 1313(c), (d), which provides that no material B documents, interrogatory responses, or deposition transcripts B received in response to a CID may be made public unless the submitter has waived confidentiality. CID material also may be used in courts, administrative bodies, or grand juries. HSR and CID materials are expressly exempted from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Information provided voluntarily to the DOJ (i.e., not under HSR or pursuant to a CID) does not receive statutory protection; however, as a matter of policy the DOJ typically does not disclose such information without good cause. For more information on FOIA, see *infra* note 30.

18 *See generally* 15 U.S.C. § 57b-2(a), (b). "Material" means "documentary material, written reports or answers to questions, and transcripts of oral testimony." *Id*. § 57b-2(a)(1).

19 *See* discussion *supra* note 17.

20 *See generally id.* § 57b-2(c), (d).

confidential or privileged commercial or financial information. Similarly, DOJ has developed policies for the treatment of voluntarily-provided information.

The Agencies may also obtain confidential information from third parties, such as competitors or customers of a respondent. The Commission, in order to address the confidentiality concerns of such parties, includes a model protective order in its Part 3 Rules that governs the use of these materials by the Commission and the respondent if a matter proceeds to an administrative adjudication. In addition to requirements generally to protect the information from the public, such as placing confidential materials under seal and requiring *in camera* review of any sensitive information, the model order also balances the need of respondent and the need to keep a third-party's sensitive materials from being shared with a competitor.[21] The model order accomplishes this goal by limiting the disclosure of such materials to the administrative law judge and staff, Commission employees, outside counsel of record for any respondent (provided they are not employees of a respondent) and anyone retained by outside counsel to assist in hearing preparation (provided they are not affiliated with a respondent, and any witness or deponent who may have authored or received the information in question). Thus, for the respondent, the model protective order requires disclosure to be limited to outside counsel, and does not allow confidential third-party materials to be disclosed to in-house counsel or business employees of the respondent.[22]

Upon receiving an appropriate request from a congressional committee, the FTC may share confidential information. When it receives such a request, the FTC typically seeks to minimize the exposure of any confidential materials by making presentations to congressional members or their staff in confidential briefings, before which the FTC notifies the members and their staff in writing about the confidential nature of the information to be provided and requests that the information remain confidential. The FTC also notifies the submitter of the information that it has received a congressional request.[23] The FTC may also share confidential information with other federal or state law enforcement agencies, if the requesting agency certifies that the information will be maintained in confidence and used only for law enforcement purposes.[24]

Should the Agencies decide to file a case in federal court, absent a settlement, the parties would have an opportunity to see the specific evidence against them in accordance with constitutional provisions and federal rules of civil procedure as administered by independent federal judges.[25] Federal judges have a broad range of tools available, including protective orders, to protect confidential business information and the rights of parties, and the Agencies typically will support the entry of an appropriate protective order to

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21 *See* 16 C.F.R. § 3.31 App. A.

22 *Id.* ¶ 7.

23 For DOJ procedures relating to disclosure to Congress, see DIVISION MANUAL III.E.6.b.ii.

24 In addition to publicly-available information, the Agencies and foreign competition agencies possess, and develop during the investigation, relevant information that they are empowered, but not mandated (as in the case of confidential business information), to keep confidential. Such "confidential agency information" can include the fact that an investigation is taking place, the subject matter, and the agencies' analysis of the matter, including market definitions, assessments of competitive effects, and potential remedies. Agencies typically share such information while maintaining its confidentiality outside the agency-to-agency relationship. *See* INT'L COMPETITION NETWORK, WAIVERS OF CONFIDENTIALITY IN MERGER INVESTIGATIONS 3-4 n.11 (2005), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf.

25 The statutes governing both HSR and CID material permit the use of such material in federal court proceedings.

govern the use of confidential information throughout the litigation.[26] The terms of such protective orders may vary, but it is not uncommon during pretrial proceedings for such orders to require especially sensitive information to be filed under seal with access limited to the parties' attorneys.[27]

Regarding the FTC's administrative process, the confidentiality protections continue to apply if the FTC files an administrative complaint pursuant to Part 3 of its rules or an action in federal court. The FTC's rules provide that material obtained through compulsory process, information that is marked confidential, and confidential commercial or financial information may be disclosed in administrative or court proceedings, but state that the submitter will first be given an opportunity to seek an appropriate protective or *in camera* order from the adjudicator.[28]

Several laws, regulations, and procedures provide for sanctions for breaches of the confidentiality laws.[29] Perhaps most importantly, the Agencies' employees (from the day they begin work) are instructed in the importance of protecting confidentiality. Agency staff is made well aware that improper disclosures of confidential information will not be tolerated.[30]

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26 DIVISION MANUAL III-70-73 (citing H.R. Rep. No. 94-1343, at 2610 (1976)) ("Once a case is filed, the use of CID material [by the DOJ] in that case will typically be governed by a protective order issued by the court in which the suit is pending. Whenever a civil action is commenced based on information obtained by CID, the defendants in that action may invoke their full discovery rights under the Federal Rules of Civil Procedure and obtain CID information gathered in the investigation that is relevant to their defense. ... [D]efendants will thus be able fully to protect their rights at trial by interrogating, cross-examining, and impeaching CID witnesses.... [T]he scope of civil discovery is not unlimited and ... the court has broad discretion under the Federal Rules to set limits and conditions on discovery, typically by issuing a protective order."); 15 U.S.C. § 57b-2(d)(1)(C) (providing that confidentiality restrictions shall not prohibit "the disclosure of relevant and material information in Commission adjudicative proceedings or in judicial proceedings to which the Commission is a party").

27 DIVISION MANUAL III-70-73 ("The [DOJ Antitrust] Division's position on the reasonableness of protective orders is guided by balancing the public interest in conducting litigation in the open to the greatest extent possible, *see* 28 C.F.R. § 50.9, against the harm to competition from having competitively sensitive information disclosed to competitors. Staffs should also keep in mind that the disclosure of third-party confidential business information obtained through CIDs may cause third-party CID recipients to be less cooperative with the Division in the future. . . ."); 16 C.F.R. § 3.31 App. A (FTC's Part 3 model protect order).

28 16 C.F.R. § 4.11(g).

29 The Trade Secrets Act, 18 U.S.C. § 1905, provides criminal penalties (fine of up to $1,000 and/or up to one year imprisonment, and removal from employment) for unauthorized disclosure of confidential business information by government employees. The Theft of Government Property statute, 18 U.S.C. § 641, provides criminal penalties (fine and/or imprisonment up to 10 years) for theft of any record or "thing of value" (including information) possessed by the U.S. government. Finally, the Office of Government Ethics Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.703, prohibits the improper use of non-public information by an Executive Branch employee to further his or her own private interest or that of another person; any violation may be cause for appropriate corrective or disciplinary action.

30 Another aspect of the issue of the confidentiality of information submitted to the federal government in the United States is FOIA. 5 U.S.C. § 551 *et seq*. FOIA generally permits any person to obtain access to "records" of federal agencies, unless they are protected from disclosure by statute or by one or more FOIA exceptions. Particularly sensitive materials that the FTC receives, such as information in pre-merger filings and materials received pursuant to compulsory process, are generally exempt from public disclosure. 15 U.S.C. §§ 18a(h), 57b-2(f). In addition, one of the exemptions to FOIA permits agencies to withhold "records or information compiled for law enforcement" if certain conditions are satisfied. 5 U.S.C. § 552(b)(7).

5. Agreed resolutions of enforcement proceedings

As reported in our February 16 submission, the Agencies are open to settlement negotiations at virtually every stage of an antitrust investigation[31] or trial proceeding.[32] There are no restrictions on the kinds of cases that the Agencies can settle. The Agencies view the opportunity for settlement as an essential part of their role as antitrust enforcers First, an appropriate settlement is often sufficient to achieve the goals of antitrust enforcement while conserving resources. Second, providing the parties with the opportunity to present settlement options and to discuss consensual resolution is a key aspect of a fair and transparent investigation process. Both merger and civil non-merger cases often are resolved in a settlement in which the company agrees to certain conditions but does not admit to the alleged law violation.[33]

For DOJ settlements, prior to entry of judgment the court determines whether the settlement is in the public interest after reviewing the proposed settlement and public comments received in accordance with the Tunney Act, 15 U.S.C. § 16.

As part of consummating a settlement, the FTC files both a complaint and a settlement document; in order to issue a complaint, the FTC Act requires the agency first to "have reason to believe" that the respondent "has been or is using any unfair method of competition," and to find that "a proceeding by it in respect thereof would be in the interest of the public."[34]

6. Judicial review and interim relief

6.1. FTC practice

As indicated, the FTC's antitrust enforcement process usually involves an administrative trial, which is conducted pursuant to Part 3 of the agency's rules and overseen by an administrative law judge, who will resolve the matter by issuing an initial decision. The respondent has a right to appeal the initial decision to the full Commission, which will conduct a *de novo* review of the administrative law judge's decision. The respondent can then appeal the final decision of the full Commission to a U.S. court of appeals and to petition the U.S. Supreme Court to review the court of appeals decision. These courts will review the Commission's legal conclusions *de novo*, while accepting its findings of fact if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[35] The Administrative Procedure Act generally governs court review of agency decision-making. Although divestiture orders are stayed until all appeals are exhausted, any other order of the Commission becomes final unless the respondent seeks a stay from the Commission. If the Commission denies the stay, the respondent may seek a stay from the court of appeals.

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31 Even when a party is willing to settle at any stage of an investigation, the Agencies must have sufficient information to be satisfied that there is a sound basis for believing that a violation will otherwise occur before negotiating any settlement. *See, e.g.*, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2004), *available at* http://www.justice.gov/atr/public/guidelines/205108.htm.

32 Under the Federal Rules of Civil Procedure, the Agencies can accept a settlement at any point prior to entry of a final judgment, or during the pendency of an appeal.

33 Indeed, more than three quarters of all merger cases filed by the DOJ are settlements incorporating a consent decree negotiated with the parties.

34 45 U.S.C. § 45(b).

35 *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

As also indicated, the FTC may seek interim relief in aid of its administrative proceeding by seeking a preliminary injunction in U.S. district court, such as to block a merger. In deciding whether to grant a preliminary injunction, the court's task is to determine, "weighing the equities and considering the Commission's likelihood of success, [whether] such action would be in the public interest."[36] The district court's action is subject to review by a federal appeals court and ultimately the U.S. Supreme Court. There are no defined timetables for the court to rule on the preliminary injunction, but given the importance and urgency of the issues involved in such a proceeding, the court typically acts as quickly as it can, given its caseload.

The Part 3 Rules also include strict deadlines to expedite its process. For example, the administrative law judge must file the initial decision within 70 days of the filing of the last-filed proposed findings, conclusions and order, or 85 days from the closing of the record if the parties waive filing of proposed findings.[37] Subsequently, in cases in which the Commission seeks interim relief in a U.S. district court, the Commission automatically reviews the initial decision and must issue a final appeal decision within 45 days of the oral argument or, if no oral argument is scheduled, within 45 days after the deadline for the filing of objections.[38] In all other cases, the objecting party may file an appeal, and the Commission must issue its final decision within 100 days after oral argument or, if no oral argument is scheduled, within 100 days after the deadline for the filing of any reply briefs.[39]

6.2. DOJ practice

As previously noted, absent a settlement, DOJ enforcement action is initiated in a federal district court, and thus the initial binding determination of whether a violation of the antitrust law has occurred is made by an independent federal district judge.[40] The judge in an antitrust case gives no deference to DOJ's decision to file a lawsuit -- the burden of proof is always on the plaintiff, *i.e.,* DOJ, and DOJ must prove its case by a preponderance of the evidence in the same way as other plaintiffs in federal litigation.

Because DOJ is a law enforcement agency that does not have an adjudicative function, it cannot order the parties to take (or not to take) action, and therefore its decisions to seek relief do not result independently in a sanction or remedy. DOJ can seek interim relief from a court, for instance a temporary restraining order (TRO) or a preliminary injunction (PI), prohibiting a merger until a court has had a chance to hold a more comprehensive hearing in the case of a TRO or a full evidentiary trial in the case of a PI. The decision whether to grant such interim relief rests with the court. Courts have fairly wide discretion as to what kind of interim relief to grant (or not grant). Following a trial, the judgment of the district court is ordinarily effective when entered by the court. In the event of an appeal, parties may request relief from the judgment pending appeal from both the trial court and the court of appeals.

The timing as to federal district court hearings and decisions is generally within the discretion of the federal district court and will depend on the particulars of the case, the judge's calendar, the complexity of the matter, and many other factors. To the extent matters are time-sensitive, that can be brought to the court's attention. The time from the filing of a case to a hearing on the merits varies widely, and can be quite short (for instance, in a particularly time-sensitive merger case) or can take one or more years (for instance, for a very complex monopolization case). In general, though, merger cases usually go to hearing

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36 15 U.S.C. § 53(b).

37 16 C.F.R. § 3.51(a).

38 16 C.F.R. § 3.52(a).

39 *Id.* § 3.52(b)(2).

40 There are no juries in federal civil litigation.

or a preliminary injunction within several months after the case is filed. There are no special rules for expedited appellate procedures for antitrust cases, but the parties can inform courts of special timing considerations that may affect scheduling arguments and deciding appeals.

7. Conclusion

Both Agencies have found that transparent and fair processes with parties during civil investigations facilitate our enforcement. Before making any prosecutorial decision, both Agencies conduct thorough investigations, and must follow internal procedures that ensure that they consider all relevant (including countervailing) evidence and legal issues. These procedures include, for example, seeking a substantive dialogue with the parties to encourage them to provide any relevant counter-arguments or facts that may support the parties' positions, providing the parties with the Agencies' view on an investigation's progress and the legal theories supporting the investigation, and allowing for internal assistance and independent review of the investigation's development by high-level management, economists, and other experts. Throughout the process, the Agencies are required to keep sensitive commercial information confidential, protecting the submissions of both parties and third parties by not disclosing such sensitive materials to the public. Finally, if the DOJ or the FTC formally requests information from targets through, for example, a subpoena, or bring enforcement actions against the targets, the opposing parties have the opportunity for independent review in federal district court. The agencies regularly review their procedures and practices and update them when necessary to further the public interest and provide a fair and open dialogue with parties.

EUROPEAN COMMISSION

1. General introduction[1]

The services of the European Commission (hereafter, the "Commission") have already explained in their written submission of 15 January 2010 the general framework that governs the EU administrative enforcement system, the respect of the rights of defence and the safeguards foreseen in the system, and recent efforts to improve transparency and predictability in Commission proceedings. The present submission adds further information on specific issues raised by the OECD Competition Committee for the second roundtable on "procedural fairness in civil and administrative enforcement proceedings" of 15th June 2010. In particular, it describes the Commission's decision-making process and its rules and practice with regard to confidentiality, requests for information, the availability and operation of agreed settlement procedures, and judicial review and interim relief.

2. Commission's practice with respect to the specific issues raised by the OECD

2.1 The decision-making process

Under the Treaty on the Functioning of the European Union ("TFEU"), the Commission has responsibility for enforcing the competition rules contained in Articles 101 and 102 TFEU. The European Union ("EU") enforcement system is that of an integrated public authority which investigates and has the power to order infringements to be brought to an end and to impose sanctions.

With regard to merger control, the EU Merger Regulation[2] also provides for a regime of administrative enforcement, under which the Commission has exclusive jurisdiction to review concentrations of an EU dimension. The said Regulation institutes a "one-stop-shop" system, based on the principle of ex-ante administrative authorisation: companies must notify to the Commission their intended mergers and acquisitions (prior notification of concentrations)[3] and must not implement them before they have been authorised ("stand-still clause")[4].

2.1.1 Directorate General for Competition

Within the Commission, the Directorate-General for Competition ("DG Competition") is primarily responsible for enforcing Articles 101 and 102 TFEU. DG Competition is administratively organised in ten Directorates, each consisting of three to five Units. Most Directorates have a specific sectoral focus, while Units within the Directorate specialise in different competition policy instruments. Each of the sectoral

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1 This paper owes to the contribution of Ingrid Breit and Ailsa Sinclair, Unit A 4, and Ulrich Koppenfels, Unit O 2, Directorate General for Competition of the European Commission

2 Council Regulation (EC) N°139/2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p.1

3 Article 4 of the Merger Regulation.

4 Article 7 of the Merger Regulation.

Directorates comprises, thus, at least one Unit specialising in antitrust enforcement. In addition, a separate Directorate is dedicated to cartel enforcement across sectors.

The investigation of a case is allocated to the relevant Unit, both from a sectoral and instrument point of view. It is managed by a case team, which is in charge of all the different phases of the procedure of the case and acts as the primary interface between DG Competition and the parties. The case team is normally managed by a Head of Unit or by an experienced official acting as a case manager. The case team is supervised by the senior management of DG Competition and the Commissioner responsible for Competition.

For the purpose of enforcing Articles 101 and 102 TFEU, the Commission is entitled to set priorities among the potential cases before it.[5] Accordingly, all cases, irrespective of their origin, are subject to an initial assessment phase during which DG Competition assesses whether the case merits further investigation. In this regard, DG Competition focuses its enforcement resources on cases in which it appears likely that an infringement could be found, in particular on cases with the most significant impact on the functioning of competition and risk of consumer harm, as well as on cases which are relevant with a view to defining EU competition policy and/or to ensuring the coherent application of Articles 101 and/or 102 TFEU.

Unlike proceedings under Articles 101 and 102 TFEU, in merger cases, the Commission is bound to adopt a decision on every proposed merger notified to it, on the basis of the available evidence. In an initial phase of the investigation ("phase 1"), the Commission will examine, within a time-limit of normally 25 working days, whether or not the notified operation raises serious doubts as to its compatibility with the internal market. At the end of phase 1, the Commission has to adopt a decision either to authorise the concentration (with or without conditions and obligations) or to initiate proceedings ("phase 2")[6]. In those cases in which the Commission has initiated phase 2 proceedings, it will adopt a decision within normally 90 working days as to whether the notified operation (with or without conditions and obligations) is compatible with the internal market or should be prohibited[7]. Where the Commission has not taken any of the above decisions within the time-limit prescribed by the Regulation, the concentration is deemed to have been declared compatible with the internal market[8].

2.1.2 Checks and balances

In order to ensure that all relevant views and evidence are properly taken into account before a final decision is adopted, and that the proposed assessment is sound, the Commission has put into place a number of checks and balances (e.g. Chief Economist, Peer review, Hearing Officer, Legal Service and other associated services of the Commission, Advisory Committee). They are of different nature and operate at different stages of the decision-making process. These safeguards apply generally to antitrust and merger control proceedings and have been described in detail in the precedent submission of the Commission at Chapter 4. These explanations are therefore not repeated here.

2.1.3 College of Commissioners

Decisions about the application of Articles 101 and 102 TFUE, as well as decisions on the compatibility of mergers with the internal market following a full "phase 2" investigation are taken by the

5 Case T-24/90 *Automec v Commission* [1992] ECR II—2223, para 77.

6 Article 6 of the Merger Regulation.

7 Article 8(1) to (3) of the Merger Regulation.

8 Article 10(6) of the Merger Regulation.

College of Commissioners, upon the proposal of the Commissioner responsible for competition policy. Decisions authorising mergers at the end of the initial "phase 1" investigation or opening phase 2 proceedings are taken by the Commissioner responsible for competition policy, who has been empowered to that effect by the Commission and acts on its behalf.

By virtue of the Treaty on the Functioning of the European Union, Commissioners shall "*refrain from any action incompatible with their duties".* Each Member State has undertaken to respect this principle and not to seek to influence the members of Commission in the performance of their tasks.[9]

2.2 Confidentiality

2.2.1 Definition of confidential information

In accordance with point 3.2 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004[10] confidential information covers business secrets and other confidential information. Business secrets are defined as information about an undertaking's business activity the disclosure of which could result in serious harm to the same undertaking. Examples of such information include: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, productions secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.

The category 'other confidential information' includes information other than business secrets which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking.

Information will be classified as confidential where the person or undertaking in question has made a claim to this effect and such claim has been accepted by the Commission.

Where the Commission intends to disclose information, the person or undertaking in question shall be granted the possibility to provide a non-confidential version of the documents where that information is contained, with the same evidential value as the original documents.

2.2.2 Access to file

The addressees of the Statement of Objections in cases under Articles 101 and 102 TFEU are granted access to the Commission's investigation file, in accordance with Article 27(2) of Council Regulation N°1/2003[11] and Articles 15 and 16 of the Antitrust Implementing Regulation No 773/2004[12], so that on the basis of that evidence, they can express their views effectively on the preliminary conclusions reached by the Commission in its Statement of Objections. The same applies to the addressees of a Statement of

9 Article 245 TFEU.

10 Merger Regulation.

11 Council Regulation (EC) N°1/2003, OJ L 1 of 4 January 2003, p.1.

12 OJ L 123,27.4.2004, p. 18.

Objection in merger cases, in accordance with Article 18(3)(3) of the Merger Regulation and Article 17 of the Merger Implementing Regulation[13].

The modalities of access to the file, as well as detailed indications on the type of documents that will be accessible and confidentiality issues, are covered by the Commission Notice on the access to file. The Hearing Officer decides on disputes between the parties, the information providers and DG Competition over access to information contained in the Commission's file in accordance with this Notice. Lastly, special rules govern access to corporate statements in cartel cases and settlement procedures[14].

Efficient access to file to a large extent also depends on the cooperation of the parties and other undertakings having provided information included in the file. All undertakings providing information in the context of a particular case, and in particular the parties, have to indicate in each submission whether they consider that information provided is confidential. If information is considered to be confidential, the information provider shall, in accordance with Article 16(3) of the Implementing Regulation, substantiate its claims and provide a non-confidential version of the information. Such a non-confidential version shall be provided in the same format as the confidential information, replacing deleted passages by summaries thereof. Unless otherwise agreed, a non-confidential version should be provided at the same time as the original submission. It should be underlined that in the case of a persistent failure to provide a non-confidential version, it may be assumed that the documents do not contain confidential information.[15]

Further to the possibilities contemplated in the Commission Notice on access to the file, two additional procedural practices have been introduced recently for cases under Articles 101 and 102 TFEU by the Best Practices for antitrust proceedings[16] for the purpose of alleviating the burden on the parties to redact their submissions in relation to confidential information. These procedural practices may be offered by DG Competition where it considers it to be useful, and is typically done in cases where there are a limited number of undertakings. Both procedural practices can be beneficial not only for the party being granted access to file but also for the information providers since they would not have the burden of redacting their confidential material.

First, in certain cases, especially those with a very voluminous file, DG Competition might accept the use of a negotiated disclosure procedure. Under this procedure, the party being granted access to file agrees bilaterally with interested third parties to receive the entirety of the information they have provided to the Commission and is contained in the Commission's file including confidential information (instead of only being given access to the redacted version of their submissions). The party being granted access to file limits access to the information to a restricted circle of persons (to be decided on a case-by-case basis). To the extent that this type of access to file would amount to a restriction of a party's right to have full access to the investigation file, it would have to accept to exercise its rights in such a way in order to enable such negotiated access to file. Equally, information providers whose information is accessed via this procedure would have to waive their rights to confidentiality vis-à-vis the Commission to the extent necessary for the proper conduct of this procedure.

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13 Commission Regulation (EC) N°802/2004 implementing Council Regulation (EC) N°139/2004 on the control of concentrations between undertakings, OJ L 133 of 30 April 2004, p.1.

14 Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006/C 298/17) and Commission Notice on the conduct of settlement procedures (OJ 2008/C 167/1).

15 See Article 16(4) of the Implementing Regulation.

16 (Draft) Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU, published on DG Competition's website on 6 January 2010.

Second, access to file may also be granted through a so called "data room" procedure organised by DG Competition, which is primarily used to facilitate the verification of economic data. Under this procedure, part of the file, also including confidential information, is gathered in a room, the data room, at the Commission's premises. Access is thereafter given to this room, to a restricted group of persons, normally the external counsel or the economic advisers of the party, under the supervision of a Commission official. The external counsel may record information contained in the data room but may not disclose any confidential information to their client. To the extent that this type of access to file would amount to a restriction of a party's right to have full access to the investigation file, it would have to accept to exercise its rights in such a way in order to enable the use of such a data room procedure. Equally, information providers whose information is accessed via this procedure would have to waive their rights to confidentiality vis-à-vis the Commission to the extent necessary for the proper conduct of this procedure. Should either side unduly refuse to waive their right to access to file or their right to confidentiality to the extent it would be necessary to implement the data room procedure, this waiver can be replaced by a decision pursuant to Articles 8 or 9 of the Hearing Officer's Mandate.[17]

Although the 2004 Best Practices on the conduct of merger control proceedings do not explicitly provide for these additional procedures for granting access to the Commission's file, data room procedures are often used in merger cases in particular to give the notifying parties' economic advisors access to confidential data collected by the Commission that is used as a basis for economic or econometric analysis of the likely effects of the merger on competition in the market.

2.2.3 Complainants and other admitted third parties

Contrary to an addressee of a Statement of Objections a complainant or complainants and other third parties admitted to proceedings under Articles 101 and 102 TFEU do not have a right to access the Commission's investigation file (decisions as to whether natural or legal persons constitute complainants or interested third parties are made by the Hearing Officer).

A complainant has the right to be provided with a non-confidential version of the Statement of Objections and be afforded an opportunity to make its views known in writing. If, however, the complainant considers that it has not been put in a position to submit any meaningful comments, it may address its concerns to the Hearing Officer.

An interested third party has the right to be informed of the nature and subject matter of the proceedings and, similarly to a complainant, be afforded the opportunity to make its views known in writing. In this respect it should be noted that it falls on DG Competition to determine the means by which a third party will be informed. Should however, a third party consider that the information is insufficient to allow it to effectively make known its views, it may address its concerns to the Hearing Officer.

The Hearing Officer also decides whether complainants and interested third parties attend the formal oral hearing in antitrust proceedings (provided such a hearing has been requested one of the parties to the proceedings).

In merger cases, complainants do not have specific procedural rights, and no access to the file is granted to parties other than the parties to the notified concentration. However, as in cases under Articles 101 and 102 TFEU, an interested third party has the right to make its view known in writing as well as orally, including in a formal oral hearing (provided such a hearing takes place on request of the parties to

[17] Commission Decision of 23 May 2001 on the terms and reference of hearing officers in certain competition proceedings, OJ L 162, 19.6.2001, p 21.

the concentration). For this purpose, it has to be informed of the nature and subject matter of the procedure, which may be done by providing it with a non-confidential version of the Statement of Objections.

2.2.4 Disclosure of confidential information

In the event that a dispute arises between an addressee of a Statement of Objections or information provider and DG Competition as to whether a piece of information is confidential or not, the dispute may be brought by the addressee or provider before the Hearing Officer for determination. The Hearing Officer will then activate the procedure commonly referred to as the "AKZO procedure",[18] in application of Article 9 of the Hearing Officer's Mandate.

The Hearing Officer carries out an independent review of the documents concerned, and considers the parties' arguments of the parties and those of DG Competition to firstly, determine whether the information is confidential *per se*. If the Hearing Officer comes to the conclusion that the confidentially claim is merited, it will, secondly, carry out a balancing test whereby the balance of the legitimate interests of an undertaking to have its confidential information protected will be weighed against the addressee's interest to be effectively heard on the information in question. If, following the balancing test, the Hearing Officer reaches the preliminary conclusion that the information can be fully or partially disclosed, the information provider will be informed of this preliminary conclusion and the reasons for it (often referred to as a *"pre-Article 9 letter"*). The information provider will be granted a deadline within which it can make known its views on the Hearing Officer's preliminary position. On the other hand, should the Hearing Officer find that the confidentiality claim is justified and that the information cannot be disclosed, the requesting party will be informed thereof. In practice, many confidentiality disputes are resolved at this stage of the procedure.

If, after receiving the pre-Article 9 letter, the information provider continues to object to disclosure, and should the Hearing Officer, having considered the arguments, maintain that the information should be disclosed, s/he will normally issue the information provider with a reasoned decision under Article 9 of the Mandate (an *"Article 9 decision")*. An Article 9 decision will specify the date on which the information will be disclosed, which cannot occur less than one week from the date of notification of the decision.

An undertaking which has provided the information in question is entitled to appeal an Article 9 decision immediately to the General Court of the European Union. It will however be requested to inform the Hearing Officer by a specified date whether it intends to lodge an application for annulment before the General Court and whether or not interim measures will be requested. If the information provider makes known its intention to challenge the decision and to request interim measures, the disputed information will not be disclosed until the President of the General Court has issued an order ruling on the application for the interim measure.

2.2.5 Respect of confidentiality claims of complainants and other information providers

At all stages of the proceedings, the Commission will respect genuine and justified requests from complainants or from information providers regarding the confidential nature of their submissions or contacts with the Commission, including in some cases, the fact of their identity, in order to protect their legitimate interests (in particular in case of fears of retaliation) and to avoid discouraging them from coming forward to the Commission[19].

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18 Case 53/85, *AKZO Chemie and AKZO Chemie UK v. Commission* [1986] ECR 168.

19 (Draft) Best Practices, para 128.

2.2.6 Publication of a non-confidential version of the decision

The summary of a Commission decision, the Hearing Officer Report and the Opinion of the Advisory Committee are published shortly after the adoption of the decision in the Official Journal of the EU in all official languages.

In addition, DG Competition also publishes a non-confidential version of the decision in the authentic languages as soon as possible on its website. For that purpose, the addresses of the decision will normally be asked to provide the Commission with a non-confidential version of the decision within two weeks together with their approval of the summary. Should disputes arise regarding the extraction of business secrets, a provisional full version of the decision excluding the accepted extracted information as well as the disputed information could be made available on DG Competition's website in any of the official languages in expectation of a final settlement regarding the disputed parts[20].

2.3 Requests for information to targets of investigations

2.3.1 Antitrust

Article 18 of Regulation N°1/2003 gives the Commission the power to obtain all necessary information from undertakings. This power can be used at any stage in the Commission's procedure and is not limited to the fact-finding stage. It is of high importance to the Commission, as obtaining such information enables it to develop a full analysis of the markets concerned. Article 11 of Regulation 17 foresaw a two-stage procedure whereby failure to respond to a simple request was a prerequisite to a request by decision which obliges the addressee to reply. Under Article 18 of Regulation N°1/2003, the Commission has the choice to issue either a simple request or to proceed immediately to a decision requiring that information be provided.

Pursuant to Article 18, the Commission may require undertakings and associations of undertakings to provide all necessary information. Information is necessary, in particular, if it might enable the Commission to verify the existence of the alleged infringement referred to in the request. The Commission enjoys a wide margin of appreciation in this respect[21].

It is DG Competition that defines the scope and the format of the request for information. In certain cases DG Competition might however discuss with the addressees the scope and the format of the request for information[22]. This practice can be particularly useful in cases of requests including quantitative data.[23]

The request for information specifies what information is required and fixes the time-limit within which the information is to be provided. Addressees are given a reasonable time-limit to reply to the request, according to the length and complexity of the information request. In general, this time-limit will be at least two weeks from the receipt of the request, for a substantial request for information.

If it does not appear possible to reply within the time-limit, addressees may ask for an extension of this deadline. Such a request, which can also be lodged in the language of the addressee's location, should

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20 (Draft) Best Practices, para 135

21 As regards the Commission's discretion in shaping the enquiry, see Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 110; Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 384; Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 212.

22 (Draft)Best practices, para 32.

23 See the Best Practices on the submission of economic evidence.

be motivated and normally be made in writing, sufficiently in advance of the expiry of the deadline. If DG Competition considers the request to be well founded, additional time (depending on the complexity of the information asked and other factors) will be granted.

The cover letter also requires the addressee to indicate whether it considers that information provided in the reply is confidential. In that case, in accordance with Article 16(3) of the Implementing Regulation, the addressee must substantiate its claims and provide a non-confidential version of the information. Such a non-confidential version shall be provided in the same format as the confidential information, replacing deleted passages by summaries thereof. Unless otherwise agreed, a non-confidential version should be provided at the same time as the original submission.

Articles 23(1) and 24(1) of Regulation N°1/2003 provide for fines and periodic penalty payments in the context of requests for information and the availability of these measures has improved the effectiveness of requests for information.

2.3.2 Mergers

Similar rules apply in merger proceedings, pursuant to Article 11 of the Merger Regulation. As in proceedings under Articles 101 and 102 TFEU, the Commission has the power to enforce companies' obligation to provide information by means of fines and/or periodic penalty payments, in accordance with Articles 14(1) and 15(1) of the Merger Regulation.

2.4 Agreed resolutions of enforcement proceedings

2.4.1 Antitrust

Settlements

On 30 June 2008, the Commission introduced a settlement procedure in cartel cases[24]. This relatively recent instrument allows the Commission to adopt a final decision in cartel cases through a simplified and quicker procedure, freeing up resources to handle more cases. The Commission retains a broad margin of discretion to determine which cases may be suitable for settlement. Parties have neither the duty nor the right to settle.

In the settlement procedure, parties may choose to acknowledge their involvement in a cartel and their liability for it, in exchange for a reduction of their fines by 10%. The Commission does not negotiate or bargain the use of evidence or the appropriate sanctions. However, the Commission effectively hears the parties and gives them an opportunity to argue their case. This form of cooperation is different from the voluntary production of information and evidence under the Leniency Notice. It is not aimed at collecting evidence, but is a simplified procedure where parties acknowledge their involvement in a cartel and liability for it, having seen the evidence on which the Commission bases its envisaged objections. Where both a settlement reduction and a leniency reduction are applicable, they are applied cumulatively. In contrast to the commitment procedure under Article 9 of Regulation 1/2003, the administrative proceedings always end with a decision finding an infringement and imposing fines, irrespective of whether the standard procedure or the settlement procedure applies.

[24] Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ L 171, 1.7.2008, p. 3–5; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167, 2.7.2008, p. 1–6. See http://ec.europa.eu/comm/competition/cartels/legislation/settlements.html.

On 19 May 2010 the European Commission adopted its first settlement decision in a cartel case involving 10 producers of memory chips or DRAMS used in computers and servers[25].

Commitments

Article 9 of Regulation N°1/2003 empowers the Commission to adopt a new type of decision by which it may make commitments offered by undertakings binding and enforceable on them ("commitment decisions"). Commitment decisions are based on commitments voluntarily offered by the party or parties concerned and thus allow the Commission and the parties to conclude cases in a more consensual mode. Commitment decisions do not make a finding of an infringement, nor do they conclude that an infringement would be terminated as a consequence of the commitments. Article 9 adds considerable value in comparison to Regulation 17, under which no enforcement possibility was available for cases concluded by informal commitments. The primary purpose of commitment decisions is to preserve effective competition and to obtain faster changes in the market for the future. It is therefore used in cases in which the Commission considers that the commitments, if subsequently fully respected by the undertaking, sufficiently address its competition concerns.

According to Recital 13 of Regulation N°1/2003, commitment decisions are not, in principle, appropriate in cases in which the Commission intends to impose a fine. For instance, in hard-core cartel cases fines are necessary, as the emphasis of enforcement is on punishing past behaviour and deterring anti-competitive practices. In other cases, the Commission has a margin of discretion in the choice offered to it under Regulation 1/2003, i.e. to make commitments binding through the adoption of a decision under Article 9 or to pursue the case under Article 7, involving a finding of an infringement.[26]

Article 9 requires that the Commission expresses its competition concerns in a preliminary assessment vis-à-vis the undertaking(s) concerned. The preliminary assessment principally creates the opportunity for the Commission to make its competition concerns known to the parties at an earlier stage of the proceedings with a view to open commitment discussions. The preliminary assessment does therefore not need to have the level of detail required for a statement of objections, which produces procedural efficiencies.

Article 27 (4) of Regulation 1/2003 provides for a market test inviting interested third parties to submit their observations within a fixed time limit, before the commitments can be finally accepted. To this end, the Commission is obliged to publish in the Official Journal a concise summary of the case and the main content of the commitments. [27]

Experience so far indicates that the instrument of commitment decisions has functioned well and has in several cases served as an effective means to address the competition problems at issue. As commitment decisions result from the parties' initiative and willingness to offer commitments, the same parties tend to be more readily inclined to implement their own voluntary commitments. Commitment decisions are also less likely to be challenged before the EU Courts than prohibition decisions. Consequently, Article 9 decisions have helped to expedite market changes. Through the lesser litigation burden and other procedural economies, Article 9 has therefore also contributed favourably to resource allocation within the Directorate General for Competition, freeing resources for the prosecution and punishment of the most serious infringements.

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25 See Commission Press release IP/10/586.

26 Case T-170/06, Alrosa v. Commission [2007] ECR II-2601.

27 In this regard, see also Case T-170/06, Alrosa v. Commission [2007] ECR II-2601, para 196.

2.4.2 Mergers

In merger proceedings, notifying parties have the possibility to offer commitments with a view to rendering the concentration compatible with the internal market, both during the initial phase 1 investigation and the in-depth phase 2 investigation. Where the Commission finds that the notified operation as modified by such commitments no longer raises serious doubts or is compatible with the internal markets, it will authorise the operation with conditions and obligations attached to the decision declaring the operation compatible with the internal market (see Articles 6(2) and 8(2) of the Merger Regulation).

During phase 1, DG Competition normally informs the notifying parties in a State of Play meeting of any serious doubts, so as to enable them to consider submitting commitments. During phase 2, commitments are normally proposed following the Statement of Objections; however, in accordance with Article 10(2) of the Merger Regulation, phase 2 commitments may already be submitted at an earlier stage, and if such commitments remove the serious doubts, the Commission may clear the notified concentration without the need to issue a Statement of Objections.

As in cases under Articles 101 and 102 TFEU, commitments proposed by the parties are market-tested before the Commission takes a final decision. In merger cases, the market test normally takes the form of requests for information addressed to the market participants that have provided information during the previous investigation, to which a non-confidential version of the proposed commitments is attached.

2.5 Judicial review and interim relief

2.5.1 Judicial Review

In accordance with Article 263 TFEU, the decisions adopted by the Commission are subject to legal review by the Court of Justice of the European Union, namely the General Court and the Court of Justice. It follows from established case law that the Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met.

As the General Court has stated, when it reviews the legality of a decision finding an infringement of Article 101(1) or 102 TFEU, the applicants may call upon it "*to undertake an exhaustive review of both the Commission's substantive findings of facts and its legal appraisal of these facts*."[28]. With regard to the review of complex economic and technical appraisals made by the Commission, the Court of Justice of the European Union will assess whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.[29] The same standards apply as well to the review of merger decisions. The Court of Justice has established that the European Courts must not only establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.[30].

Moreover, the Court of Justice of the European Union has, by virtue of Article 31 of Regulation N°1/2003 and Article 16 of the Merger Regulation, unlimited jurisdiction to review fines or periodic

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28 See Joined Cases T-25/95 etc *Cimenteries CBR and Others v Commission* [2000] ECR II-508, para 719.

29 Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, points 87 -89.

30 Case C-12/03 P *Commission v TetraLaval* [2005] ECR I-987, points 37-41.

penalty payments imposed by the Commission. The Court of Justice of the European Union may cancel, reduce or increase the fine or periodic penalty payment imposed.[31]

2.5.2 Interim relief granted by the Courts of the European Union

In accordance with Article 278 TFEU, actions before the Court of Justice of the European Union do not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended. According to Article 279 TFEU the Court of Justice may in any cases before it prescribe any necessary interim measures. An application of this kind shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for.

Three conditions must be fulfilled before interim relief will be granted: (1) a *prima facie* case that the Commission's assessment is unlawful; (2) the risk of serious and irreparable damage to the party; (3) the balance of interests must favour the adoption of such measures.

The President of the General Court may grant the application even before the observations of the opposite party have been submitted. The decision on the application takes the form of a reasoned order. This order has only an interim effect and is without prejudice to the decision on the substance of the case by the Court.

[31] Article 261 TFEU and Article 31 of Regulation N°1/2003. A similar provision exists for those rare decisions imposing fines in merger proceedings (see Article 16 of the EC Merger Regulation), for instance for supplying incorrect or misleading information or for violation of the obligation to notify or of the stand-still clause (Articles 14 and 15 of the EC Merger Regulation).

BRAZIL

1. Foreword

Statute n. 8.884/1994 (Competition Law) built the current Brazilian Competition Policy System. The mentioned System is composed by 3 independent agencies: CADE (Administrative Council for Economic Defence) which renders final decisions in conduct proceedings and merger reviews, SDE (Secretariat of Economic Law) which investigates mainly conduct cases, and SEAE (Secretariat for Economic Monitoring) whose investigations concentrate on merger reviews. It is important to clarify that, under Brazilian framework, merger reviews are *ex post.*

As so, conduct proceedings are installed in CADE with a report of SDE, and merger review with a report of SEAE. Regardless of its type, proceedings are always designated on a random basis to one of CADE's commissioner's office. The assigned Reporting Commissioner elaborates a legal opinion and reasons for his vote. The final decision is taken within the Plenary, whose components (6 Commissioners and 1 President) each has a vote. The decision is reached by a qualified majority.

Besides commissioners' individual offices, Presidency and Plenary, CADE is also integrated by DEE (Department of Economic Studies), which provides technical consultancy for commissioners and Presidency.

Moreover, there are two independent legal officers with CADE. One is the PROCADE (Attorney General's Office of CADE), which renders legal opinions in cases pending in this Agency and also represents CADE and enforce its decisions in Court. Other is Public Prosecutor Office of CADE, which mainly officiates as *custos legis*, representing the public interest.

2. Decision-making process

Substantial evidence is supplied to CADE mainly by SEAE and SDE, which conduct investigations and render reports. SEAE's staff mainly develops econometric studies, but may also render qualitative evidence. SDE's authorities have full information gathering powers, including powers to obtain testimony of witness, telephone records and conducting dawn raids. Police agents and public prosecutors may aid SDE in bringing evidence. During all administrative proceeding, CADE may ask for further information and investigation. Parties and often third interested parties and even other federal agencies are invited to contest evidence and submit new facts and evidences to the Agency. By these means, CADE aims at assuring that due process of law, contradictory and legal defense requirements are fully met.

Each of the 6 Commissioner's Offices works as independent teams used internally. Additionally, DEE performs as an independent team under CADE's umbrella.

Before the proceeding is installed in CADE, SEAE's economists are responsible for conducting the main investigation of notified mergers. Once the proceeding is installed, SEAE's and DEE's economists may be requested to render further economic analyzes at any stage of the proceeding.

The Attorney General's Office of CADE and the Public Prosecutor's Office of CADE provide additional channels of direct input to decision-makers. It is worth noting that PROCADE issues legal opinions which focus on legal aspects but may also extend to substantial issues.

Outside analysts and experts, from private or public sector, shall help CADE's decision-markers when especially requested for. The provision is set out in Article 7, XI, and Article 36 of Statute n. 8884/1994.

Recently, due to cooperation established with CGU (Office of the Comptroller General), CADE is able to process and analyze data using software such as *I2*[1]. This device provides CADE with a further avenue for obtaining evidence and confirming information gathered.

3. Confidentiality

In accordance with Brazilian Legal System the defendant in an administrative proceeding has utterly guaranteed the right to respond and to defend himself. Confidentiality issues are dealt with in a slightly different manner. Confidentiality covers aspects of business secrets information solely. This means that these information are not publicized to third parties. Nevertheless, there cannot be any element of the accusation covered by confidentiality opposed to the defendant for that would undermine due process of law.

Brazilian mechanism of limiting disclosure ensures restricted access to confidential documents. Access is only freely granted to the owner of the information and the personnel of the antitrust system.

Confidential information is defined first by the parties that submit a request of confidentiality of the information handed to the antitrust authorities. These authorities label the documents as confidential and from that moment on it is no longer accessible to the public.

CADE has enacted an internal Resolution that is binding for the agency regarding the definition and proceedings towards confidential information.

The parties have to identify the information as confidential in order for it to be treated as such.

The parties to whom the information are related may always object to its disclosure prior to the it being made public.

The Brazilian antitrust agency, on a case by case analysis, balances the benefits of public disclosure with the respect of confidential information. Seldom does the agency publicize information about ongoing investigation.

The possible penalties for violation of confidentiality rules may be of a civil, administrative or penal nature depending on the circumstances in which this violation took place.

4. Requests for information to targets of investigation

Under Brazilian Legal framework, there are no specific procedures to review information requests with the party. In order to assess its veracity, CADE compares and confronts all information gathered. Article 36 of Statute n. 8.884/1994 provides that CADE may also address compulsory requests to any

[1] By using *I2* software, for example, the Agency was able to identify all corporate and business links between parties and company that acquired assets sold by parties in an auction. The mentioned auction was celebrated to comply with a TCD (agreement signed for settle a merger review case), as a means to enforce divestiture of assets request by CADE.

federal agency or authority reports on technical matters of their competence. In any case, information and documentation requests are compulsory and any unjustified refusal, omission, flaw or lateness in providing such a reply are punishable with fines according to Art. 26 of Statute n. 8.884/1994. It is important to state that a draft resolution for establishing a specific procedure to assess the truthfulness of information provided is now being analyzed by CADE's Plenary.

Party is granted with access to case files (including confidential documentation) as a means to acknowledge the theory of the case and reasons for requesting the information.

Party can ask for reconsideration of the information requested and deadlines based on a provision set out in the Federal Constitution of Brazil, which guarantees the right of individuals to petition to any federal agency.

Non-parties neither are communicated of the theory of the case and reasons for requesting the information, nor are provided with access to confidential documentation within case files.

5. Agreed resolutions of enforcement proceedings

Before a final decision is rendered, parties may resolve enforcement matters by signing agreements with CADE at any stage of proceedings. With reference to merger reviews, Article 139 of Resolution 45 provides that an APRO (agreement to preserve reversibility of transaction) can be established, and Article 58 of competition law authorizes the conclusion of a TCD (performance agreement). Such documents are of valuable importance regarding pos-merger review framework. While APROs impose restrictions and conditions on the acquiring company's to integrate activities, aiming at preserving Agency's ability to enforce relief if merger turns out to be declared unlawful; TCD set out structural or behavioural remedies in mergers that has already been considered anticompetitive. With regard to conduct proceedings, Article 53 of competition law permits settling a TCC (cessation of conduct agreement), through which monetary penalty and remedies can be established. For settling enforcement matters, the Attorney General's Office of CADE in tandem with CADE may also sign with parties a legal agreement within a judicial proceeding. The provision is set out in Article 10 of competition law and Statute n. 9.469/1997. By these means, parties compromise to withdraw suits filed before courts and agree to comply with CADE's decision in return for reliefs in sanctions imposed.

There are no restrictions on the types of cases that can be resolved by mutually agreed dispositions. Agreements can be settled both within conduct and merger cases.

CADE actively seeks to sign agreements. Based on its experience, CADE can assess that agreement settlement forges not only positive incentives for parties to duly perform their obligations, but also negative incentives for them to resort to judicial remedies and appeals, which tend to be costly and lengthy. For fostering agreement settlement, CADE has developed special expertise in such a field. It was established the Technical Group on Negotiation (responsible for negotiation draft TCCs proposed by parties) and the Unit to Monitor Compliance (responsible for monitoring and evaluating compliance with all types of agreements).

6. Judicial review and interim relief

In the Brazilian legal system the Judiciary may intervene at any time of the administrative competition law enforcement process. That is to say that at the very start of the administrative process the Judiciary may address interim measures for instance in regard of procedural fairness or other aspects of due process of law. The Judiciary may not review the merits of the administrative ruling but it is possible to have this ruling annulled for a procedural aspect.

The level of deference of the Judiciary towards agency´s decision is so that it may not review the merits of the decision but there have been precedents of annullement due to procedural aspects or due to alleged absence of proportionality of the administrative ruling.

The pending of judicial review has the effect of freezing the sanction or remedy issued by the agency. That is to say that although the party has to deposit the value of the sanction imposed it may not be collected by the agency before the judicial body reaches the stage of final decision.

The judicial body as previously mentioned may grant interim relief or measures.

Judicial procedures in Brazil may grant expedite interim measures. However, it may take a decade or more to reach a final decision, that is to say a ruling over which there is no possible questioning. Unfortunately there are no means of expedite judicial review of administrative decisions. This may lead to procedures that are meant only to postpone the inevitable sanctioning in a way that could be roughly compared to sham litigation.

BULGARIA

1. Improvement of the decision-making process

The CPC has recently created a special unit with the purpose of providing ad hoc independent legal consultancy to case-handling teams. The unit is composed of the commission's lawyers responsible to defend the CPC's decisions before the Supreme Administrative Court at appeals as well as by the legal experts working within the Competition Policy unit. The unit is not involved in every single case in parallel with the main case-handling teams but is rather being consulted at the initiative of the latter or at the request of the commissioner reporting the case to the panel of commissioners. The unit may be consulted at every stage of the proceedings – during the investigation phase (for example, the assessment of collected evidences), to the formulation of a Statement of Objections, to the stage of drafting the final decision. Moreover, the unit is mandatorily consulted at three occasions: prior to a decision on whether or not to initiate ex officio proceedings, when assessing the effect on trade between Member States in antitrust cases and when applying the mechanism of referral of merger cases having a Community dimension to/from the European Commission). Finally, the unit may be required to prepare a legal analysis on a specific topic for the purposes of consolidating and improving the commission's practice.

The consultation may be given in a formal way (in a report or an analysis discussing specific questions raised by the case-handling team) or through non-formal discussions and correspondence. When done formally, the unit's opinions are added to the case file as internal commission documents. This way they are necessarily being taken into consideration by the panel of commissioners when deciding on the cases. At no time, however, are the unit's formal consultations binding for the case-handling teams or for the panel of commissioners. It is necessary to further mention that, being given the status of internal documents, the formal consultations of the unit are not accessible to the parties to the proceedings (art. 55, Para 1 of the Law on the Protection of Competition (LPC)).

The unit may, furthermore, assist the commissioners at hearings, especially where it has already been involved in the case. The unit's role at these occasions is to provide clarifications on legal questions as, for example, the rights of defense, assessment of evidences, qualification of a given behavior as constituting an infringement etc.

In sum, the creation of the above described unit mainly aims at ensuring that case-handling teams, although having in their midst legal experts as per the internal rules of the CPC, have the opportunity to raise questions of law and procedure whenever an independent opinion would be of significant help to finding the most adequate approach to the issue at hand. The initiative is, furthermore, expected to bring a better quality of the decision making process as a whole. The earlier involvement of the CPC's defense lawyers in such cases will help, in this respect, identify potential flaws before the decision has been issued. This is likely to improve the chances of issuing decisions that stand during appeals.

The tasks of the above described unit have been laid down in the Internal Rules for Administering Documents.

Based on a similar understanding, the CPC has also created a special task team, composed of expert-economists, whose task is to provide independent assistance and advice to the case-handling teams where such is needed. Its creation, however, is too recent to allow us to assess its effectiveness.

Outside independent experts are also used to help decision making process when the CPC needs special expertise in order to clarify any aspects related to the proceedings. These experts are appointed upon request of the parties or on the authority's own initiative, by a ruling of the decision-making body. In the ruling the CPC indicates the expert, the task of the expertise and the deadline for submission of expert's report. According to the newly adopted LPC the expert appointed must be totally independent and therefore, cannot be a person interested directly or indirectly in the outcome of the proceedings. The expert submits his report to the CPC which can approve it with a ruling. Where the report is contested by the parties to the proceedings, the CPC may assign the assessment of the same task to one or more other experts. Ultimately, when taking the final decision on the case the CPC is not bound by the expert's report but is empowered to consider it together with the other evidential materials collected during the proceedings.

2. Confidentiality

The parties to proceedings before the CPC have the right to access all documents included in the case file except for those containing production, trade or other secret, as well as internal documents of the Commission, including correspondence with the European Commission and other national competition authorities. Such documents, namely production and trade secret as well as professional secret, are defined in the LPC as representing confidential information. Here below are the exact definitions of the LPC for such documents:

> *"Production or trade secret shall mean facts, information, decisions and data related to the economic activities, the preservation of confidentiality of which is in the interest of the rightful holders thereof, and for which the latter have undertaken appropriate measures."*
>
> *"Professional secret shall mean:*
>
> *a) any information, which the Commission creates or acquires for the purposes of the investigations under this Law or in relation thereto, and the disclosure of which may jeopardize the business interest or the reputation of the parties or that of a third party; the professional secret shall not be official secret within the meaning of the Protection of Classified Information Act;*
>
> *b) the information, exchanged between the Commission and the national competition authorities of the member-states of the European Union and the European Commission in relation to the exercise of their powers and the co-operation between them;*
>
> *The information subject to public announcement pursuant to this or any other act shall not be professional secret."*

It is for the parties involved to claim the confidentiality of such documents. The party alleging the confidentiality of a particular document needs to motivate its claim as well as to provide a non-confidential version of the document in question. However, the CPC may, via a formal ruling subject to appeal before the Supreme Administrative Court within seven days of the notification thereof, decide that a given information, contrary to the allegations of the party, does not constitute confidential information within the meaning of the LPC.

In the event where the CPC acknowledges the confidential character of a document, no access is given thereto to the other parties to the proceedings. However, the LPC provides for an exception in this case. Indeed, access to such a document may be granted where the CPC considers it as constituting evidence of significant value to the alleged infringement or as being of importance to the proper guarantee of the other party/ies' rights of defence. Whenever the CPC considers that certain confidential information has to be

disclosed on the above-mentioned grounds, it shall issue a ruling in this regard and inform the affected person of it. The act of granting access in this case is also subject to judicial review.

Whenever the CPC investigates an alleged violation under Art. 101 or Art. 102 TFEU (ex Art. 81 EC and Art.82 EC), it applies independently or in parallel with the relevant national prohibitions the provisions on cooperation under Council Regulation (EC) No 1/2003. By virtue of Art. 12 of the Regulation, the CPC can exchange with the European Commission and with the other national competition authorities all kind of information, incl. confidential information. The documents and the correspondence with the European Commission and the other national competition authorities become part of the CPC case file, but the parties to the proceeding or other parties are not given access to these documents (Art. 55, para 1). The protection regime of these documents is similar to the one, regulating the access to the Commission's internal documents.

Moreover, the CPC is currently working on substantiating its rules concerning an alleged by the parties under investigation Legal Professional Privelege (LPP), with special emphasis given to the practical issue of how the CPC agents deal with LPP allegations during on-site inspections. Although seizure of priviliged attorney-client information is generally prohibited under the Bulgarian legislation, the CPC needs to elaborate a more detailed view on how to handle such information in practice. In this regard, the CPC is following closely the development of the case Akzo Nobel Chemicals and Akcros Chemicals v. Commission which is ongoing before the CJEU[1].

Handling of confidential information on behalf of the CPC is subject to the judicial control of the Supreme Administrative Court over the commission's decisions and rulings as part of the process of appeal. On the other hand, any disclosure of confidential information by agents of the CPC, being it intentional or negligent, is subject to disciplinary sanctions.

3. Requests for information to targets of investigations

All parties to the proceedings are informed immediately after their initiation on the theory of case. At the same occasion, the case team, besides inviting the parties to present their statements on the case, usually requests information or evidence to be provided. The parties are given the contacts of the case team's experts, to whom the parties can turn during the investigation. It is usual practice, and most of the time objectively necessary, for the parties to the proceedings to meet the case team and/or to have telephone conversations or e-mail communication with the case handlers. Meetings are organized on *ad hoc* basis and are only intended to ensure the process of gathering evidence on the specific case. In this respect, it is not unusual for the parties to ask for a reconsideration of the deadlines for response to the requests for information.

The requests for information are considered the most common procedural instrument for evidence gathering in competition cases and there is no difference as to the procedural rules applicable to parties to the proceedings and other persons or entities in this respect. In accordance with the LPC all natural persons and legal entities, including undertakings, associations of undertakings, state authorities and local government bodies, non-governmental organizations are obliged to render their assistance to the CPC, including by responding to its requests for information. All the persons requested are obliged to provide complete, accurate, true and not misleading information within a time limit determined by the CPC. In case of failure to comply with this obligation the authority is empowered to impose pecuniary sanction in the amount of 1% of the total turnover in the preceding financial year on the respective legal entities and/or administrative fine of BGN 500 to BGN 25,000 – on the natural persons. The decision, by which the pecuniary sanction is imposed, shall specify the period within which the relevant entity shall fulfil its

1 Case No C 550/07.

assistance obligation or furnish complete, accurate, true and not misleading information. In case of failure to furnish complete, accurate, true and not misleading information after the expiry of the specified period, the CPC is empowered to impose periodic pecuniary sanctions on an undertaking or association of undertakings to the amount of up to 1% of the average daily turnover for the preceding financial year for each day of failure until the unlawful action or omission is terminated and the requested information is provided, respectively.

4. Agreed resolutions of enforcement proceedings

The newly amended LPC has introduced the possibility for undertakings against which the CPC adopted a Statement of Objections (SO) to propose to the commission to undertake commitments in view of terminating the alleged in the SO conduct. In case the CPC approves the proposed commitments, the proceedings are terminated with a no-infringement decision.

This instrument presents a dual utility. From a defense strategy perspective, on the one hand, the possibility to undertake commitments constitutes for the undertaking an alternative way to exercise its rights of defense once the CPC formulated the SO against it. Indeed, faced with the SO, the undertaking may either decide to continue defending itself or acknowledge the allegations of the CPC by proposing, on its own accord, corrective actions. The law actually does not prevent the undertaking from doing both simultaneously, that is, to propose to undertake commitments and, in the same time, build its defense in a response to the SO in case the commission does not approve the proposed commitments. The undertaking may also decide on withdrawing the commitments it has proposed any time until the CPC has made its decision on the commitments. In the latter case, the proceedings continue their normal course. If the SO has been formulated against more than one undertaking, it is possible for those undertakings or part of them to propose to jointly undertake commitments. In any event, the undertaking needs to decide upon its course of action within the deadline for responding to the SO.

From a competition policy perspective, on the other hand, the instrument of undertaking commitments may represent, in some cases, a more adequate remedy to the distortion of the competition caused by the conduct of the undertaking/s. An undertaking that is able to propose and further undertake concrete, adequate and most likely difficult for it commitments would certainly be aware of the harm it has caused to the competition and, what is more, to the legal offence such harm could lead to. Such a state of awareness on behalf of the undertaking is likely to have a much stronger deterrent effect for it in the future than it would have had if the undertaking were simply fined for its conduct. This latter effect is even strengthened given that the CPC may reopen the proceedings at any time if the undertaking lacks to abide to the commitments it has taken.

Undertaking commitments is not, however, made possible for all types of infringements. The law forbids the CPC to approve commitments where the alleged in the SO infringement has been qualified as serious. The adopted by the CPC earlier in April 2010 Rules on Commitments further substantiate the cases where the commission cannot approve the proposed commitments. Those cases include cartel allegations, abuses of dominance with price and/or market territory fixing, structural abuses and exploitative abuses where a large number of consumers have been affected.

In the specific cases that follow the CPC can even refuse to review a proposal for undertaking commitments: where the undertaking did not comply with a previous decision of the CPC that has entered into force, where there is a precedent to the alleged infringement either sanctioned in a previous decision or put into evidence by a past behavior, where the alleged infringement is continuing or where the infringement has caused significant damages to a large number of persons whom would have legal interest to claim indemnity before the Civil Courts. In this respect, when commitments have been proposed by an undertaking, the CPC is due first to assess their admissibility in an in-camera sitting. If the commission

decides that the proposal is admissible for further review, it issues a ruling in that sense; in the opposite case, the commission simply resumes the proceedings, adds the proposal to the case file and informs the party thereof.

The LPC leaves the appraisal of the proposed commitments against the circumstances of the case at the full discretion of the CPC. The Rules on Commitments provide further guidelines to the commission on the principles against which the commitments need to be assessed. Those principles require, inter alia, that the commitments, in order to be approved by the commission, be proportionate to the harm done, lead to the immediate recovery of the competition and not only to the termination of the unlawful conduct, be relevant to the essence of the infringement, be unconditional, adequate and sufficient in order to guarantee the effective resolution of the competitive problems as well as to allow the CPC to control their fulfillment. Thus, the CPC may only partially approve the proposed commitments if it considers that some aspects are not satisfying the above criteria.

As part of the procedure, the CPC, once it has ruled further review of the commitments, informs all the parties to the proceedings inviting them to present their comments and/or objections within a deadline of seven days. At the discretion of the commission, the undertaking that has proposed the commitments may be allowed to respond to any objections made by the other parties or modify its proposal as a result of such objections. The deadline for reaction in this case is set to not less than seven days. In case that the initial proposal has been indeed modified, the CPC may, again on its own discretion, invite the other parties to comment on the new proposal. It is necessary to be outlined, however, that the commission is not bound by any of the formulated objections and may approve the commitments even where all parties have objected to the proposal. The only exception in the latter case is when the fulfillment of the commitments is conditional to the acceptance or the cooperation of a party that objected to the proposal.

The procedure ends with either an in-camera decision of the CPC that approves the commitments or the resumption of the proceedings in case the CPC has not approved the proposed commitments.

In the event the CPC decides on approving the undertaking of commitments, it outlines in its decision the facts of the case as well the infringement, the proposal and the objections formulated by other parties and its own analysis for compliance of the proposed commitments. The decision sets also the deadline for the fulfillment of each commitment and last, but not least, it states that they are no further grounds for the continuation of the initiated proceedings. At the Commission's discretion, the decision may also set the duration of the commitments and/or oblige the undertaking/s to periodically inform and present evidence on the fulfillment of the commitments.

Should there be more than one undertaking subject to an SO and some of the offending undertakings did no present or withdrew a proposal for undertaking commitments, the CPC continue the normal course of the proceedings against those undertakings, while dismissing the case regarding the undertaking or undertakings whose commitments have been approved.

5. Judicial review and interim relief

5.1 Judicial review

The CPC decisions being administrative acts may be entirely or partially contested before the Supreme Administrative Court regarding their lawfulness. Grounds for contestation are: lack of competence; lack of conformity with the prescribed form; essential breach of the administrative and procedural rules; contradiction to the substantive legal provisions; non-compliance with the purpose of the law. The court does not limit itself only with the consideration of the grounds, pointed out by the appellant,

but is obliged to check the lawfulness of the contested administrative act on all grounds provided for in the Administrative Procedural Code.

As a general principle laid down in the LPC, all decisions of the CPC, unless otherwise provided in the law, are subject to appeal before the Supreme Administrative Court within fourteen days upon their notification to the parties to the proceedings or upon their publication in the electronic registry of the commission for third parties. Appellants may be either the parties to the proceedings or any third party that proves legal interest of overturning the decision. Decisions that cannot be appealed are, inter alia, the decisions for terminating proceedings that have been initiated ex officio by the commission, the decisions adopting a sector inquiry, the decisions adopting statements as part of the proceedings for competition advocacy and other purely administrative decisions (as, for instance, a decision for provision of assistance to agents of the European Commission carrying out inspections on the territory of Bulgaria).

Conversely, the rulings of the CPC are subject to appeal before the Supreme Administrative Court only where expressly so provided by the LPC. The deadline for appeal is set to seven days upon the ruling notification to the parties concerned. Appellants in this case may only be the parties to the proceedings. Examples of rulings that are subject to appeal is when the CPC rejects an allegation stating that a given document represents confidential information or the ruling ordering interim measures.

According to the procedural rules laid down in the Administrative Procedural Code, the decisions and rulings of the commission are subject to a two-instance judicial control of the Supreme Administrative Court. At the first instance, the decision or ruling is reviewed on substance by a panel composed of three judges, while at cassation the decision may be reviewed only on points of law by a panel of five judges. The court may declare the invalidity of the contested administrative act, to cancel it entirely or partially, to amend it or to reject the contestation. After declaring the invalidity or cancelling the CPC decisions, the court refers the case back to the competition authority with obligatory instructions for the interpretation and the application of the law.

As a general rule, the appeal suspends the enforcement of the decision/ruling except for the cases where the CPC prohibits a concentration among undertakings or orders the termination of an infringement, including by imposing behavioural and/or structural measures to restore competition or other cases that are expressly provided for in the LPC (as, for instance, the ruling ordering interim measures).

The CPC decisions and rulings enter into force whenq according to the LPC, they are not subject to appeal or they have not been appealed by the interested parties or the appeal has been withdrawn by them, or the appeal has been dismissed by the court. If a sanction has been imposed by the CPC, it is not executable until the decisions has entered into force.

5.2 Interim relief

According to the procedural rules in force, the Supreme Administrative Court may, as an interim relief, order the suspension of the enforcement of the CPC's decision or ruling in exceptional circumstances.

5.3 Timing of the review of the judicial body

The timeframes of the judicial proceedings that are laid down in the Administrative Procedure Code are purely instructive and are, therefore, not binding upon the court. However, in practice, most of the cases are finalized (first and cassation instances altogether) within one calendar year. There is no expedited review of the cases envisaged by the Code.

LITHUANIA

1. Decision-making process

What procedures does your agency have in place to ensure that decision-makers consider all relevant evidence and remain open to considering different explanations for the conduct under investigation? Are independent teams used internally? Is there an independent review of the case by specialized economists? Are there other channels of input directly to the decision-makers? Are outside analysts or experts used to help decision-makers? What other techniques or practices has your agency adopted to promote sound decision-making?

The Lithuanian Competition Council must comply with procedural rules laid down in legal acts of the Republic of Lithuania. Basic procedural principles (i. e. principle of impartiality, equity, *etc*.) and general issues of the proceedings carried out by the Competition Council (*e. g.* investigative actions, grounds for opening and closing of the proceeding, right to be heard, right to access the case material, *etc*.) are established in the Law on Public Administration and in the Law on Competition. In more detail procedural issues are regulated in the Rules of the Procedure of the Competition Council. The administrative procedure carried out by the Competition Council provides few procedural aspects which are intended to guarantee that decision-makers (the Competition Council as a decision-making body which consists of 5 members) consider all relevant evidence and explanations towards the alleged infringement.

During the investigative phase of the administrative procedure the Competition Council adopts all necessary decisions regarding inspections, prolongation of the investigation and other decisions relevant to the investigation. Usually, when certain question is to be presented to the Competition Council, investigation team must produce a notice on the process of the investigation: what investigative actions have been made, what evidences have been found, what are the next planned investigative actions and *etc*. Thus the Competition Council is able to follow the process of the investigation from its beginning and, if it is needed, by itself draw investigators attention to certain issues regarding possible relevant evidence and possible assessment of the investigated behavior of the undertakings concerned. In consequence by being active from the beginning of the investigation the Competition Council as a decision-making body is able to consider all relevant evidence and evaluate the conclusions made by the investigation team in the statement of objections, which is a final investigative document and in which all alleged charges of the infringement of the competition rules against certain undertakings must be stated.

Furthermore, before presenting the draft statement of objections to the Competition Council, investigators must present it and all case material to the in-house lawyers of the Competition Council, who are not directly included in the investigation, for a legal assessment on the statement of objections to be made. For the purpose of making the legal assessment the draft statement of objections and the case material is revised, *e. g.* whether there are enough evidences to support the alleged infringement of the competition rules, whether there are other relevant evidences that were not discussed in the draft statement of objections but which are important in the context of a certain alleged infringement, whether the factual and legal reasoning in the draft statement of objections is sufficient to exclude possibilities to acquit or to justify investigated behavior and whether there are other relevant issues that might be important for the Competition Council while deciding on the conclusions of the investigation. The legal assessment and the statement of objections are presented to the Competition Council at the same time, so the Competition Council gets additional information on relevant evidences or other relevant matters related to the

investigation of the alleged infringement and thus can decide whether any revisions or amendments need to be made in the statement of objections or even can decide to direct investigators to continue investigation and to take a closer look at certain circumstances, evidences or to give more reasons on the alleged infringement. This internal procedure is applied before the Competition Council adopts official decision to complete the investigative phase of the administrative procedure and approve final statement of objections which is then sent to the undertakings concerned. This procedure is intended to ensure that in the statement of objections will be discussed all relevant matters of the investigation and reasoned conclusions on the alleged infringement of the competition rules will be made thus guaranteeing to the undertakings concerned their right to be heard an give explanations on the precisely investigated and examined evidences and precisely made primary conclusions of the alleged infringement.

The internal procedure of the approval of the statement of objections is not the only internal procedure to ensure that the Competition Council will consider all relevant evidences and different explanations on the case. This possibility is guaranteed also by another administrative proceeding phase – preparation for the hearing of the case. During this procedure investigators receive written explanations from the undertakings concerned on the conclusions made in the statement of objections and they must summarize arguments of the undertakings concerned and give their reasoned opinion on these explanations to the Competition Council. It must be mentioned that written explanations submitted by the undertakings usually contain a lot of arguments and comments on evidences which significantly differ from ones stated in the statement of objections. Thus prior to the hearing of the case the Competition Council is introduced with alternative interpretations and explanations of the facts or other circumstances discussed in the statement of objections. Meanwhile the duty of the investigators to give reasons and arguments on these written explanations and present them to the Competition Council also serves as additional information to the Competition Council about possible alternative explanations or information about other evidences that may be relevant in the case.

During the hearing of the case, which according to the Law on Competition must be held orally, the Competition Council also has an opportunity to hear and thus take into account oral explanations of the undertakings concerned. Moreover, the Competition Council has a right to ask the undertakings concerned to clarify their position, arguments or other relevant information in order to make reasonable decision concerning alleged infringement. In cases where Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are applied, following provisions of the Council Regulation (EC) No. 1/2003 before adopting final decision the Competition Council must also take into account the opinion on the certain case of the European Commission.

Additionally, the Law on Competition provides that during the investigative phase the assistance of the outside specialist and experts on certain issues may be used if this necessity arises. Furthermore the Competition Council as a decision making body in certain cases if it finds it useful or necessary in order to ensure proper investigation and analysis of a complex case, may decide to create an investigation team from the Competition Council's specialists qualified in different fields as well as create an independent team of specialist to give independent from the investigators' opinion or revision of certain issues related to the case concerned or make any other use of the in-house specialists until making its final decision on the infringement of the competition rules.

Finally it is important to mention that the documents prepared during the investigation that are mentioned above (*e. g*. statement of objections, legal assessment) or opinions and explanations expressed by the investigation team, outside or in-house experts or specialist are not binding on the Competition Council when it makes its final decision on the infringement of the competition rules. The Competition Council remains open to alternative explanations until the moment of the adoption of the final decision. Final assessment of the relevant evidences and behavior under consideration is made by 5 members of the Competition Council as persons who are entitled to express their opinion based on their professional

knowledge and experience by voting. All members of the Competition Council have a right to discuss different positions if they exist on relevance of certain evidences and possible explanations, justifications of the alleged anticompetitive behavior under consideration. Final decision on the infringement of the competition rules is adopted by majority votes of the members of the Competition Council.

2. Confidentiality

How does your agency balance a defendant's right to review and respond to evidence that will be used against it with the need to protect confidentiality? Are there special procedures available for disclosure necessary to protect rights of defense, e. g. by limiting the disclosure to legal representatives so as to ensure that business secrets are not divulged to competing businesses? How is confidential information defined? What rules apply to the protection of confidential information obtained from parties by your agency? Is such information automatically considered to be confidential, or does the party have to identify it as such? If such information is to be disclosed to other parties or made public, does the party have a prior right to object to the disclosure? How does your agency balance the benefits of public disclosure of ongoing investigations with the need to respect the confidentiality of targets of proceedings and possible effects on their reputation? What are the penalties for negligent/intentional violation of confidentiality rules?

In the administrative proceeding that is carried out by the Competition Council the most important issue concerning confidential information is related to the confidential information which contains undertakings' commercial secrets. Competition rules do not describe this type of information; instead it is outlined in other laws. For instance, the Civil Code of Lithuania prescribes that information shall be considered to be a commercial (industrial) secret if a real or potential commercial value thereof manifests itself in what is not known to third persons and cannot be freely accessible because of the reasonable efforts of the owner of such information, or of any other person entrusted with that information by the owner, to preserve its confidentiality. The information that cannot be considered commercial (industrial) secret shall be determined by laws.

Following provisions of the Law on Competition the Competition Council and its staff are obliged to respect and to protect from disclosing to other persons information that contains commercial secrets. The Law on Competition stipulates that commercial secrets of undertakings disclosed to the Competition Council and its administrative staff in the course of exercising control over compliance with this Law must be kept confidential and, in the absence of the undertaking's consent, must be used only for the purposes the information was provided.

To ensure balance between protection of the commercial secrets of the undertaking and the proper investigation of the alleged anticompetitive behavior of the undertaking there are few issues that are dealt with during the investigation.

First of all it must be mentioned, that as it follows from the provisions of the Civil Code, undertakings concerned must have interest in protecting their commercial secrets as such information is not automatically considered to be confidential and in consequence the Competition Council and its staff do not have a duty to protect it. For this reason persons must be active and thus must request the protection of the confidential information clearly identifying it and explaining the reasons, why this information must be protected as commercial secret. That kind of request can be submitted to the Competition Council at any stage of the administrative procedure, but the person concerned must be aware, that if that kind of request will be lodged later that the investigative stage of the administrative procedure is completed, there is a risk that the information it wishes to protect may be disclosed to other undertakings as they at this time gain their right to access case material. According to the Law on Competition, upon completion of the

investigation, the parties to the proceedings shall be presented with the statement of objections and shall be provided access to the documents of the case, except documents containing commercial secrets of another undertaking. In such cases, the consent of this undertaking shall be required. Thus, if the undertaking concerned didn't lodge the request to protect its commercial secrets, this information is disclosed to the parties of the investigation. By trying to avoid that kind of situations the investigators of the certain case always encourage undertakings or persons concerned to request the protection of their commercial secrets as soon as they submit that kind of information to the Competition Council.

The following is an example of the procedure. The investigator, who in any stage of the investigation or the examination of the case has received the request of an interested person concerning the protection of commercial secrets, shall within 10 working days pass a duly grounded decision concerning the protection of the information furnished by the undertaking concerned. Prior to the taking of the decision concerning the protection of the commercial secrets, the civil servant shall have a right to establish a time limit within which the undertaking having lodged a request concerning the protection of its commercial secrets shall submit the extract of the document containing no commercial secrets and the description of each part of the document intended to be treated as classified. In the event the undertaking that has filed a request concerning the protection of its commercial secrets, fails to submit the extracts and descriptions of the documents, the information sought to be protected by the undertaking shall not be deemed constituting a commercial secret. The undertaking concerned shall be notified of the decision passed. If the protection to the information is granted, the staff of the Competition Council is responsible for the proper safekeeping of the information containing commercial secrets. The list of the documents containing these secrets must be created and these documents must be filed into a separate file, which must be kept safely and separately from other case material.

The protection of the commercial secrets may be granted even during the hearing of the case. For instance, although the hearing of cases of the Competition Council usually is held publicly, the Competition Council, following the provisions of the Law on Competition, may, on its own initiative or at the request of the persons (undertakings) concerned, announce a closed hearing of the case, when it is necessary to protect commercial secrets of undertakings.

The precise identification of commercial secrets is important for the proper investigation of the case. The nature of the investigation of the alleged anticompetitive behavior stipulates that most of the undertaking's decisions that are investigated as possible infringement of the competition rules usually are commercial decisions. Undertakings under investigation are interested in protecting as their commercial secrets even anticompetitive decisions or any commercial data on which anticompetitive decisions are based. However this interest may in some cases conflict with the public interest to clearly determine and prohibit anticompetitive behavior. Thus the decision whether certain information should be protected as constituting commercial secrets of the undertaking concerned is adopted taking into account all relevant circumstances including the nature of the information, the nature of the alleged infringement of the competition rules, the evidential value of the information concerned, *etc*. The distinction between two different situations in this respect must be made.

It must be mentioned that the Competition Council understands the importance of the protection of the commercial secrets and usually grants protection for it, if undertaking concerned makes a reasoned request and this information does not make the essence of the certain case. Even if the confidential information has an evidential value for the case, depending on the case, it still may be protected from other persons by undertaking special means, *e. g.* making extracts without confidential information of the Competition Council's official documents that must be announced publicly or other way made available to other persons (statement of objections, decision on the infringement of the competition rules, *etc*.). This is usually the case when the protection is needed for the commercial secrets of the undertaking, against which the investigation was carried out and the decision was adopted. Thus the undertaking concerned is able to

get access to this information and exercise right of defense without any limitations; only access to this information by other persons or parties of the case is limited.

On the other hand problems may arise if the information on which the Competition Council could base its decision constitutes commercial secrets of the person (undertaking) other than the suspected infringer of the competition rules. This issue is important in the context of the right of defense, to review and respond to the evidences that are used against certain undertaking. In order to avoid the violation of the right of defense, the Competition Council does not use as evidence in the case information, which certain accused undertaking cannot access, including information containing other persons commercial secrets, unless this person's consent to disclose its confidential information is given. For this reason, as it was mentioned above, it is very important for the undertakings concerned to make reasoned requests for the protection of their commercial secrets and for the Competition Council to make reasoned decisions, whether certain information submitted to the Competition Council for the purposes of the investigation indeed is information consisting commercial secrets. However it must be mentioned that despite these possible difficulties managing information consisting commercial secrets, until now the Competition Council did not have any problems concerning disclosure of the commercial secrets or breach of the right to defense for the misuse of this information.

It is important to note, that these procedures applied for the protection of commercial secrets may *mutatis mutandis* applied in respect of other confidential information, *e. g.* private information, information consisting state, professional or bank secret. The duty to protect that kind of information is established in certain legal acts of the Republic of Lithuania, *e. g.* the Law on State Secrets and Official Secrets. Thus the Competition Council in any way must take proper measures to protect it and take this fact into account while using it as evidence in certain case.

For the misuse of any form of the confidential information liability may be applied. The Law on Competition states that disclosure of commercial secrets of undertakings by the Competition Council and its staff shall incur liability under law. This liability may occur under civil, labour, administrative, and even criminal law, depending on the type of confidential information disclosed, as well as other factors. If, for instance, commercial secrets were revealed, under the civil law the responsible person would be bound to compensate damages resulting from the disclosure. However, the Criminal Code states that a disclosure of a commercial secret in certain cases can be punished by taking away or restricting the right to work in that position, a fine, an arrest, or incarceration for a period of up to 2 years.

The Competition Council is functioning transparently and therefore it does disclose publicly information about ongoing investigations, except certain cases when, following provisions of the Law on Competition some of the decisions of the Competition Council may be held confidential (usually in order to secure the fact of the opening of the investigation until inspections are made). However, while disclosing information of the ongoing investigations the Competition Council always states that investigations do not necessarily mean that the undertakings concerned have infringed the Law on Competition. The Competition Council respects the right of defense of the undertakings concerned, especially the right to be heard during the investigation.

3. Requests for information to targets of investigation

Does your agency have procedures to review information requests with the party? Is the party informed of the theory of the case and reasons for requesting the information? Can the party ask for a reconsideration of the information requested and/or deadlines, or appeal to a reviewing office within the agency? Do procedures and practices differ if the addressee of the request for information is not a party to the proceeding?

While carrying the investigation investigators of the Competition Council have some special rights in order to request information for the purpose of the investigation. Following provisions of the Law on Competition investigators have rights to get information (data, documents, *etc*.) from the undertakings, against which the investigation is carried out, and from any other undertakings, public institutions or other persons, if they have information relevant to the investigation. It must be noted, that these requests are obligatory only in case if the addressees are properly informed about the legal background of these requests, *i. e.* the investigator must provide information about the investigation concerned (give a copy of the decision of the Competition Council to start the investigation) and must present document confirming his powers to request the information during the investigation (usually authorization to carry out investigative actions for certain investigator is given in the decision of the Competition Council to start the investigation). The Law on Competition does not make any difference between requests for information addressed to the undertakings under investigation, other parties of the proceeding and any other addresses. All of them must submit requested information, if grounds for this request are properly presented to them. If they do not submit the requested information, grounds for their liability under administrative law may arise.

None of the regulations of the administrative proceeding carried out by the Competition Council provide for formal procedure of reviewing or reconsidering of the information requested or of the deadlines for the submission of the requested information. However, the addressees may always contact the investigator for the clarification or for the reconsideration of the request, giving their reasons why the request, in their opinion, is unreasoned or cannot be executed or not executed in time. Thus the addressees of the request and the investigator may find a common solution of problems that arise because of the requested information.

On the other hand, if the addressee – undertaking which behavior is investigated – thinks that the investigator misuses its investigative powers, this addressee may lodge the complaint to the Competition Council within 10 days from the reception of the request. The Competition Council its decision on these actions of the investigator must adopt within 10 days from the receipt of the complaint. This decision then may be appealed to the Vilnius Regional Administrative Court. Other addressees of the requests of the information may lodge their complaint following general rules established in the Law on Administrative Proceedings.

4. Agreed resolutions of enforcement proceedings

At what stage or stages of an investigation and/or litigation can the parties resolve an enforcement matter by means of a mutually agreed disposition with your agency? Are there restrictions on the types of cases that can be settled in this manner? Does your agency actively seek to settle cases?

The Law on Competition does not provide for the formal settlement procedure when an agreement with the Competition Council may be reached. However, the parties of the procedure, *i. e.* undertakings suspected of the participating in the anticompetitive agreement, until the completion of the investigative

stage of the administrative procedure may admit their anticompetitive behavior and, if fulfill certain other conditions, they may be exempted from fine or get a reduction of it (leniency program).

As a form of a settlement procedure for any cases when anticompetitive behavior of the undertakings is investigated, these undertakings may acknowledge the material circumstances established by the Competition Council in the course of the investigation (*i. e.* the circumstances described in the statement of objections). In general it means that undertakings acknowledge that they, however, did indeed violate the competition rules. That kind of acknowledgment may be expressed in written explanations on the statement of objections or may be expressed orally during the hearing of the case (in this case this fact is clearly recorded in the minutes of the hearing). The fact of the acknowledgement is taken into account when the Competition Council makes its decision on the infringement of the competition rules and, following provisions of the Law on Competition, this fact is considered to be a mitigating circumstance thus constituting grounds for reduction of a fine usually by 10 per cent of the fine, which would be imposed on the undertaking concerned otherwise. It must be mentioned, that the investigators during the investigation and the Competition Council during the hearing of the case always encourage undertakings concerned to acknowledge the infringement of the competition rules and thus benefit from the reduction of fines to be imposed.

If the settlement is not reached during the Competition Council's administrative procedure, later settlement (*e. g.* during the appeal against the Competition Council's decision procedure in administrative courts) and any benefits from it are not possible. Of course it is possible that the undertaking concerned acknowledges its participation in the infringement of the competition rules during judicial procedure in administrative courts; however this fact could only lead to the settlement of the judicial case but would not change the decision of the Competition Council and sanctions imposed on the undertaking by it.

5. Judicial review and interim relief

At what point in the competition law enforcement process does an independent judicial body have an opportunity to review the conclusions of your agency as to whether a violation of the law has occurred? What level of deference does the judicial body grant to the agency's decision? If the agency's decision has resulted in a sanction or remedy, what is the effect of the pending judicial review on that sanction or remedy? Can the judicial body grant interim relief? What is the timing of the review by the judicial body, and are there procedures for expedited review of time-sensitive business transactions or conduct?

An independent judicial body (Vilnius Regional Administrative Court) can review the conclusions of the Competition Council when the undertakings as well as other persons who believe that their rights, protected by the Law on Competition, have been violated, appeal against the decision of the Competition Council. A written complaint can be lodged not later than within 20 days after the delivery of the resolution of the Competition Council or publication of its operative part in the official gazette "*Valstybės žinios*". In certain cases, only the parties to the proceedings have the right to appeal. The decision of the Vilnius Regional Administrative Court further may be appealed to the Supreme Administrative Court of Lithuania, which adopts final decision in the case.

The Law on the Administrative Proceedings and the Law on Competition stipulates that the court has a right to adopt decision *inter alia* to amend the decision of the Competition Council or even revoke it (partially or fully). However following the provisions of the Law on the Administrative Proceedings the court shall not make assessment of the disputed administrative act and acts (or omission) from the point of view of political or economic expediency and shall only establish whether or not there has been in a specific case an infringement of law or secondary legislation act, whether or not the entity of

administration has exceeded its competence, also whether or not the act (action) contradicts the objectives and tasks for the purpose whereof the institution has been set up and vested with appropriate powers.

From these provisions it follows that the judicial body may review in full the decision of the Competition Council. However, because of the nature of the competition law and cases, when decisions of the Competition Council is based *inter alia* on the economical reasoning and assessment (*e. g.* the definition of the relevant market, establishment of the dominant position, *etc*.), especially in complex cases, the court may not be able to make a full revision of the Competition Council's decisions. The judicial revision basically is limited only to the legal assessment of the case, *e. g.* is the infringement properly qualified; are evidential and reasoning thresholds met; were any violations of the principal procedures, especially rules intended to ensure objective evaluation of all circumstances, made. Meanwhile economic assessment falls outside the revision of the court, except some obvious errors of the economical reasoning are detected by the court. Thus it can be concluded that, despite the fact that the court has a right to fully revoke the decision of the Competition Council, the court still grants some level of deference to the Competition Council's decision as far as the issues related to the economic assessment of the certain case are concerned.

The Law on Competition states that the lodgment of a complaint to the Vilnius Regional Administration Court against the Competition Council's decision does not suspend the implementation of it, unless this court decides otherwise. The court may grant an interim relief only if the grounds established in the Law on the Administrative Proceedings exist either by its own initiative or after the request of the interested party. Usually the court grants interim relief and suspends the validity of the Competition Council's decision only in cases if there is enough evidence that after the final decision in the judicial case is adopted it would be impossible to implement it.

According to the provisions of the Law on Administrative Proceedings the period for the preparation for the hearing of the case must not last longer than 1 month after the complaint has been lodged. The hearing itself must be finished and the judgment of the court concluded within 2 months from the day the decision to hear the case was made. The court may extend the time limit of the hearing for a period of up to 1 month. The judgment of the Vilnius Regional Administration Court may be appealed to the Supreme Administrative Court of Lithuania where the same time limits would be applied. However, in practice these terms of the judicial review are usually longer and it takes up to 6 months for the Vilnius Regional Administrative Court to adopt its decision and up to 1 year for the Supreme Administrative Court of Lithuania to adopt its final decision of the case. There is no possibility to have an expedited review of the cases related to the review of the Competition Council's decisions.

RUSSIAN FEDERATION

The FAS Russia examines the cases on violation of the antimonopoly legislation basing on the Federal Law No. 135 of July 26, 2006 "On Protection of Competition" (hereinafter referred to as the Law) and on the Administrative Regulation No. 447 of the FAS Russia "On initiation and examination of cases on violation of the antimonopoly legislation".

When the FAS Russia is going to initiate the case it establishes specialized Commission on examination of a case on violation of the antimonopoly legislation (hereinafter refer to as the Commission). Within the period of 3 days from the date of start of case examination the FAS Russia sends a letter to the parties to the cases where it informs about the fact of case examination, the background to its examination and the contact details of the person responsible for this case in the FAS Russia. The Commission is called upon the Order of the Head of the FAS Russia.

During the case examination the Commission estimates all collected evidences to the case on its own perception basing on the complete, objective and direct investigation of such evidences.

The Commission has a right to attract independent experts to the examination of the case according to the Part 4 of the Article 43 of the Law. However these experts can not be members of the Commission. Several times the FAS Russia requested the best Moscow Universities on economics and government regulation to prepare research projects on a particular theme in order to find the ways of solving difficult questions arisen during the case examination.

The Commission of the FAS Russia includes the permanent representatives of the Central Bank of the Russian Federation when examining the case on violation of the antimonopoly legislation by credit organizations in the banking services market and the permanent representatives of the relevant executive authorities of the Russian Federation when examining the cases on violation of the antimonopoly legislation by financial organizations (except for the credit organizations) that have licensees issued by executive authorities in the securities market (such as Federal Service on Financial Markets and Federal Service of Insurance Supervision). These representatives can make up almost a half of the Commission members. This is done in order to take fair decisions and to take into consideration both competition requirements and requirements of self-regulators.

According to the Part 1 of the Article 25 of the Law all economic entities must submit the documents, explanations and information in written or oral form including confidential information and official correspondence in electronic format to the FAS Russia basing on the FAS Russia motivated request. The economic entities are liable for non-provision or untimely provision of information or submission of inadequate information. All the documents are considered on the meetings of the Commission with participation of the parties ensuring protection of their rights.

The Central Bank of the Russian Federation must provide the FAS Russia with its regulatory acts as well as the information (except for the bank secrecy) in written form that the FAS Russia needs in order to conduct the analysis of the competition conditions in the credit organizations services market and to control over the market conditions.

When submitting information the parties mark those elements of information that are to be considered as confidential. Notions of confidential information, business secret, etc. are strictly defined in the Russian federal legislation (for instance, Law No. 5485-1 "On State Secret", Federal Law No. 149-FZ "On information, information technologies and on protection of information", Federal Law No. 98-FZ "On Commercial secret" and other.

The FAS Russia can not disclose the received confidential information while performing its functions in accordance with the part 1 of the Article 26 of the Law except for the cases provided for by the Russian legislation.

In case of disclosure of confidential information the representatives of the FAS Russia incur an administrative, civil-legal and criminal liability (part 2 Article 26 of the Law).

The harm made to the private or legal persons as a result of confidential information disclosure by the representatives of the FAS Russia is compensated from the treasury of the Russian Federation (part 3 Article 26 of the Law).

Rules on protection of confidential information are compulsory both for merger review cases and antitrust enforcement.

The procedure of the disclosure of information on the FAS Russia' activity, the list of open access information as well as the procedure of information placement on the FAS Russia official web-site are provided for in the Regulation of the FAS Russia "On Information Policy" approved by the Order of the FAS Russia No. 848 of 21.12.2009.

In order to be an open and sensitive authority to the fast changing situations and to help business ensure fair competition conditions in the markets the part 1 of the Article 48 of the Law provides for the list of circumstances that allow terminating the case on violation of the antimonopoly legislation. For example, the Commission can terminate the case examination if the party that violated the Law voluntary eliminated the violation and the circumstances of this violation etc.

The FAS Russia had never practiced termination of case examination based on the mutually agreed disposition of the parties as such opportunity is not provided for in the Law.

The decision of the FAS Russia can be appealed during the three months period from the moment of its issue (according to the article 52 of the Law). In case if the appeal is sent to the arbitrage court the execution of instructions issued by the FAS Russia are stopped till the decision comes into force.

The most recent example with regard to the long history of appeal procedure is the decision of the High Arbitrage Court of the Russian Federation (the highest judicial instance in Russia) with regard to the case of the FAS Russia vs. TNK-BP Holding, where it confirmed the FAS Russia decision on the fact of abuse of dominance by the TNK-BP Holding on the wholesale oil product market and on imposition of a fine over 36,6 mln US dollars. This decision was finally confirmed despite the lack of support of the FAS Russia by the three different lower court instances.

SOUTH AFRICA

1. Introduction

Proceedings in the Competition Commission("the Commission") of South Africa and its counterpart the Competition Tribunal ("the Tribunal") are governed by the Competition Act[1] and Regulations determined by the Minister of Trade and Industry to detail rules for the conduct of proceedings in these two juristic bodies. In fulfilling its mandate the Tribunal and Commission must have regard to the principles enshrined in South Africa's Constitution which protect the rights of individuals to just administrative action[2] that is lawful, reasonable and procedurally fair.

2. Decision Making Process

In accordance with the rules of natural justice and in order to ensure complete procedural fairness, the Tribunal is a juristic body that acts independently of the Commission and its function is to adjudicate matters referred to it by the Commission. The Tribunal appoints its own members and staff and has a separate set of rules[3] governing its procedures from that of the Commission. At no stage prior to referral are members of the Tribunal involved in a matter.

In order to ensure that all sets of evidence are placed before the Tribunal, their rules allow for an exchange of pleadings, commencing with referral documents that are filed in the Tribunal. The rules also allow for a discovery process, whereby parties will exchange evidence that they will use and produce before the Tribunal. The Tribunal procedures allow for a pre-hearing conference whereby parties often discuss issues on discovery, witnesses, expert witnesses etc.[4] Hearings before the Tribunal are conducted in public and in an inquisitorial manner[5]. The Tribunal may direct parties to address them on specific issues by actively engaging them during the process. Witnesses can be summonsed by the Tribunal to testify at hearings.[6] In addition there is an intervenor procedure allowing any person with a material interest in a matter before the Tribunal to intervene upon application[7]. The Commission often appoints an independent legal counsel and in very complex cases (usually those involving abuse of dominance) an independent team of economists to evaluate the case and present it to the Tribunal on their behalf. These independent economists will often testify before the Tribunal as expert witnesses.

1 South African Competition Act No 89 of 1998.

2 Section 33 of the Constitution of the Republic of South Africa.

3 Rules for the Conduct of Proceedings in the Competition Tribunal ("Competition Tribunal Rules").

4 Rules 21 and 22 Competition Tribunal Rules.

5 Section 52(2) of the South African Competition Act.

6 Rule 47 of the Competition Tribunal Rules.

7 Rule 46 of the Competition Tribunal Rules.

3. Confidentiality

Confidential information is defined by the Act[8] as "trade, business or industrial information that belongs to a firm, has a particular economic value and is not generally available to or known by others." Discovery of documents[9] is permitted or directed by the Tribunal at the pre-hearing stage. Special procedures are available for disclosure of certain confidential information without compromising the rights of the defense, for example, the Tribunal has ruled[10] that the legal representatives of respondents in a matter may obtain access to confidential records filed by the Commission subject to application to the Tribunal for leave to do so. However the records can only be inspected at the Commission's offices and the legal representatives must sign confidentiality undertakings prior to the granting of such access. Underlying the concept of confidentiality and allowing the process to work more effectively is the principle that if a party makes a confidentiality claim, the Commission is bound by this until such time as the Tribunal (upon application by parties who wish to challenge this) directs otherwise.

The Rules[11] governing the protection of confidential information obtained from parties by the Commission lists the following type of information as restricted:

- Information that was determined as confidential by the Tribunal or is subject to a confidentiality claim[12]
- The identity of a Complainant who requests that he remain anonymous
- -Information received by the Commission during the investigation of a complaint or a merger until that process has been finalised and the Commission has issued its determination.
- Information that falls under the Promotion of Access to Information Act no 2 of 2000
- Documents containing internal communication between officials of the Commission, opinions, reports and recommendations obtained by the Commission, discussions and minutes of meetings held to formulate a policy in the performance of the Commission's duties.

The information listed above is automatically confidential. In addition to this, parties submitting information to the Commission who wish for it to remain confidential, must complete a form CC7. This is a document requiring all information regarded as confidential to be listed. The party claiming confidentiality bears the onus of completing their own form CC7. Failure to do so could result in disclosure of the information to third parties, however the party who submitted this information does have a prior right to object to the disclosure. The Commission may also claim docket privilege or litigation privilege when challenged to produce information for public disclosure of investigations. Negligent or intentional violation of the confidentiality rules is considered an offence[13] and may expose the Commission to a civil damages claim.

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8 The South African Competition Act No 89 of 1998.

9 Rule 55 of the Competition Tribunal Rules.

10 The Competition Commission v Unilever PLC & 3 others, Case No 13/CAC/Jan02.

11 Rules 14 and 15 of the Rules for the Conduct of Proceedings in the Competition Commission ("Competition Commission Rules").

12 Section 45(3) and section 45(4) of the South African Competition Act No 89 of 1998.

13 Section 69 of the South African Competition Act No 89 of 1998.

4. Requests for Information to Targets of Investigations

Although there are no formal rules governing a review of information requests sent by the Commission to parties, in practice respondents who have been summonsed to provide information often correspond with the lead investigator in a matter regarding the scope of a summons, possible extensions for their submissions or bring up any legal objections they may have to the summons. This correspondence is usually done in writing. All summons issued by the Commission must inform the parties of the relevant sections the Commission is investigating and the specific conduct contravening these sections.[14] The parties are also entitled to access to the form CC1 which contains the initial complaint[15]. If the addressee of the request for information is not a party to proceedings the process is more informal, the request will be sent in the form of a letter not a summons and the Commission lacks the power to ensure compliance.

5. Agreed Resolutions of Enforcement Proceedings

Settlement proposals can be discussed at any time during the investigation. The Commission procedures allow for Respondents to enter into consent orders with the Commission at any time before issuing a notice of non-referral or referring a matter to the Tribunal.[16] During the Tribunal process the parties may hold a settlement conference at any time prior to the Tribunal making a final order.[17] In practice most settlement discussions take place either when the Commission has notified the parties of its intention to refer the matter to the Tribunal for prosecution or during the Tribunal hearing. The Commission also has a Corporate Leniency Policy that encourages parties to come forward with evidence or information of a contravention in exchange for full immunity from prosecution. There are no restrictions on the type of cases that will be settled and the Commission is amenable to settlement in most instances as litigation can be a long and expensive procedure.

6. Judicial Review and Interim Relief

A complainant may at any stage *after* a formal decision is taken by the Commission approach the Tribunal to review this decision[18]. If the Commission has imposed a sanction and the matter is then referred to the Tribunal the penalty is stayed pending the outcome of the Tribunal's decision. At any time after a decision has been taken by the Commission, whether or not a hearing has commenced at the Tribunal a complainant may apply to the Tribunal for interim relief.[19] Interim relief is also available to parties during the investigation stage, before the Commission has taken a decision, if there is a danger that the party may suffer irreparable loss whilst waiting for the investigation to take its course[20]. The Tribunal may grant the interim order if it is reasonable to do so after having regard to the evidence, the need to prevent serious or irreparable damage and the balance of convenience. Such interim orders do not last for a period longer than six months. The Tribunal may on good cause shown dispense with formalities and

14 Woodlands Dairy (Pty) Ltd & Milkwood Dairy (Pty) Ltd v The Competition Commission, Case No 103/CR/Dec06.

15 Rule 14(c)(i) of the Competition Commission Rules.

16 Rule 18 of the Competition Commission Rules.

17 Rule 23 of the Competition Tribunal Rules.

18 Section 51(1) of the South African Competition Act No 89 of 1998.

19 Section 49C of the South African Competition Act No 89 of 1998.

20 See fn 19.

shorten the time period for interim relief applications by hearing them on an Urgent basis.[21] A decision of the Tribunal may also be taken on appeal or review to the Competition Appeal Court.[22]

21 Rule 28(3) of the Competition Tribunal Rules.

22 Section 61 of the South African Competition Act No 89 of 1998 and Rule 42 of the Competition Tribunal Rules.

CHINESE TAIPEI

1. Introduction

The Administrative Procedure Act was implemented in January 2001. The legislative purpose of the Act is to ensure that all administrative acts are carried out in pursuance of a fair, transparent and democratic process based on the principle of administration by law so as to protect the rights and interests of the people, enhance administrative efficiency and further the people's reliance on administration. Therefore, the Fair Trade Commission (hereinafter the FTC) has to follow the administrative procedures provided in the Administrative Procedure Act in performing such administrative acts as rendering administrative dispositions, entering into administrative contracts, establishing legal orders and administrative rules, deciding on administrative plans, employing administrative guidance and dealing with petitions.

2. Decision-making process

During its investigation, the FTC should comply with Articles 36, 39, 102, and 103 of the Administrative Procedure Act, Article 27 of the Fair Trade Act, and Articles 31 to 33 of the Enforcement Rules of the Fair Trade Act. More detailed rules are provided in the "Guidelines for Case Investigations made by the FTC."

Once the complaint is accepted, an investigation is initiated during which, pursuant to Point 2 of the Guidelines for Case Investigations made by the FTC, the FTC may conduct its investigations in accordance with the following procedures:

- to notify the parties and any related third party to appear to make statements;
- to notify relevant agencies, organizations, enterprises, or individuals to submit books and records, documents, and any other necessary materials or exhibits;
- to dispatch personnel for any necessary on-site inspection of the office, place of business, or other locations of the relevant organization or enterprises;
- to conduct a questionnaire survey, to hold consultation meetings or seminars for obtaining the opinions from other government entities, organizations, academicians, experts, trade associations and related trading counterparts, to conduct on-site investigations and collect related evidence, to ask for professional authentication opinions from professional agencies, academicians, experts or associations, to request for opinions from other regulators or other related agencies in writing, or hold oral arguments.

Moreover, with regard to antitrust and merger review cases, the FTC's Commissioners shall take turns to serve as the reviewing Commissioner of individual cases. Additional reviewing Commissioner(s) may be assigned to jointly review cases if necessary. The Commissioners' Meeting of the FTC is comprised of 9 full-time Commissioners, including a Chairperson and a Vice-Chairperson, all of whom are nominated by the Premier and appointed by the President for a three-year renewable term. The Commissioners must be well experienced in law, economics, finance, tax, accounting or management and shall act

independently in performing their duties. The Commissioners' Meeting is the highest policy-making body, and decisions can only be passed with over half of all Commissioners in attendance and an affirmative vote from over half of those in attendance. Scholars, experts and representatives from administrative agencies or enterprises who are concerned with the matters to be resolved may be invited to attend the Commissioners' Meeting to make statements of facts or express opinions. A Commissioner may request to include his/her dissenting or concurring opinions in the Commissioners' Meeting minutes or publish them on the FTC website.

In antitrust or merger cases that are important and complicated, the FTC will establish an internal task force to properly conduct research on the relevant economic and legal issues. In addition, upon its consideration of the complexity and necessity of the case, the FTC will hold meetings to consult with scholars, experts, government agencies, trade associations, and related enterprises. Therefore, the FTC is able to gather valuable insights and useful market information as well as economic analyses as reference in reviewing the case. The FTC has employed the above-mentioned procedures and Commissioners' meeting system to make sure that the decision-maker is able to fully consider all relevant evidence when reviewing antitrust and merger cases and to ensure sound decision-making in the case reviews.

3. Confidentiality

The matters related to information disclosure and confidentiality are provided for in the Administrative Procedure Act, the Freedom of Government Information Act, and the Computer-Processed Personal Data Protection Act, which are general laws. If otherwise provided in other special laws, the provisions in such special laws shall prevail over the general laws.

According to the Paragraph 1, Article 27-1 of the Fair Trade Act, a party or a related person in the process of the investigation procedure has the right to apply to the FTC for reading, transcribing, copying or taking photographs of relevant materials or files, under the condition that such requests are limited to those necessary to claim or defend his/her legal rights and interests except under any one or more of the following conditions:

- Drafts of an administrative decision or any other working document prepared for a case;
- Materials related to national defense, military affairs, diplomatic affairs, and any other official secrets that are required to be kept confidential by laws or regulations;
- Materials relating to personal privacy, professional secrets, or business secrets that are required to be kept confidential by laws or regulations;
- Where it is likely to infringe the rights and interests of a third party;
- Where it is likely to seriously obstruct the performance of the official duties in maintaining social order, public security, or any other public interests.

Paragraph 2 of the same article states, "Procedural matters and restrictions relating to the qualifications of applicants, the application period, the scope of materials or files available for access, and the way to proceed as referred to in the preceding paragraph shall be prescribed by the Central Competent Authority."

To this effect, the qualifications of the applicant, the scope of accessible materials of files, application procedures, fees and other information are required, and this is outlined in the "Regulation Governing Access to Materials and Files of the Fair Trade Commission." A party or a related person has the right to

apply to the FTC for reading, transcribing, copying or taking photographs of relevant materials or files. Third parties providing information to the FTC may require that their information be kept confidential and not be read, transcribed, photocopied, or photographed by a party or a related person. The FTC has to consider whether there is a justifiable reason to do so. As only partial data or records are kept confidential, the FTC shall remove that part or seal it appropriately and make the rest accessible. The list for the classifications of, and access to, the materials and files of the FTC is provided as an attachment for reference.

In administrative appeal procedures, an administrative appellant, a party, who has the same interest as an administrative appellant, or an administrative appeal representative may file an application to the agency with jurisdiction of administrative appeal to view, cite, photocopy, or photograph documents in a file pursuant to Articles 49 and 50 of the Administrative Appeal Act. In the event of any of the circumstances set forth in Article 51 of the Administrative Appeal Act, the agency with jurisdiction of administrative appeal shall reject the application. During administrative litigation procedures, the matters related to the access to materials and files are governed by Articles 95 to 97 of the Administrative Litigation Act.

Pursuant to Article 27 of the Computer-Processed Personal Data Protection Act, a government agency which infringes upon the rights and interests of a party and violates any provision of this Act shall be liable for the damages arising therefrom, provided, however, that the above provisions do not apply to damages arising from natural disaster, incident or other force majeure. Article 34 of the same Act provides that "a person who intends to make unlawful gains for himself or for a third party or intends to infringe upon the interests of another by illegally outputting, interfering, changing, deleting personal data files or by other illegal means impeding the accuracy of personal data files thus causing damage to another shall be punished with an imprisonment of less than three years, or detention, or a fine of less than fifty thousand New Taiwan Dollars."

Furthermore, a government official who takes advantage of his position, or opportunity or means available to him to commit the offenses prescribed in Articles 33 or 34 shall be subject to punishments half as severe as those enumerated above. The Congress passed a third reading on the proposed amendment to the Computer-Processed Personal Data Protection Act on 27 April 2010. The name of the Computer-Processed Personal Data Protection Act has been changed to the Personal Data Protection Act. The 2010 amendment comprises some changes, including an increase in civil, criminal and administrative responsibilities. Thus, a violator who intends to make unlawful gains will be subject to an imprisonment of up to five years, or a fine of up to one million New Taiwan Dollars.

4. Requests for information to targets of investigation

Article 26 of the Fair Trade Act states, "the FTC may investigate and handle, upon complaints or ex officio, any violation of the provisions of this Act that harms the public interest." Paragraph 1, Article 27 of the same Act provides that "in conducting investigations under this Act, the FTC may proceed in accordance with the following procedures: 1. to notify the parties and any related third party to appear to make statements; 2. to notify relevant agencies, organizations, enterprises, or individuals to submit books and records, documents, and any other necessary materials or exhibits; and 3. to dispatch personnel for any necessary on-site inspection of the office, place of business, or other locations of the relevant organization or enterprises."

During its investigation, the FTC shall notify the party that is to make statements either in writing or on site. The written notice[776] shall contain the matter to be investigated, the explanations or materials that

[776] Articles 31 and 34 of the Enforcement Rules of the Fair Trade Act and Article 104 of the Administrative Procedure Act.

the notified party is required to provide with respect to such a matter, the time limit within which an appearance must be made or a written statement prepared, the legal basis for the FTC's investigation[777], and the legal effects of failing to present a statement or to appear without due cause[778] (i.e., the FTC may successively assess thereupon an administrative penalty until the party provides the information or appears to make a statement).

Pursuant to Article 43 of the Fair Trade Act, in regard to any person subject to any investigations conducted by the FTC who refuses the investigation without justification, or refuses to appear to respond or to render relevant materials such as books, records, documents, or exhibits by the set time limit, the FTC may impose an administrative penalty of not less than twenty thousand and not more than two hundred fifty thousand New Taiwan dollars upon it. Should such person continue to refuse the investigation without justification upon a further notice, the FTC may continue to issue notices of investigations, and may successively assess thereupon an administrative penalty of not less than fifty thousand and not more than five hundred thousand New Taiwan dollars each time until it accepts the investigation, and appears to respond, or provides relevant materials, documents or exhibits. The party subject to the afore-said disposition may seek an administrative remedy with regard to such disposition.

In case a party or a related person fails to appear to make statements or render relevant materials to the FTC within the set time limit, the subjects may file a written application to request that the FTC extends the period for responding; as to whether or not extensions will be agreed will be decided by the FTC. If the addressee of the request for information is not a party to the proceeding, the FTC will also conduct the same investigation procedures and practices and will only issue the notices of investigations to such addressee as a related person for responding.

5. Agreed resolutions of enforcement proceedings

According to Article 136 of the Administrative Procedure Act, in the event that the administrative authority is unable to ascertain complete factual or legal information during an investigation, in order to achieve its administrative objectives and resolve a dispute, the authority may enter into an administrative contract of settlement in lieu of imposing administrative sanctions. Since it was founded, the FTC with its limited resources has commonly been confronted with cases involving complicated, anti-competitive conduct. Therefore, for an efficacious resolution of individual cases and in the interests of all parties, the FTC enacted the "Guidelines for Administrative Settlement."

Pursuant to the Guidelines for Administrative Settlement, the FTC should consider the following factors prior to proceeding with the negotiation of an administrative settlement contract: 1) the legality and propriety of the mutual concessions of the FTC and the parties; 2) the maintenance of the public interest; and 3) the potential damage to any interested party resulting from the administrative settlement contract made. Prior to proceeding with the negotiation process, the case should be reported at the Commissioners' meeting regarding whether or not to reach an administrative settlement, as well as the key points and scope of negotiation. All administrative settlement contracts shall be made in writing, and conclusions in the contract-making process shall also be made in writing. The major conclusions resolved by the Commissioners' meeting shall be published on the FTC website according to the "FTC Directions on On-line Information."

777 Article 27 of the Fair Trade Act.

778 Article 43 of the Fair Trade Act.

6. Judicial review

The Administrative Litigation Act offers judicial remedy procedures to ensure the rights of the people. Article 4, Paragraph 1 of the Administrative Litigation Act provides that "where a person, who considers his/her right or legal interest was injured by a central or local government agency's administrative dispositions made in violation of law, is dissatisfied with the decision resulting from the administrative appeal filed in accordance with the Administrative Appeal Act or where no administrative appeal decision is made over three months after such filing or over two months after the extending of the period of the appeal decision has expired, such person may file with the High Administrative Court to revoke the litigation proceedings." Article 6, Paragraph 1 of the same Act provides that "litigation to determine the nullity of an administrative disposition and to determine the validity of a legal relation under the public law shall not be filed unless the plaintiff is entitled to immediate legal interests of the decision of such litigation."

Thus, should the parties or interested parties be dissatisfied with the decision of the FTC, they have the right to petition to the Appeal and Petition Committee under the Cabinet within 30 days after receiving the disposition letter or the day after the decision. If they are still dissatisfied with the decision of the Committee, they have the right to bring the suit to the administrative court within two months of the day after receiving the disposition letter. Therefore, the independent judicial body has an opportunity to review the decisions of the FTC as to whether a violation of the law has occurred.

Additionally, based on the FTC's internal statistics, up to the end of April 2010, for each stage of the administrative remedies that the agency with jurisdiction of administrative appeal or administration litigation upheld the FTC's dispositions as follows: 1) the stage of Appeal and Petition Committee, 95.90%; 2) the stage of the High Administrative Court, 93.71%; and 3) the stage of the Highest Administrative Court, 90.00%.

ANNEX

Table 1. Reference List for the Classifications of, and Access to, the Materials and Files of the FTC

Source of materials	Category	Specific materials	Accessibility
Materials provided by the parties	Materials on the identities and backgrounds of complainants	Company license	Not accessible
		Business license	
		Personal ID	
	Facts provided by complainants	Production and sales materials	Accessible in principle unless confidential by nature, but may be
		Statements of opinion	kept confidential at the request of the complainant with justifiable reason
		Other case-related materials	
		Materials unrelated to the case	Not accessible
	Materials on the identities and backgrounds of respondents	Company license	Not accessible
		Business license	
		Personal ID	
	Facts submitted by respondents	Production and sales materials	Accessible in principle unless confidential by nature, but may be
		Statements of opinion	kept confidential at the request of the respondent with justifiable reason
		Other case-related materials	
		Materials unrelated to the case	Not accessible
Materials provided by related parties	Materials on the identities and backgrounds of related parties	Company license	Not accessible
		Business license	
		Personal ID	
	Facts provided by related parties	Production and sales materials	Accessible in principle, but may be kept confidential at the request of the related party with justifiable reason
		Statements of opinion	
		Other case-related materials	
		Materials unrelated to the case	Not accessible

Materials obtained through investigation by the FTC	Interview statement records		Accessible in principle, but may be kept confidential where secrets are involved or where requested with justifiable reason by the maker of the statements
	Questionnaire surveys	Sample design	Accessible
		Statistical findings	Accessible in principle
		Individual questionnaire materials	Not accessible
	Expert opinions	Professional authentication opinions	Accessible in principle, but may be kept confidential where requested by the appraiser or provider of the professional opinion
		Professional opinions	
		Materials on the identities and backgrounds of experts	Not accessible
	Opinions from the participants of the consultation meetings	Records of individual statements	Accessible in principle
		Compiled and categorized conclusions	Accessible in principle
	Opinions from the seminar participants	Records of individual statements	Accessible in principle, but may be kept confidential depending on its nature where so requested by the seminar participants
		Compiled and categorized conclusions	Accessible
	Opinions of industry, associations and organizations		Accessible
	Opinions and materials from other agencies	Letters from government agencies and statements made before the FTC by representatives of agencies	Accessible in principle, but may be kept confidential at the request of the agency
		The FTC inspection records	Accessible in principle, with the exception of partial data that are kept confidential.
	Other materials obtained by investigation	Material objects (real evidence)	Not accessible
		Photographs	Not accessible
		Audio recordings	Not accessible
International agreements			Not accessible

BIAC

This paper supplements the submissions filed by the Business and Industry Advisory Committee (BIAC) on 8 February 2010 in connection with the OECD Competition Committee's Working Party No. 3 Roundtable, "Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings", held on 16 February 2010.

1. Decision-making process

What procedure does your agency have in place to ensure that decision-makers consider all relevant evidence and remain open to considering different explanations for the conduct under investigation? Are independent teams used internally? Is there an independent review of the case by specialized economists? Are there other channels of input directly to the decision-makers? Are outside analysts or experts used to help decision-makers? What other techniques or practices has your agency adopted to promote sound decision-making?

A central principle of procedural fairness is that authorities should seek to gather evidence in order to establish an accurate factual record on the basis of which sound competition law and policy can be applied. Investigators should therefore be expressly obliged to carry out their task fairly and to take full account of the need to ascertain, collect and record all relevant evidence, without prejudice as to whether such evidence is supportive of charges or exculpatory in nature.

Investigators must take responsibility for gathering all of the information, bearing in mind, particularly in cartel cases, that the evidence of a leniency applicant may not always provide the complete picture. The prospect of an early resolution to an infringement investigation must not lead an agency to short-cut the evidence-gathering procedure.[1]

Evidence should be recorded comprehensively and in a manner that can be made available to the defendant (e.g. an agenda and full record of all facts and matters discussed and provided to investigators during meetings and other discussions with complainants, witnesses and third parties should be made and kept on the investigation file).[2]

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1 Cases in the UK may illustrate these concerns. The OFT recently withdraw a criminal prosecution it had brought against a number of individuals following the emergence of new evidence (which had not been disclosed to the defence team). The OFT also indicated that it intends to examine whether the leniency applicant had provided full and complete evidence. http://www.oft.gov.uk/news-and-updates/press/2010/47-10. In its *Dairy* and *Tobacco* investigations, the OFT reached settlements ('early resolution agreements') with a number of companies. However, in the light of evidence obtained subsequently, the OFT decided to drop certain elements of its case - which may give rise to a need to re-visit the original settlements. http://www.oft.gov.uk/news-and-updates/press/2010/45-10.

2 For example, it is noted that the DG Competition consultation document on "Best practices on the conduct of Art 101/2 TFEU proceedings" (http://ec.europa.eu/competition/consultations/2010_best_practices/index.html, paragraphs 38-45) does not fully address the criticisms of the European Ombudsman in respect of the Intel Article 102 investigation. In its decision, the Ombudsman indicated that the Commission should ensure that a proper internal note, to be placed on the file, is made of the content of all meetings and telephone calls with third parties where

Investigators should have the expertise and resources necessary to collect and evaluate all relevant evidence, to understand the conduct under investigation and to evaluate its impact, including appropriate legal, economic and linguistic skills and specialist support. This requires agencies to have in-house economists or to use external economists who will scrutinise often complex antitrust issues and open a dialogue with the parties under investigation, through their counsel and their economists.

Investigators should respect the rights of every firm to seek legal advice from counsel of their choice. This should include the recognition of legally-privileged status for all advice from in-house counsel and other lawyers advising the firm, whether or not they are admitted to practice in the jurisdiction of the investigation. It should also include permitting a firm to have its chosen counsel, including counsel from outside the jurisdiction, if acting under the supervision of counsel admitted to practice in the jurisdiction, present at all appropriate stages in the proceedings, including at on-site inspections and during interviews of a firm's employees and potential witnesses.

A firm targeted by an investigation should be advised of the applicable procedure and timing, be kept informed of the progress of the case, and be given the opportunity to discuss the case and respond to agency concerns throughout the investigatory procedure. In BIAC's opinion, the rights of defence should be recognised in a full, on-going manner and not, as is currently the case in a number of jurisdictions, be limited to a one-off right to respond to fully developed formal charges presented at the end of the investigation, by which time investigators' views, and the course of the evidence gathered, may have become entrenched. In the practical experience of businesses involved in enforcement proceedings, an early opportunity to comment on agency concerns can be crucially important to minimise misunderstandings and secure a fair process.

The agency should disclose the facts, documents, theories and legal authority to firms under investigation as early in the investigative process as is practicable.[3] Such disclosure should take place, in any event, sufficiently in advance of the preparation of any written statement of charges so as to enable the firm(s) under investigation to address relevant evidence, facts, theories of harm, and legal authorities with the investigators prior to the finalisation of the statement of charges. Investigators should also be available to meet regularly with firms being investigated to discuss the agency's concerns, to explain its evolving view of the facts, evidence and claims at issue and to provide the parties a genuine opportunity to respond to such concerns on an early and on-going basis. The agency should agree to meetings with a party based upon an agenda of issues for discussion to ensure a meaningful, two-way dialogue at those meetings.

A commitment by agencies to such on-going transparency and engagement will not only allow firms a full and fair right to respond but will also help to narrow the scope of disputed issues, correct misconceptions, reduce the likelihood that the agency may be surprised by arguments made in response to its formal charges and enable the agency to test its theories during the course of the investigation, thereby enhancing the quality of the agency's fact-finding and its ability to allocate its resources efficiently.

In particular, BIAC recommends the following as minimum standards for transparency and engagement on a stage by stage basis during the investigation.

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information is gathered or where important procedural issues are discussed. (http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/html.bookmark#hl8).

3 By contrast, for example, in Korea "the level of evidence or other details are not revealed to the defendant during the investigation in principle." Submission of Korea, Roundtable on Procedural Fairness: Transparency Issues in Civil and Administrative Proceedings, ¶ 27 (20 Jan. 2010). The defendant receives access to ***certain*** supporting documents and reference data" only when the Examination Report setting forth the statement of charges is issued. Id., ¶ 29 (emphasis added).

- Initiation - A firm targeted by an investigation should be given written notice of the fact of the investigation; its objective, legal basis and scope; indicative timeline of the investigative process; as well as the investigation team[4] as soon as the implementation of appropriate confidentiality safeguards allow. There should be the opportunity for an early meeting with the investigators, including senior members of the antitrust agency and senior managers of the investigation team, to discuss and clarify the matter.

- Preliminary Assessment - A soon as the investigators have completed their initial evidence gathering and assessment of the case, targeted firms should be informed of the investigators' preliminary assessment, including a description of the factual basis for the possible charges, the evidence and the economic theories and legal analysis contemplated by the investigators in support of the potential charges. The firms should also be given copies of all complaints and supporting materials and of all evidence, both inculpatory and exculpatory, with protection of legitimate business secrets being secured as described in section 2 below.

- Reaction to the Preliminary Assessment - Targeted firms should have the right to react to the preliminary assessment, to discuss the proposed charges and comment on the evidence[5] and the economic theories and legal analysis, including at meetings with the senior staff of the agency, as well as managers of the investigation team and with any economists and other specialists involved. The opportunity to meet and confer with the investigators should be granted sufficiently in advance of any written recommendation by the investigators to the decision-makers on proposed findings of fact and conclusions of law.

- Prior to Formal Charges - It is particularly important that after their reaction to the preliminary assessment, firms under investigation be offered a meeting with the official(s) responsible for deciding whether the investigation should proceed to the stage where formal charges will be made before that decision is taken.[6]

If the agency decides to bring formal charges against the firms under investigation, a written report (the Report) provided to the defendants should identify all charges that the agency is making against them, as well as all documents, statements and other evidence upon which the agency relies.[7] The Report should disclose which entities within each corporate group are charged with responsibility for the charges and the basis for such responsibility. The Report should also include and describe all of the underlying data (including the sources of such data) and the methodology used to prepare any chart, graph or other analysis

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4 The parties should also be kept up to date on an ongoing basis by being informed promptly of any changes in the team membership.

5 The agency should have the ability to encourage - although not require - 'triangular' meetings between all parties and the agency, e.g. to deal with opposing views in respect of the evidence.

6 For example, the OFT's quaintly named "Last Cigarette" meetings in merger cases.

7 A failure on this front lead to the dismissal of a high-profile prosecution against a United States Senator on charges of fraudulent disclosure of gifts from constituents. After a jury had found Senator Ted Stevens guilty of failing to make such disclosures, the prosecutors, on appeal, revealed that they had failed to disclose notes from an interview of a witness that adversely impacted the defendant's ability to cross-examine that witness. Based on this disclosure, the U.S. Attorney General dismissed all charges against the Senator noting that "[a]fter careful review, I have concluded that certain information should have been provided to the defense for use at trial. In light of this conclusion, and in consideration of the totality of the circumstances of this particular case, I have determined that it is in the interest of justice to dismiss the indictment and not proceed with a new trial." See, http://media.adn.com/smedia/2009/04/01/04/Stevens_filing.source.prod_affiliate.7.pdf.

relied upon in the Report. Contemporaneously with the issue of the Report, the agency should provide the defendant with copies of all of the evidence, including all potentially exculpatory evidence, subject only to the confidentiality safeguards described in section 2.

The agency should have the burden of proving each element of the violation charged against the defendants through the evidence relied upon in the Report.

The defendants should be entitled to respond in writing to the Report, to comment on the evidence and to offer their own evidence in rebuttal as well as to respond to the investigators' proposed economic theories and legal analysis. The time allowed for this written response should be fully adequate and should take into account, inter alia, the complexity of the case as illustrated by the duration of the investigation, the need for translations of the Report and of the evidence, and the quantity and complexity of the relevant evidence, including that submitted by the defendant. Businesses regularly have real practical difficulties in responding adequately to charges against them because of the inadequate time allowed by agencies for the formal response, including in cases where the investigation has taken several years, meaning that extra time is needed to investigate historic facts. A fully adequate period for response would not cause any significant delay in the overall timeframe of the investigation.

Where a Report makes charges against multiple defendants or where a version of it is provided to any other party for comment, each defendant should have the right to submit comments, and to receive and respond to comments submitted by others.

The defendant should also be provided with full details of any proposed penalty and remedies which the investigators intend to propose to the decision-maker(s), the manner in which any penalties have been calculated, the necessity for any remedies and the facts and evidence to be relied upon to justify them. Agencies should bear the burden of proving that proposed penalties are proportionate to the seriousness of the infringement and the damage caused to consumers and the economy[8] and consistent with penalties imposed for other economic and corporate offences. Depending upon the structure of the agency's process, the issue of penalty and remedies may be more fairly addressed at a separate later stage, following the process regarding the existence of the violation, in which case defendants should be given a full opportunity to respond in writing and request a hearing regarding any penalty and remedies proposed at that stage. It is the practical experience of business that in many cases these issues are at least as controversial as the basic questions as to liability and extending a properly transparent process to the issue of penalties and remedies is not only crucial to basic fairness but might significantly reduce the need for and complexity of appeals.

As well as the opportunity to respond in writing to the charges and any proposed penalty and remedies, defendants should have the right to a hearing before the decision-maker(s) or fully empowered agents. It should be clear that merely providing a perfunctory hearing, in the absence of the minimum due process standards applicable to the investigatory stage discussed above, does not in itself constitute adequate due process.

The purpose of this hearing is to provide the defendant with the opportunity for a live, in-person presentation of their response to the charges, for the defendant to question the evidence and witnesses relied upon by the investigators, including any complainants and others who have provided evidence on which the agency relies, to query the investigators and bring forward witnesses for the defence, who will also be available for questioning. The hearing should provide the decision maker(s) with the opportunity to

8 See for example the judgment of the Paris Court of Appeal (19 January 2010) reducing significantly the fines imposed on a number of steel companies (www.autoritedelaconcurrence.fr/doc/ca08d32_siderurgie.pdf).

evaluate the charges, the strength of the evidence, the credibility of the witnesses and the company's defences and hence to evaluate the extent to which the investigators have discharged their burden of proving the charges.

The schedule for such hearings should be set after consultation with the defendant and should allow ample time sufficient for full consideration of the case, bearing in mind the complexity and volume of the issues and the evidence. Rules governing hearings should be established well in advance and rules of procedure and evidence at the hearing should be applied equally to the agency and the defendant and not be subject to change without the agreement of the defendant.

The submission of additional evidence and arguments by the agency following the close of this hearing should be prohibited absent extraordinary circumstances. The defendant should be allowed to make supplemental submissions following the hearing in response to any new matters raised and any such supplemental submissions should be disclosed to the other parties who should be provided with a reasonable opportunity to respond.

Once the Report has been issued, *ex parte* contact between the agency staff presenting the case against the defendant and the decision-maker(s) and their staff should be prohibited until such time as the final decision has been rendered.[9]

It is critical to a fair process that there be a clear functional and institutional separation between the roles of those responsible for conducting the investigation and those responsible for making any enforcement decision to which such investigation may lead.

Many regimes entrust the investigation and decision-making function to different bodies but these functions should be separate even if they are discharged by the same agency. An agency responsible for investigation and decision-making which does not rigorously separate these two functions will inevitably be perceived to be subject to prosecutorial bias, however genuinely well-intentioned and ethical its officials may be.[10] Rights of appeal are not a practical substitute, so far as business is concerned, for fairness at the agency stage, given the additional time, costs, commercial and reputational damage incurred while an appeal is pursued and given the fact that evidentiary standards of review differ by jurisdiction and are not always *de novo*.

Agencies should make use of a 'devil's advocate' panel and explain in guidelines when and how this panel will be involved in the investigatory process. Critical documents should be made available to this panel in advance and the panel should be able to put questions to the parties too - i.e. the panel should not be a 'one-shot' cross-check, but rather a genuine internal testing of the agency's provisional thinking on an ongoing basis.

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9 The defendant's right to respond to the agency's charges has little value if the investigators can circumvent that right through ex parte contact with the decision makers or their advisors.

10 Wils, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function" (2004) 27 *World Competition: Law and Economic Review* 202, 215. For example, in Case Number 2001 Heon-Ga 25, the Seoul High Court on its own initiative asked the Constitutional Court of Korea to rule whether the procedures of the Korean Fair Trade Commission violated due process under the Korean Constitution. While the Court held the KFTC's procedures were not unconstitutional, 4 out of the 9 judges dissented, arguing that the KFTC violated due process under the Korean Constitution by failing to segregate its investigatory and decision-making bodies; failing to provide defendants with sufficient opportunity to gather evidence and put forth a defense and failing to ensure that its Commissioners possessed sufficient expertise, qualifications and independence.

Decision-makers should be independent of political influence.

Decisions should only be addressed to defendants identified in the Report and must only rely on facts and evidence disclosed to the defendants and to which defendants have had a full opportunity to respond. Decisions should be fully reasoned and include all relevant findings of fact and conclusions of law. Any adverse decision should address all of the major defences and points raised by the defendants and should explain why they were not persuasive.[11] Similarly, an agency should explain the underlying reasoning for a decision not to bring formal charges following an investigation through the issuance of a closing statement or similar document.

Fundamental rights of the defence require that the investigation should be carried out expeditiously[12] and business is interested in avoiding excessive periods of uncertainty while investigations continue, particularly where the fact of the investigation is in the public domain and the business risks reputational harm. At the same time, it is not in the interests of due process to establish unreasonably short time periods that sacrifice the time required to give proper attention to a firm's response to any allegations against it. BIAC therefore recommends that the time period for an investigation should be set by the agency at the start of the proceedings taking account of the complexity of the matters concerned, the need for translation and subject to overall maximum time limits. The investigation period should be extended only when delay is caused by the defendant's failure to deal promptly with reasonable requests from the investigators or by serious unforeseen causes.

2. Confidentiality

How does your agency balance a defendant's right to review and respond to evidence that will be used against it with the need to protect confidentiality? Are there special procedures available for disclosure necessary to protect rights of defence, e.g. by limiting the disclosure to legal representatives so as to ensure that business secrets are not divulged to competing businesses? How is confidential information defined? What rules apply to the protection of confidential information obtained from parties by your agency? Is such information automatically considered to be confidential, or does the party have to identify it as such? If such information is to be disclosed to other parties or made public, does the party have a prior right to object to the disclosure? How does your agency balance the benefits of public disclosure of ongoing investigations with the need to respect the confidentiality of targets of proceedings and possible effects on their reputation? What the penalties for negligent/intentional violation of confidentiality rules?

Throughout enforcement proceedings, a competition agency will regularly be faced with tension between the need to provide firms subject to the investigation with full details of the complaints and evidence to enable them to respond fully to the allegations on the one hand and the confidentiality required to protect legitimate business secrets of complainants and others participating in the investigation on the other hand. The agency will also need to safeguard the confidential information of firms under investigation.

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11 Except where expressly agreed to by the defendant pursuant to a settlement procedure.

12 The need to act within a reasonable time in conducting administrative proceedings relating to competition policy is a general principle of EU law. This is an element of the right to good administration - contained in the Charter of Fundamental Human Rights, made binding by the Lisbon Treaty. See also *French Perfumes* (Judgment of the Paris Court of Appeals of 10 November 2009) where the decision of the Conseil de la Concurrence was quashed on account of the excessive length of the proceedings (specifically the 4.5 year delay between the act under investigation and the date on which the companies became aware of the fact that they would be required to submit a defence).

It is important for agencies to ensure that confidentiality protection extends only to information that is legitimately in need of protection from disclosure. An agency should not redact or anonymise information on its own initiative. The agency should in its procedural rules provide clear guidelines identifying the criteria used to define confidential information in a manner consistent with the laws of the jurisdiction concerned. It is good practice for an agency to have in place a procedure for review and mediation of disputes concerning confidentiality. Business finds such procedures useful, even if they are informal and internal, particularly where judicial review of such procedural questions is available only after the outcome of the enforcement proceeding or is costly and time-consuming.

In providing access to the file, the agency should give the defendant access to all materials, including any information determined by the agency to be confidential (which as discussed below, may be subject to restrictions limiting the employees who may access such confidential information).[13] In exceptional circumstances, i.e., where there is compelling commercial sensitivity surrounding the sharing of certain confidential information such that it would be demonstrably harmful to allow a defendant's employees full access to it even under the safeguards described in paragraph 2.4, it may be appropriate to request that parties agree to special procedures for dealing with the manner in which defendant's employees are provided with access to such exceptionally sensitive elements (without prejudice to the defendant's right to access materials).[14]

It is also important that agencies have in place and implement rules requiring agency personnel to protect all information gathered as part of investigations, including the status of investigations and possible procedures, from improper disclosure and from use otherwise than for the purpose of the investigation in question. Such rules should ensure that the agency does not share information with anyone other than the parties being investigated and agency personnel working on the investigation. The rules should also provide that the firms being investigated and others participating in the investigation must not disclose such materials to anyone other than their counsel and retained experts or where required by law and must not use such materials otherwise than for purposes of the investigation in question.

Finally, the agency should provide the defendants, complainants and third parties with an opportunity to request that any confidential information they submitted be redacted from the public version of the decision.

3. Requests for information to targets of investigations

Does your agency have procedures to review information requests with the party? Is the party informed of the theory of the case and reasons for requesting the information? Can the party ask for a reconsideration of the information requested and/or deadlines, or appeal to a reviewing

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13 Procedures, such as some "data room" type arrangements or limiting access to the file as a whole to defendant's counsel, in the practical experience of business, may be unsatisfactory and deny the defendant the ability to understand in context the detail of the case against it. Business is most concerned that short-cut procedures may become the norm, e.g. DG Competition's consultation document on best practices (paragraph 85) contemplates that a defendant may not "unduly refuse" a data room procedure (under which only its external counsel will have access to the file, undermining the company's own right to access as well as its right to rely on internal counsel).

14 Such special procedures could include, for example a procedure pursuant to which the defendant would be given access to the confidential information on terms defined in an access agreement between the parties and the agency (whose terms would regulate *inter alia* the identity of those persons within the firms in question who may have unrestricted access and, if deemed necessary, penalties for breach of non-disclosure or use restrictions).

office within the agency? Do procedures and practices differ if the addressee of the request for information is not a party to the proceeding?

The procedures available to investigators for the gathering of evidence should be employed in a reasonable and proportionate manner, taking account of the nature of the proceedings and the burden placed upon the subjects of the investigation and other market participants involved. Companies should be given reasonable time to respond to such requests, upon consultation with the agency.

General inquiries, such as market studies or sectoral inquiries, should be confined to situations where an agency can demonstrate that the inquiry is necessary and proportionate in light of the agency's evidence-based competition concerns. Where inquiries are appropriate, they should be defined clearly and as narrowly as the identified competition concerns permit. Requests for information and the format for its provisions should be designed to minimise the burden on the market participants concerned[15] while enabling the investigators to understand the conduct or transaction under investigation and its likely impact on competition in the affected market.

Invasive measures such as surveillance, on-the-spot investigations of company premises and private homes, the removal of forensic images of company data and searches should be used only in proceedings concerning serious "hard core"[16] violations, only when circumstances so require, and only upon warrant confirming the necessity of such measures. The investigating authority must also take care to respect relevant data protection and privacy laws, in particular when handling electronic data. When questioning individuals in the course of investigations, great care must be taken that they are informed of their rights, in particular their right to privilege against self-incrimination.

4. Agreed resolutions of enforcement proceedings

At what stage or stages of an investigation and/or litigation can the parties resolve an enforcement matter by means of a mutually agreed disposition with your agency? Are there restrictions on the types of cases that can be settled in this manner? Does your agency actively seek to settle cases?

Agreed resolution policies ('settlements') should be flexible but also transparent. Agencies should make it clear in guidelines when they regard a case as being suitable for settlement. Although some cases may be more suitable for settlement (e.g. a cartel case where the core facts are not contested) than others, there is no reason for an agency to restrict itself in terms of which cases may be settled. Agencies should also have the ability to settle 'hybrid' cases - i.e. where not all of the elements of the case are agreed between the agency and the parties under investigation; or where not all of the parties are in agreement with the agency.

It is important to make a distinction between (i) those parties who admit the facts and provide evidence (leniency in the EU; amnesty in the US); and (ii) those parties that dispute at least some of the facts or cannot or do not wish to confirm them but, nevertheless, wish to resolve the matter speedily (whether because the party is simply not in a position to challenge the facts - e.g. due to sale or purchase of the business, the departure of implicated personnel - or prefers to limit the disruption and reputational damage of a contested case). The latter category of parties should still be able to settle the case without admission as to the facts or legal theories concerned and should not be prejudiced by the fact that they wish

15 The scope and format of information requests should be discussed with the parties where appropriate, e.g. in sectoral inquiries or merger investigations where the timetable allows this.

16 "Hard-core" infringements generally include price fixing; output limitation; and the sharing of markets or customers between competitors.

to challenge certain aspects of the case. The agency should ensure that the case is founded on facts which are capable of being proven.

In cases involving multiple defendants, when considering publication regarding the outcome for some defendants only, the agency shall have due regard to the presumption of innocence for all remaining defendants. In most cases, given the risk of irreparable reputational damage, this may require that publication be delayed until the case against all defendants is resolved.

Prior to making any press release or public statement regarding enforcement proceedings or decisions, the agency should notify the firm concerned. It is best practice to provide sight of the proposed text and an opportunity for the firm to comment on it. Business finds such openness by an agency in relation to planned publicity extremely helpful in practice to ensure an appropriate firm response to press and stakeholder enquiries and to avoid unintentional disclosure of confidential material.

5. Judicial review and interim relief

At what point in the competition law enforcement process does an independent judicial body have an opportunity to review the conclusions of your agency as to whether a violation of the law has occurred? What level of deference does the judicial body grant to the agency's decision? If the agency's decision has resulted in a sanction or remedy, what is the effect of the pending judicial review on that sanction or remedy? Can the judicial body grant interim relief? What is the timing of the review by the judicial body, and are there procedures for expedited review of time-sensitive business transactions or conduct.

The courts play a significant role in guaranteeing due process, particularly when competition agencies are an administrative body. It is important for the courts to ensure antitrust proceedings are conducted in a fair manner. The courts' function as a check and balance of the competition agency enhances not only the credibility of the enforcement action, but is in keeping with basic principles for fairness and rule of law that are hallmarks of a developed and accountable legal system.

Defendants should be entitled to a timely right to appeal any decision issued by a competition authority before a court consisting of impartial judges. In the interests of certainty for all parties and the proper administration of justice, the court must be obliged to give judgement within a reasonable time (and with appropriate rules regarding interim relief including suspension of decisions under appeal where appropriate).

Courts should have full jurisdiction, ensuring that not only the defendant's rights with respect to transparency and due process were respected by the competition authority; but that the court also reviews the law and facts relied on by the agency (as well as any exculpatory evidence not relied upon by the agency) to come to its own appraisal of the law and facts. In doing so, the role of the courts should be to confirm that the ultimate burden of proof was indeed met by the agency. Finally, the court should review any imposed penalty or remedy to determine that it is appropriate and proportionate.[17]

[17] This should include its own assessment of whether the penalty/remedy is proportionate and consistent with other cases, as described above in paragraph 1.14.

SUMMARY OF DISCUSSION

The Chair opened the roundtable and reminded the delegates that the roundtable was a continuation of the discussion on procedural fairness which was started in February 2010. The purpose of the roundtable was to discuss the balance between transparency and confidentiality, the availability of settlement procedures and judicial review.

To start the roundtable, the Chair introduced Mr. Götz Drauz, who would provide an opening presentation on confidentiality issues in administrative antitrust procedures.

1. Confidentiality issues

Mr. Götz Drauz started by outlining the tension between respecting the rights of defence of the parties while at the same time respecting the confidentiality of those providing information to competition authorities. These two legitimate and competing interests must be reconciled to enable parties to properly understand the case against them without causing disproportionate damage to information providers. Competition authorities need to foster a reputation for respecting confidentiality to ensure the continued supply of information in ongoing investigations, while simultaneously using all relevant evidence in their possession to establish if there has been an infringement of competition law. A fine balance must be struck, in which competing interests are carefully weighed against each other to arrive at a workable solution. Different agencies operate in different legal and cultural contexts, and there is no 'one size fits all' approach. However, active and good faith engagement of all interested parties can go some way to resolve the matter.

When assessing allegedly confidential information, there is a two step process that agencies typically follow. First it must be established if the information in question is confidential under the applicable law and second whether, on balance, disclosure to a party other than the provider should nevertheless be made. Regarding the first limb of this test, there are different types of confidentiality that may be recognised in antitrust proceedings. The most important category is that of business secrets, trade secrets or commercially sensitive information. This appears to be an almost universally recognised class of confidentiality amongst antitrust agencies. Whilst the precise definition will vary from jurisdiction to jurisdiction, it generally covers costs and price information, commercial know-how, production and supply information, market shares and commercial strategies. This is the type of information that competition law seeks to prevent competitors from exchanging amongst themselves. Other types of confidential information recognised in many jurisdictions include sensitive personal information such as private telephone numbers and addresses, medical records or employment records of individuals. In many jurisdictions general data protection rules regarding the disclosure of this type of information already exist.

Protecting confidential information that would place the provider under considerable economic or commercial pressure from competitors or trading partners if it were revealed avoids a conflict between the private economic interest of the information provider and the broader public benefits of effective application of the competition rules. Often it is not the information itself that requires protection but the identity of the information provider. Finally, confidentiality is often recognized where disclosure would be against the public interest; for example, if it were to put national security interests at stake.

If the information in question does qualify as confidential, a balance needs to be struck between the protection of confidentiality and the interests in disclosing the information. A number of different factors need to be considered by antitrust agencies, including:

- *the degree of harm* that could be caused to the information provider and the person to which the information relates;

- *the value* as a matter of inculpatory or exculpatory evidence;

- *the availability of alternative non-confidential documents* that can be used to prove or disprove the alleged infringement;

- *the availability of methods to desensitise information* without undermining its value, *e.g.,* non-confidential summaries;

- *policy considerations*, *e.g.,* the agencies' ability to protect confidential information.

The key factor in most jurisdictions is the administration of justice, *i.e.*, the ability of agencies to prosecute and the ability of the accused to defend themselves. In terms of procedure, in most jurisdictions those providing information will need to identify it as confidential and provide non-confidential versions. However, in some instances the agency may also carry out its own initial assessment of the confidentiality of the information.

Once a confidentiality claim has been made, it is often those agency officials involved in managing the case who decide whether the information should be disclosed. In some jurisdictions, there is a separate decision maker, albeit within the administrative agency. For example, the Hearing Officer in the EU is formally part of the European Commission, but able to resolve most confidentiality disputes. In many jurisdictions, the information provider is formally consulted or informally offered the possibility to challenge the disclosure decision before the information is disclosed. Parties to an investigation may also have the right to challenge the agency decision to disclose or not before a judge with a possibility of obtaining interim measures, or they may have to bring an appeal against the main decision.

It is fundamentally important that parties under investigation are able to understand the nature of the case against them, and the evidence used to establish the case. A rigorous assessment of confidentiality claims should be conducted and mechanisms to make the relevant information available without violating confidentiality must be fully explored. If incriminating or inculpatory evidence is deemed to be confidential, the balance of interest may dictate that disclosure should not be made. Furthermore, under the principle of respect of the rights of defence, any information to which a party has not had access should not be used as evidence against it.

There are a number of methods antitrust agencies can employ to provide evidence containing confidential information to the parties whilst respecting confidentiality. The widely used 'conventional methods' involve redacting the confidential information and providing non-confidential summaries, redacting confidential figures, or using 'in camera' sessions in court or administrative proceedings. There are also two less common 'innovative' methods. The first involves making full disclosure of all evidence, including any confidential information, but limiting the persons to whom this information is made available. Such a 'confidentiality ring' will usually consist of external legal and economic advisors. The second method involves limiting the circumstances in which the information is available by placing documents in a data room on the agency's premises. Access is then granted to external advisors under the supervision of agency officials, provided the advisors agree not to disclose the confidential information to their client.

Sufficient information should be provided to allow third parties to contribute usefully to on-going proceedings; their involvement should promote the public interest in effective enforcement of competition rules rather than serve individual commercial interests. There is an extra layer of consideration when courts are involved in the process, either as the decision maker or as an appeal body, as the information will then normally be disclosed to the general public. In many judicial proceedings, the principles of open justice and legal requirements for procedural fairness often provide a powerful argument in favour of disclosure.

Competition agency officials should carry out a critical and thorough assessment of confidentiality claims, which can often be very broad. More experienced (rather than junior) members of the case team should therefore work with the information providers to seek justification for, and identify the, key pieces of confidential information. An open and honest dialogue between the case team and the parties should be encouraged, including informal discussion, and confidentiality issues should be resolved as early as possible in the procedure to allow agency officials to focus on the substance of the case. The publication of guidelines by antitrust agencies governing the treatment of confidential information should also be encouraged. Internal decision-making and dispute resolution mechanisms, for example through the use of hearing officers, can also play a useful role, even if the hearing officers form part of the same organization as the prosecuting authority.

The Chair thanked Mr. Drauz for his presentation and opened the proceedings for discussion. First, she asked the delegation from Germany to explain how they determine what information is confidential, and how it is treated.

The delegation from Germany explained that while no clear statutory definition of 'confidential information' exists in Germany, the term has been defined in the practice of the competition agency and in the case law. Some central elements can be identified, including that the confidential information; (i) must be linked to a business or company; (ii) must not be available to third parties; (iii) must be relevant to the competitiveness of the business or company and; (iv) must be intended to be kept secret by the owner of the business or company. If the information is established as confidential, the Bundeskartellamt cannot base its decision on that piece of evidence. Similarly, while the courts have full access to agency files, confidential information cannot be revealed in an open court case and judgements ordinarily cannot be based on any information deemed confidential. However, a court may refer openly to the confidential information if the holder uses it as part of the oral or written pleadings in court, or if, on balance, the significance of the competitive concern overrules the confidentiality claim. The Bundeskartellamt is keen to protect confidential information in order to foster a trustworthy reputation, and to encourage cooperation and dialogue with the parties. A careful balance is therefore required between the interests of the parties submitting the confidential information, and the interests of the competition investigation.

The Chair next asked Switzerland to comment on how confidential information is defined by the competition agency in its practice.

Switzerland responded that the concept of a business secret is contained in Article 162 of the Swiss Criminal Code. The three conditions necessary for information to constitute a business secret have been established by Federal Supreme Court case law and they include; (i) the information should not be publicly available; (ii) the party has a subjective interest in keeping the information secret and; (iii) there is an objective interest in keeping the information secret, which is assessed on a case by case basis. In the case of any doubt, the secretariat of the Competition Commission will make the final decision on whether the information constitutes a business secret. This decision is then subject to routine appellate procedures.

The Chair then asked Australia to discuss its new rules in force on protected information gathered in cartel investigations.

The delegation from Australia explained that parties can receive the same protection afforded to immunity applicants if they provide information relating to a potential or actual cartel offence. The Australian Competition and Consumer Commission (the ACCC) will only disclose this protected information for the purpose of court proceedings, after considering the public interest in doing so. A limited list of factors are taken into consideration including (i) the fact the protected information was given in confidence; (ii) how disclosure may affect relations with other countries, and (iii) the need to avoid any disruption to national or international efforts relating to law enforcement, criminal intelligence, or criminal investigation. If, after weighing up these factors, a court decides disclosure is warranted, the circumstances in which the information can be used are then limited.

The Chair next turned to Greece.

The delegation from Greece explained how confidentiality issues are addressed in the various stages of Greek competition proceedings. First, in the investigation phase, the Director General for competition is responsible for gathering all the relevant evidence. Confidentiality issues are decided separately by the President of the Board. Second is the intermediate stage, in which the President decides either to reject the complaint or to recommend that the four Commissioners sign the Statement of Objections. Third is the decision making stage, in which the Board takes into account all the evidence before coming to a conclusion. If, at this stage, there is an issue relating to confidentiality, the Board may exercise its discretion favourably towards the rights of the defence.

The Chair then asked the Slovak Republic for its views on how issues of transparency and confidentiality should be balanced.

The delegation from the Slovak Republic responded that balancing parties' rights to defend themselves and the protection of business secrets is assessed on a case by case basis. Factors taken into account include: (i) the evidentiary significance of the information; (ii) the sensitivity of the information; (iii) the extent to which disclosure may cause harm to the company providing the information; and (iv) the seriousness of the infringement under investigation. In a case where disclosure of confidential information is required, the agency would seek the agreement of the interested party to allow disclosure of the information to the other parties' legal representatives.

The Chair next asked the EU to discuss the use of negotiated disclosure and data rooms.

The delegation from the EU first reiterated that the principles of access to the Commission file are laid down in the Commission Notice on access to the file. If a disagreement arises between DG Competition and a party to the procedure, it may be referred to the Hearing officers for independent review. Two additional procedures have been recently introduced that apply when only a limited number of parties are involved in the case, so that the need for redaction of confidential information is reduced. First, under the 'negotiated disclosure' procedure, the party being investigated carries out bilateral negotiations with interested third parties to access the entire file, but with access restricted to a limited number of people, who are designated on a case by case basis. This procedure was used in the recent *Intel* case. Second, under the 'data room' procedure, which is primarily used for the verification of economic data, the file and any confidential information is kept in a physical data room. Access is then given to a restricted group of people, which usually includes legal and economic advisors, who can take copies of documents but cannot disclose the confidential information to their client. These two procedures were formally introduced in non-merger proceedings following the publication of the (Draft) Best Practices for antitrust proceedings published in January 2010. They have been used in five cases so far.

The Chair then turned to Canada for a discussion of how confidential information is shared with other law enforcement agencies.

The delegation from Canada explained that information relating to competition investigations, and the identity of the informant, are kept confidential, with only limited exceptions. One such exception is the ability of the Bureau, under certain circumstances, to disclose confidential information to another Canadian law enforcement agency. This could be any provincial or federal body that has the power under its legislation to enforce criminal or civil provisions. The Bureau's decision to disclose information is entirely discretionary and depends on a number of circumstances including; (i) a potential criminal offence or a threat to public safety or security; (ii) the need to secure a search warrant or wire tap; (iii) an express request from a law enforcement agency or; (iv) a situation involving deceptive marketing practices or mass marketing fraud. In the last case, this may include involvement with international enforcement bodies. If the Bureau is not confident that the reasons for requesting the information are appropriate or suspects appropriate safeguards are not in place, the foreign enforcement agency may be required to submit a request to the Government of Canada under a Mutual Legal Assistance in Criminal Matters treaty to obtain the information in question.. Although it may be necessary in some circumstances to share information, as a general rule the Bureau aims to minimise the extent of the confidential information disclosed. Maintaining confidentiality and ensuring the confidence of parties involved in competition investigations is fundamental to pursuing the Bureau's mandate, and maintaining credibility as a law enforcement agency.

The Chair asked South Africa to clarify how confidentiality rules apply there.

The delegation from South Africa outlined the definition of confidential information, as stated in the Competition Act, as "trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others". Any claim for confidentiality that does not comply with this definition is deemed invalid. During the investigative stage of the procedure information may also be categorised as 'restricted'. This covers all information that is acquired by the Competition Commission of South Africa (the Commission) in the course of its investigation, and includes the identity of information sources and internal Commission notes and research. If a case is not referred to the Competition Tribunal for adjudication, this restricted information remains confidential and third parties cannot access it without a court order or the express consent of the parties who provided it. If a case is referred, the Tribunal rules require this information to be made available to third parties via their legal representatives. The documents must be viewed at the offices of the Commission, and no copies can be made. The legal representatives must sign a confidentiality agreement that they will not disclose the information to their clients until the Tribunal has made a determination. In deciding the case, the Tribunal may use any information that has been declared confidential in its decision making. However, as all Tribunal decisions have to be justified in a public document, two versions of the report are created, an internal confidential version and a public non-confidential version.

The Chair then turned to Turkey for an update on its recently released communiqué on the right to access the file and the protection of trade secrets.

The delegation from Turkey explained that the communiqué was published by the Turkish Competition Authority (the Authority) and set out new rules on confidentiality issues and the rights of access to file. A definition is given for 'trade secrets' and this is used as a proxy for the more general term of confidentiality. It is the parties' responsibility to notify the Authority of any trade secrets in the documents, and provide justifications. The Authority may then carry out an additional ex officio assessment. Under the communiqué, once information is defined as containing trade secrets it cannot be disclosed either to the public or to third parties. The exceptions to this rule include; (i) information that is publicly available; (ii) information over five years old (deemed as having limited trade value) and; (iii) information relating to a violation of the Competition Act. However, the Authority should not disclose any trade secrets solely to strengthen a point made in its decision.

The Chair then asked Mr. Drauz if he wished to comment on the members' interventions. Mr. Drauz commented that transparency remains the main concern for practitioners, in particular transparency as to what issues are most important for the investigating agencies. This can be seen as problematic by some agency officials who may feel they are weakening their position by revealing all the issues under consideration. However, encouraging a dialogue between the agency, defendants and third parties facilitates a better understanding of the key issues and can reduce the length of proceedings. In terms of confidential information, parties have a natural tendency to submit over-inclusive confidentiality claims, and early bilateral discussions between the providers of the information and the agency officials enable a quicker agreement on what claims are genuine.

The Chair then asked BIAC and Ireland for their views on confidentiality issues. The delegation from BIAC emphasised the importance of business involvement in every aspect of the confidentiality debate. There is a hierarchy of confidential information and levels of protection necessary, and balancing this may lead to different outcomes depending on the disclosure required. There are two rules to be considered. First, from the defendant's viewpoint, competition enforcement is not a suitable area for secret trials. Although some competition authorities are required to present their case in court, others are able to make administrative decisions which impose quasi-criminal sanctions on companies. In this context, it is fundamental for procedural fairness that the defendant has access to all the evidence. Second, it is critical that there be protection against the use of non-public information outside the scope of the investigation for which it was produced. This includes use by the defendant as well as by third parties or the authorities. A reasonable protection of confidential information can be achieved through redaction, blurring and the use of ranges. For the protection of extremely sensitive confidential information, limiting disclosure even vis-à-vis the defendant may be necessary. This can be done via the use of special procedures, for example specific access agreements and/or limiting the range of people who have access to the information. However, these special procedures should not be used in place of a careful assessment of what is confidential. In addition, limiting access only to external legal advisors may not be sufficient; senior managers not involved with everyday commercial interactions should also be involved in the disclosure. Also, historic data may not need to be categorized as confidential, taking account of the time which has passed since it was collected. Informal mechanisms for resolving disputes between parties and agencies regarding confidential information can also be extremely useful, as they result in a quicker decision, and therefore reduce the time needed for consideration of the case.

The delegation from Ireland commented that, in the context of court reviews or appeals generally, there is a body of rules and established practices which deal with confidentiality and business secrets. Therefore techniques such as limiting access to external counsel, or limiting the circle of corporate officials with access, are already employed in a number of fields outside of competition law. The decision on disclosure of confidential information is dependent on which point in the procedure it becomes necessary. In mergers, for example, decisions clearing or blocking a merger need to be intelligible and publicly justified by the agency, and this is the motivation for deciding if confidential information should be included in the decision. In contrast, when faced with a disclosure decision concerning a third party, the questions to be considered are: (i) why is disclosure problematic? and (ii) what is the competition issue? It is therefore key to establish what the purpose of disclosure is for each stage of the proceedings, and each separate issue. This ensures that disclosure is made only when it is really needed. Different jurisdictions adopt different techniques which all have their place in the procedure; and in some cases these techniques may include disclosing highly confidential information in order to verify the true facts of the case.

The delegation from the UK made four final observations on confidentiality. First, while confidentiality rings may work in certain cases at the appeal stage, it may be difficult for them to work at the administrative stage and particularly during the initial investigation. Second, disclosing documents only to lawyers can only work in certain jurisdictions, as in some countries, lawyers have a duty to their clients to disclose all information in their possession regardless of what undertakings are given to third parties or

to the court. Third, in terms of the breadth of confidentiality claims, in many cases, agencies have been unwilling to challenge claims sufficiently early and ensure that these claims have been consistently made. Fourth, there is a need for decisions about confidentiality claims to be taken at a senior level not just within the agency, but also within companies, as otherwise junior employees may claim confidentiality for a huge range of issues that later on prove not to be valid.

2. Decision-making

The Chair commented that convergence on the institutional design of antitrust enforcement agencies is often considered less important than convergence on the analysis of substantive policy issues. However, institutional design does matter when it comes to ensuring that an agency's operations and decision-making processes are perceived to be transparent by the parties involved in the enforcement proceedings, and by the public at large. The Chair then called on the Czech Republic to describe the structure in place in that country and how it improves the objectivity and impartiality of the decision making process.

The delegation from the Czech Republic responded that in general any decision of a Czech administrative body can be reviewed by a higher administrative authority before it is appealed to a court. For example, the decision of a municipality would be reviewed by a region. In the case of central bodies with no higher authority, such as the Competition Office (Office), the Chairman will review the decision. In order to enhance the objectivity of the review, the Chairman will be advised by a group of thirteen independent advisors. Only two of these advisors are employees of the Office. The remaining eleven are unconnected with the Office but are very knowledgeable in the field of competition law; for example, they are chosen among professors, economists and other competition experts. The advisors are given the case file prepared by the Office, and although they do not have access to all the original evidence, a completely objective review is carried out by fresh eyes not previously involved in the investigation or decision making. The Chairman is not bound by any recommendation made by the advisory group, but, in the last eight years, the Chairman's opinion has not differed from that of the advisors.

The Chair next asked the Dutch delegation to expand upon the 'toll gate procedure' which monitors the progress of a case during different moments of the investigation.

The delegation from the Netherlands explained the four stages of the cartel proceedings. The first stage is the investigative stage which is carried out by the Competition Department. Using the 'toll gate procedure', the case team and chief economist of the competition agency (the NMa) will discuss the likely success of an investigation on the basis of a 'go' and 'no go' decision. These are internal decisions taken by case handlers at internal meetings, and at this stage the parties are not informed of when, or what, issues are discussed. The opinions are then submitted to the Director of the Competition Department and his management team, and, in larger cases, an expert unit may also be involved to provide further internal review. Since the introduction of the toll gate procedure four years ago, cases which are unlikely to be successful are now terminated at an early stage. Companies involved in the procedure are informed of the case closure promptly. If the Competition Department decides to continue with a case, the toll gate procedure ends and a statement of objections is drafted, signed by the Director and sent to the parties. The second stage relates to the setting of the sanction and is carried out by the Legal Department, which is separated from the investigating case handlers by a 'firewall'. The Legal Department will re-examine the case and decide whether an infringement can be established, and if so what type of fine to impose. Oral hearings are carried out and the legal team presents a draft decision to the Board of Directors of the NMa, which then makes the final decision.

Once the final decision has been issued, the parties may file an administrative appeal, which is the third stage of proceedings. The parties can request the NMa or the Board of Directors to carry out a full review of the case again, and an independent committee will advise the NMa on whether to uphold the

decision or review it. This committee consists of experts, such as economists, lawyers, former judges and university professors who are not employed by the NMa. Of the last twenty cases that reached the administrative appeal stage, two were completely reviewed with the original decision on the fine withdrawn. In all the other cases, the decision was mainly upheld, although the reasoning was elaborated. When the revised second decision is issued, the opinion of the expert committee is also published to ensure complete transparency. The fourth stage of proceedings is judicial review; and the NMa has a relatively good track record before the courts. This can be, in part, attributed to the fact that the NMa's decision is defended in court by the Legal Department, and, once a court judgement is given, it is carefully analysed by the Legal Department for reference in future cases.

The Chair next asked the Bulgarian delegation to describe a recent institutional reform which resulted in the creation of a specialist advisory unit.

The delegation from Bulgaria explained that, at the beginning of 2010, the legal service and the competition unit were joined together in one directorate responsible for providing legal advice to the Commission on the Protection of Competition (the Commission). The former legal service unit consisted of lawyers with significant experience in defending the Commission decisions in court, and a sound understanding of Bulgarian competition law jurisprudence. In contrast, the competition unit consists of policy experts who closely follow EU case law and deal with competition advocacy cases in Bulgaria. Combining these two units provides an opportunity for the Commission to streamline its internal investigation and decision making process, in addition to applying a more consistent approach to the legal assessment of the case facts. Under the new structure, the combined unit is responsible for providing formal and informal advice to case handlers during an investigation. If the unit is consulted formally, then a memo or report will be issued which then becomes part of the case file, and is given to the Commissioners who decide the case. However, this document is classified as internal and therefore will not be accessible by the parties. There are three occasions when the unit will be consulted on a mandatory basis; (i) before the Commission takes a decision for initiating ex officio proceedings; (ii) following an assessment of the effect on trade between EU member states in order to decide if the Commission should apply the EU competition rules in parallel and; (iii) when the Commission is applying the referral mechanism under the EC Merger Regulation. The unit may also, either on its own initiative or at the Commissioner's request, carry out a legal analysis on specific topics which are of concern to the Commission's work.

The Chair next turned to the US contribution, which stressed the importance of frequent agency meetings with the parties, and asked how these meetings fit into the overall decision making process of the two US agencies.

The delegation from the US responded that the Antitrust Division of the Department of Justice (DOJ) encourages informed and substantive input from the parties at all stages of the investigation. This input relates to the facts, the economic evidence and the theories of harm relevant to the case. It is relayed orally via informal meetings between the parties and their legal and economic advisors and the DOJ, and also through formal written submissions from the parties, or 'White Papers' and other documents. This interaction facilitates openness and transparency, and allows DOJ to inform the parties about the course of the investigation and the key milestones in the investigation process. The process also provides the parties with an opportunity to interact with both staff and senior officials at DOJ to discuss their thinking on the case. Prior to filing any case against the parties in court, senior officials from DOJ, including often the Assistant Attorney General, will meet with the parties and their advisors to explain their concerns, and provide the parties with an opportunity to explain their arguments. DOJ may refine its thinking following such a meeting. The interactive procedure used by DOJ has three aims; (i) to focus on the key aspects of the investigation, both in terms of agency proceedings and the court process; (ii) to ensure better

enforcement decisions and; (iii) to facilitate transparency and ensure there are no surprises for either the parties or the agency.

The Federal Trade Commission (the FTC) also views meeting the parties as an integral part of the administrative process. This process is split into four stages; (i) the initial enquiry; (ii) the part II proceedings; (iii) the investigatory stage and; (iv) the part III formal internal hearing. Under each of these stages there are opportunities for informal dialogue, presentation of evidence and expert opinion. Early interaction with the parties is particularly important. In the initial enquiry stage a decision is taken whether an investigation should proceed, and the legal and economic teams will advise on the approach that should be adopted. When a recommendation is made to the Bureau Directors, parties are invited to explain their views on the legal theories that have been put forward. If the Bureau Directors decide to recommend a complaint to the Commission, the parties have the opportunity to meet with the Chairman and the Commissioners before a final decision is taken. This continued dialogue ensures not only procedural fairness, but also strengthens the decisions made and allows cases to be resolved more effectively and efficiently.

The Chair next asked Russia to discuss its use of external experts.

The delegation from Russia explained that both permanent government experts and independent experts may act as advisors when examining a case. The permanent experts may be from sector regulators or other executive authorities, and can constitute up to half of the Federal Antimonopoly Service (the FAS) members on a case. Their role is to ensure that the specific characteristics of the sector are taken into consideration alongside competition issues. Independent experts can also be engaged and they are not employed by, or members of, the FAS. The independent experts are often from research institutions with specialist economic or technical knowledge, and are engaged for a research project on a particular subject. Expert Councils are also used. These Councils advise on competition developments in specific industries from tourism to defence, in addition to legal proposals put forward by either the FAS or other government authorities.

The Chair next asked the UK to discuss the independence of decision makers, in addition to an update on its recent transparency project.

The delegation from the UK explained that the Competition Commission (the Commission) does not choose its own cases, as they are referred to it either by the Office of Fair Trading (the OFT) or by market or sector regulators or as a result of an appeal from a decision of one of the sector regulators. The Commission is a decision-making body, whose role is to carry out an in-depth Phase II investigation. There is no policy agenda regarding investigatory priorities, and there are no pre-conceived ideas of outcome, as Phase I is carried out by the referring entity. Commission decisions are made by members, who are an external pool of independent experts, not permanent employees of the Commission, on whom the Commission can draw to make up panels to conduct particular enquiries. There are currently more than forty members, up to five of whom will be selected to conduct a particular investigation. The members are responsible for the strategic direction of the enquiry, and the weighing up of the evidence but not for its conduct or the day to day case management, which is carried out by staff teams. Both the members and the staff teams are multidisciplinary and include economists, lawyers, business advisors and financial experts, with each discipline carrying equal weight in the decision making process. In order to ensure transparency, the Commission has published guidance on substantive analysis in addition to the procedures for mergers and market investigations. As a matter of law, the Commission must consult publicly on its proposed decisions relating to both the competition assessment and remedies. The decisions are also subject to judicial review before the Competition Appeal Tribunal, which is a specialist competition court. The process therefore involves independent decision makers to whom parties have direct access, multiple

hearings to allow for oral testimony during the course of the enquiry, a highly transparent process with formal consultations at key stages of the enquiry, and the opportunity for judicial review.

In May 2010, the OFT published a transparency statement setting out several commitments relating to competition enforcement cases. This included commitments to provide information to parties at the start of an investigation, including the identity of the OFT investigation team, contact details and expected time frame of the investigation. In appropriate cases, advance notice for information requests will be given, particularly to recipients of significant information requests. Also, where it is practical and appropriate to do so, particularly where legal rules do not lay down a different procedure, OFT will provide formal information requests in draft. Parties will be provided with regular updates on the case status, and if the time frame is deviated from, explanations will be given. Advance notice of any public announcements will also be provided, with copies provided where practicable. As part of the OFT's consultation on transparency, views were sought on the sharing of the OFT's provisional thinking in competition enforcement cases. However, in contrast to the Commission, which typically shares its provisional thinking at the Phase II stage, it was felt by some that the Phase I stage was too early for this to be consistent with the OFT's role. The OFT acknowledges the difficulties in this area but will keep an open mind about when and how to share its provisional thinking and case teams will consider any requests from parties. Greater transparency should be welcomed by all, but there is a balance to be struck between the speed of the investigation and the decision taking whilst allowing parties proper and transparent proceedings and respecting the rights of the defence. The OFT has experienced challenges in procedural terms through, for example, very protracted disputes over confidentiality and redactions in documents. This has the effect of slowing down the case as resources are diverted to dealing with those issues rather than the broader work of the OFT.

3. Requests for information

The Chair commented that different jurisdictions adopt a wide range of practices regarding requests for information, with some following well developed rules and others using a more discretionary approach. The Chair then asked Finland to discuss how information is sought from parties there.

The delegation from Finland responded that the Finnish Competition Authority (the FCA) has relatively wide discretionary powers when asking for information from companies. In significant cases a discussion will be held with the parties before sending them formal requests for information. These discussions are targeted to understand how the business works, how the market works, what kind of information the company already possesses and the information that the parties can provide without any extra undue burden. It is also an opportunity to clarify that the same language is being used by all parties, and to define any technical wording, for example in energy and telecoms cases, to ensure there is no misunderstanding on either side. Further discussions are also carried out with the parties before the statement of objections is sent, with the aim of clarifying the agreed facts of the case and establishing where any disagreements might be. These further discussions are carried out at a late stage of the proceedings to ensure that a robust statement of objections is produced, which can then be justified before the court if necessary. The FCA has also adopted a practice in order to lessen the administrative burden of dealing with the hundreds of documents collected during the investigation period. Before finalising the statement of objections and going to court, the documents that are not needed for the court proceedings are returned to the companies from which they came. There has been some criticism that these documents may be needed for future litigation. However, the FCA will continue to use this method as it avoids some of the time consuming issues related to access to file where there are documents that are not necessary for the investigation itself.

The Chair next turned to Mexico to explain how information is requested there.

The delegation from Mexico responded that, as there is no formal procedure under the competition law for information requests, the practice of the Federal Competition Commission (the Comision Federal de Competencia or "CFC") is relatively flexible. It is common practice for the case handler to discuss the content of the information request with the parties both before and after the request is issued. This ensures that the necessary information is obtained, while minimising the burden on the parties to comply with the requests. The degree of flexibility will depend on the case. Parties tend to have a stronger incentive to comply with information requests in merger cases than in abuse of dominance or cartel cases and the CFC's procedures are more flexible when parties are not confrontational.

The Chair next asked Chile to explain how parties are able to contest information requests.

The delegation from Chile explained that in Chile a dual enforcement system is in place, with the competition agency (the FNE) investigating the case and a Competition Tribunal acting as the decision making body. The FNE has powers to request information when it starts the investigation, and the parties can challenge these requests in two ways: either asking the FNE for a reconsideration or filing a special motion with them. The motion will then be submitted to the tribunal, with an opinion from the FNE on the arguments put forward by the parties. The Tribunal will commonly deny the parties' request on the grounds that the arguments used are too broad and there is insufficient justification as to what the risks are. In addition, the FNE is bound by extremely strict rules on maintaining confidentiality, and if any officer breaches this rule, he/she can be criminally sanctioned. Therefore any information collected from information requests will be well protected from third parties and/or competitors. The Tribunal also has tight rules in place on handling confidential information, but if a piece of information is essential for the case the tribunal may decide, in exceptional circumstances, to lift the confidentiality veil.

The Chair next asked Hungary to discuss how parties are consulted on requests for information there.

The delegation from Hungary responded that, when an information request is issued, the parties will be informed either by the request itself, or verbally by a case handler who compiled the request, about the opportunity for a consultation with the agency. This is an opportunity for the parties to understand the background, reason and context of the request. The aim is not for the parties to negotiate or change the request, but for the competition agency (the GVH) to explain exactly what data is needed and why. There may be an opportunity to refine the original request in terms of aggregation of data, substitution of unavailable data, or the timeframe for responding. In around 5 to 10 % of cases, serious reconsideration of the request may be needed. This may occur, for example, where there are issues concerning industry standards in producing and storing of data, or information asymmetry. The information request consultation is a useful tool, and will often play a larger role in cases involving industries which the GVH is not familiar with.

4. Settlements

The Chair commented that while agencies make efforts to ensure transparency during litigation, this might not always be the case for settlements. In most cases, interested third parties have limited access to the evidence that motivated the case settlement. A careful balance needs to be struck between providing more insight into how agencies evaluate evidence and make decisions, while at the same time protecting trade secrets and confidentiality. The Chair then asked Korea to explain its practices in agreed settlements.

The delegation from Korea explained the three ways in which antitrust cases can be closed or settled. First is the 'recommendation of correction' process. This involves closing the case without an official decision-making process, but with the parties agreeing simply to correct certain practices. This process may be adopted in the following circumstances; (i) there is insufficient time to correct the anti-competitive behaviour through the official procedures; (ii) the harm is expected to increase over time; or (iii) the

violator admits the competition law breach and has a clear intention to correct the practice immediately. The second process is the 'simplified procedure'. This involves the official decision making process being conducted, but if the party admits the violation and agrees to follow the corrective measures, the case can continue as a written procedure and the party does not need to be present at any hearings. Third is the 'consent order' system, a proposal for which is currently under consideration by the KFTC. If this is introduced it will lead to determination of cases without a legal decision, but instead with an agreement between the competition authority and the parties on measures as to how best correct the anti-competitive practices.

The Chair then asked Brazil to describe its procedures for early resolution of a case.

The delegation from Brazil explained that three tools are used by the Brazilian Competition Authority (CADE) to resolve complicated cases early, two for mergers and one for cartels. The first is an agreement to preserve the reversibility of a transaction (called an 'APROT'), which freezes a proposed acquisition and allows the CADE sufficient time to study the case. The second is a post-merger order agreement proposed by the Commissioner (called a 'TCD'), in which the CADE permits the acquisition to proceed but requires either behavioural or structural remedies. The third is a conduct agreement used in cartel cases (called a 'TCC') and is proposed by the parties, and then analysed by the Commissioner. The authority has 60 days to improve the first draft of the agreement proposed by the parties, and a final version is then agreed upon.

The Chair next asked Chinese Taipei what conditions would be considered to terminate a case.

The delegation from Chinese Taipei responded that in some cases it is possible for the Fair Trade Commission (the CTFTC) to enter into a settlement agreement imposing administrative sanctions. Under the administrative settlement guidelines, the CTFTC must satisfy three conditions prior to proceeding with negotiations; (i) the settlement must be lawful; (ii) the settlement must be in the public interest; and (iii) potential damage to any third party as a result of the settlement must be ascertained. The need to satisfy these conditions has meant very few cases have been settled by the CTFC using this type of administrative contract.

5. Judicial review

The Chair asked Japan to discuss the proposed amendment to the Antimonopoly act that will change the way in which hearings are conducted.

The delegation from Japan replied that under the current competition law when parties are not satisfied with orders given by the Japan Fair Trade Commission (the JFTC) a complaint can be lodged, but the JFTC hears the appeal first. If the parties still object to the JFTC's decision, the case is then brought to the Tokyo High Court. However, this hearing procedure has raised concerns amongst the business community for lacking fairness because the organisation that issues the order is to determine the appropriateness of the order itself. In response to the criticism, an amendment bill was submitted to the Diet. The bill contains provisions which abolish the current JFTC first appeal hearing procedure and instead, the Tokyo District Court will hear, at first instance, any appeals against an order made by the JFTC. The JFTC will hear opinions and complaints of parties before the initial issuing of the order. The bill is expected to be made into law at the next session of the Diet.

The Chair next asked Lithuania to discuss the standard of review used by the court there.

The delegation from Lithuania responded that under national law the court has the right to amend or revoke any decision of the Lithuanian Competition Council (the Council). However, where complex economic reasoning is used, the judicial decision is usually limited to a legal assessment of the case, *i.e.*,

whether the infringement has been properly established and if the evidential thresholds were met. Economic assessments related to, for example, the definition of the relevant market or the establishment of a dominant position are generally considered to be outside the ambit of the court. A level of deference will therefore be given to the Council in its decision making on these matters.

The Chairman next turned to Israel.

The delegation from Israel explained the different standards of judicial review that may be applied. The general standard, under administrative law, applies to almost all judicial review concerning government agencies. Under this standard, the court will not intervene in a decision unless it is "manifestly unreasonable". However, decisions taken by the Israel Antitrust Authority (the IAA) have to satisfy higher standards. Under the Civil Enforcement Act, there are two standards which can apply, depending on whether the IAA makes the decision, or whether it is the specialist Antitrust Tribunal. The first standard is used if the IAA makes a formal decision, such as blocking a merger or declaring an abuse of dominance. The parties can appeal to the Antitrust Tribunal which will review the decision using the 'mistakes' standard. The Tribunal has a number of institutional tools at its disposal, including the hearing and examination of witnesses, and should give sufficient weight to the fact that a prior IAA decision has been taken. The second standard is adopted in procedures in which the IAA has no authority to make its own decision and must request remedies from the Tribunal, for example, an order to undo a merger. In these cases, the standard is the 'balance of evidence', and the IAA carries the burden of proof to convince the Tribunal that the balance of evidence is in the authorities favour.

The delegation from BIAC provided some final comments on the discussion from the viewpoint of the business community. It agreed that the central principle for agencies is to establish an accurate factual record. However, agencies have an obligation to act fairly in collecting all the relevant evidence, including exculpatory evidence. The facts and the legal and economic theories of the case should be disclosed at as early a stage as practicable. Minimum standards for transparency and engagement should be established which fit the range of institutional and practical procedures adopted by different agencies. There should be a full hearing in addition to a written procedure, and a clear separation between the role of the investigators and those making enforcement decisions. "Devil's advocate" panels are useful, but to increase the effectiveness of this type of internal review, the panels should have the ability to put questions to the parties. In terms of requests for information, prior consultation can be useful to ensure that companies respond as effectively as possible, and the time given for responding should be reasonable. Proportionality should be adopted in the use of investigative tools, and the most invasive measures, *e.g.*, surveillance, on the spot investigations at domestic premises, imaging data on computer systems, etc. should be limited to cases of the most hardcore suspected violation. To ensure full transparency, both for public consumption and advocacy purposes, both adverse decisions and court judgments should be published with their reasoning. Businesses welcome the opportunity to resolve issues at an early stage and with the flexibility offered by settlement agreements. However, where appropriate, parties should be able to settle a case without having to admit liability. Judicial review is essential, but it should be in addition to, and not a substitute for, fair procedures at the initial agency stage.

The delegation from Canada commented on the importance of separating two issues related to this area, which are sometimes merged. On the one hand, there is the broad public interest in transparency, and the desire for predictability on how cases are decided, and how evidence is collected and used. Transparency is a shared value that benefits not only third parties and the public, but also the agencies who gain credibility from being transparent and from making better decisions. On the other hand, there is the very specific and immediate interest of the defendants in knowing the nature of the case developing against them, which allows them to relate and respond. These two issues do not conflict, but the satisfaction of one does not necessarily lead to the satisfaction of the other. Historically there has been a natural inclination on the part of agencies to safeguard certain information, and an unwillingness to share everything with the

parties being investigated. Although many agencies have now committed themselves to be more open with the parties, it does require good judgment and foresight to do so. In some cases, it may not be appropriate for junior staff members to make these decisions without supervision from more experienced colleagues. It is thus incumbent on the agencies to find suitable ways to balance the competing interests, and this will need to be assessed on a case by case basis.

The Chair concluded the Roundtable by thanking all the contributors and intervenors and drew the Roundtable to a close.

COMPTE RENDU DE LA DISCUSSION

La présidente ouvre la séance et rappelle aux délégués que la table ronde s'inscrit dans la continuité de la discussion sur l'équité procédurale entamée en février 2010. L'objet de cette table ronde est d'examiner la question de l'équilibre entre transparence et confidentialité, entre procédures de transaction et recours devant les tribunaux.

Pour lancer les débats, la présidente présente le premier intervenant, M. Götz Drauz, qui présentera un exposé sur les problèmes de confidentialité dans les procédures administratives aux termes du droit de la concurrence.

1. Problèmes de confidentialité

M. Götz Drauz commence par décrire la tension qui existe entre la nécessité de respecter les droits de la défense et la nécessité de respecter en même temps la confidentialité à l'égard de ceux qui fournissent des informations aux autorités de la concurrence. Ces deux intérêts légitimes et concurrents doivent être conciliés pour permettre aux parties de bien comprendre ce qui leur est reproché sans imposer de préjudice disproportionné aux informateurs. Les autorités de la concurrence doivent défendre une réputation de respect de la confidentialité pour assurer la pérennité de la fourniture d'informations dans les enquêtes en cours, tout en utilisant tous les éléments pertinents en leur possession pour déterminer s'il y a eu infraction au droit de la concurrence. Il s'agit de trouver un juste équilibre dans lequel ces intérêts concurrents sont soigneusement pesés les uns vis-à-vis des autres afin de parvenir à une solution viable. Les différentes autorités travaillent dans des contextes juridiques et culturels différents et il n'y a pas d'approche uniforme en la matière. Toutefois, un engagement actif et de bonne foi de toutes les parties intéressées peut contribuer à avancer vers la solution du problème.

Lorsqu'elles évaluent les informations réputées confidentielles, les autorités suivent normalement un processus en deux temps. Elles doivent vérifier d'abord si les informations en question sont confidentielles au regard du droit applicable, puis si, en fin de compte, il y a tout de même lieu de communiquer ces informations à une autre partie que l'informateur. En ce qui concerne le premier volet de ces vérifications, il existe différentes catégories de confidentialité qui peuvent être admises dans des procédures touchant au droit de la concurrence. La principale catégorie est celle des secrets d'affaires, des secrets commerciaux ou des informations commercialement sensibles. Il semble y avoir là une catégorie de confidentialité pratiquement universellement admise par les autorités de la concurrence. Même si la définition précise de cette catégorie varie d'un pays à l'autre, elle recouvre généralement les informations sur les coûts et les prix, le savoir-faire commercial, la production et l'offre, les parts de marché et les stratégies commerciales. Il s'agit là du type d'informations dont le droit de la concurrence s'efforce d'empêcher l'échange entre les concurrents eux-mêmes. Parmi les autres types d'informations confidentielles reconnues comme telles dans de nombreuses juridictions, on retiendra les informations personnelles sensibles, comme les numéros de téléphone et adresses privés, ou encore les antécédents médicaux ou professionnels. Dans de nombreuses juridictions, les règles générales de protection des données concernant la communication de ce type d'informations existent déjà.

Le fait de protéger les informations confidentielles susceptibles de soumettre l'informateur à des pressions économiques et commerciales considérables de la part de ses concurrents ou partenaires commerciaux dans le cas où elles viendraient à être révélées, évite un conflit entre les intérêts économiques

privés de l'informateur et les avantages d'une application effective des règles de la concurrence pour le grand public. Souvent, ce ne sont pas les informations elles-mêmes qui doivent être protégées, mais l'identité de l'informateur. Enfin, la confidentialité est souvent admise lorsque que la divulgation des informations risque d'aller à l'encontre de l'intérêt général, par exemple, en cas de mise en jeu des intérêts de la sécurité nationale.

Si les informations concernées ne sont pas reconnues comme confidentielles, il convient de trouver un compromis entre la protection de la confidentialité et l'intérêt de divulguer les informations. Les autorités de la concurrence doivent à cet égard tenir compte d'un certain nombre de facteurs :

- *le préjudice* susceptible d'être causé à l'informateur et à la personne à laquelle les informations se rapportent ;

- *la valeur* des informations en tant qu'éléments à charge ou à décharge ;

- *l'existence d'autres documents non confidentiels* pouvant être invoqués à charge ou à décharge ;

- *l'existence de méthodes de désensibilisation des informations* ne portant pas préjudice à leur valeur, par exemple des synthèses non confidentielles ;

- *des considérations d'ordre politique,* par exemple la capacité des autorités à protéger la confidentialité des informations.

Dans la plupart des juridictions, le facteur essentiel se situe au niveau de l'administration de la justice, à savoir la capacité des autorités à engager des poursuites et la capacité de l'accusé à se défendre. Du point de vue procédural, dans la plupart des juridictions, les informateurs doivent préciser que les informations sont confidentielles et en fournir des versions non confidentielles. Toutefois, dans certains cas, les autorités peuvent aussi effectuer leur propre évaluation initiale de la confidentialité des informations.

Une fois qu'une demande de protection de la confidentialité a été formulée, ce sont souvent les agents de l'autorité chargés de l'affaire qui décident si les informations doivent être divulguées. Dans certaines juridictions, c'est une instance distincte qui prend la décision, mais au sein de la même autorité administrative. Par exemple, le conseiller-auditeur dans le cadre de l'UE fait officiellement partie de la Commission européenne, mais il est habilité à régler la plupart des différends portant sur des questions de confidentialité. Dans de nombreuses juridictions, l'informateur est officiellement consulté ou se voit informellement offrir la possibilité de contester la décision de divulgation avant qu'elle ne soit exécutée. Les parties prenantes à une enquête peuvent aussi contester devant un juge la décision de l'autorité de divulguer ou non des informations avec la possibilité d'obtenir des mesures transitoires, ou ils peuvent faire appel de la décision principale.

Il est essentiel que les parties faisant l'objet d'une enquête puissent comprendre la nature de ce qu'on leur reproche et les éléments utilisés pour étayer le dossier. Il convient d'évaluer de façon rigoureuse les demandes de protection de la confidentialité et d'étudier tous les mécanismes permettant de diffuser les informations sans violer la confidentialité. Si des éléments à charge sont considérés comme confidentiels, c'est l'équilibre des intérêts en jeu qui peut dicter la décision de ne pas divulguer les informations. En outre, selon le principe de respect des droits de la défense, toutes les informations auxquelles une partie n'a pas accès ne sauraient être utilisées comme élément à charge contre elle.

Il existe un certain nombre de méthodes que les autorités de la concurrence peuvent utiliser pour présenter des éléments de preuve contenant des informations confidentielles aux parties tout en respectant la confidentialité. Les « méthodes classiques » largement utilisées consistent à reformuler les informations

confidentielles et à présenter des synthèses non confidentielles, à remanier des chiffres confidentiels ou à recourir au « huis clos » dans le cadre des procédures judiciaires ou administratives. Il existe également de méthodes « innovantes » moins courantes. La première consiste à divulguer l'intégralité des éléments de preuve y compris d'éventuelles informations confidentielles, tout en restreignant le nombre de personnes auxquelles ces informations sont communiquées. Un tel « cercle de confidentialité » se compose généralement de conseillers juridiques et économiques externes. La seconde méthode consiste à restreindre les conditions dans lesquelles les informations sont diffusées en plaçant les documents dans un local de sauvegarde de données dans les installations de l'autorité. L'accès aux informations est alors accordé à des conseillers extérieurs sous la surveillance d'agents de l'autorité, à condition que ces conseillers s'engagent à ne pas communiquer les informations confidentielles à leurs clients.

Il convient de fournir suffisamment d'informations pour permettre à des tierces parties de contribuer utilement à la procédure en cours ; leur implication va en effet dans le sens de l'intérêt général qui est de mettre en oeuvre efficacement les règles de la concurrence plutôt que de servir des intérêts commerciaux particuliers. Il existe un autre aspect à prendre en considération lorsque les tribunaux interviennent dans le processus, soit en tant que décideurs soit en temps qu'instance d'appel, car les informations vont alors normalement être rendues publiques. Dans de nombreuses procédures judiciaires, les principes de justice ouverte et les obligations juridiques d'équité procédurale constituent souvent un puissant argument en faveur de la divulgation des informations.

Les agents de l'autorité de la concurrence doivent procéder à une évaluation critique et approfondie des demandes de protection de la confidentialité qui sont souvent très générales. Des enquêteurs plus expérimentés doivent donc travailler avec les informateurs pour identifier les éléments essentiels des informations confidentielles et en justifier la confidentialité. Il convient d'encourager l'instauration d'un dialogue ouvert et honnête entre les enquêteurs et les parties y compris au moyen de discussions informelles, et les problèmes de confidentialité doivent être réglés aussi tôt que possible dans la procédure pour permettre aux agents de l'autorité de se concentrer sur le fond de l'affaire. La publication de lignes directrices par les autorités de la concurrence à propos du traitement des informations confidentielles doit aussi être encouragée. Le processus de décision interne et les mécanismes de règlement des différends, par exemple en recourant à des conseillers-auditeurs, peut aussi s'avérer utile, même si ces derniers font partie de la même organisation que les autorités chargées des poursuites.

La présidente remercie M. Drauz pour son exposé et ouvre la discussion. Tout d'abord, elle demande à la délégation de l'Allemagne d'expliquer comment les autorités déterminent si des informations sont confidentielles et comment elles les traitent.

La délégation de l'Allemagne explique que, malgré l'absence de définition claire du terme « informations confidentielles » en Allemagne, il en existe une dans la pratique de l'autorité de la concurrence et dans la jurisprudence. On peut identifier un certain nombre d'éléments déterminants, notamment le fait que l'information confidentielle (i) doit être liée à une entreprise ou une société ; (ii) ne doit pas être disponible pour des tiers ; (iii) doit concerner la compétitivité de l'entreprise ou de la société et (iv) doit être destinée à être maintenu secrète par le propriétaire de l'entreprise ou de la société. Si l'information est considérée comme confidentielle, le *Bundeskartellamt* ne doit pas fonder sa décision sur cet élément de preuve. De la même façon, bien que les tribunaux aient pleinement accès aux dossiers de l'autorité, des informations confidentielles ne peuvent pas être divulguées dans le cadre d'un procès public et normalement, les jugements ne peuvent pas reposer sur des informations réputées confidentielles. Toutefois, un tribunal peut faire ouvertement référence à des informations confidentielles si le détenteur utilise ces informations dans le cadre de son plaidoyer oral ou de ses conclusions écrites devant les tribunaux, ou si, en fin de compte, l'importance de la préoccupation au regard du droit de la concurrence prévaut sur la demande de protection de la confidentialité. Le *Bundeskartellamt* est soucieux de protéger la confidentialité des informations afin de faire valoir sa réputation de fiabilité et d'encourager la coopération

et le dialogue avec les parties. Il convient donc de trouver un juste équilibre entre les intérêts des parties communiquant des informations confidentielles et ceux des enquêteurs.

La présidente demande ensuite à la Suisse d'expliquer comment l'autorité de la concurrence définit la notion d'informations confidentielles dans sa pratique.

La Suisse répond que le concept de secret des affaires est inscrit dans l'article 162 du Code pénal suisse. Les trois conditions à satisfaire pour qu'une information constitue un secret des affaires ont été énoncées dans la jurisprudence du Tribunal fédéral, à savoir ; (i) l'information ne doit pas être publiquement disponible ; (ii) la partie a un intérêt subjectif à maintenir cette information secrète et (iii) il existe un intérêt objectif pour maintenir le secret sur cette information, secret qui est apprécié au cas par cas. En cas de doute, le secrétariat de la Commission de la concurrence décide en dernier ressort si l'information concernée constitue un secret des affaires. Cette décision peut alors faire l'objet d'une procédure d'appel classique.

La présidente invite ensuite l'Australie à présenter ses nouvelles règles sur les informations protégées recueillies dans le cadre d'enquêtes sur des ententes.

La délégation de l'Australie explique que les parties peuvent bénéficier de la même protection accordée aux demandeurs d'immunité si elles fournissent des informations concernant une infraction potentielle ou effective au droit des ententes. La *Competition and Consumer Commission* australienne (ACCC) ne divulguera ces informations aux fins de la procédure judiciaire qu'après avoir étudié si cela servait l'intérêt général. Une liste limitée de facteurs est prise en considération, à savoir (i) le fait que l'information protégée a été communiquée de façon confidentielle ; (ii) les effets que la divulgation des informations peut avoir sur les relations avec d'autres pays et (iii) la nécessité d'éviter de perturber les efforts nationaux ou internationaux concernant l'application du droit, le renseignement criminel ou les enquêtes pénales. Si, après avoir pesé ces facteurs, un tribunal décide que la divulgation des informations est justifiée, les circonstances dans lesquelles les informations peuvent être utilisées sont alors limitées.

La présidente s'adresse ensuite à la Grèce.

La délégation de la Grèce explique la façon dont les problèmes de confidentialité sont traités aux différents stades de la procédure en droit grec de la concurrence. Premièrement, au stade de l'enquête, le Directeur général de la concurrence est chargé de réunir l'ensemble des éléments de preuve pertinents. Les problèmes de confidentialité font l'objet d'une décision séparée par le président du Conseil de la concurrence. Le deuxième stade est celui de la phase intermédiaire au cours de laquelle le président décide soit de rejeter la plainte, soit de recommander que les quatre Commissaires signent la Communication des griefs. Le troisième stade est celui de la décision, pour laquelle le Conseil tient compte de tous les éléments de preuve avant de rendre une conclusion. Si, à ce stade, se pose un problème de confidentialité, le Conseil est habilité à rendre une décision favorable aux droits de la défense.

La présidente invite ensuite la République slovaque à donner son point de vue sur la façon de concilier les problèmes de transparence et de confidentialité.

La délégation de la République slovaque répond que le compromis entre les droits des parties à se défendre et la protection des secrets des affaires est le fruit d'une évaluation au cas par cas. Les facteurs pris en compte sont les suivants : (i) la portée des informations en tant qu'éléments de preuve ; (ii) le caractère sensible des informations; (iii) le préjudice que la divulgation des informations peut porter à la société les fournissant et (iv) la gravité du manquement faisant l'objet de l'enquête. Dans le cadre d'une affaire donnant lieu à une demande de divulgation d'informations confidentielles, l'autorité va chercher à

obtenir l'accord de la partie intéressée afin de permettre la divulgation des informations aux représentants juridiques des autres parties.

La présidente demande ensuite à l'UE d'évoquer l'utilisation de la divulgation négociée et des locaux de sauvegarde de données.

La délégation de l'UE commence par rappeler que les principes d'accès aux documents de la Commission sont énoncés dans la Communication de la Commission relative aux règles d'accès au dossier de la Commission. En cas de désaccord entre la DG concurrence et une partie à la procédure, il est possible d'en référer aux conseillers-auditeurs en vue d'un examen indépendant. Deux autres procédures ont été récemment introduites et s'appliquent lorsque seul un nombre limité de parties sont impliquées dans l'affaire, de sorte que la nécessité de reformuler les informations confidentielles est réduite. Premièrement, aux termes de la procédure de « divulgation négociée », la partie faisant l'objet de l'enquête entame des négociations bilatérales avec les tiers intéressés en vue d'avoir accès à la totalité du dossier, cet accès étant néanmoins réservé à un nombre limité de personnes désignées au cas par cas. Cette procédure a été utilisée dans la récente affaire *Intel*. Deuxièmement, aux termes de la procédure du local de sauvegarde de données, qui sert avant tout à la vérification de données économiques, le dossier et les éventuelles informations confidentielles sont conservées dans un local physique de sauvegarde de données. L'accès à ce local est alors donné à un groupe restreint de personnes qui comprent généralement les conseillers juridiques et économiques, lesquels peuvent prendre des copies des documents mais ne peuvent pas communiquer des informations confidentielles à leurs clients. Ces procédures ont été officiellement introduites dans des affaires ne concernant pas des fusions, à la suite de la publication en janvier 2010 (d'un projet) de Bonnes pratiques relatives aux procédures en matière d'ententes. Elles ont été jusqu'ici utilisées dans cinq affaires.

La présidente s'adresse ensuite au Canada afin d'aborder la façon dont les informations confidentielles sont communiquées à d'autres autorités chargées de l'application du droit.

La délégation du Canada explique que les informations concernant les enquêtes en matière de concurrence et l'identité de l'informateur demeurent confidentielles, à quelques exceptions près. Parmi ces exceptions, on retiendra la possibilité pour le Bureau, dans certaines circonstances, de communiquer des informations confidentielles à une autre autorité canadienne chargée de l'application du droit. Cela peut concerner tout organisme provincial ou fédéral habilité par la loi à faire appliquer des dispositions pénales ou civiles. La décision du Bureau de communiquer des informations est entièrement discrétionnaire et dépend d'un certain nombre de circonstances, à savoir (i) une infraction pénale potentielle ou une menace pour la sûreté et la sécurité publiques ; (ii) la nécessité d'obtenir un mandat de perquisition ou de réaliser des écoutes ; (iii) une demande expresse d'une autorité chargée de l'application du droit ou (iv) une situation impliquant des pratiques commerciales mensongères ou une fraude commerciale massive. Ce dernier peut recouvrir l'intervention d'instances internationales d'application du droit. Si le Bureau n'est pas certain que les raisons de demander la communication des informations sont justifiées ou s'il craint que les mesures de protection convenables n'aient pas été prises, l'autorité étrangère peut être tenue de soumettre une demande au gouvernement du Canada aux termes d'un traité d'entraide judiciaire en matière pénale afin d'obtenir les informations concernées. Bien qu'il puisse s'avérer nécessaire dans certaines circonstances de communiquer des informations, en règle générale, le Bureau cherche à minimiser le volume des informations confidentielles communiquées. Le maintien de la confidentialité et le souci de préserver la confiance des parties concernées dans les enquêtes en matière de concurrence est essentiel à l'exercice des missions du Bureau et à sa crédibilité en tant qu'autorité chargée de l'application du droit.

La présidente propose à l'Afrique du Sud d'expliquer la façon dont s'appliquent les règles de confidentialité dans ce pays.

La délégation de l'Afrique du Sud présente la définition des informations confidentielles telle qu'elle figure dans la *Competition Act*, à savoir « les informations commerciales, managériales ou industrielles qui appartiennent à une entreprise, présente une valeur économique particulière et ne sont généralement pas mises à la disposition ou portées à la connaissance d'autrui ». Toute demande de protection de la confidentialité qui n'est pas conforme à cette définition est réputée non avenue. Au cours de la phase d'enquête de la procédure, les informations peuvent aussi être considérées comme « à diffusion restreinte ». Cela recouvre toutes les informations obtenues par la *Competition Commission* d'Afrique du Sud (la Commission) au cours de son enquête, y compris l'identité des sources d'information et les notes et études internes de la Commission. Si une affaire n'est pas déférée au *Competition Tribunal*, de telles informations restent confidentielles et les tiers ne peuvent y avoir accès sans une ordonnance du Tribunal ou le consentement exprès des parties ayant fourni les informations. Si une affaire est déférée au Tribunal, les règles de ce dernier imposent que ces informations soient communiquées aux tiers par l'intermédiaire de leurs représentants juridiques. Les documents doivent être consultés dans les services de la Commission et aucune copie ne doit en être faite. Les représentants juridiques doivent signer un accord de confidentialité aux termes duquel ils ne communiqueront pas les informations à leurs clients tant que le Tribunal n'a pas pris sa décision. Pour trancher l'affaire, le Tribunal peut utiliser toute information déclarée confidentielle dans sa décision. Toutefois, comme tous les arrêts du Tribunal doivent être motivés dans un document public, deux versions du rapport sont établies, une version interne confidentielle et une version publique non confidentielle.

La présidente se tourne alors vers la Turquie pour un point sur le communiqué récemment publié par ce pays quant au droit d'accès au dossier et à la protection des secrets commerciaux.

La délégation de la Turquie explique que le communiqué a été publié par l'Autorité turque de la concurrence (l'Autorité) et présente les nouvelles règles sur les problèmes de confidentialité et les droits d'accès au dossier. La notion de « secrets commerciaux » est définie et cette définition est utilisée comme substitut du terme plus général de confidentialité. Il appartient aux parties d'informer l'Autorité de la présence de tout secret commercial dans les documents et de fournir des justifications à cet effet. L'Autorité peut alors procéder à une évaluation supplémentaire *ex officio*. Aux termes du communiqué, dès lors que des informations sont réputées contenir des secrets commerciaux, elles ne peuvent pas être communiquées au public ou à des tiers. Cette règle comporte néanmoins les exceptions suivantes : (i) les informations qui sont publiquement disponibles ; (ii) les informations datant de plus de cinq ans (réputées n'avoir qu'une valeur commerciale limitée) et (iii) les informations relatives à une infraction à la *Competition Act*. Toutefois, l'Autorité ne doit divulguer aucun secret commercial au simple motif d'étayer sa décision.

La présidente demande ensuite à M. Drauz s'il souhaite commenter les interventions des membres. M. Drauz explique que la transparence reste la principale préoccupation des praticiens, en particulier la transparence quant au problème les plus importants pour les autorités chargées des enquêtes. Cela peut poser des problèmes aux agents de certaines autorités qui peuvent avoir le sentiment d'affaiblir leur position en révélant l'ensemble des questions examinées. Toutefois, le fait d'encourager un dialogue entre les autorités, la défense et les tiers permet de mieux comprendre les grands enjeux et peut réduire la durée de la procédure. En ce qui concerne les informations confidentielles, les parties ont une tendance naturelle à demander une protection trop générale de la confidentialité et l'organisation précoce de discussions bilatérales entre les informateurs et les agents de l'autorité permet de parvenir plus rapidement à un accord sur les demandes légitimes.

La présidente demande ensuite au BIAC et à l'Irlande de donner leur point de vue sur les problèmes de confidentialité. La délégation du BIAC souligne l'importance de l'implication des entreprises dans tous les aspects du débat sur la confidentialité. Il existe une hiérarchie des informations confidentielles et des niveaux de protection nécessaires, et la prise en compte de tous les aspects peut aboutir à des résultats

différents en fonction de l'autorisation de divulgation demandée. Des règles doivent être prises en considération en la matière. Premièrement, du point de vue du défendeur, l'application du droit de la concurrence n'est pas un domaine se prêtant à des procès à huis clos. Bien que certaines autorités de la concurrence soient tenues de soumettre leurs dossiers aux tribunaux, d'autres sont habilitées à prendre des décisions administratives qui imposent des sanctions quasi pénales aux sociétés. Dans ce contexte, il est essentiel pour l'équité procédurale que le défendeur ait accès à tous les éléments de preuve. Deuxièmement, il est essentiel qu'il y ait des protections contre l'utilisation d'informations non publiques en dehors du champ de l'enquête pour laquelle ces informations ont été fournies. Cela concerne l'utilisation de ces informations par le défendeur aussi bien que par des tierces parties ou par les autorités. On peut parvenir à une protection raisonnable des informations confidentielles en procédant alors à une reformulation, une occultation de certains éléments et à l'utilisation de fourchettes. En ce qui concerne la protection d'informations confidentielles extrêmement sensibles, il peut s'avérer nécessaire de limiter leur diffusion même vis-à-vis du défendeur. Cela peut se faire par le biais du recours à des procédures spéciales, comme des accords d'accès spécifiques et/ou la limitation du nombre de personnes ayant accès aux informations. Toutefois, ces procédures spéciales ne doivent pas se substituer à une évaluation soigneuse de ce qui doit être considéré comme confidentiel. En outre, réserver l'accès aux informations aux seuls conseillers juridiques externes peut ne pas suffire : les cadres dirigeants impliqués dans les interactions commerciales au jour le jour doivent aussi être associés à la divulgation des informations. En outre, il n'est sans doute pas nécessaire de considérer comme confidentielles des données rétrospectives, compte tenu du temps écoulé depuis leur collecte. L'existence de mécanismes informels de règlement des différends entre les parties et les autorités à propos d'informations confidentielles peuvent également être extrêmement utiles, car ils accélèrent les décisions et réduisent donc le temps nécessaire à l'examen de l'affaire.

La délégation de l'Irlande explique que, dans le contexte d'examens devant les tribunaux ou d'appels en général, il existe un corpus de règles et de pratiques établies qui traitent de la confidentialité et des secrets d'affaires. En conséquence, des techniques comme la restriction de l'accès aux informations à un conseiller externe ou la limitation du cercle des représentants de la société ayant accès aux informations, sont déjà employées dans un certain nombre de domaines extérieurs au droit de la concurrence. La décision de divulguer des informations confidentielles dépend du moment de la procédure auquel cette divulgation devient nécessaire. Dans le cas de fusions, par exemple, la décision d'autoriser ou de bloquer une fusion doit être intelligible et justifiée publiquement par les autorités et c'est ce qui pousse à trancher sur la question de savoir si les informations confidentielles doivent être prises en compte dans la décision. En revanche, dans le cas d'une décision de divulgation concernant une tierce partie, il convient de prendre en compte les questions suivantes : (i) pourquoi la divulgation pose-t-elle un problème et (ii) en quoi consiste le problème du point de vue de la concurrence ? Il est donc essentiel de définir l'objet de la divulgation à chaque étape de la procédure et en ce qui concerne chacun de ses aspects. Cela permet de ne décider de divulguer des informations que lorsque c'est véritablement nécessaire. Les différentes juridictions adoptent diverses techniques qui ont toutes leur place dans la procédure ; en outre, ces techniques peuvent consister à divulguer des informations très confidentielles afin de vérifier les véritables faits constitutifs du dossier.

La délégation du Royaume-Uni formule quatre dernières observations sur la question de la confidentialité. Premièrement, même si les cercles de confidentialité peuvent être efficaces dans certains cas au stade de l'appel, c'est peut-être moins le cas au stade administratif et plus particulièrement durant l'enquête initiale. Deuxièmement, la divulgation de documents aux seuls avocats ne peut fonctionner que dans certaines juridictions, car dans certains pays, les avocats sont tenus de communiquer à leurs clients l'ensemble des informations en leur possession, quels que soient les engagements pris vis-à-vis de tierces parties ou du tribunal. Troisièmement, en ce qui concerne le champ couvert par les demandes de protection de la confidentialité, dans bien des cas, les autorités se sont montrées réticentes à contester ces demandes suffisamment tôt et à faire en sorte qu'elles soient formulées de façon cohérente. Quatrièmement, les décisions sur les demandes de protection de la confidentialité doivent être prises à un niveau élevé, non seulement au sein des autorités, mais aussi au sein des entreprises, car sinon des salariés moins

expérimentés risquent de demander une protection de la confidentialité au titre d'un énorme éventail de questions qui ne s'avèreront pas recevables par la suite.

2. Prise de décision

La présidente explique que la convergence de la conception institutionnelle des autorités chargées d'appliquer le droit de la concurrence passe souvent pour moins importante que la convergence de l'analyse des questions de fond. Or la conception institutionnelle a de l'importance lorsqu'il s'agit de vérifier si les initiatives et les processus de décision d'une autorité sont perçus comme transparents par les parties impliquées dans la procédure d'application du droit et par le grand public. La présidente appelle la République tchèque à décrire les structures en place dans ce pays et la façon dont elles améliorent l'objectivité et l'impartialité du processus de décision.

La délégation de la République tchèque répond que, de façon générale, toute décision d'une instance administrative tchèque peut être révisée par une instance supérieure avant de donner lieu à un appel devant les tribunaux. C'est ainsi que la décision d'une collectivité locale serait examinée par une région. Dans le cas d'organismes centraux qui ne dépendent pas d'une autorité supérieure, comme l'Office de la concurrence (l'Office), c'est le président de cet organisme qui examinera la décision. Pour accroître l'objectivité de cet examen, le président s'appuiera sur un groupe de treize conseillers indépendants. Seuls deux de ces conseillers sont salariés de l'Office. Les onze autres conseillers sont indépendants de l'Office, mais connaissent très bien le domaine du droit de la concurrence ; par exemple, ils sont choisis parmi des professeurs, des économistes et d'autres experts de la concurrence. Les conseillers reçoivent le dossier préparé par l'Office et même s'ils n'ont pas accès à tous les éléments originaux, ils procèdent à un examen complètement objectif en apportant un regard nouveau de personnes qui n'ont pas auparavant été impliquées dans l'enquête ou la prise de décisions. Le président n'est pas tenu de suivre les recommandations formulées par le groupe de conseillers mais ces huit dernières années, l'avis du président ne s'est pas écarté de celui des conseillers.

La présidente invite ensuite la délégation des Pays-Bas à décrire plus avant la « procédure du point de contrôle » qui permet de vérifier l'avancement d'une affaire à différents moments de l'enquête.

La délégation des Pays-Bas explique les quatre phases de la procédure d'examen des ententes. La première phase est celle de l'enquête qui est effectuée par le Département de la concurrence. À l'aide de la « procédure du point de contrôle », l'équipe en charge de l'affaire et le chef économiste de l'Autorité de la concurrence (la NMa) vont étudier les chances de succès d'une enquête afin de prendre une décision de type « feu vert » ou « feu rouge ». Il s'agit de décisions internes prises par les responsables du dossier lors de réunions internes et, à ce stade, les parties ne sont pas informées du moment où les questions sont examinées ni de la nature de ces questions. Les avis sont ensuite soumis au directeur du Département de la concurrence et à son équipe de direction, sachant que dans des affaires particulièrement importantes, une unité d'experts peut aussi intervenir pour procéder à un examen interne supplémentaire. Depuis l'introduction de la procédure des points de contrôle il y a quatre ans, des affaires qui avaient peu de chances d'aboutir ont pu être rapidement closes. Les entreprises concernées par la procédure sont rapidement informées de la clôture de l'affaire. Si le Département de la concurrence décide de poursuivre l'examen de l'affaire, la procédure du point de contrôle se termine et une Communication des griefs est rédigée, signée par le directeur puis transmise aux parties. La seconde phase porte sur la détermination de la sanction et relève du Département des affaires juridiques qui est séparé de l'équipe d'enquête par un « pare-feu ». Le Département des affaires juridiques réexamine l'affaire et décide si un manquement au droit peut être établi et, si c'est le cas, la nature de l'amende à appliquer. Des auditions sont effectuées et l'équipe de juristes présente un projet de décision au conseil d'administration de la NMa, qui prend alors la décision finale.

Une fois que la décision finale a été arrêtée, les parties peuvent former un appel administratif qui constitue la troisième phase de la procédure. Les parties peuvent demander à la NMa ou au conseil d'administration de procéder à un nouvel examen complet de l'affaire et un comité indépendant va alors conseiller la NMa sur l'opportunité de maintenir sa décision ou de la revoir. Ce comité se compose d'experts, économistes, juristes, anciens magistrats et professeurs d'université qui ne sont pas employés par la NMa. Sur les vingt dernières affaires parvenues au stade de l'appel administratif, deux ont été entièrement revues, la décision initiale sur l'amende ayant été retirée. Dans toutes les autres affaires, la décision a été en grande partie maintenue, même si le raisonnement a été modifié. Lorsque la décision révisée est rendue publique, l'avis du comité d'experts est également publié de façon à assurer une transparence complète sur le dossier. La quatrième étape de la procédure consiste dans un examen par les tribunaux et, en matière de procès, la NMa peut se prévaloir d'assez bons antécédents. Cela peut en partie être attribué au fait que la décision de la NMa est défendue devant le tribunal par le Département des affaires juridiques et, une fois que l'arrêt du tribunal est rendu, il est soigneusement analysé par ce département afin de servir pour des affaires futures.

La présidente invite ensuite la délégation bulgare à décrire une récente réforme institutionnelle qui a aboutie à la création d'une unité consultative spécialisée.

La délégation de la Bulgarie explique qu'au début de 2010, le service juridique et l'unité de la concurrence ont été réunis en une même direction chargée de fournir des avis juridiques à la Commission sur la protection de la concurrence (la Commission). L'ancien service juridique se composait d'avocats ayant une expérience importante de défense des décisions de la Commission devant les tribunaux et connaissant bien la jurisprudence bulgare en matière de droit de la concurrence. En revanche, l'unité de la concurrence se composait d'experts suivant de près l'évolution de la jurisprudence de l'UE et chargés de dossiers de promotion de la concurrence en Bulgarie. La réunion de ces deux unités offre la possibilité à la Commission de rationaliser son processus interne d'enquête de décision, tout en appliquant une approche plus cohérente de l'évaluation juridique des circonstances de l'affaire. Dans le cadre de la nouvelle structure, la nouvelle unité est chargée de donner des avis formels et informels aux agents chargés d'une enquête. Si l'unité est consultée de façon officielle, un mémorandum ou un rapport sera établi qui fera ensuite partie du dossier et sera transmis aux Commissaires qui statuent sur l'affaire. Toutefois, ce document est classé comme interne et n'est donc pas accessible aux parties. Il existe trois situations dans lesquelles l'unité va être obligatoirement consultée : (i) avant que la Commission ne décide d'entamer une procédure *ex officio*; (ii) à la suite d'une évaluation des effets sur les échanges entre les membres de l'UE afin de décider si la Commission doit appliquer parallèlement les règles de la concurrence de l'UE et (iii) lorsque la Commission applique le mécanisme de renvoi prévu par le Règlement CE sur les concentrations. L'unité peut également, de sa propre initiative ou à la demande du Commissaire, procéder à une analyse juridique de sujets spécifiques concernant les travaux de la Commission.

La présidente revient maintenant à la contribution des États-Unis qui souligne l'importance de réunions fréquentes des autorités avec les parties et elle demande comment ces réunions s'inscrivent dans le processus de décision globale des deux autorités américaines.

La délégation des États-Unis répond que l'Antitrust Division du Département de la Justice (DOJ) encourage les contributions en connaissance de cause et sur le fond des parties à tous les stades de l'enquête. Ces contributions se rapportent aux faits, aux éléments économiques et aux doctrines du préjudice pertinentes pour l'affaire. Elles sont relayées de façon orale à travers des réunions informelles entre les parties et leurs conseillers juridiques et économiques et le DOJ, ainsi que par le biais de contributions écrites formelles des parties ou de « Livres blancs » ou autres documents. Cette interaction est un facteur d'ouverture et de transparence et permet au DOJ d'informer les parties du déroulement de la procédure et des étapes essentielles du processus d'enquête. Cela donne aussi aux parties la possibilité de s'adresser à des agents ou des hauts responsables du DOJ afin d'évoquer leur réflexion sur l'affaire. Avant

de déposer plainte à l'encontre des parties devant les tribunaux, les hauts responsables du DOJ, y compris souvent l'Assistant Attorney General, se réunissent avec les parties et leurs conseillers pour leur faire part de leurs préoccupations et pour donner aux parties la possibilité d'expliquer leurs arguments. Le DOJ peut affiner sa réflexion à la suite de telles réunions. La procédure interactive utilisée par le DOJ a trois objectifs : (i) s'attacher aux aspects essentiels de l'enquête aussi bien du point de vue de la procédure engagée par les autorités que du processus judiciaire ; (ii) améliorer les décisions en matière d'application du droit et (iii) faciliter la transparence et faire en sorte qu'il n'y ait pas de surprise que ce soit pour les parties ou pour l'autorité.

La Federal Trade Commission (la FTC) considère également que les réunions avec les parties sont une composante à part entière du processus administratif. Ce processus se décompose en quatre étapes : (i) l'enquête préliminaire ; (ii) la partie II de la procédure ; (iii) le stade de l'enquête et (iv) l'audition interne formelle de la partie III. À chacune de ces étapes, il est possible d'engager un dialogue informel, de présenter des éléments de preuve et d'entendre l'avis d'experts. L'interaction précoce avec les parties est spécialement importante. Lors de l'enquête préliminaire, on décide si l'enquête doit se poursuivre et les équipes juridiques et économiques vont apporter leurs conseils sur la démarche à adopter. Lorsqu'une recommandation est formulée à l'intention des Directeurs du Bureau, les parties sont invitées à expliquer leur point de vue sur les doctrines juridiques mises en avant. Si les Directeurs du Bureau décident de recommander le dépôt d'une plainte auprès de la Commission, les parties ont la possibilité de rencontrer le Président et les Commissaires avant que la décision définitive ne soit prise. Ce dialogue permanent assure non seulement l'équité procédurale, mais donne aussi plus de poids aux décisions prises et permet de régler des affaires de façon plus efficace et efficiente.

La présidente invite ensuite la Russie à expliquer l'utilisation qu'elle fait des experts externes.

La délégation de la Russie explique que des experts gouvernementaux permanents et des experts indépendants peuvent intervenir en tant que conseillers lors de l'examen d'une affaire. Les experts permanents peuvent provenir d'autorités de tutelle sectorielles ou d'autres autorités exécutives et peuvent représenter jusqu'à la moitié des membres du Service fédéral antimonopole (le Service) travaillant sur une affaire. Leur rôle est de veiller à ce que les caractéristiques spécifiques du secteur concerné soient prises en considération parallèlement aux questions de concurrence. Des experts indépendants peuvent également intervenir et ne sont pas salariés ni membres du Service. Les experts indépendants viennent souvent d'instituts de recherche et sont dotés de connaissances spécialisées économiques ou techniques et ils travaillent pour un projet d'études portant sur un sujet particulier. Des experts-conseils sont également utilisés. Ces derniers apportent des conseils sur l'évolution de la concurrence dans des branches d'activité spécifiques du tourisme à la défense pour compléter les propositions juridiques formulées par le Service ou par d'autres autorités gouvernementales.

La présidente invite le Royaume-Uni à traiter de l'indépendance des décideurs et à faire le point sur son récent projet relatif à la transparence.

La délégation du Royaume-Uni explique que la *Competition Commission* (la Commission) ne choisit pas ses propres affaires puisqu'elles lui sont soumises soient par l'*Office of Fair Trading* (l'OFT) soit par des autorités de tutelle de marchés ou de secteurs, soit encore à la suite d'un appel formé contre une décision de l'une des autorités de tutelle sectorielle. La Commission est une instance de décision dont le rôle consiste à effectuer une enquête approfondie de Phase II. Il n'y a pas de hiérarchie en matière de priorités d'enquête et il n'y a pas d'idées préconçues quant au résultat des enquêtes dans la mesure où la Phase I est effectuée par l'entité renvoyant l'affaire devant la Commission. Les décisions de la Commission sont prises par des membres d'un pool extérieur d'experts indépendants, qui ne sont pas salariés de la Commission et auxquels la Commission peut s'adresser pour constituer des panels chargés de mener des enquêtes particulières. Il y en a actuellement plus de quarante dont cinq ou plus sont affectés à une enquête

particulière. Ces experts sont responsables de l'orientation stratégique de l'enquête et de l'évaluation des éléments de preuve, mais non de la gestion au jour le jour de l'affaire qui est confiée à des équipes composées d'agents de la Commission. Les experts comme les équipes d'agents sont pluridisciplinaires et comprennent des économistes, des juristes, des conseillers d'entreprise et des experts financiers, toutes les disciplines ayant le même poids dans le processus de décision. Pour assurer la transparence du processus, la Commission a publié des lignes directrices sur l'analyse de fond des affaires qui viennent compléter les procédures relatives aux fusions et les enquêtes sur les marchés. Aux termes de la loi, la Commission est tenue de procéder à des consultations publiques sur ces propositions de décisions concernant aussi bien les évaluations des affaires et des mesures correctives en matière de droit de la concurrence. Ces décisions peuvent donner lieu à une révision judiciaire devant le *Competition Appeal Tribunal*, instance spécialisée dans le droit de la concurrence. Le processus fait donc intervenir des décideurs indépendants auxquels les parties ont directement accès, de multiples auditions afin de permettre des dépositions orales en cours d'enquête, un processus très transparent prévoyant des consultations formelles aux principaux stades de l'enquête et la possibilité de recours devant les tribunaux.

En mai 2010, l'OFT a publié une déclaration de transparence énonçant les différents engagements relatifs aux affaires d'application du droit de la concurrence. Il s'agissait notamment d'engagements de communication d'informations aux parties au début d'une enquête, y compris l'identité des membres de l'équipe d'enquête de l'OFT, des coordonnées et un délai prévisionnel d'achèvement de l'enquête. Le cas échéant, les demandes d'information donnent lieu à une notification préalable, en particulier aux destinataires de demandes d'information importantes. De plus, lorsque c'est possible et convenable, en particulier lorsque les règles applicables ne prévoient pas de procédure différente, l'OFT communique des projets de demande d'informations formelles. Les parties sont informées régulièrement de l'État d'avancement de l'affaire et, en cas d'écarts par rapport au calendrier prévu, des explications leur sont fournies. La notification préalable d'éventuelles annonces publiques est également assurée, des exemplaires des communiqués étant fournis dans toute la mesure du possible. Dans le cadre de la consultation de l'OFT sur la transparence, des avis ont été sollicités sur la possibilité pour l'OFT de faire part de ses réflexions préliminaires dans des affaires d'application du droit de la concurrence. Toutefois, contrairement à la situation de la Commission, qui fait part de ses réflexions préliminaires lors de la Phase II, certains ont estimé que la Phase I intervenait trop tôt dans le processus pour que cela soit compatible avec le rôle de l'OFT. Ce dernier reconnaît l'existence de difficultés dans ce domaine mais reste ouvert quant au moment où et à la façon dont il fera part de ses réflexions préliminaires, et ses équipes prendront en considération toutes les demandes des parties. L'amélioration de la transparence devrait certes être bien accueillie par tous, mais il reste à trouver un juste équilibre entre la rapidité de l'enquête et de la prise de décision et le souci d'assurer aux parties une procédure juste et transparente ainsi que de respecter les droits de la défense. L'OFT a connu des problèmes d'ordre procédural, par exemple à l'occasion de très longs différends sur des problèmes de confidentialité et de reformulation dans des documents. Cela a pour effet de ralentir l'avancement de l'affaire puisque des ressources s'en trouvent détournées pour le traitement de telles questions aux dépens du travail plus général de l'OFT.

3. Demandes d'information

La présidente explique que les différentes juridictions adoptent des pratiques des plus diverses à l'égard des demandes d'information : certaines observent des règles bien établies tandis que d'autres ont recours à une approche plus discrétionnaire. La présidente invite la Finlande à expliquer les voies par lesquelles les parties demandent des informations dans ce pays.

La délégation de la Finlande répond que l'Autorité finlandaise de la concurrence (l'Autorité) dispose d'une assez large latitude pour solliciter des informations auprès d'entreprises. Dans des affaires importantes, l'Autorité discute avec les parties avant de leur envoyer une demande officielle d'information. Ces discussions visent à comprendre la façon dont l'entreprise fonctionne, comment le marché fonctionne,

le type d'information que la société détient déjà et les informations que les parties peuvent fournir sans alourdissement indu de leurs contraintes. C'est aussi l'occasion de vérifier que toutes les parties parlent le même langage et de définir un éventuel vocabulaire technique, par exemple dans les affaires concernant les secteurs de l'énergie et des télécommunications, de façon à éviter tout malentendu de part et d'autre. D'autres discussions interviennent en outre avec les parties avant l'envoi de la Communication des griefs, de façon à préciser les faits sur lesquels les parties se sont accordées et de définir les éventuels points de désaccord. Ces nouvelles discussions interviennent à un stade tardif de la procédure pour assurer la solidité de la Communication des griefs qui peut devoir être justifiée le cas échéant devant le tribunal. L'Autorité a aussi adopté une pratique visant à atténuer la contrainte administrative du traitement des centaines de documents collectés au cours de l'enquête. Avant de mettre la dernière main à la Communication des griefs et de soumettre l'affaire au tribunal, les documents qui ne sont pas nécessaires à la procédure judiciaire sont retournés aux entreprises qui les avaient fournis. Cette pratique a parfois été critiquée en raison de la possibilité que ces documents puissent s'avérer nécessaires dans le cadre d'un procès futur. Toutefois, l'autorité continuera d'appliquer cette méthode pour éviter un certain nombre de problèmes qui demandent du temps et qui concernent l'accès au dossier dans lequel se trouvent des documents qui ne sont pas nécessaires à l'enquête proprement dite.

La présidente se tourne ensuite vers le Mexique qui est invité à expliquer les modalités des demandes d'informations dans ce pays.

La délégation du Mexique répond que, dans la mesure où le droit de la concurrence ne prévoit pas de procédure formelle de demande d'informations, la pratique de la Commission fédérale de la concurrence (la Comision Federal de Competencia ou « CFC ») est relativement souple. Il est fréquent que les responsables du dossier examinent le contenu de la demande d'informations avec les parties avant et après la formulation de la demande. Cela permet d'obtenir les informations nécessaires tout en minimisant les contraintes que de telles demandes imposent aux parties. Dans ce domaine, la souplesse dépend de l'affaire. Les parties tendent ainsi à avoir plus intérêt à satisfaire aux demandes d'information dans des affaires de fusion que dans des affaires d'abus de position dominante ou d'ententes et les procédures de la CFC sont plus souples lorsque les parties ne sont pas dans la confrontation.

La présidente demande ensuite au Chili d'expliquer comment les parties peuvent contester des demandes d'information.

La délégation du Chili explique que le Chili est doté d'un régime dual d'application du droit, l'autorité de la concurrence (*Fiscalia Nacional Economica* ou FNE) enquêtant sur l'affaire tandis qu'un Tribunal de la concurrence intervient en temps qu'instance de décision. La FNE est habilitée à demander des informations lorsqu'elle entame l'enquête et les parties peuvent contester ces demandes de deux façons : soit en demandant à la FNE de reconsidérer sa demande, soit en lui remettant une motion spéciale. Cette motion sera ensuite soumise au Tribunal en étant assortie de l'avis de la FNE sur les arguments avancés par les parties. Le Tribunal rejette généralement la demande des parties au motif que les arguments invoqués sont trop généraux et que la demande est insuffisamment justifiée en ce qui concerne les risques encourus. En outre, la FNE est tenue de respecter des règles extrêmement strictes quant à la préservation de la confidentialité et si l'un de ses agents contrevient à cette règle, il encourt une sanction pénale. En conséquence, toute information collectée au moyen de demandes d'informations sera protégée vis-à-vis de tierces parties et/ou de la concurrence. Le Tribunal doit également respecter des règles strictes sur le traitement des informations confidentielles, mais si une pièce est essentielle au dossier, il peut décider, dans des circonstances exceptionnelles, de lever la confidentialité.

La présidente invite ensuite la Hongrie à expliquer les modalités de consultation des parties à propos des demandes d'information dans ce pays.

La délégation de la Hongrie répond que, lorsqu'une demande d'informations est formulée, les parties en sont averties soit dans le cadre de la demande, soit verbalement par un responsable du dossier qui a examiné la demande au regard de l'opportunité d'une consultation avec l'autorité. C'est l'occasion pour les parties de mieux comprendre les conditions, les motifs et le contexte de la demande. Il ne s'agit pas pour les parties de négocier ou de modifier la demande, mais pour l'autorité de la concurrence (la GVH) d'expliquer exactement quelles sont les données nécessaires et pourquoi elles sont demandées. Cela peut être l'occasion de préciser la demande initiale en termes d'agrégation des données, de substitution de données disponibles ou de délais de réponse. Dans environ 5 à 10 % des cas, un réexamen sérieux de la demande peut s'avérer nécessaire. Cela peut être notamment le cas lorsque se posent des problèmes concernant les normes sectorielles de production et de conservation de données ou l'asymétrie de l'information. Cette consultation est un instrument utile et souvent particulièrement important dans des affaires concernant des secteurs que la GVH connaît mal.

4. Procédures transactionnelles

La présidente indique que même si les autorités font des efforts de transparence au cours des procédures judiciaires, ce n'est sans doute pas toujours le cas pour les procédures transactionnelles. Le plus souvent, les tierces parties intéressées n'ont qu'un accès limité aux éléments ayant justifiés la transaction dans l'affaire. Il convient de trouver un juste équilibre entre fournir plus d'informations sur la façon dont les autorités évaluent ces éléments et prennent leurs décisions et protéger les secrets commerciaux et la confidentialité. La présidente invite la Corée à expliquer sa pratique en matière de transactions.

La délégation de la Corée explique les trois modes de clôture ou de transaction dans les affaires de concurrence. Il y a d'abord le processus de « recommandations de correction ». Cela permet de clore l'affaire sans processus de décision officielle, les parties convenant simplement de corriger certaines pratiques. Ce processus peut s'appliquer dans les situations suivantes : (i) il n'y a pas assez de temps pour corriger les comportements anticoncurrentiels par l'intermédiaire des procédures officielles ; (ii) le préjudice risque de s'accroître au fil du temps ; ou (iii) le contrevenant admet le manquement au droit de la concurrence et manifeste clairement son intention de corriger immédiatement la pratique concernée. Vient ensuite la « procédure simplifiée ». Ce processus passe par une décision officielle, mais si la partie admet le manquement et convient d'appliquer des mesures correctives, l'affaire peut se poursuivre dans le cadre d'une procédure écrite et les parties ne sont pas tenues d'assister à toutes les auditions. Il y a enfin le système de « l'ordonnance d'expédient », actuellement étudié par la KFTC. Si cette procédure est retenue, elle permettra de conclure des affaires sans décision judiciaire, mais au moyen d'un accord entre l'autorité de la concurrence et les parties sur les mesures permettant le mieux de corriger les pratiques anticoncurrentielles.

La présidente demande ensuite au Brésil de décrire les procédures qu'il applique pour accélérer le règlement des affaires.

La délégation du Brésil explique que l'Autorité brésilienne de la concurrence (la CADE) dispose de trois instruments pour régler rapidement des affaires complexes, deux concernant les fusions et un les ententes. Le premier consiste en un accord visant à préserver la réversibilité d'une opération (un « APROT »), qui permet de geler un projet d'acquisition et donne à la CADE suffisamment de temps pour étudier le dossier. Le second réside dans un accord sur une ordonnance post-fusion proposée par le Commissaire (un « TCD »), dans le cadre duquel la CADE permet à l'acquisition de se poursuivre mais impose des mesures correctives comportementales ou structurelles. Le troisième est un accord de bonne conduite utilisé dans les affaires d'entente (un « TCC ») qui est proposé par les parties avant d'être analysé par le Commissaire. L'autorité dispose de 60 jours pour améliorer la première version de l'accord proposé par les parties, avant la conclusion d'un accord sur la version finale.

La présidente demande au Taipei chinois dans quelles conditions on peut envisager de clore une affaire.

La délégation du Taipei chinois répond que, dans certains cas, la Fair Trade Commission (la CTFTC) peut conclure un accord transactionnel imposant des sanctions administratives. Aux termes des lignes directrices relatives aux transactions administratives, la CTFTC doit satisfaire trois conditions avant d'entamer des négociations : (i) la transaction doit être légale ; (ii) elle doit être dans l'intérêt général et (iii) le préjudice qui peut en découler pour un quelconque tiers doit être établi. Compte tenu de la nécessité de satisfaire ces conditions, il y a eu très peu de cas de transactions négociées par la CTFC au moyen de ce type de contrat administratif.

5. Recours devant les tribunaux

La présidente demande au Japon d'expliquer la proposition de modification de la loi anti monopole qui va changer la conduite des auditions.

La délégation du Japon répond qu'aux termes de la loi en vigueur sur la concurrence, lorsque les parties ne respectent pas les ordonnances de la Japan Fair Trade Commission (la JFTC) une plainte peut être déposée, mais la JFTC examine d'abord l'appel. Si les parties continuent d'avoir des objections à la décision de la JFTC, l'affaire est alors portée devant la Haute Cour de Tokyo. Toutefois, les milieux d'affaires craignent que cette procédure d'audition ne soit pas équitable puisque l'organisation qui rend l'ordonnance doit elle-même décider de la recevabilité de cette ordonnance. En réaction à cette critique, un projet de loi de modification de la législation existante a été soumis à la Diète. Ce projet de loi prévoit de supprimer l'actuelle procédure d'examen du premier appel devant la JFTC et ce sera le Tribunal de district de Tokyo qui examinera, en première instance, les éventuels appels d'une ordonnance prise par la JFTC. La JFTC entendra les avis et les plaintes des parties avant de rendre une quelconque ordonnance. Ce projet de loi devrait être adopté lors de la prochaine session de la Diète.

La présidente invite ensuite la Lituanie a expliqué la norme de recours appliquée par le tribunal dans ce pays.

La délégation de la Lituanie répond qu'au terme de son droit national, le tribunal est habilité à modifier ou rapporter toute décision du Conseil lituanien de la concurrence (le Conseil). Toutefois, lorsque l'affaire implique un raisonnement économique complexe, la décision judiciaire est généralement circonscrite à une évaluation juridique de l'affaire, en d'autres termes on vérifie si le manquement a bien été établi et si les normes de preuves ont été satisfaites. Les évaluations économiques concernant par exemple la définition du marché pertinent ou l'établissement d'une position dominante sont réputées échapper à la compétence du tribunal. Une certaine latitude est donc accordée au Conseil dans ses décisions sur de tels sujets.

La présidente s'adresse ensuite à Israël.

La délégation d'Israël explique que différentes normes de recours devant les tribunaux peuvent s'appliquer. En droit administratif, la norme commune s'applique à presque tous les recours devant les tribunaux concernant des autorités publiques. D'après cette norme, le tribunal s'abstient d'intervenir dans une décision à moins qu'elle ne soit « manifestement déraisonnable ». Toutefois, les décisions prises par l'Autorité israélienne de la concurrence (l'Autorité) doivent respecter des normes plus exigeantes. Aux termes de la loi d'application du droit civil, deux normes peuvent s'appliquer selon que c'est l'Autorité qui prend la décision ou le Tribunal de la concurrence. La première norme s'applique au cas ou l'Autorité rend une décision formelle, comme le blocage d'une fusion ou la déclaration d'un abus de position dominante. Les parties peuvent former un appel auprès du tribunal de la concurrence qui réexamine la décision en

s'appuyant sur la norme des « erreurs ». Le tribunal dispose d'un certain nombre d'instruments institutionnels, y compris les auditions et les dépositions de témoins et il doit accorder un poids suffisant au fait que l'autorité a pris une première décision. La seconde norme avait adopté dans des procédures dans lesquelles l'autorité n'est pas habilitée à prendre sa propre décision et doit demander l'application de mesures correctives au tribunal, par exemple une ordonnance de remise en cause d'une fusion. Dans de tels cas, la norme applicable est celle de la « prépondérance de la preuve » et la charge de la preuve repose sur l'Autorité qui doit convaincre le Tribunal que la prépondérance de la preuve est favorable aux autorités.

La délégation du BIAC présente une série de derniers commentaires se plaçant du point de vue des milieux d'affaires. Elle admet que le principe essentiel pour les autorités consiste à établir un ensemble de faits précis. Toutefois, les autorités sont tenues d'agir de façon équitable lors de la collecte de l'ensemble des éléments pertinents, y compris des éléments à décharge. Les faits et les théories juridiques et économiques concernant l'affaire doivent être divulgués dès que possible. Il convient d'établir des normes minimums de transparence et d'engagement se conformant à l'éventail des procédures institutionnelles des pratiques adoptées par les différentes autorités. Il doit y avoir une audience à part entière venant s'ajouter à une procédure écrite et une séparation claire entre le rôle des enquêteurs et de ce qui prennent les décisions d'application du droit. Des panels jouant les « avocats du diable » sont certes utiles, mais pour accroître l'efficacité de ce type d'examen interne, ces panels devraient être habilités à poser des questions aux parties. En ce qui concerne les demandes d'information, une consultation préalable peut servir à vérifier que les sociétés réagissent aussi efficacement que possible et le délai de réponse accordé doit être raisonnable. Le principe de proportionnalité doit être appliqué à l'utilisation des instruments d'enquête et les mesures les plus invasives, par exemple la surveillance, les descentes dans les locaux, la capture de données sur des systèmes informatiques, etc. doivent être réservées aux affaires portant sur les soupçons de violations les plus inacceptables. Pour assurer une transparence totale, aussi bien vis-à-vis du public qu'à des fins de représentation, les décisions défavorables comme les arrêts des tribunaux doivent être publiés avec l'exposé de leurs motifs. Les entreprises se félicitent de la possibilité de régler des problèmes à un stade précoce et de la souplesse offerte par les accords transactionnels. Toutefois, en tant que de besoin, les parties doivent pouvoir régler une affaire sans être contraintes à reconnaître leur responsabilité. Les recours devant les tribunaux sont essentiels mais ils doivent venir compléter les procédures équitables engagées au premier stade d'intervention des autorités et non pas s'y substituer.

La délégation du Canada explique l'importance de séparer deux problèmes concernant ce domaine que l'on confond parfois. D'un côté, la transparence s'inscrit dans l'intérêt général et dans le souci de prévisibilité quant à la façon dont les décisions sont prises et dont les éléments de preuve sont collectés et utilisés. La transparence est une valeur commune utile non seulement aux tierces parties et au grand public, mais aussi aux autorités qui gagnent en crédibilité lorsqu'elles font preuve de transparence et lorsqu'elles améliorent la qualité de leurs décisions. D'un autre côté, il existe un intérêt très spécifique et immédiat pour les défendeurs de connaître la nature des griefs réunis contre eux, ce qui leur permet de réagir. Ces deux préoccupations ne sont pas contradictoires, mais répondre à l'une ne revient pas nécessairement à satisfaire l'autre. Traditionnellement, les autorités ont une propension naturelle à conserver certaines informations par-devers elles et une réticence à tout communiquer aux parties faisant l'objet de l'enquête. Même si de nombreuses autorités se sont désormais engagées à plus d'ouverture vis-à-vis des parties, encore faut-il qu'elles sachent faire preuve de bon sens et de clairvoyance pour ce faire. Dans certains cas, demander à de jeunes agents de l'autorité de prendre de telles décisions en dehors du contrôle d'agents plus expérimentés n'est sans doute pas judicieux. Il appartient donc aux autorités de trouver des moyens convenables d'aboutir à un juste équilibre entre des intérêts concurrents, ce qui suppose une évaluation au cas par cas.

La présidente conclut la table ronde en remerciant tous les participants pour leurs contributions et leurs interventions et elle clôt la table ronde.