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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**INSTITUTIONAL AND PROCEDURAL ASPECTS OF THE RELATIONSHIP BETWEEN
COMPETITION AUTHORITIES AND COURTS, AND UPDATE ON DEVELOPMENTS IN
PROCEDURAL FAIRNESS AND TRANSPARENCY**

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on “Institutional and Procedural Aspects of the Relationship between Competition Authorities and Courts, and Update on Developments in Procedural Fairness and Transparency” held by the Competition Committee (Working Party No.3 on Enforcement and Co-operation) in October 2011.

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 les Aspects institutionnels et procéduraux des rapports entre les autorités de la concurrence et les tribunaux, et point sur les évolutions en cours en matière d'équité et de transparence procédurales qui s'est tenue en octobre 2011 dans le cadre du Comité de la concurrence (Groupe de travail No.3 sur la co-opération 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) *National courts play a significant role within the process of competition law enforcement. The precise responsibilities of courts vary from jurisdiction to jurisdiction. Within certain systems, the competition authority brings enforcement actions before the court, which acts as final decision-maker with respect to alleged breaches of the competition rules. In other systems, the competition authority itself is empowered to take infringement decisions, and the courts provide an appeal mechanism or review function for such administrative decisions.*

National courts comprise an integral element of competition law enforcement systems in all OECD member countries. In some jurisdictions, the national court is the decision-maker at first instance for both public and private enforcement, determining whether the competition provisions have been breached by the defendant on the facts. In other systems, the competition authority makes administrative decisions regarding competition cases, which are then subject to higher level review by the courts. Within some systems, there may be a specialised judicial body for determination of competition law enforcement cases, distinct from the general national court system. Moreover, within a single system, there may be several channels for competition law enforcement. For example, criminal enforcement proceedings generally take place before a court, whereas within some systems, administrative decisions regarding violations of the law are taken by the competition authority.

Country experiences show a wide variation in judicial institutional arrangements among countries for review of competition decisions, in particular the question of whether such cases should be heard within the general civil courts, the administrative courts, or by a specialised competition tribunal. A number of competition systems utilise the competition authority itself as the first stage of review, by requiring the public agency to reconsider any disputed decision, with the possibility of further appeal to the courts. More generally, the discussion confirmed that courts perform an important supervisory function within competition law systems, ensuring that the rule of law is upheld throughout the enforcement process.

- (2) *The standard of review applied by the courts in competition cases varies between jurisdictions, and may also depend upon the particular administrative or judicial act under review. In some jurisdictions, judicial review is of the legality of the administrative decision of the competition authority; in other jurisdictions, courts can engage in a review on the merits of the case, i.e., the court essentially considers the competition issues de novo. Certain acts of competition authorities are not amenable to judicial review: in particular, in some jurisdictions the decision to discontinue a competition investigation.*

Whether there will be any significant difference between a review of legality and a de novo review on the merits will depend on the intensity of the review of legality; in some member countries a review of legality may involve a very detailed examination of the facts and evidence relied on. Judicial review of the legality of a competition decision involves scrutiny of the process of competition law decision-making, to determine whether a decision is based on accurate and reliable evidence, does not exceed the limits of the authority's discretion and no error of law has been made. Hence a legality review can involve a detailed review of evidence. Under a de novo review on the merits, the court may exercise all the powers conferred on the original decision-maker. The standard of review utilised in competition cases varies throughout the

member countries. Members of the business community typically are in favour of rigorous standards of review, thus permitting the reviewing court to assess whether the decision is substantively correct on the facts as well as being procedurally sound.

Certain decisions taken by competition authorities may have indirect effects on third parties that are not subject to judicial review. In particular, the decision by a competition authority to close a competition investigation without taking an action or making a finding as to whether there was an infringement cannot, in many competition systems, be challenged before the courts.

- (3) *In view of the specialised nature of competition law, the quality of judicial decision-making in competition cases can benefit from the provision of training in competition law for judges, as well as the use of experts to assist non-specialised judges. In some member countries, specialised competition law tribunals are employed, and/or competition review cases are concentrated within a single court of general jurisdiction, thereby allowing for the development of particular expertise in such courts. In cases in which it is not a party, the competition authority may choose or be obliged to provide the court with an expert opinion on the relevant law and facts, acting as amicus curiae.*

When competition law is enforced or reviewed through the ordinary court structure, there is a possibility that generalist courts will incorrectly apply its provisions, particularly when complex economic theories and tools ought to be applied. The provision of judicial training in competition law is therefore viewed as a key mechanism to improve the quality of decision-making in competition cases before the courts. National competition authorities in some jurisdictions may have a role to play in the provision of such training, in addition to any professional or regulatory body with responsibility for judicial training. In some jurisdictions, further assistance to judges can be provided through use of expert judicial advisors in competition cases, or the temporary appointment of competition experts as judges.

In some competition systems, there are specialised courts in place to hear appeals or review competition decisions. Such an arrangement may require the formal establishment of a distinct competition tribunal, or of a separate competition chamber within a general court system. Alternatively, a single court of general jurisdiction may be designated as the regular forum for review of competition decisions, facilitating the accumulation of competition law knowledge and expertise within that particular court.

The competition authority may choose, or be required under national legislation, to provide expert advice to the court in competition cases, acting as *amicus curiae*. This approach may be particularly useful in order to ensure consistency between public and private enforcement of competition law. In those systems that report use of the *amicus curiae* procedure, typically the competition authority's opinion is not dispositive of the legal issues, but will generally be afforded considerable weight by the court.

- (4) *In addition to deciding and/or reviewing administrative decisions in competition cases, the court may have additional roles. For example, the competition authority may need authorisation from the court to conduct dawn raids at business premises or private homes. Courts also may be involved in resolving disputes that arise during the course of an investigation, for example concerning claims of legal professional privilege. In some competition systems, alternative dispute resolution mechanisms have been established, in order to avoid the need for resort to judicial intervention in some such cases.*

Typically, the role of the courts in competition proceedings goes beyond mere assessment of the legality or correctness of infringement decisions. In particular, the court may play a role in supervising the conduct of the competition authority's investigation. In many systems, the competition authority is obliged to secure authorisation from a court in order to exercise certain investigative powers, for example,

operating wire taps or conducting inspections or dawn raids at business premises. The court may also be required to resolve disputes that arise between the public enforcement agency and the private firm(s) during the course of an investigation. For example, the court may be required to rule on whether disputed claims of legal professional privilege are valid, which could result in the exclusion of certain evidence from the case file.

Given the considerable costs, in terms of both time and expense, of litigating such procedural disputes, some competition systems have sought to develop alternative dispute resolution mechanisms in order to provide more efficient solutions to these problems. In the European Union, for example, competition investigations are supervised by an independent Hearing Officer, who now acts, *inter alia*, as an impartial arbiter in disputes concerning legal professional privilege, the right against self-incrimination and deadlines for submission of documents. The Office of Fair Trading in the United Kingdom is similarly experimenting with the use of a neutral Procedural Adjudicator, to resolve disputes involving deadlines, access to file and requests for confidentiality redactions.

- (5) *In general, the courts play a central role in the private enforcement of competition law. In many member country legal systems, actions for damages for losses incurred as a result of competition law violations may be brought by private individuals before the national courts. There is considerable variation among national systems with respect to private enforcement, for example, regarding the viability of class actions suits, the availability of exemplary damages and the status of follow-on actions.*

Private enforcement of competition law generally involves damages actions brought by private individuals before the ordinary courts, seeking compensation for losses incurred as a result of breaches of competition law. National courts therefore play a central role in private enforcement in most competition systems. A key concern with respect to private enforcement is the question of consistency with public enforcement activity, in particular where decisions on public and private enforcement are taken and reviewed by wholly separate administrative and/or judicial bodies.

Although private damages actions in competition cases are permitted in many member countries, considerable variations exist with respect to the conditions under which such actions are permitted. For example, there are differences in relation to the admissibility of class action suits or representative actions brought by consumer groups; the availability of exemplary or punitive damages in addition to recovery for actual losses; and the extent to which a prior finding of violation by the competition authority constitutes a necessary precondition for private enforcement.

- (6) *The protection of confidential business information is a significant concern when competition cases reach the courts, as it is throughout the process of competition enforcement. Such information may be liable to disclosure under freedom of information requirements, court-ordered discovery or other transparency provisions. Protection of information pertaining to leniency applications in cartel cases is a particular concern, which requires a balancing of the interests of private litigants in follow-on damages actions against the need to protect the integrity of a competition authority's leniency programme.*

The protection of confidential business information gathered during the course of a competition investigation is a recurring concern throughout the process of competition law enforcement. Such information may be disclosed pursuant to freedom of information provisions, court-mandated discovery or general rules on access to file for litigants. In many member country legal systems, there are exceptions to the disclosure requirements that can be invoked in order to protect confidential information contained in the agencies' case files. Nonetheless, in certain circumstances the public interest may favour disclosure.

The question of disclosure of information provided pursuant to a leniency application requires a particularly sensitive balancing of the need to encourage and facilitate private enforcement in competition cases and the need to protect the integrity and attraction of a competition authority's leniency programme, in order to safeguard its public enforcement function. Our roundtable discussion highlighted the desirability of having in place a legislative framework to make express statutory provision for the performance of this balancing exercise by the courts.

- (7) *The roundtable discussion emphasised the need for constant scrutiny and reappraisal of competition enforcement procedures, and in particular, the possible scope for further improvement of the existing framework. The discussion and submissions illustrated a variety of recent changes and innovations in competition law structures within member countries, which are of a substantive, procedural and/or institutional nature.*

The roundtable also provided an opportunity for member countries to report on updates with respect to procedural fairness and transparency within their jurisdictions. Even within the context of well-developed competition systems, there is a consensus regarding the necessity and appropriateness of regular review of existing rules and procedures, in order to identify opportunities for improvement.

The submissions and roundtable discussion analysed a broad range of recent or on-going developments within national and supra-national competition law systems. These changes relate to, *inter alia*, the status of the competition authority as an independent agency (e.g., Slovenia), the comprehensive overhaul of the substantive and procedural provisions of the national competition legislation (e.g., Greece), the strengthening of the enforcement powers of a competition authority, coupled with a more demanding standard for judicial review of competition decisions (e.g., Mexico), the reform of antitrust procedures and expansion of the role of the hearing officer (e.g., European Commission), as well as changes to the general civil procedure framework that may have a particular impact on competition litigation (e.g., Poland, Romania).

While many of these developments will have a positive effect on the competition enforcement framework, a number of submissions identified recent changes that may have a more ambiguous impact on the functioning of the competition system. In particular, interpretations of the ambit of the substantive or procedural competition rules by the courts may have the effect of limiting the scope for public enforcement by the competition authority.

- (8) *The discussion and submissions further highlighted the importance of transparency within competition law enforcement structures. Particular emphasis was placed on the desirability of making available within the public domain sufficient information regarding the enforcement objectives and procedures of the competition authority, in addition to its decisional practice. In formulating such policy documents, seeking input from stakeholders through a public consultation may significantly improve the coherency and completeness of the final document.*

The submissions and roundtable discussion emphasised the importance of transparency for the purposes of protecting the fairness, consistency and legitimacy of the competition enforcement process. In particular, many delegations reported recent publication of materials outlining the enforcement objectives and procedures of their respective competition authorities. Additionally, dissemination of information regarding the decisional practice of the authority, including decisions to close major investigations without any finding as to whether there was an infringement, leads to increased certainty for businesses.

Numerous submissions identified the beneficial impact of public consultations for the process of developing policy guidelines for publication, which can, moreover, function to guide the work of the competition authority going forward. Public consultations allow for stakeholder involvement in the

drafting process, thereby providing opportunities to test the soundness and workability of the proposed rules and procedures, and to identify gaps and ambiguities within the intended framework.

SYNTHÈSE

par le Secrétariat

- (1) *Les tribunaux nationaux jouent un rôle important dans le processus d'application du droit de la concurrence. Leurs responsabilités précises varient d'un pays à l'autre. Dans certains systèmes, l'autorité de la concurrence porte les actions d'application de la loi devant les tribunaux, qui tranchent en dernier ressort sur les infractions alléguées aux règles de la concurrence. Dans d'autres, l'autorité de la concurrence est elle-même habilitée à rendre des décisions en cas d'infraction et les tribunaux représentent alors un mécanisme d'appel ou exercent une fonction de contrôle de ces décisions administratives.*

Dans tous les pays de l'OCDE, les tribunaux font partie intégrante du régime d'application du droit de la concurrence. Dans certains pays, le tribunal est l'organe qui rend les décisions en première instance tant dans le cadre des actions civiles que privées, déterminant à partir d'éléments factuels si le défendeur a enfreint les dispositions du droit de la concurrence. Dans d'autres systèmes, l'autorité de la concurrence rend les décisions administratives dans les affaires de concurrence, décisions qui sont ensuite soumises, au niveau supérieur, au contrôle des tribunaux. Dans certains systèmes, une instance judiciaire spécialisée, disposant d'une autonomie par rapport à l'appareil judiciaire général du pays, peut être en place et c'est alors elle qui est chargée de trancher dans les affaires concernant l'application du droit de la concurrence. De plus, au sein d'un seul et même système peuvent coexister plusieurs voies d'application. Ainsi, les procédures pénales sont généralement du ressort des tribunaux alors même que dans certains systèmes, les décisions administratives concernant les infractions à la loi sont rendues par l'autorité de la concurrence.

Selon les pays, les affaires relevant du droit de la concurrence peuvent être tranchées soit par les tribunaux civils généraux, soit par les tribunaux administratifs, soit par un tribunal de la concurrence spécialisé et les dispositifs judiciaires et institutionnels de contrôle des décisions rendues sont extrêmement divers. Un certain nombre de systèmes font appel à l'autorité de la concurrence en tant que première instance de contrôle en lui demandant de réexaminer toute décision contestée, tout en ménageant par ailleurs une possibilité de recours supplémentaire devant les tribunaux. Plus généralement, la discussion a confirmé que les tribunaux exercent une importante fonction de surveillance dans le cadre des systèmes d'application du droit de la concurrence, assurant le respect de l'état de droit tout au long de la procédure.

- (2) *La norme de contrôle juridictionnel appliquée par les tribunaux dans les affaires de concurrence varie d'un pays à l'autre et peut également dépendre de l'acte administratif ou judiciaire particulier faisant l'objet du contrôle. Dans certains pays, le contrôle juridictionnel porte sur la légalité des décisions administratives rendues par l'autorité de la concurrence ; dans d'autres, les tribunaux peuvent procéder à un examen du bien-fondé de l'affaire, réexaminant alors tous les tenants et les aboutissants depuis le début. Certains actes des autorités de la concurrence ne peuvent être soumis à un contrôle juridictionnel. Dans certains pays, tel est en particulier le cas pour les décisions qu'elles prennent de classer une enquête sans suite.*

En fonction de son intensité, un contrôle de la légalité diffère plus ou moins d'un contrôle exhaustif des décisions rendues ; dans certains pays de l'OCDE en effet, un contrôle de la légalité peut donner lieu à un réexamen très détaillé des faits et éléments probants invoqués. Le contrôle juridictionnel de la légalité des décisions rendues en matière de droit de la concurrence donne lieu à un examen minutieux du

processus de décision afin de vérifier que les décisions sont fondées sur des preuves exactes et fiables, n'outrepassent par les limites des prérogatives de l'autorité de la concurrence et qu'aucune erreur de droit n'a été commise. Un contrôle de la légalité peut donc comprendre un examen détaillé des éléments de preuve. Dans le cadre d'un contrôle exhaustif des décisions rendues, le tribunal peut exercer tous les pouvoirs attribués à l'autorité administrative décisionnaire. Les normes de contrôle juridictionnel appliquées dans les affaires de concurrence varient selon les pays de l'OCDE. Les membres des milieux d'affaires sont généralement favorables à des normes rigoureuses de contrôle, autorisant le tribunal qui l'exerce à évaluer si les décisions rendues sont, sur le fond, respectueuses des faits et sont irréfutables sur le plan de la procédure.

Certaines décisions rendues par les autorités de la concurrence qui ne font pas l'objet du contrôle juridictionnel peuvent avoir indirectement des effets sur des tiers. Ainsi, les décisions prises par une autorité de la concurrence de classer sans suite une enquête sans engager de poursuites ou sans se prononcer sur l'existence ou non d'une infraction, ne peuvent, dans de nombreux systèmes d'application du droit de la concurrence, être contestées devant les tribunaux.

(3) *En raison de la nature spécialisée du droit de la concurrence, le fait de dispenser aux juges des formations en la matière ainsi que le recours à des experts pour aider les juges non spécialisés dans ce domaine pourraient être un avantage du point de vue de la qualité des décisions judiciaires rendues dans les affaires de concurrence. Dans certains pays de l'ODE, des tribunaux spécialisés en droit de la concurrence sont compétents en la matière et/ou le contrôle juridictionnel de toutes les affaires de concurrence est du ressort d'un unique tribunal de droit commun, ce qui permet aux juges qui y siègent d'accumuler des compétences particulières dans ce domaine. Lorsqu'elle n'est pas partie à une affaire, l'autorité de la concurrence peut choisir de fournir au tribunal un avis d'expert sur la législation ou sur les faits, ou être tenue de le faire par la législation nationale, intervenant alors en tant qu'*amicus curiae*.*

Lorsque le droit de la concurrence est mis en application par les tribunaux ordinaires ou que ceux-ci contrôlent les décisions rendues en la matière, le risque existe que ces tribunaux non spécialisés n'appliquent pas ses dispositions comme il convient, notamment quand ils doivent manier des théories ou des instruments économiques complexes. Le fait de dispenser aux juges une formation en droit de la concurrence est donc considéré comme un mécanisme essentiel pour améliorer la qualité des décisions rendues par les tribunaux dans les affaires de concurrence. Dans certains pays, l'autorité de la concurrence nationale peut avoir un rôle important à jouer pour dispenser ces formations, en plus de celles qu'assurent les instances professionnelles ou réglementaires chargées de la formation des juges. Dans certains pays, le recours, dans les affaires de concurrence, à des conseillers judiciaires spécialisés ou la désignation temporaire, à des postes de magistrats, de spécialistes du droit de la concurrence peut apporter aux juges une aide supplémentaire.

Dans certains systèmes, des tribunaux spécialisés sont en place. Ils sont chargés d'entendre les appels ou de contrôler les décisions relevant du droit de la concurrence. Un tel dispositif peut nécessiter la création officielle d'un tribunal de la concurrence distinct ou d'une chambre autonome de la concurrence au sein de l'appareil judiciaire général. Autre cas de figure, un unique tribunal de droit commun peut être désigné pour faire office d'instance ordinaire de contrôle des décisions relevant du droit de la concurrence, ce qui favorise du même coup l'accumulation de connaissances et de compétences dans ce domaine par les juges qui y siègent.

L'autorité de la concurrence peut choisir de fournir des avis d'expert au tribunal dans les affaires de concurrence, ou être tenue de le faire par la législation de son pays, intervenant alors en tant qu'*amicus curiae*. Cette approche peut être particulièrement utile pour assurer une cohérence entre l'application publique et l'application privée du droit de la concurrence. Selon les pays dont le système recourt à la

procédure d'*amicus curiae*, l'avis de l'autorité de la concurrence n'a, le plus souvent, pas pour objet de trancher les questions juridiques, mais les tribunaux lui accordent néanmoins généralement un poids considérable.

- (4) *Outre le fait de rendre des décisions et/ou de contrôler les décisions administratives dans les affaires de concurrence, le tribunal peut encore exercer d'autres fonctions. Ainsi, l'autorité de la concurrence peut être tenue de demander au tribunal l'autorisation de perquisitionner des locaux d'entreprises ou des domiciles privés. Les tribunaux peuvent également intervenir pour régler des différends survenant dans le courant d'une enquête, concernant par exemple des demandes ayant trait au respect du secret professionnel par les professionnels du droit. Dans certains systèmes, des mécanismes alternatifs de règlement des différends ont été mis en place afin d'éviter, le cas échéant, de faire appel aux tribunaux.*

Généralement, le rôle des tribunaux dans les procédures relevant du droit de la concurrence va au-delà de la simple évaluation de la légalité ou du bien-fondé des décisions relatives aux infractions. Le tribunal peut en particulier intervenir pour surveiller le déroulement des enquêtes menées par l'autorité de la concurrence. Dans de nombreux systèmes, l'autorité de la concurrence est tenue d'obtenir l'autorisation du tribunal en vue d'utiliser certains moyens d'enquête, pour procéder par exemple à des interceptions de communications ou encore à des inspections ou à des perquisitions dans des locaux d'entreprise. Le tribunal peut également être invité à régler les différends survenant dans le courant de l'enquête entre l'autorité administrative publique et une ou plusieurs entreprises privées par exemple. Le tribunal peut être invité à statuer sur la validité de demandes contestées portant sur le respect du secret professionnel par les professionnels du droit et qui auraient pour effet d'exclure certains éléments de preuve du dossier de l'affaire.

Étant donné les coûts considérables induits par le temps et par les dépenses consacrés au règlement de ces différends procéduraux, certains systèmes d'application du droit de la concurrence ont cherché à mettre en place des mécanismes alternatifs de règlement des différends afin de résoudre plus efficacement ces problèmes. Ainsi, dans l'Union européenne, les enquêtes relevant du droit de la concurrence sont supervisées par un conseiller auditeur indépendant qui intervient désormais, entre autres, en tant qu'arbitre impartial en cas de différends relatifs au respect du secret professionnel par les professionnels du droit, au droit de ne pas contribuer à sa propre incrimination et aux délais de communication des documents. Au Royaume-Uni, l'Office of Fair Trading expérimente ainsi de manière analogue le recours à un Procedural Adjudicator neutre (arbitre procédural) pour régler les différends concernant les délais, l'accès au dossier et les demandes de confidentialisation de documents.

- (5) *En général, les tribunaux jouent un rôle central en matière d'application privée du droit de la concurrence. Dans nombre de systèmes juridiques des pays de l'OCDE, les particuliers peuvent porter devant les tribunaux nationaux des actions en dommages et intérêts au titre des pertes qu'ils ont subies par suite d'infractions au droit de la concurrence. En matière d'actions privées, la situation varie considérablement d'un système à l'autre, s'agissant par exemple de la recevabilité des procédures engagées dans le cadre d'une action de groupe, de la possibilité de demander des dommages et intérêts exemplaires et du statut des actions requérant la reconnaissance préalable de l'infraction par l'autorité de la concurrence.*

L'application privée du droit de la concurrence donne généralement lieu à des actions en dommages et intérêts portées devant les tribunaux ordinaires par des particuliers cherchant à obtenir réparation au titre des pertes qu'ils ont encourues par suite d'infractions au droit de la concurrence. Dans la plupart des systèmes, les tribunaux jouent donc un rôle central en matière d'application privée du droit de la concurrence. La question de la cohérence de l'application privée et de la répression publique – en particulier lorsque les décisions concernant les actions publiques et privées sont rendues et contrôlées par

des instances administratives et/ou judiciaires entièrement autonomes les unes des autres – est une préoccupation essentielle.

Même si dans de nombreux pays de l'OCDE, les actions privées en dommages et intérêts sont autorisées dans les affaires de concurrence, les conditions en vertu desquelles ces actions sont permises sont extrêmement variables. Ainsi, des différences existent concernant la recevabilité des actions de groupe ou des recours collectifs engagés par des groupes de consommateurs, la possibilité de demander des dommages et intérêts exemplaires ou punitifs en plus de la récupération des pertes subies et le fait que l'ouverture d'une action privée soit ou non subordonnée à la reconnaissance préalable de l'infraction par l'autorité de la concurrence.

- (6) *La protection des informations commerciales confidentielles est une préoccupation importante lorsque les affaires de concurrence sont portées devant les tribunaux, ainsi que tout au long du processus d'application du droit de la concurrence. La communication de ces informations peut être imposée en vertu d'obligations tenant à la liberté de l'information, d'un processus de communication des pièces sur injonction d'un tribunal et d'autres règles de transparence. La protection des informations concernant des demandes de clémence dans les affaires d'entente constitue une préoccupation particulière, imposant de trouver un équilibre entre les intérêts des parties privées en cas d'action en dommages et intérêts subordonnée à une reconnaissance préalable de l'infraction par l'autorité de la concurrence et la nécessité de protéger l'intégrité du programme de clémence de l'autorité de la concurrence.*

La protection des informations commerciales confidentielles recueillies dans le courant d'une enquête est une préoccupation récurrente tout au long du processus d'application du droit de la concurrence. Il arrive que de telles informations soient communiquées en application de dispositions relatives à la liberté de l'information, d'un processus de communication de pièces sur injonction d'un tribunal ou de règles générales imposant l'accès des parties au dossier. Dans nombre de systèmes juridiques des pays de l'OCDE, des dérogations aux obligations de communication d'information sont prévues et peuvent être invoquées pour protéger les informations confidentielles contenues dans les dossiers des affaires établis par l'autorité de la concurrence. Néanmoins, dans certains cas, l'intérêt général peut rendre préférable la communication de ces informations.

La question de la communication des informations divulguées dans le cadre d'une demande de clémence impose de trouver un équilibre particulièrement délicat entre la nécessité d'encourager et de faciliter les actions privées dans les affaires de concurrence et celle de protéger l'intégrité et l'attrait du programme de clémence de l'autorité de la concurrence, afin de préserver sa fonction d'autorité administrative publique. Les discussions de notre table ronde ont souligné que l'existence d'un cadre législatif est souhaitable afin d'énoncer des dispositions explicites conformément auxquelles les tribunaux seront à même de respecter cet équilibre.

- (7) *Les discussions de notre table ronde ont souligné qu'un examen minutieux et une réévaluation constante des procédures d'application du droit de la concurrence, portant en particulier sur le volant éventuel de nouvelles améliorations à apporter au cadre existant, sont nécessaires. La discussion et les exposés des pays ont mis en évidence toutes sortes d'évolutions et d'innovations récentes – tant sur le fond que sur le plan procédural et/ou institutionnel – des instances des pays de l'OCDE chargées de faire appliquer le droit de la concurrence.*

La table ronde a en outre offert aux pays de l'OCDE l'occasion de présenter un bilan sur l'équité et la transparence procédurales de leur système respectif. Même lorsque le système est bien rodé, les pays s'accordent à penser qu'il est nécessaire et utile de procéder à un réexamen périodique des règles et procédures en vigueur pour mettre en évidence les améliorations éventuelles à apporter.

Lors des exposés et des discussions, toute une série d'évolutions récentes ou en cours survenues au sein des systèmes nationaux et supranationaux d'application du droit de la concurrence ont été analysées. Ces évolutions concernent notamment le statut de l'autorité de la concurrence en tant qu'organisme indépendant (en Slovénie, par exemple), la refonte complète des dispositions de fond et de procédure du droit de la concurrence national (comme en Grèce), le renforcement des pouvoirs d'application du droit de l'autorité de la concurrence, s'accompagnant d'une norme plus stricte de contrôle juridictionnel des décisions rendues dans les affaires de concurrence (au Mexique par exemple), la réforme des procédures d'application du droit de la concurrence et l'élargissement de la fonction du conseiller auditeur (par la Commission européenne, par exemple), ainsi que les évolutions du cadre général de procédure civile qui peut avoir un impact sur les actions en justice relevant du droit de la concurrence (en Pologne et en Roumanie, par exemple).

Plusieurs de ces évolutions auront des répercussions favorables sur le cadre d'application du droit de la concurrence. Un certain nombre des exposés ont cependant mis en lumière certaines évolutions récentes dont l'impact sur le fonctionnement du système d'application du droit de la concurrence risque d'être moins évident. Les diverses interprétations du champ d'application des règles de concurrence, sur le fond ou du point de vue de la procédure, peuvent en particulier avoir pour effet de limiter la portée de l'application publique par l'autorité de la concurrence.

- (8) *La discussion et les exposés ont mis en évidence l'importance de la transparence des structures chargées de faire appliquer le droit de la concurrence. Ils ont particulièrement souligné qu'il est souhaitable de diffuser dans le domaine public une quantité suffisante d'informations sur les objectifs visés par l'autorité de la concurrence en matière d'application de la loi et sur les procédures qu'elle observe et de diffuser par ailleurs des informations sur la pratique décisionnelle de celle-ci. La cohérence et l'exhaustivité de la version finale des documents préparés à cette fin pourraient être sensiblement renforcées par les contributions des parties prenantes, recueillies dans le cadre de consultations publiques.*

La discussion et les exposés ont mis en évidence l'importance de la transparence en vue de protéger l'équité, la cohérence et la légitimité du processus d'application du droit de la concurrence. Nombre de délégations ont en particulier fait savoir qu'ont été récemment publiés des documents présentant, dans les grandes lignes, les objectifs et procédures de leur autorité nationale de la concurrence en matière d'application de la loi. De surcroît, la diffusion d'informations sur la pratique décisionnelle de l'autorité, y compris sur les décisions qu'elle a prises de classer sans suite des enquêtes majeures sans se prononcer sur l'existence ou non d'une infraction, permet d'accroître la certitude pour les entreprises.

De nombreux exposés ont mis en évidence l'impact favorable des consultations publiques sur le processus de mise au point de lignes directrices stratégiques destinées à être publiées, qui pourront en outre guider les travaux de l'autorité de la concurrence dans l'avenir. Les consultations publiques permettent aux parties prenantes de participer à l'élaboration de ces documents, ce qui leur donne la possibilité de s'assurer du bien-fondé et de l'applicabilité des règles et des procédures qui y sont proposées et de faire ainsi ressortir les lacunes et les ambiguïtés du dispositif projeté.

AUSTRALIA

1. Overview

In civil and criminal competition law proceedings in Australia, the Federal Court of Australia (the Court) is required to determine whether a person has acted illegally based on evidence presented and tested in court.

Evidence obtained in an investigation by Australia's competition regulator, the Australian Competition and Consumer Commission (ACCC), is made available to those parties subject to competition enforcement proceedings. In certain limited circumstances and subject to the supervision of the court, information may be withheld from a respondent on public interest grounds.

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 Court to ensure confidentiality is protected. Such claims however are rigorously tested.

2. The separation of powers

The first three chapters of the Australian Constitution¹ are titled "The Parliament" (the legislature), "The Executive Government" (the administration) and "The Judicature" (the judiciary) and provides for these three functions to be separated, which is known as the separation of powers.

The executive or administration cannot exercise judicial power. In the federal system, judicial power can only be exercised by the courts. Courts are required to be comprised of independent judicial officers with security of tenure and to have the power to make and enforce orders.

The ACCC may only exercise administrative power. The determination of whether a contravention of the CCA has occurred is a matter for the Courts.

3. ACCC and the Court

3.1 Civil penalty proceedings

If the ACCC forms the view that conduct contravenes Part IV (the general competition provisions) of the *Competition and Consumer Act 2010* the ACCC does not have the power to unilaterally penalise or prevent that conduct. Instead, in civil proceedings (including proceedings for civil pecuniary penalties), the ACCC must commence legal proceedings in the Federal Court of Australia alleging that a contravention of the CCA has occurred.

¹ *The Constitution*, along with Acts and Regulations referred to in this submission, are available online at www.comlaw.gov.au

3.2 *Criminal cartel proceedings*

The ACCC's position is that serious cartel conduct should be prosecuted criminally whenever possible. For this reason, the ACCC will distinguish serious cartel conduct from that which is less serious in nature, including relatively minor conduct.

If the ACCC forms a view that serious cartel conduct has occurred,² it forwards a brief of evidence to the Office of the Commonwealth Director of Public Prosecutions (CDPP). The ACCC will work closely with the CDPP in relation to matters that could be the subject of referral.

The CDPP is independent of the ACCC and considers whether to institute criminal proceedings with reference to the Prosecution Policy of the Commonwealth.³ The CDPP will only commence proceedings if it considers:

- there is sufficient evidence to prosecute the case; and
- it is evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest

Ordinarily there are committal proceedings where the evidence against the accused is tested by the court before trial. If the court determines that is insufficient evidence to proceed, the matter is unlikely to progress to trial.

Following the committal, if the CDPP elects to institute proceedings, it conducts the proceedings on behalf of the Commonwealth of Australia and the proceedings are conducted in public accordance with Australia's criminal court procedures, which include trial by jury.

The procedural rules of Court cases in Australia are designed to ensure fair hearings and trials. A comprehensive review of these procedures is beyond the scope of this submission but some examples of rules particularly relevant to competition cases are set out in the "Court Proceedings" section below.

4. **Exercising administrative power**

The ACCC has a number of administrative powers it exercises in the course of regulating competition. These powers include:

- powers compelling the production of evidence in investigations;
- accepting undertakings offered by organisations under s87B of the CCA to resolve competition concerns; and
- authorising anti-competitive conduct that the ACCC considers is in the public interest.

The ACCC has a broad power to accept or reject undertakings offered under s87B of the CCA to resolve competition concerns⁴ and it routinely exercises this power. If the ACCC elects to litigate rather

² For further information, see *ACCC approach to cartel investigations* July 2009.

³ A copy of the Prosecution Policy of the Commonwealth is available at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/>

⁴ There must be a relationship between the conduct complained of and the s87B undertaking accepted: *ACCC v Woolworths (South Australia) Pty Ltd* (2003) ATPR 41-941.

than accept an undertaking so offered, the Court will not intervene in that decision.⁵ However, once an 87B undertaking is accepted by the ACCC, the party who offered the undertaking is bound by its terms and the ACCC may apply to the Court if it considers one of the conditions of the undertaking has been breached.⁶ If the Court is satisfied that the undertaking has been breached, it has power to make various orders including imposing financial penalties on the party who proffered the undertaking.⁷ Section 87B undertakings may be varied or withdrawn by consent. A decision by the ACCC on whether to accept an amendment or withdrawal is subject to judicial review⁸ (see below).

The ACCC and the Australian Energy Regulator (AER), an independent statutory authority and part of the ACCC, also make administrative regulatory decisions in specific national regulated industries and markets, where competition is limited. These decisions include:

- determining the terms and conditions (including prices) for infrastructure access, or arbitrating disputes over access between infrastructure owners and access seekers, in specific regulated markets; and
- publishing price monitoring reports about regulated markets to increase the transparency of regulated industry performance and to discourage excessive price increases and unsatisfactory performance standards by regulated businesses.

All ACCC and AER regulatory decisions are made through public, open and transparent consultation processes that facilitate participation by regulated businesses, access seekers and interested parties.

5. Merits review

These decisions may be subject to either administrative review or judicial review. Administrative reviews are also known as merits reviews as they reconsider the merits of a decision. They take place where an organisation or individual accepts that the ACCC/AER has power to make the decision it has made, but disagrees that the ACCC's/AER's decision was the correct or preferable decision in the circumstances. These review mechanisms ensure that administrative decisions are merit based.

For example, the AER is required to make electricity and gas decisions regulating the terms and conditions (including prices) for access to transmission and distribution networks. The AER has to make its decision balancing the interests of infrastructure owners, users and the broader public by promoting specific objectives set out in the legislation—that is, to promote efficient investment in energy services for the interests of consumers with respect to price, quality, reliability, safety and security. This task involves the assessment of large amounts of factual data and the exercise of judgment and discretion by the AER. Infrastructure owners may seek merits review of the AER's decision from the Australian Competition Tribunal. The Tribunal has the power to vary the original decision if it is satisfied the AER made a material error of facts, incorrectly exercised its discretion or made a decision that was unreasonable in all the circumstances.

⁵ *ACCC v Signature Security Group Pty Ltd* (2003) 52 ATR 1.

⁶ *Competition and Consumer Act 2010* s87B(3).

⁷ *Competition and Consumer Act 2010* s87B(4); *ACCC v Alinta 2000 Ltd* [2007] FCA 1362; (2007) ATPR 42-179.

⁸ Under the *Administrative Decisions (Judicial Review) Act 1977: Australian Petroleum Pty Ltd v ACCC* [1997] FCA 175; (1997) 73 FCR 75; 143 ALR 381; ATPR 41-555.

6. Judicial review

In some circumstances, the ACCC will make what it considers to be an administrative decision in circumstances where the organisation effected by the decision considers it exceeds the ACCC's power. Such disputes can be subject to judicial review.

For example, the ACCC is required to make access determinations for certain communication services. These determinations will provide default price and non-price terms of access to the service in the absence of a negotiated commercial agreement. The ACCC cannot make an access determination until it has, in accordance with specific and transparent legislative processes, held a public inquiry, prepared and published a report about the inquiry. A party affected by the making of an access determination may seek judicial review of that decision by the Court. Such a review does not question the merits of the decision but whether the ACCC had the power to make the determination in the first instance or followed the legislative procedure or otherwise made a legal error in making the determination.

7. Court proceedings

7.1 *Basic elements of civil and criminal proceedings in Australia*

In the Australian legal system, the party bringing the proceedings, being the applicant (ACCC) in civil proceedings or prosecutor (CDPP) in criminal proceedings, 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.⁹ For example, the applicant/prosecutor in proceedings must particularise allegations in a written statement of claim/charge.

Complementing these rules and reflecting the Australian Government's responsibility for maintaining proper standards in litigation, the ACCC is also required to observe the *Commonwealth's obligation to act as a model litigant*¹⁰ when conducting litigation.

With limited exceptions in civil proceedings, a respondent/defendant is not required to lead evidence in its case until the applicant/prosecutor has closed its case. If the respondent/defendant considers that the applicant/prosecutor has failed to prove its case to the requisite standard of proof at this time, the respondent/defendant may elect to lead no evidence in proceedings. Each party is entitled to cross examine witnesses and test any evidence that is lead in proceedings.

Except in exceptional circumstances, Court proceedings are conducted in public. At the conclusion of proceedings, written reasons for judgment and the Court's orders are produced by the Court and made publicly available.

Each party has an automatic right to appeal decisions of single judges made at the first instance by the Federal Court to the Full Federal Court. Appeals of Full Federal Court decisions to Australia's highest judicial decision making body, the High Court of Australia, may only be made where the High Court grants special leave to appeal.

⁹ *Federal Court Rules*. Please note that all the legislative instruments referred to in this paper are accessible via <http://www.comlaw.gov.au/>

¹⁰ Appendix B of Schedule 1 of the *Legal Services Directions 2005*.

7.2 Information disclosure in civil pecuniary proceedings

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.

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.

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 *Competition and Consumer Act 2010* (the CCA), to request disclosure of documents obtained by the ACCC which tend to establish their case.¹¹ 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.¹² The issue of protected cartel information is further discussed below.

7.3 Information disclosure in criminal proceedings

Reflecting the gravity of the available sanctions, criminal proceedings place higher obligations on the prosecutor and provide greater protections to the defendant than civil proceedings. For example, criminal proceedings require the prosecution to prove the case beyond reasonable doubt and impose strict obligations on the early disclosure of the prosecution’s evidence.

7.4 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.

8. Competition investigations, court proceedings and confidentiality

Confidentiality may be claimed during the investigation and litigation phase. A general overview is provided in relation to both stages.

8.1 Prior to the court hearing

Competition law cases generally draw upon commercial information and documents provided by suppliers, customers and competitors of the respondent. While sensitive deliberations on the circumstances

¹¹ *Competition and Consumer Act 2010*, section 157.

¹² *Competition and Consumer Act 2010*, section 157 (1A).

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.¹³ Generally this undertaking will expire if the contents of the document are disclosed in open court.¹⁴

8.2 *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.¹⁵ 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.¹⁶ Rather they operate to restrict access by third parties to the confidential material.

8.3 *Freedom of information*

Certain documents in the possession of Commonwealth government agencies such as the ACCC must be released to applicants upon a valid request¹⁷ unless they are exempt. Exemptions include documents protected by client legal privilege, confidential information and business/personal information. Some exemptions are now subject to a public interest test that is weighted in favour of disclosure, aimed at increasing public participation in government processes and increased scrutiny, discussion and review of government activities. Where documents are released to an applicant, the agency is also generally required to publish those documents on a website, except where publication would be unreasonable. Consultation is

¹³ *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2008] FCA 391.

¹⁴ See for example *Federal Court Rules*, Order 15, Rule 18.

¹⁵ *Federal Court of Australia Act 1976*, section 50.

¹⁶ Noting that material may be accessible on a need to know basis rather than to all persons working for a party to litigation.

¹⁷ See the *Freedom of Information Act 1982*.

often required with affected third parties prior to releasing documents to an applicant. Numerous review options are available to dissatisfied applicants and third parties.¹⁸

Agencies must also now proactively publish certain categories of information on a website, including an agency plan which shows how the agency proposes to meet the requirements of the information publication scheme.¹⁹

8.4 *Protected cartel information*

Australia considers that an effective immunity policy is integral to the detection, deterrence and prosecution of cartels.²⁰ 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.²¹

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 public interest factors.²² 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.²³

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.

8.5 *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.

¹⁸ Internal review by the agency concerned or the Australian Information Commissioner, merits review by the Administrative Appeals Tribunal or judicial review by the Court. Complaints about agency freedom of information procedures may also be made to the Australian Information Commissioner.

¹⁹ See <http://foi.accc.gov.au/> for more information.

²⁰ 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.

²¹ *Competition and Consumer Act 2010*, sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK.

²² *Competition and Consumer Act 2010*, section 157B.

²³ *Competition and Consumer Act 2010*, section 157D.

9. Conclusion

The Constitution of Australia requires courts to determine whether the CCA has been contravened and, if so, the redress that should be ordered in such circumstances. Where the ACCC exercises administrative decision making in its investigations or in exercising specific regulatory functions, these decisions are transparent and appealable.

CANADA

UPDATE ON DEVELOPMENTS IN TRANSPARENCY

1. Introduction

As an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* (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.

Transparency is a key component in building and maintaining credibility and trust with stakeholders. It helps explain the Bureau’s priorities to the public, and ensures that Bureau policies are applied in an impartial, open, and accessible manner, and are seen to be so applied. This, in turn, helps to ensure the legitimacy of Bureau investigations and enforcement decisions to foster compliance with the law, and to build trust between the Bureau and its stakeholders. As this Working Party has recognized, transparency and fairness 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.”¹

2. Confidentiality

Confidentiality is vital to the Bureau’s work, as it protects the integrity of investigations and commercially sensitive information. Section 29 of the Act sets out the confidentiality protections for information in the possession or control of the Bureau. In addition, subsection 10(3) of the Act states that inquiries must be conducted in private. As such, the Bureau must always measure the importance of transparency against its statutory obligations.

3. The Bureau’s on-going transparency activities

The Bureau endeavours to be as transparent as the law permits. The Bureau uses many means to promote transparency and predictability for businesses and consumers, primarily through publications (e.g., news releases, information bulletins, enforcement guidelines, and position statements).

3.1 *Enforcement guidelines & bulletins*

The Bureau publishes, and regularly updates, enforcement guidelines that articulate the Bureau’s enforcement policy and approach with respect to various provisions of the Act. Enforcement policy is developed in light of the Bureau’s past experience, jurisprudence, and economic theory.

¹ OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Working Party No. 3 on Co-operation and Enforcement, *Executive Summary of the Roundtables on Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings – 16 February 2010 and 15 June 2010* (18 August 2011) (hereinafter “OECD, WP3 *Executive Summary*”), at p. 2.

The development and publication of guidance on an agency's enforcement approach can be particularly useful on issues that remain unclear or uncertain to stakeholders. In this regard, the Bureau recently published guidance documents on its approach to two areas of the law that stakeholders and/or the Bureau believed could benefit from further clarification; namely, information sharing in the context of hostile transactions, and leniency in criminal cartel cases.

First, in June 2010, the Bureau released new Interpretation Guidelines with regard to its policy on information sharing in the context of hostile transactions.² The policy describes the Bureau's general approach to communicating information to a bidder and target during the course of its review.

Second, in September 2010, the Bureau published its Leniency Program Bulletin and a comprehensive set of frequently asked questions.³ The Bulletin outlines the factors that the Bureau considers when making sentencing recommendations to the Public Prosecution Service of Canada (the "PPSC") and the process for seeking a recommendation for a lenient sentence in criminal cartel cases. The Bulletin is a result of extensive consultations with, among others, the Canadian, American, and International Bar Associations, carried out in 2008 and 2009.

The Bureau also continues to review and update guidance documents to incorporate changes brought about by the 2009 amendments to the Act and to reflect current Bureau priorities. For example, the Bureau updated its *Bulletin on Corporate Compliance Programs*⁴ on September 27, 2010, which describes the Bureau's approach to programs designed to ensure compliance with the Act and other statutes administered and enforced by the Bureau. This most recent version of the *Bulletin on Corporate Compliance Programs* reflects comments received through public consultations, and incorporates the 2009 amendments to the Act.

In June 2011, the Bureau commenced a public consultation on draft revisions to its Merger Enforcement Guidelines ("MEGs").⁵ The MEGs, initially published in 2004, have been revised to accurately reflect current Bureau practice and current legal and economic thinking. The draft revised MEGs were published following roundtable consultations across Canada in 2010 and early 2011, consultations with foreign agencies, and a focused internal review. The draft revised MEGs describe, to the extent possible, how the Bureau conducts its analysis of merger transactions.

3.2 *Position statements*

The Bureau also publishes position statements for certain cases, which allow the Bureau to provide greater detail to the public and stakeholders about its conclusions and the approach taken in particular cases.

² Competition Bureau, "Hostile Transactions Interpretation Guideline Number 1: Bureau Policy on Disclosure of Information" (June 2010), available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03395.html>

³ Competition Bureau, Bulletin, "Leniency Program" (September 2010), available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html>

⁴ Competition Bureau, Bulletin, "Corporate Compliance Programs" (September 2010), available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03280.html>

⁵ Competition Bureau, *Merger Enforcement Guidelines: Draft for Consultation – June 2011* (June 2011), available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03384.html>

For instance, in February 2011, the Bureau released two statements regarding proposed mergers that were the subject of substantial media interest and public attention.⁶ While the Bureau had concluded, in both cases, that it did not intend to make an application to the Competition Tribunal in respect of the proposed transaction, it was felt appropriate to disclose the Bureau's conclusions, given the public nature of, and interest in, the proposed transactions.

4. The Bureau's new transparency initiatives

Throughout 2010, the Bureau undertook a self-assessment to identify opportunities to enhance the transparency of its activities. In particular, the Bureau reviewed current practices and policies to identify whether additional information could be made public while taking into consideration the Bureau's confidentiality constraints.

As part of this work, the Bureau conducted a review of the practices of several of the Bureau's international counterparts to assess the amount, type, and level of detail of information that is being provided to the public, particularly with regard to on-going and concluded enforcement matters.

This work illustrated that, in general, the Bureau's current enforcement practices and policies provide a high degree of transparency. In addition, the Bureau's regular publication of news releases regarding, among other things, decisions on enforcement matters, educates and informs the public and stakeholders about the Bureau's enforcement activities, as well as the impact of cases on businesses and consumers.

This assessment did, however, identify areas for improvement to increase transparency of the Bureau's activities. The following describes three initiatives that the Bureau is currently developing, and anticipates implementing by the end of this year, all of which focus particularly on the Bureau's merger review activities.

4.1 Merger registry

As part of its self-assessment, the Bureau found that some antitrust agencies currently post comprehensive lists of all merger decisions, including clearances, on their websites. Indeed, some agencies publish lists of mergers currently under consideration.

In order to improve our reporting in this area, the Bureau will create a Merger Registry, to be published on its website, that will contain information on concluded reviews and that will be updated monthly. In particular, the Merger Registry will include the names of the parties, the industry sector, and the outcome of the review, which could include an Advance Ruling Certificate,⁷ a No Action Letter,⁸ a Consent Agreement, a judicial decision, or "other".

⁶ See "Competition Bureau Statement Regarding BCE's Acquisition of CTV" (1 February 2011), available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03345.html>, and "Competition Bureau Statement Regarding Merger of XM Canada and Sirius Canada" (23 February 2011), available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03351.html>

⁷ An Advance Ruling Certificate ("ARC") may be issued where the Commissioner is satisfied by a party or parties to a proposed transaction that she would not have sufficient grounds on which to apply to the Competition Tribunal under section 92 of the Act for an order against a proposed merger. Where the Commissioner issues an ARC, and where the proposed transaction to which the certificate relates is substantially completed within one year after the certificate is issued, the Commissioner cannot apply to the Tribunal solely on the basis of information that is the same or substantially the same as the information on which issuance of the certificate was based. However, issuance of an ARC will not prevent the Commissioner from making an inquiry in respect of any other provision of the Act.

The Bureau is pleased to be undertaking this initiative that will provide the public and stakeholders with more timely information on the Bureau's merger review activities by providing a clear accounting of concluded merger reviews.

4.2 Position statements

The issuance of position statements has been used by the Bureau to describe the analysis and reasons behind the Bureau's conclusions in certain complex merger cases.⁹

The Bureau has very recently committed to publish more position statements for certain complex mergers to increase public and stakeholder understanding of a particular merger review, and to improve the predictability of the merger review process while encouraging compliance with the law. Position statements offer an excellent opportunity to provide technical information on already public transactions, including those that were subject to unique or uncommon analytical techniques, while respecting the Bureau's confidentiality obligations.

4.3 Public announcements where no enforcement action taken

As a subset of the above, in the past, and on an *ad-hoc* basis, the Bureau has actively publicly announced the completion of certain high-profile merger reviews where no enforcement action was taken by the Bureau. Public announcements of this sort provide additional transparency by providing the public with additional information on the Bureau's merger activities, particularly with regard to those mergers that garner a high degree of public interest. As noted above, the Bureau made two such public announcements in February 2011.

5. Conclusion

The Bureau continues to evaluate and assess its internal practices and policies to find new ways to enhance transparency and predictability to stakeholders. The Bureau also continues to follow the progress of other jurisdictions in this area, and will strive to incorporate lessons learned and best practices into the Bureau's own practices and policies.

⁸ No Action Letters (NALs) stipulate that "the Commissioner does not, at this time, intend to make an application under section 92 in respect of the proposed transaction."

⁹ Complex mergers involve proposed transactions between competitors, or between customers and suppliers, where there are indications that the transaction may, or is likely to, create, maintain, or enhance market power. Proposed transactions, where the combined post-merger market share of the parties is potentially 35% or more, are generally classified as complex. This category also includes certain proposed transactions where the combined post-merger market share is less than 35% but certain other factors, that tend to indicate a complex merger, are present, including the need to co-ordinate with one or more foreign competition authorities, the need to analyze an efficiency exception of failing firm claim, the existence of barriers to entry, or the fact that the merger is between participants in a concentrated industry.

CHILE

1. **Relationship between competition authorities in Chile: an administrative agency and a special judicial tribunal**

The institutional arrangement for competition law in Chile considers both an administrative body and a judicial body. The Fiscalía Nacional Económica (hereinafter, the “FNE”; also legally translated as “National Economic Prosecutor’s Office”) 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”) is the decisional judiciary body having exclusive jurisdiction on 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 FNE as a plaintiff in adversarial proceedings participates before the TDLC in the equivalent position as of any other party, with no special privileges. There are no special presumptions favoring FNE’s claims grounded on its representation of the public interest in competition law issues. Both institutions are completely separated bodies, even located in different buildings.

In the case of adversarial proceedings initiated by private plaintiffs which are empowered of filing a complaint directly before the TDLC, if no complaint by the FNE is submitted in the same proceeding, the TDLC may request a technical report from the FNE, which may be used by the TDLC to base its decision, complementing the records the parties have submitted.

The following paragraphs summarize different activities the TDLC has to perform regarding the FNE’s activities during FNE’s investigation and once a formal proceeding has been initiated.

1.1 *TDLC’s role during FNE’s investigation or before a formal proceeding has been initiated at the TDLC*

The FNE should give a notice to the TDLC’s President every time the records of an investigation will be kept secret as well as in cases when the Police will provide support for FNE’s investigation.¹

The FNE should request the authorization of the TDLC for omitting its legal duty of communicating to the investigated parties the initiation of an investigation.²

¹ Article 39 letter a) of the Competition Act provides that “...*With the knowledge of the President of the Competition Tribunal, the General Directorate of the Chilean Investigation Police shall provide to the National Economic Prosecutor the staff he requires for complying with the task indicated in this subsection or execute the specific proceedings requested with the same purpose. / The National Economic Prosecutor, with the knowledge of the President of the Competition Tribunal, may instruct that investigations that are initiated ex-officio or by virtue of complaints be restricted.*”

The TDLC should decide on complaints submitted by parties claiming harm due to the FNE's requests of information for its investigations.³

The TDLC should evaluate and issue an authorization regarding FNE's petitions on special powers (i.e. wiretapping, dawn raids, seizures, etc.). In addition to TDLC's authorization, the FNE should obtain a warrant before a Court of Appeals' judge, in order to perform those powers.⁴

The TDLC should evaluate and approve or reject non-judicial settlements that the FNE and a potential defendant may attain, as an alternative dispute resolution mechanism aimed at avoiding litigation, remedying competitive concerns as well.⁵

In cases of obstruction to FNE's investigations, the FNE may petition before a criminal judge the imposition of a prison term up to 15 days against the investigated individual, after an authorization by the TDLC has been issued.⁶

Before the initiation of an adversarial proceeding at the TDLC, the TDLC can order interim relief (cautionary injunctions aimed at preventing anticompetitive effects).⁷

² Article 39 letter a) of the Competition Act provides that "...The National Economic Prosecutor may instruct that the affected party not be notified of the commencement of an investigation, with the authorization of the Competition Tribunal."

³ Article 39 letter h) of the Competition Act provides that "...Individuals and the representatives of the legal entities from which the National Economic Prosecutor needs information whose delivery may cause damage to their interests or those of third parties may request the Competition Tribunal to dismiss the requirement totally or partially. This request must be justified and shall be submitted to the National Economic Prosecutor's Office within five days following the request made by this authority, whose effects will be suspended from the moment the relevant presentation is carried out. The Competition Tribunal shall hear and resolve said request at its next meeting, with a verbal or written report from the National Economic Prosecutor, and its ruling shall not be susceptible to any kind of appeal."

⁴ Article 39 letter n) of the Competition Act provides that "In serious and qualified cases in investigations aimed at proving the behaviour described in sub-section a) of Article 3, with prior approval of the Competition Tribunal, to request authorization from the relevant Magistrate of the Court of Appeals, through a grounded petition, that the police or the investigations police, under the guidance of an officer of the National Economic Prosecutor's Office, proceed to:..."

⁵ Article 39 letter ñ) of the Competition Act provides that the National Economic Prosecutor shall have the power "To sign extrajudicial agreements with economic agents involved in his investigations, in order to protect free competition in the markets. / The Tribunal shall review the agreement in a single hearing summoning the parties for that purpose, within five working days after receiving the information. During this proceeding, the Tribunal may hear pleadings by the parties. The Tribunal shall approve or reject the agreement within fifteen working days, counted from the date of the hearing. Once rendered, these resolutions shall be binding on the parties that appeared for the agreement, and only an objection before the same Tribunal may be brought against them..."

⁶ Article 42 of the Competition Act provides that "People who obstruct investigations opened by the National Economic Prosecutor's Office in the scope of its functions may be arrested for up to 15 days. / The arrest warrant shall be issued by the competent criminal court judge, upon request by the National Economic Prosecutor, prior authorization by the Competition Tribunal."

⁷ Article 25 of the Competition Act provides that "The Tribunal may, at any stage of the trial or prior its commencement, decree all precautionary measures needed to avoid the negative effects of the conduct subject of the complaint and to safeguard the common interest, for the time deemed necessary..."

1.2 *TDLC's role after a formal proceeding before the TDLC has been initiated*

Adversarial proceedings can be initiated both by a complaint by the FNE or by a private plaintiff's complaint (or by other public body acting as a plaintiff). They cannot be initiated by the TDLC *ex officio*. An adversarial proceeding has the procedural form of a trial. The FNE or a private plaintiff submits by written the grounds for an accusation, the defendant(s) has a deadline for submitting a response or defense to the accusation. If there are facts that must be proven, a stage for submitting evidence takes place.⁸ Evidence submitted can be commented by the parties. Thereafter, a public hearing where all the parties can present their arguments orally before the TDLC's five judge members closes the opportunities for parties' activities within the procedure until the issuing of TDLC's ruling.⁹ In this sense, the main role of the TDLC is to conduct and push forward the proceeding along its different stages. Additionally, the TDLC performs four major functions during these proceedings: it can promote the negotiation of a settlement between the parties and if parties settle, it have to approve or reject the settlement;¹⁰ it can order –even after the final hearings– probative activities considered indispensable¹¹; it can order interim cautionary injunctions aimed at preventing anticompetitive effects;¹² and, even though the procedure is public, the TDLC must avoid risks due to the dissemination of parties' sensitive commercial information and thus it should decree on petitions about the confidentiality of records, balancing protection of sensitive commercial information and due process and the right of defense.¹³

⁸ Articles 20-22 of the Competition Act.

⁹ Article 23 of the Competition Act provides that *“Once the probatory term expires, the Tribunal shall declare so, and shall set the date and time for the hearing. The Tribunal shall hear pleadings from the parties' attorneys when requested by any of them.”*

¹⁰ Article 22 of the Competition Act provides that *“After the term established in article 20 has expired, and whether or not the service of the procedure upon the interested parties was effected, the Tribunal may summon the parties to a conciliation hearing. If it is not considered pertinent to do so, or if said procedure has failed, the Tribunal shall set a twenty working days period for the submission of evidence. In the event that the conciliation has been reached, the Tribunal shall give its approval, provided that it does not infringe free competition. The appeal referred to in article 27 can be brought against the resolution that approves conciliation, by people who are allowed to litigate and who were not parties to such conciliation.”*

¹¹ Article 22 subsection 2° of the Competition Act provides that *“The Tribunal may instruct, at any stage of the case, even after the hearing when it turns out to be indispensable for clarifying those facts that still appear to be obscure and doubtful, the practice of the evidentiary proceedings that are deemed necessary.”*

¹² *Ibidem*, supra footnote number 7.

¹³ Articles 22 subsections 7° and ff. of the Competition Act provide that *“Instrumental proof may be presented up to ten days prior to the date set for the hearing of the case. Upon request by a party, the Tribunal may decree that access to those instruments that contain formulas, strategies or trade secrets or any other element which dissemination could significantly affect the competitive performance of the titleholder be restricted from third parties who are foreign to the process, or that they be kept confidential from the other party. [...] / Without prejudice to the above, at any stage of the process and even as a means for better resolving the case, the Tribunal may order the relevant party, ex officio or upon request of the party, to prepare a public version of the document so that other parties may exercise their right to object to it or to observe it. / If the above-mentioned public version is insufficient as valid information for ruling on the case, the Tribunal may decree, ex-officio and by a justified resolution, the declassification of the document, and shall instruct that it be disclosed to the other parties.”*

Non-adversarial proceedings, used for matters such as merger reviews or other consultations on competition law issues,¹⁴ are less formal and allow for the participation of a broader number of interested persons. A decree issued by the TDLC communicates the initiation of a non-adversarial proceeding and is published in the Official Gazette and on the TDLC's web site. In addition, this decree is served to the FNE and to other relevant authorities, regulators, companies and economic actors. Served persons as well as any other person having a legitimate interest may submit by written their views on the issue in question within a deadline. Thereafter, the TDLC will set the day and time for an open public hearing where parties that submitted their views by written will have the chance of presenting their arguments orally.¹⁵ Again, the main role of the TDLC is to conduct and push forward the proceeding along its different stages, with the aim of obtaining optimal levels of information on the industry and markets potentially affected.

The presentation above is an overview of the relationship between the competition authorities in Chile, where the system considers an administrative agency, the FNE, and a judicial body, the TDLC. Revision of TDLC's decisions is a duty in charge of the Supreme Court (it is performed by a special chamber therein, in charge of constitutional and administrative matters). The length of the revision procedure before the Supreme Court is relatively short, taking in average between 6 months and 1 year. Thus, the Supreme Court is the judicial body having general competence which is most involved in the enforcement of competition law. For these reasons, in the remaining part of this contribution we will consider the Supreme Court first and thereafter other judicial, quasi-judicial and/or law enforcement bodies with which competition authorities have to deal more or less regularly.

2. The role of the Supreme Court

The Supreme Court (SC) has to perform a revision of TDLC's decisions that have been challenged by a special recourse called "*recurso de reclamación*". The mechanism is available in adversarial and non-adversarial proceedings. The procedure is not exactly neither an extended judicial review proceeding (since only the stage before the Supreme Court is considered) nor an appeal -new evidence cannot be submitted- but it is pretty similar to an appeal, where matters of fact (such as the accurately assessment by the TDLC of the evidence submitted) and of law (such as what are the elements of an infringement) are taken into account.

In the two years between August 2009 and July 2011, the SC issued 20 rulings regarding the review of TDLC's rulings issued in an adversarial proceeding. In 15 of the said 20 cases the SC upheld TDLC's decision.

Among the remaining 5 cases, one time the SC overruled in total a TDLC's condemnatory ruling on excessive prices charged by an infrastructure concessionaire.¹⁶ In another excessive pricing case where the TDLC had punished water distribution & sewage companies, the TDLC admitted the subsidiary petition of

¹⁴ The same procedure is used for other relevant but less frequent matters such as the issuing by the TDLC of reports required by sector regulations, aimed at defining whether a service is provided on competitive or monopolistic terms and thus whether price regulation is justified. It is used as well for the issuing of general instructions by the TDLC: according to the Competition Act, the TDLC has the power of issuing general instructions in accordance with the law, which shall be observed by individuals executing or entering into acts or contracts that are related to or that could infringe free competition (Article 18 N° 3 of the Competition Act).

¹⁵ Competition Act, Article 31.

¹⁶ SC, January 28th, 2011, docket number 6100-2010, overrules TDLC's Ruling N° 100/2010 TDLC (*Pto. Terrestre Los Andes*).

reducing the amount of the fines and revoked a TDLC's recommendation on regulatory amendments.¹⁷ In other two cases, it was the FNE that had challenged the TDLC's decision and adjudicating on its favor, the SC raised the amount of the fines imposed: one case dealt with an exclusionary abuse in the distribution of matches¹⁸, the other one dealt with a horizontal agreement in urban passenger transportation market.¹⁹ The remaining case (among the 5 in which the SC did not dismissed completely the challenge), the SC just limited its decision to overrule TDLC's ruling that had made supporting the plaintiffs all the procedural and attorney fees.²⁰

The above numbers show significant degrees of deference of the SC regarding TDLC's decisions in adversarial proceedings in the last years. Regarding non-adversarial cases, the degrees of deference are even higher.²¹

The SC also plays a role in reviewing settlements approved during a trial by the TDLC in adversarial proceedings, according to Article 22 of the Competition Act.²² In 2009, the SC was requested for reviewing a landmark settlement where one of the defendants of a cartel case had confessed its participation and agreed to pay USD\$ 1 million. The SC showed again its deference with regards to TDLC's decision on approval, upholding it, with a dissenting vote though.²³

3. The Constitutional Court

The Constitutional Court (*Tribunal Constitucional*, hereinafter, the "TC") is a special tribunal in charge of the *ex ante* control of constitutionality of legislation and *ex post* control of constitutionality of legislation, its interpretation and other administrative acts.²⁴

According to its legal authority, the TC has issued decisions assessing the conformity to the Constitution of new amendments to the Competition Act. In every case it has performed this task, it has held this conformity, although ancillary statements in its decisions or dissenting votes.²⁵

¹⁷ SC, May 18th, 2010 docket number 5443-2009, upheld in part and overruled in part TDLC's Ruling N° 85/2009 (*Sanitarias*).

¹⁸ SC, June 2nd, 2010, docket number 277-2010, adjudicated in favor of the FNE and private plaintiff recourses, raising the amount of the fine determined by Ruling N° 90/2009 TDLC (*Fósforos*).

¹⁹ SC, December 29th, 2010, docket number 1746-2010, adjudicated in favor of the FNE's recourse, raising the amount of the fine determined by Ruling N° 94/2010 TDLC (*Transportes Central – Osorno*).

²⁰ SC, July 20th, 2011, docket number 2358-2011, overrules in part Ruling N° 109/2011 TDLC (*Conservación Patagónica*).

²¹ In the two years between August 2009 and July 2011, the SC has issued only one ruling in revision of a TDLC's decision issued from a non-adversarial proceeding. It was a merger review case where TDLC's decision was upheld. SC, August 10th, 2010, docket number 68-2010, upheld decision N° 31/2009 TDLC (*Anagra/Soquicom*).

²² *Vid. supra* footnote number 10.

²³ SC, August 31, 2009, docket number 3344-2009, upheld TDLC's settlement approval decision of April 13th, 2009, on case number C 184-08.

²⁴ The core of its regulation is contained in the Political Constitution of the Republic of Chile, articles 92 – 94.

²⁵ The TC by Ruling of October 7th, 2003, docket number 391-2003, made an assessment and held the constitutionality of the amendments that would be introduced by Act N° 19.911/2003 which significantly amended the Competition Act, for instance, by creating the TDLC which replaced the former *Antimonopoly*

The TC may also be requested to assess the constitutionality of the application of a legal provision when a proceeding before the TDLC is still pending. In several cases the TC has declared those requests as non-admissible.²⁶ In one case, when the TC adjudicated on the substance, the TC affirmed TDLC's position according to which reports the TDLC has to issue according to sectorial legislation are not legally challengeable before a superior court.²⁷

By and large, the role played by the TC do not alters significantly the regular work of competition authorities, in spite of the interest of parties of using this alternative mechanism, very often, just for delaying purposes.²⁸

4. The Transparency Council

The Transparency Council (*Consejo para la Transparencia*, hereinafter, the "CPLT") is a relatively new body which has quasi-judicial powers in the field of transparency of public bodies and access and availability of the public information and documents they possess. It is regulated by the Transparency Act N° 20.285/2008.

The relationship between the competition authorities -particularly the FNE- and this body has been more intense in the last years due to two parallels trends: the efforts of this new body to disseminate a culture of transparency in public management by and large, and the efforts of the FNE to protect the information of its investigations with more and more caution in order to protect the commercial sensitivity of the information the FNE handles and to ensure the effectiveness of its investigations. Those trends have translated into decisions by the CPLT concerning whether the FNE has proceeded according to the Transparency Act provisions when it has denied a request of a specific document or a query on information.

The mechanism works as follows. Any person may request to the FNE, as a public body, a specific document or more general information.²⁹ The FNE may approve the request and hence provide the requested information, or it may approve the request only in part providing partially the requested

Commissions. Again, in 2009, the TC by Ruling of June 23th, 2009, docket number 1377-2009, made an assessment and held the constitutionality of the amendments that would be introduced by Act N° 20.361/2009 which amended the Competition Act significantly reinforcing its effectiveness against cartel behavior. In this latter ruling, however, three of the nine members of the TC dissented on the grounds that the new powers against cartels (particularly wiretapping) did not satisfy the constitutionality thresholds due to the absence of proportionality between the means for investigation and the seriousness of the infringement.

²⁶ Particularly, in the famous retail pharmacies cartel case one of the defendants requested the intervention of the TC twice. However, both constitutional claims, grounded on procedural due process infringements were rejected because of their lack of constitutional relevance. TC, Ruling of March 26th, 2009, docket number 1344-2009-INA; and TC, Ruling of July 14th, 2009, docket number 1416-09-INA.

²⁷ TC, Ruling of September 7th, 2010, docket number 1448-09-INA.

²⁸ The strategy of requesting the TC has been used even in merger control proceedings (a supposedly non-adversarial proceeding). A request of this kind has been recently rejected concerning Lan/Tam airlines merger case. TC, Ruling of September 1st, 2011, docket number 2046-11-INA.

²⁹ The general duties of public bodies regarding the Transparency Act consider *Active Transparency duties*, (i.e., making available on their websites, or by other means, significant amounts of information concerning, resources, contracts, etc.), as well as *Passive Transparency duties*, which consider answering to requests by providing the information or documents requested, unless, there is a justification in the Transparency Act for not providing it. During 2009 the FNE received 63 requests for information on these grounds, 104 in 2010 and, so far, has received 54 in 2011.

information, or finally, the FNE can deny it. In cases of partial approval or rejection of the request, the requesting party may submit a claim before the CPLT.³⁰ Decisions of the CPLT may be challenged before the Court of Appeals.³¹

The requests of information may take place during the FNE's investigation or even once the proceeding before the TDLC has started. Thus, in some cases the FNE has faced strategic requests of information by defendant's attorneys once the trial before the TDLC has begun.

The Transparency Act provides for several justifications that allow the FNE to deny in total or deny partially requests of information.³² The CPLT by and large has held that the use of those justifications by the FNE is indeed according to the Transparency Act. For instance, in one case, the CPLT held that *"disclosing the requested information in the current case could affect not only the undertaking's rights but could set a precedent that would make harder for the FNE to accomplish its legal duties that include protecting the public economic order for the common good. Disclosure of information voluntarily provided to the FNE by persons and undertakings would threaten FNE's legal mandates of identifying and assessing the facts that could constitute infringements to the competition law and of monitoring markets, and it seems clear that such a disclosure would be more harmful to the common good than its secrecy."*³³

The example above shows that the CPLT has a good understanding of FNE's legal duties. It has showed a consistent decision practice so far, without generating significant troubles to the FNE's activities.

5. A Court of Appeals' judge: grant of a warrant for special investigation powers

According to the Competition Act, a warrant issued by a Court of Appeals' judge must be obtained if the FNE pretends to use its special powers (i.e. wiretapping, raids, seizures, etc.) in a specific investigation. This warrant is required in addition to the TDLC's authorization granted previously for the same purposes.³⁴

When the amendments that introduced these special powers in the Competition Act came into force in 2009, the FNE's head and higher officers had several meetings with Court of Appeals' presidents, with competition advocacy purposes and also aimed at discussing how co-ordination on these matters would take place.

From then on, all of FNE's requests of warrants have been granted by judges. Only in requests of extensions judges have been more cautious. When assessing these requests, FNE's higher officers have a

³⁰ During the years 2010-2011 these proceedings have motivated 7 decisions by the CPLT on requests of information to the FNE.

³¹ So far, no case involving a request of information to the FNE has been challenged before the Court of Appeals after CPLT's decision.

³² Among the justifications provided by the Transparency Act for denying access to public information (articles 20-21), the most frequently argued by the FNE are: (i) the opposition to disclosure by a third party which could be harmed by the disclosure of the information requested; (ii) the disclosure affects the due compliance of statutory duties of the requested body; (iii) the information requested is part of the background for adopting or implementing a future decision, action or policy; (iv) the information requested is needed for legal or judicial defense; (v) the disclosure of the requested information may affect third parties' commercial or economic rights; (vi) the requested information is too generic or broad and its collection would be too onerous, distracting officers from their regular duties.

³³ CPLT's decision of May 25th, 2010, docket number C 576-09, Rc. 7°.

³⁴ Article 39 letter n) of the Competition Act. *Vid. supra*, footnote 4.

private meeting with the corresponding judge in order to explain him the request. Judges assess the request on a case by case basis.

It is expected that experience will show that the FNE's use of these special powers is an effective tool for investigating hard core cartels,³⁵ and then judges will become even more familiar with these means for investigating competition law infringements.

6. The civil tribunals for adjudication on private damages actions

Before 2003, there was no provision in the Competition Act regulating private damages actions, so damages claims for antitrust infringements were subject to the common provisions for civil damages contained in the Civil Code.³⁶ In 2003, an amendment to the Competition Act introduced a new provision that regulates civil actions for damages caused by an antitrust violation.³⁷

The amendment aimed at reducing the length of private actions proceedings. Even though these actions are under the competence of civil judges –and not the TDLC, the amendment to the Competition Act gave TDLC's decisions an important role in civil proceedings. According to the law, the TDLC's ruling on fact and law cannot be challenged in the corresponding civil suit. This means that the discussion will be the existence of the claimed injury, causality and damages.

Notwithstanding the improvements, the number of private actions is still very low. Up to date, no private action based on cartel infringement has been submitted, for instance. This may be due to the absence of procedural incentives such as class actions, which in Chile are only available for consumer protection matters.

Due to the limited number of private damages actions submitted so far, competition authorities have not felt compelled to develop advocacy initiatives or other particular exchanges with civil judges on these matters. But if the number of private damages actions increases in the future, it is likely that competition authorities will have more exchanges with these judicial bodies.

7. The criminal court and criminal public prosecutor

In cases of obstruction to FNE's investigations, the Competition Act empowers the FNE to petition before a criminal judge the imposition of prison up to 15 days to the investigated individual, after an authorization by the TDLC has been issued. This provision, however, has rarely been used.

On the other hand, the Chilean 1874 Penal Code contains old provisions that could potentially be applicable to individuals participating in a cartel but these provisions' scope is not clear. These provisions seem to be not easy to enforce. Substantive requirements include the identification of the "natural price" of the goods or services exchanged and to prove fraud and, in anyway, in case of conviction, effective prison

³⁵ In June 2011 the FNE for the first time filed complaints grounded on information requested through the means of wiretapping.

³⁶ Section starting at Art. 2314, Civil Code, for torts or non-contractual damages.

³⁷ Article 30 of the Competition Act provides that "*The damage claim that may result from the anticompetitive conduct judged as such by a final ruling of the Competition Tribunal, shall be filed in the competent civil court according to the general rules, and shall be handled according to the summary proceedings established in Book III Title XI of the Civil Procedure Code. / The competent civil court, when ruling on the damage claim, shall base its ruling on the conduct, actions and legal classification thereof, as established by the decision of the Competition Tribunal.*"

is very unlikely to be imposed due to the benefits provided by penal law that allow substituting prison in cases of first penal infringements having low sanctions as it is in this case.

Currently, there is an ongoing criminal proceeding against some individuals that participated in a cartel. We are looking forward to the ruling the criminal judges may issue on this case.

So far, the FNE has developed initiatives aimed at co-ordinating criminal law and competition law enforcement policies in cartel cases. However, Criminal prosecutors feel backed by their discretionary powers to enforce the criminal provisions of the Penal Code as they wish, and do not seem willing to resign to those powers. This makes even more interesting the ruling the criminal judges may issue on the case mentioned above, since it will provide the framework for future efforts aimed at achieving the said co-ordination.

8. Final remarks

Competition Authorities in Chile include an administrative agency and a judicial body. The particularities of the TDLC as a judicial body that make of it a proper competition authority are that it is a special judicial body which competence is limited to adjudication in competition law issues and that it is integrated by lawyers and economists.

Beyond the special and major intervention of the TDLC in competition law matters, competition authorities deal with different judicial and quasi-judicial bodies. A significant role is played by the Supreme Court, which has showed significant degrees of deference with regards to TDLC's decisions in the last years.

But interactions with other judicial and quasi-judicial bodies also include the Constitutional Court, the Transparency Council, a judge of Court of Appeals, civil judges and criminal judges. Even though the interactions with these bodies seem to be much more infrequent than interactions with the Supreme Court, some interventions by these bodies could be determinant and have significant consequences in competition law enforcement. So far, however, this has not been the case.

GERMANY

1. Introduction

This submission seeks to start with a brief overview of the substantive competition provisions in the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter “ARC”)¹ (2.) and the different procedural rules that apply to public and private competition cases in Germany (3.) to provide a basis for an introduction into the relationship between the German competition authorities and the courts (4.). Finally, the submission will give an update on recent developments relating to issues of procedural fairness and transparency in the enforcement process (5.).

2. Substantive provisions of German competition law

The German Competition Authority (hereinafter “*Bundeskartellamt*”) is competent for enforcing the ban on cartels (Section 1 and 2 ARC) and exercising abuse control (Section 19 and 20 ARC), if the anti-competitive effects of such practices extend beyond the territory of one federal *Land*.² Furthermore, the *Bundeskartellamt* has the exclusive competence for implementing merger control under the ARC in Germany (Section 35 to 43 ARC). Finally, if the anticompetitive agreements or abusive practices are likely to affect trade between the EU Member States, the *Bundeskartellamt* also applies the European competition law provisions (Articles 101 and 102 of the Treaty on the Functioning of the European Union – TFEU).

3. Procedural rules for public and private competition cases

3.1 Merger control proceedings

Merger control proceedings (Section 37 to 43 ARC) by the *Bundeskartellamt* are conducted as administrative proceedings in accordance with the special procedural rules in Section 54 to 62 ARC complemented by the more general rules of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*; hereinafter “VwVfG”)³. The VwVfG and the ARC together form the framework for the *Bundeskartellamt*’s proceedings. Under the provisions of the ARC, the *Bundeskartellamt* has extensive investigatory powers in order to obtain comprehensive information on the market conditions (Section 57-59 ARC). At the end of merger control proceedings, the *Bundeskartellamt* may prohibit a merger project, clear it or clear it subject to conditions (Section 40 ARC).

3.2 Non-merger administrative proceedings

Anticompetitive agreements (Section 1 and 2 ARC; Article 101 TFEU) as well as the abuse of a dominant or powerful position (Sections 19, 20 ARC, Article 102 TFEU) are prohibited by law. Violations

¹ An English version of the ARC is available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf

² Violations of the ban on cartels or abusive practices, the effects of which are limited to one *Land*, are prosecuted by the competition authority of the respective *Land*.

³ Available in German only at <http://www.gesetze-im-internet.de/vwvfg/index.html>

of these provisions constitute administrative offences in Germany and may be fined if they have been committed intentionally or negligently (Section 81 ARC). Depending on the seriousness of the infringement, the complexity of the legal assessment and the likelihood of proving intention or negligence, the *Bundeskartellamt* as the competent authority has the discretion to decide on how to handle the case procedurally. It may either choose to initiate administrative offence proceedings (see c) below) or it may merely initiate administrative proceedings.

Administrative proceedings with regard to anticompetitive agreements and abuses are governed by the special procedural rules as described in Section 54 to 62 ARC together with the more general rules of the VwVfG. According to Section 54 ARC the *Bundeskartellamt* can initiate such proceedings either on its own accord or following a complaint. The formal steps following the initiation of proceedings are modelled on judicial procedure. The ARC and the VwVfG therefore stipulate for the parties to the proceedings⁴ the right to be heard⁵ and further provisions ensuring fair proceedings.

The normal legal outcome of administrative proceedings is a cease and desist order, by which the respective anti-competitive behaviour has to be abandoned (Section 32 ARC). In excessive pricing cases the provision can also be invoked to impose payback orders. The *Bundeskartellamt* furthermore has the possibility to order interim measures in urgent cases if there is a danger of a serious, irreparable damage to competition (Section 32b ARC). The measure must however be limited and may not exceed one year. The *Bundeskartellamt* also has the possibility to issue commitment orders (Section 32b ARC). This enables companies to avoid a decision by the *Bundeskartellamt* by committing themselves to adopt a certain conduct.

3.3 *Administrative offence proceedings*

In cases of clear-cut and serious infringements, the *Bundeskartellamt* can also decide to initiate administrative offence proceedings. The *Bundeskartellamt* opens such proceedings in particular in cases of cartel agreements which lead to particularly severe distortions of competition. Such agreements will often take the form of agreements between competitors on prices, quantities, geographic areas or customer groups (“hard-core cartels”).

In administrative offences proceedings not only the provisions of the ARC apply, but also the provisions of the Federal Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*; hereinafter “OWiG”).⁶ The OWiG contains the general provisions for most enforcement activities of the German Federal Government or *Länder* (federal states) against violations of public law (not including criminal law).

The legal outcome of administrative offence proceedings is the imposition of a fine by formal decision. Criminal sanctions, and in particular prison sentences cannot be imposed. The sole exception to this general rule has been provided for bid-rigging offences. These constitute criminal offences under German criminal law and are prosecuted by the public prosecutor. If the undertakings concerned agree, cases may also end by settlement.

⁴ See Section 54 subsection 2 ARC for parties to the proceedings.

⁵ See Section 56 ARC which provides that the competition authority shall give the parties an opportunity to comment.

⁶ See Section 81 ARC and Section 46 of the Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*).

3.4 *Private enforcement proceedings*

Private enforcement claims play an important role in Germany, especially in abuse and discrimination cases but also in cases of anticompetitive agreements. They are dealt with by specialized civil courts (Section 87 and 89 ARC). In cases where a party claims damages after the *Bundeskartellamt* or another European competition authority has issued a final decision that an infringement has occurred, such finding is binding on the court (Section 33 (4) ARC).

4. **Relationship between the competition authorities and the courts**

The relationship between the *Bundeskartellamt* and the courts differs according to the nature of the preceding proceedings. Because of the complex legal and economic nature of competition law, the competent courts are not administrative but specialised civil courts divisions.

4.1 *Administrative proceedings*

The relationship between the *Bundeskartellamt* and the respective courts is governed by the provisions of the ARC.

In the case of merger control proceedings, the companies can appeal against a decision by the *Bundeskartellamt* before the Düsseldorf Higher Regional Court (Section 63 ARC) where the *Bundeskartellamt* is party to the proceedings (Section 67 (1) (2) ARC). The appeal may be lodged on a factual and legal basis, providing the companies with a full factual and legal review of the *Bundeskartellamt's* decision (Section 70 ARC). The court is competent to fully investigate the facts itself and may even request the *Bundeskartellamt* to provide or collect further data to analyse the case in more detail or with a different focus.

There are four chambers specialized in competition matters at the Düsseldorf Higher Regional Court. Appeals only on points of law against decisions of the Düsseldorf Higher Regional Court can be lodged with the Federal Court of Justice in Karlsruhe (Section 74 and 75).

4.2 *Administrative offence proceedings*

In the case of administrative offence proceedings, the situation differs. If an order of the *Bundeskartellamt* imposing a fine in an antitrust or cartel case is appealed against, the *Bundeskartellamt* first examines whether the order must be changed or revoked (intermediate proceedings).

If the *Bundeskartellamt* decides not to change its decision and the complaints are substantiated, the *Bundeskartellamt's* decisions will again be subject to full review with regard to the factual and legal basis. This review, in the first place, is conducted by the Düsseldorf public prosecutor's office. After examination by this office the proceedings are referred to the Düsseldorf Higher Regional Court. At all hearings the *Bundeskartellamt* is represented in court, in addition to the public prosecutor's office. Thereby, the *Bundeskartellamt* is able to contribute its case knowledge to the proceedings and to support the public prosecutor's office. It is, however, not party to the proceedings before the court. The procedural law in these appeal cases is complemented by the German Code of Criminal Procedure (*Strafprozessordnung*; hereinafter "StPO"). The procedural rights and safeguards for the companies are thus more or less equivalent to criminal law.

4.3 *Private enforcement*

Finally, the *Bundeskartellamt* also has the opportunity to be involved in private enforcement proceedings. It is informed of such private antitrust proceedings by the respective courts. According to

Section 90 ARC and Article 15 Council Regulation (EC) No 1/2003, the courts are required to give this information. The *Bundeskartellamt* can participate as *amicus curiae* in the civil proceedings resulting from private enforcement actions. This allows the *Bundeskartellamt* to help to safeguard a coherent development in the public and private enforcement of competition law. The *Bundeskartellamt* is to be informed of all private enforcement actions arising before courts and upon request can be sent all briefs, records, orders and decisions. Members of staff have a right to take an active part in the court proceedings by way of written or oral statements. In private antitrust proceedings the parties have the possibility to appeal the case in points of fact and law and finally to the Federal Court of Justice on points of law.

The *Bundeskartellamt* participates in every proceeding before the Federal Court of Justice by way of oral statement and before the courts of lower instance by way of written statements in leading cases, in cases linked to on-going cases of the *Bundeskartellamt* and upon the request of the courts.

4.4 Non-case related interaction between competition authorities and courts

The *Bundeskartellamt* participates in discussions with the judges of the specialized competition chambers on various occasions, such as national and international conferences. An example of such an occasion is the discussion in the framework of the Meeting of the Working Group on Competition Law. This Group meets once a year to discuss fundamental issues of competition policy.⁷

Furthermore, the *Bundeskartellamt* and inter alia members of the Düsseldorf Higher Regional Court and the Federal Court of Justice are members of a working group which discusses current issues and problems in the application of the ARC. These discussions contributed, amongst others, to the white paper of the competent Federal Ministry of Economics and Technology for the envisaged 8th amendment to the ARC.

The *Bundeskartellamt* may also decide to communicate its views on aspects of law and its own procedures by issuing guidance papers.⁸

5. Update on issues of procedural fairness in the enforcement process

5.1 White paper on the 8th amendment to the ARC

Procedural fairness and transparency are fundamental constitutional principles in the German legal system and therefore play a key role in German administrative law and in the German competition law regime.⁹ As mentioned above and described in more detail in our previous submissions, these principles are safeguarded by the complementing rules of the ARC and for administrative offence proceedings the OWiG and the StPO. In view of higher fines in competition law cases in recent years, the courts have been more and more stringent in applying the provisions on procedural fairness and transparency.

⁷ Another example is the International Conference on Competition organized by the *Bundeskartellamt* biennially. The most recent International Conference on Competition was organized in April 2011 and was dedicated to the topic “A spotlight on cartel prosecution”. It was attended by representatives from academia and national and international courts.
For more information see http://www.ikk2011.de/Seiten/index_e.html

⁸ See for example the guidelines on the setting of fines that have been posted on the website at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E_Logo.pdf

⁹ See Germany’s contributions to the February 2010 Roundtable on “Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings”, OECD Doc. [DAF/COMP/WP3/WD\(2010\)6](#) and to the June 2010 Roundtable on “Procedural Fairness issues in civil and administrative enforcement”, OECD Doc. [DAF/COMP/WP3/WD\(2010\)35](#).

In practice, these principles may however lead to a considerable burden not only on the courts but also on the undertakings concerned, the competition authority and the public prosecutor's office. A single case may occupy one specialized chamber of the Düsseldorf Higher Regional Court for several months. The result of ensuring the principle of oral presentation and public hearing involves that the court is particularly reluctant to base its decision on written witness depositions and instead has the witnesses heard again in the proceedings.

In more recent cases both the Courts and the *Bundeskartellamt* were further slowed down in the proceedings by the fact that complex and extensive data files could not be introduced into the procedure in digital form, but that the procedural rules required the *Bundeskartellamt* to print out the files, which does not necessarily mean they can be read and understood in printed form. Furthermore, the principle of oral presentations may lead to the reading out of extensive documents and thus prolong the proceedings. Proceedings may then easily continue for a vast number of days.

To improve the effectiveness of administrative offence proceedings in view of the economic complexity of these cases, the white paper on the 8th amendment to the ARC proposes a number of changes to the procedure. These include in particular: legal entities should be obliged to provide specific data relevant to the amount of the fine, in particular information regarding the entity's economic capacity or its conceivable affiliation to an economic unit consisting of several legal entities; furthermore, loopholes in the current legislation that provide undertakings with opportunities to circumvent a fine by means of restructuring should be closed.

5.2 Access to leniency applications (*Pfleiderer case*)

On 14 June 2011, the European Court of Justice (ECJ) issued a preliminary ruling in the case *Pfleiderer vs. Bundeskartellamt*.¹⁰ The preliminary question was asked by the Local Court of Bonn and related to an administrative fines procedure at the *Bundeskartellamt*.¹¹

On 21 January 2008, the *Bundeskartellamt* had imposed fines pursuant to national law and inter alia Article 81 EC (now Article 101 TFEU) on European manufacturers of decor paper. A customer of these decor paper manufacturers applied for access to the file under the German Code of Criminal Procedure in order to prepare a claim for damages. He, in particular, requested access to the leniency applications and all documents the leniency applicants had handed over to the *Bundeskartellamt*. The *Bundeskartellamt* denied access to these leniency documents in view of the potential negative effects on future leniency applications. The customer appealed against this decision to the Local Court of Bonn and the Court decided to stay the proceedings and to refer the question to the ECJ of whether Articles 11 and 12 of Regulation 1/2003 exclude access to leniency documents.

The ECJ outlined the importance of leniency programmes for the effective enforcement of competition law and acknowledged the possibility that extensive access to file can endanger the efficiency of leniency programmes as such as well as the efficiency of the implementation of EU competition law. On the other hand, the ECJ points out that it is settled case law that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition and that this right cannot be rendered practically impossible or excessively difficult by national rules.

¹⁰ The decision is available at <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79889385C19090360&doc=T&ouvert=T&seance=ARRET>

¹¹ See Germany's contributions to the June 2010 Roundtable on "Procedural Fairness issues in civil and administrative enforcement", OECD Doc. [DAF/COMP/WP3/WD\(2010\)35](http://www.oecd.org/dataoecd/1/2/47612312.pdf).

The ECJ has ruled that it is for the national courts, on the basis of their national laws, to determine the conditions under which such access must be permitted or refused by weighing both interests protected by EU law (right to claim damages vs. effectiveness of enforcement of competition law). The local Court of Bonn has yet to adopt a final decision on this case.

GREECE

1. Introduction

Law 3959/2011, on the “Protection of free competition”,¹ entered into force in April 2011, replacing Law 703/1977 which had survived –albeit with important modifications² - for more than thirty years. The rules pertaining to proceedings and procedural rights before the Hellenic Competition Commission (“HCC”) are hereafter laid down in the new Greek Competition Act, Law 3959/2011, and in the Regulation on the Functioning and Management of the Hellenic Competition Commission (“Procedural Regulation”).³

Law 3959/2011 introduces significant substantive and procedural amendments, while maintaining the core provisions of antitrust legislation (articles 1 and 2, which are very closely drafted to articles 101 and 102 TFEU), regarding collusion and abuse of dominance. In particular, it fully aligns the Greek legislation to the requirements of Council Regulation (EC) No 1/2003 as it completes the self-assessment system by abolishing the obligation to notify agreements restricting competition.⁴ Also, it provides for the direct application of the EU Block Exemption Regulations even on agreements which affect only the Greek market and have no community dimension. Moreover, it removes the provisions regarding the prohibition of the abuse of a relationship of economic dependence from the new Greek Competition Act and imports them to the Unfair Competition Act, law 146/1914, transferring the authority to enforce said rules to the civil courts.

2. The HCC

The HCC is an independent administrative authority and its decisions are administrative acts which can be challenged before the Athens Administrative Court of Appeals. According to the new law, the HCC continues to enjoy financial and administrative autonomy and represents itself by its own right before the Courts. The HCC consists of two separate bodies: the Directorate General for Competition (“DGC”) which is the body responsible for investigations, and the Board which is the decision-making body. The DGC performs all necessary investigative actions (e.g. collection of information, dawn-raids, taking depositions etc.) pertaining to investigations initiated *ex officio*, following a complaint, or due to a sector inquiry.⁵ It

¹ Gov. Gazette (Official Journal) Issue A´ 93/20.04.2011.

² Its last major amendment had taken place in August 2009 by virtue of Law 3784/2009.

³ It takes the form of a Joint Ministerial Decree which is issued following an opinion by the HCC and is published in the Gov. Gazette. A revised decree is expected to be issued in the following year, with amendments matching respective changes of the new Greek Competition Act.

⁴ Law 3784/2009 (art. 21) had already abolished the notification as a requirement for exempting agreements restricting competition according to art. 1 par. 3 (equivalent to art. 101 par. 3 TFEU). The law had, nevertheless, retained the notification obligation for agreements falling within the ambit of art. 1 par. 1 (equivalent to art. 101 par. 1 TFEU) for “marketplace mapping” purposes.

⁵ Article 11 of Law 3959/2011 provides for an exceptional tool whereby the HCC, acting *ex officio* or upon request of the Minister of Development, Competitiveness and Shipping, may conduct inquiries into a particular sector of the national economy. If the HCC finds that there is no effective competition in that sector, and that its ordinary powers under the antitrust and merger control rules are not sufficient, it may

then evaluates the information and evidence collected and assists the HCC's Commissioner-Rapporteurs in preparing the Statement of Objections (SO) pertaining to each case. An oral hearing is subsequently conducted before the HCC in its capacity as a decision-making authority. At the conclusion of the hearing in question the HCC issues a decision on whether an infringement of competition law provisions has been committed, in which case it may impose a fine, issue a cease-and-desist order, impose necessary behavioural or structural measures, accept commitments, propose remedies, or make recommendations. The aforementioned procedure (service of SO, oral hearing of the parties involved etc.) is followed also with regard to the authority's competence to impose interim measures, when there is imminent risk of serious and irreparable damage to competition.

The HCC constitutes hence, the first instance jurisdiction with regard to public enforcement of the Competition Act. Although the European Court of Justice in its landmark *Syfait* ruling declined to adjudicate a preliminary question on EU law referred by the HCC because it considered that the latter was not "a court or tribunal", falling under the scope of Article 267 TFEU (former 234 EC),⁶ 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 certain procedural rights which are essentially attuned to court-type proceedings.⁷

Under the new Greek Competition Act, the next Board of the HCC shall consist of eight (instead of nine, as was the case until the reform) members, namely the President, the Vice-President, four full-time Commissioners - Rapporteurs⁸ and two (instead of three) other, part- or full-time, Members.⁹ The President and the Vice-President shall be chosen by the Parliament (by decision of the Conference of Presidents), whereas the rest of the Members shall be chosen and appointed by the Minister of Development,

adopt any necessary (behavioral or structural) measures to restore conditions of effective competition in the market. According to articles 11 and 23 of the same law, the HCC may further opine for the abolition or amendment of legislative acts when the latter hinder effective competition.

⁶ 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, however, Opinion of Advocate General Jacobs delivered on 28.10.2004 (not followed by the court), 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).

⁷ 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 court proceedings. Such guarantees go some way to supplying the necessary *inter partes* element to the Competition Commission's decision-making process".

⁸ The latter are not just members of the decision-making body, the Board, but are also responsible for the final drafting of the Statement of Objections. 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 stricter before the August 2009 amendment.

⁹ It should be noted that the appointment of a Vice-President and the substitution of several Members of the Board as provided for in the new law are currently pending.

Competitiveness and Shipping, following an Opinion of the Committee on Institutions and Transparency of the Parliament. The Commissioner – Rapporteur shall not have, under the new regime, the right to vote in the cases he/she is assigned as a rapporteur.

Article 12(1) of Law 3959/2011 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 the members of the HCC is further guaranteed by the fact that they are obliged to notify to the Minister and to the President of the HCC any duties, professional activity, project, consultation etc. which they have assumed during the five years period before the beginning of their service. In the event a relationship of a Member with an undertaking involved in a case being investigated arises, the Member is presumed to have a conflict and cannot participate in the discussions and the decision concerning the case in question.¹⁰ Also, during the term of service, the part-time members of the HCC may not engage in any professional activity which is not compatible with the capacity and duties of an HCC member.¹¹ Moreover, the President, the Vice-President, and the Members of the HCC are not allowed, after the end of their term of service, to provide services with regard to cases they had handled, or to the decision making of which they had participated. Similarly, the above persons are not allowed, for three years after the end of their term of service to defend cases before the HCC or to challenge HCC’s cases before the Courts.¹²

Law 3959/2011 introduces disciplinary control for the Members of the HCC regarding compliance with their obligations deriving from said law. The body competent to apply the pertinent sanctions is the Disciplinary Council (article 13), which shall be composed by judges of the supreme courts, and a professor specializing in competition law or economics. The council of Ministers initiates the procedure in question following a request as to that effect by the Minister of Development, Competitiveness and Shipping.

3. Transparency – fairness issues and innovative aspects of the legislative reform

3.1 *Making policy through enforcement priorities: Transparency – administrability enhanced*

The new Greek Competition Act finally provided the authority with some discretion as to the cases to which it may focus its investigations. With a view to establishing a framework for prioritizing its cases and strategic objectives, the HCC issued on 31.08.2011, following public consultation, a Notice on Enforcement Priorities, quantifying the respective criteria so as to improve the efficiency of its enforcement action, while at the same time increasing transparency and accountability. Consequently, low priority complaints may be excluded from the investigative focus of the authority. The President must issue reasoned decisions to this effect, upon recommendation by the DGC. Such decisions must be notified to the complainant within 30 days and are subject to judicial review. The DGC will investigate the higher priority complaints timely, according to their ranking. The ranking of a particular case may change by virtue of decision of the Director General, approved by the plenary of the HCC. The above system is internal and the ranking of the cases is not public.

¹⁰ Article 12(4).

¹¹ The participation of representatives of chambers of commerce and other collective interests in the Board of the HCC has been abolished since 2009; thus the impartiality and the independence of the Authority has been significantly strengthened.

¹² Article 12(9).

According to the above Notice on Enforcement Priorities, taking into account the need to allow for a swifter and more effective action in tackling severe market distortions, the large number of complaints brought before the HCC, as well as their varying significance, the fact that the available human resources of the HCC are necessarily limited and that it is practically impossible to allocate resources in investigating every complaint, even if it is providing little evidence and/or concerns a case of minor importance for the Greek market, the HCC sets the following criteria to be applied in the prioritisation of a case:

- The basic criterion in the enforcement action of the HCC is to serve the public interest. The latter is assessed under the light of the estimated impact of a practice on competition, and especially on consumers, with priority given to ex officio investigations or complaints pertaining, in particular, to:
 - Hard-core restrictions (price-fixing, market sharing and sale or production restrictions) of national scope, especially in cases of horizontal agreements (cartels), taking particularly into account the market position of the undertakings involved, the structure of the relevant market and the estimated number of the affected consumers.
 - Products and services which are essential or of major importance to the Greek consumer, where the anticompetitive practice under examination may have a significant impact on the increase of prices and/or the quality of services (especially as compared to Member States of the European Union).
 - Anticompetitive practices with cumulative effect (i.e. practices applied by a large number of companies which are able to pass on the increased prices to intermediate undertakings or final consumers).
- The submission of a relevant application for leniency, if all the criteria of the leniency programme are met.
- The necessity of adopting exceptional measures of regulatory nature in certain sectors of the economy, according to the strict terms and conditions of article 11 of Law 3959/2011.
- HCC's competence to opine either ex officio or upon request by the Minister of Development, Competitiveness and Shipping.

The prioritisation between many cases must necessarily take also into account:

- The need for clarification of novel or key legal issues (also in cases of anti-competitive practices with local effect) in order to ensure legal certainty, as well as consistent and coherent interpretation of national or EU legislation on the protection of free competition.
- The fact that the HCC is the best-placed institution to act against the distortions of competition, and that the civil courts are respectively the most competent authorities to deal with private disputes pertaining to competition law infringements.
- The estimated result of the Commission's intervention, especially if an immediate improvement in the functioning of competition is anticipated.
- The extent that a complaint is substantiated

- The available resources (both human and financial) of the HCC in relation to the requirements of other pending current cases or investigations, also bearing in mind the probability of proving the infringement.

3.2 *Administrative sanctions for antitrust infringements*

Following the finding of an infringement, the HCC may impose administrative fines to the infringing undertakings.¹³ The new Competition Act has currently reduced the maximum fines for infringement of articles 1 and 2 thereof (and articles 101 and 102 TFEU respectively) from 15% to 10% of the total turnover of the undertaking (or association of undertakings) participating in the infringement.¹⁴ However, to the extent the economic benefit of the undertaking from the infringement can be calculated, the fine must at least equal such benefit, even if it exceeds the 10% turnover threshold.

Law 3959/2011 also introduces joint and several liability for the members of the association of undertakings to which a fine has been imposed, unless those had no knowledge of the infringement, did not implement the decision in question or promptly and actively dissociated themselves from it. Finally, the HCC continues to apply its two Notices, namely the 2006 Guidelines on the Method of Setting Fines (which is in general along the lines of the European Commission's Guidelines on the method of setting fines), and the 2009 Interpretative Notice on the range of gross proceeds from products or services that determine the basic amount of fine in case of an infringement.¹⁵

It is worth noting that for the first time, law 3959/2011 empowers the HCC to impose administrative fines ranging from € 200.000 to € 2.000.000 directly to natural persons demonstrably engaged in preparative actions, in the organization or in the actual implementation of the antitrust infringement, thus introducing direct personal liability of the upper management of the undertaking¹⁶ and the persons responsible for the implementation of the anti-competitive decisions. The position of the person in the undertaking as well as the extent of her participation to the infringement shall be taken into account in order to determine the level of the fine. Before the imposition of the fine, the natural persons have the right to be heard. This provision, combined with the new provisions of the leniency program, is aiming to offer natural persons an incentive to co-operate with the HCC. The said fine is supplementary to the joint and several liability of natural persons for the fine imposed to the undertaking.

3.3 *Criminal liability*

Law 3959/2011 also provides for criminal liability for antitrust offences. The involvement in a cartel is sanctioned with imprisonment for the minimum period of two years [compared to a minimum period of six months under the previous law] and a criminal fine ranging from €100.000 to €1.000.000 Euros. Vertical restraints or merger infringements are sanctioned with a criminal fine ranging from €15.000 to €150.000 Euros. Finally, the abuse of a dominant position is sanctioned with criminal fines ranging from

¹³ This is without prejudice to potential tort (damages) claims raised by potential victims of antitrust infringements before civil courts, which are, however, currently, not common in Greece.

¹⁴ Article 25(2).

¹⁵ Law 3959/2011 has also provisions regarding the failure to provide information or to comply to HCC's decisions and for the infringement of merger provisions. The said law has modified the levels of the fines regarding: a. the faulty infringement of the obligation to notify mergers, b. the early implementation of the merger prior to the approval, c. the non-compliance with terms and conditions in the context of commitments assumed.

¹⁶ In the case of -collective- decision-making bodies, the persons which did not participate or voted against the anti-competitive decision shall not be considered liable.

€30.000 to €300.000 Euros. Upon issuance of each infringement decision, the HCC is obliged to notify the competent prosecutorial authority. In the event that the HCC or a competent regulatory authority are investigating a potential infringement of articles 1 and/or 2 of law 3959/2011 (equivalent to articles 101 and 102 TFEU), the competent prosecutorial authorities shall postpone any further action in a pending criminal procedure. In a criminal trial concerning the infringement of articles 1 and 2, any person directly affected from the actions in question may appear before the court in the capacity of a civil claimant.

3.4 *Leniency program - natural persons*

Natural persons may also apply for leniency according to law 3959/2011, to the extent the respective program of the authority includes natural persons in its provisions.

In addition, according to article 44(4) of law 3959/2011, the persons involved in an antitrust infringement are exonerated from criminal liability to the extent that, on their own accord and before being investigated in any way for their action, they report it to the Prosecutor, the HCC or any other competent authority, providing evidence thereof. In any other event, the substantial contribution (submission of evidence) of such persons to the uncovering of said infringements shall be treated as mitigating circumstance according to the Criminal Code.

Furthermore, the granting, under the leniency program, of immunity to an undertaking shall relieve the natural persons liable for the actions of the undertaking from criminal liability;¹⁷ if, under the leniency program, a mere reduction has been granted to the undertaking, the natural persons liable for the actions of the undertaking shall also be punished with a reduced sanction..

3.5 *Limitation period*

Law 3959/2011 introduces for the first time a limitation period for the imposition of sanctions. According to article 42 thereof, the power of the HCC to impose sanctions for infringements of said law shall be subject to a limitation period of five years. As is the case with the limitation periods provided by regulation EC 1/2003 and according to the general principles of law, time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases. Moreover, any action taken by the HCC or the European Commission for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has lapsed, without the HCC having imposed a fine. That period shall be extended by the time during which limitation is suspended (the limitation period for the imposition of fines shall be suspended for as long as the decision of the HCC is the subject of proceedings pending before the Courts).

3.6 *Burden of proof*

According to article 4 of law 3959/2011, which is inspired from article 2 of Regulation EC 1/2003, in the proceedings before the HCC for the application of articles 1 and 2 of said law, each party shall bear the burden of proving its allegations.

¹⁷ Article 25(8) and 44(3).

3.7 *Monitoring HCC's functioning and efficiency of implementation of the law*

Law 3959/2011 enhances the monitoring of the functioning and effectiveness of the enforcement action of the HCC, thus promoting transparency and accountability with a view to ensuring its continuous improvement (Article 22 of Law 3959/2011).

4. **Procedural stages and timetable of key proceedings before the HCC**

Procedural due process is safeguarded under Law 703/1977 and the Procedural Regulation, which provide for the stages and timetable of the proceedings, as well as for the defence rights of the persons which are subject to the HCC proceedings.¹⁸ In brief, the procedural stages before the HCC can be summarised as follows:

- *Investigation Phase I:* The Directorate General launches an investigation following a complaint¹⁹ or on its own initiative (see below).
- *Investigation Phase II:* The case is introduced to the Board (plenary assembly) of the HCC by the President (upon a recommendation by the DGC concerning the degree of priority of the case).²⁰ For a case to be introduced as above stipulated, it must fulfil the priority criteria of article 14(2) as extensively described above.

The Board of the HCC 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 the proposal to reject a complaint. The Commissioner - Rapporteur submits the proposal to the plenary or to a chamber of the HCC within 120 days from its assignment.

- *Hearing proceedings before the HCC Board:* Both the undertaking which was under investigation and the complainant are served the Statement of Objections (or the proposal to reject the complaint) at least 45 days before the oral hearing. The parties receive confidential versions of the HCC's statement, in observance of provisions protecting confidential information submitted to the authority by the parties (or seized during dawn-raids). At that procedural point, both parties may exercise their rights of access to the authority file, without prejudice to confidential information. They may also submit a written memorandum in response to the Statement of Objections. A rebuttal of other parties' memoranda can be submitted before the hearing. The persons who have submitted a request or complaint are entitled to be present during the hearing before the HCC, alone or with and/or through an attorney. At the hearing the parties may cross-examine each other and their respective witnesses (expert or other) and may also submit, with the permission of the President, post-hearing written memoranda.
- *Issuing of HCC's decision:* Final decisions have to be issued within twelve months from the assignment of the case to a Commissioner - Rapporteur. The decisions of the HCC are notified to all the interested parties and are subsequently published in the Government Gazette (again with deference to confidentiality considerations).

¹⁸ The Code of Administrative Proceedings which establishes general procedural rules for administrative bodies supplements the provisions relating to the HCC proceedings, to the extent no specific provision is in place.

¹⁹ Article 36 *et seq.*

²⁰ Article 15(1).

Notably, before and until the onset of the oral proceedings before the HCC, 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.²¹

Under the HCC Procedural Regulation, during the investigation phases I and II and prior to the date on which the Statement of Objections is served, the persons which are subject to the investigation enjoy (albeit limited) access to file rights and may at any point submit 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, and they may exercise their right to have access to a copy of the non-confidential version of the complaint in order to have the opportunity to rebut the complaint prior to the notification of the SO.

4.1 Requests for information - Inspections

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 persons or legal entities, public or other authorities.

Furthermore, the HCC has investigative 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. The law²² specifies that such inspections may take place solely for the purpose of uncovering infringements of articles 1, 2, 5-10, 11 of law 3959/2011, as well as articles 101, 102 TFEU. For the purposes of conducting an inspection, the HCC officials are vested with the powers of a tax auditor and must observe the national constitutional provisions on the sanctuary of domicile.²³ In the latter context, an inspection in private premises can only be carried out in the presence of a judge. 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, without prejudice to the client-attorney privilege.

4.2 Access to complaints

Under the Procedural Regulation, the undertaking under investigation has limited access to the file of the authority. In particular, it may obtain non-confidential copies²⁴ of the complaint filed against it prior to the notification of the Statement of Objections,²⁵ namely, already during the investigative stage. Here, the legislator has stricken a balance between the need of the authority to keep the file of its investigations confidential and the need to safeguard the equality of arms to the benefit of the undertaking under investigation, which may then submit explanatory briefs and/or information it considers exculpatory. Hence, access to the complaint at this stage constitutes an important safeguard, enabling the undertaking under investigation to better prepare its defence. Also, it is beneficial to the investigation process, as the DGC becomes informed of the arguments of the undertakings under investigation at a fairly early stage and

²¹ The commitments' procedure is currently under amendment.

²² Article 39.

²³ See Article 9 of the Constitution.

²⁴ 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.

²⁵ See Article 19(4) of the Procedural Regulation.

may obtain a more complete and objective view of the factual basis of the case or reassess its investigation strategy. Access to the complaint at this early stage may also contribute to the effectiveness and the economy of the procedure before the HCC, as it enables the undertakings under investigation to offer commitments responding to the competition concerns of the authority, before the issuing of the Statement of Objections.

4.3 Conclusion of the investigation - Notification 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 a proposal on how to decide on the case.²⁶ It is co-signed by the Commissioner – Rapporteur and by the team of the DGC officials who 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 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 DGC and the Commissioner - Rapporteur, concerning the alleged infringement. The SO clearly indicates whether a fine should be imposed and explains the matters of fact and of law which justify the imposition of a fine, notably the duration and gravity of the infringement. It also explores the facts which may give rise to aggravating and mitigating circumstances.²⁷ The SO is not binding on the Board of the HCC. The investigation is concluded with the service 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.

4.4 Exercise of rights of defence after the notification of the Statement of Objections

4.4.1 Access to the file

Undertakings under investigation or which have notified a merger have a right of access to the non-confidential data of the file following the service of the Statement of Objections and the summons to attend the hearing before the HCC Board.²⁸ Provided that access to documents containing confidential information or business secrets is indispensable 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 partially to the documents in question. In this case, the HCC President exercises powers similar to those of the European Commission's Hearing Officer;²⁹ by way of an additional procedural safeguard. According to article 41(2) of law 3959/2011, classified information related to the application of law 3959/2011 constitutes part of the administrative file and maintains its confidential character throughout its submission to the Athens Administrative Court of Appeals and the Council of State. Such information is submitted in a separate section of the file and access to it may be granted to the parties only if necessary for safeguarding a superior interest, upon permission by the court.

²⁶ See Article 20(3) of the Procedural Regulation.

²⁷ In some instances, the HCC severed the issue of the infringement from that of the calculation of the proposed fines and a separate Statement of Objections on the latter has been served to the accused undertakings. They had the opportunity to be heard at a separate oral hearing, which was conducted before HCC's final decision imposing fines was issued (see in the "Super Market" cases, HCC decisions 277/IV/2005 and 284/IV/2005). The accused undertakings questioned the right of the authority to sever the issues of infringement and calculation of fines, but the Athens Administrative Court of Appeals upheld the respective HCC decisions.

²⁸ See Article 8(12) of Law 703/1977.

²⁹ 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.

4.4.2 *Reply to the Statement of Objections - Memoranda*

The parties to a hearing before the HCC must submit, at least 30 days prior to the hearing, a written memorandum,³⁰ 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. Within this deadline the parties must also submit all evidence and procedural documents they intend to invoke in the hearing. Rebuttals³¹ are made by way of a supplement to the memorandum and are optional, but must be submitted at least 15 days prior to the hearing.

4.5 *Hearing proceedings before the HCC Board*

4.5.1 *Oral hearing procedure*

The hearing begins with a presentation of the Statement of Objections by the Commissioner – Rapporteur. Then, the parties are heard in the order determined by the President.³² 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.³³ Under Greek law each party is entitled to cross-examine the legal representatives and the witnesses and experts of the other parties with the President's permission;³⁴ this is an important tool for the defendant, and 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.³⁵ 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.

If, however, all parties to the case declare in their written memoranda, submitted before the date set for the hearing, that they will abstain from attending it, the HCC Board may, at its discretion, decide whether an oral hearing will be held.³⁶

4.5.2 *Submission of final memoranda*

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

³⁰ See Article 11(2) of the Procedural Regulation.

³¹ See Article 11(4) of the Procedural Regulation.

³² See Article 20(4) of the Procedural Regulation.

³³ See Article 20(5) of the Procedural Regulation.

³⁴ 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).

³⁵ See Article 20(6) of the Procedural Regulation.

³⁶ See Article 11(2) of the Procedural Regulation.

4.5.3 *Access to the oral hearing's minutes*

Minutes of the hearing throughout the procedure, and especially during the examination of witnesses are kept in electronic means. The minutes are then transcribed and the transcripts are handed over to the parties. The deadline for the submission of the final memorandum by the participants in the hearing begins after the receipt of the transcripts.

4.5.4 *Issuing and publication of decisions*

Taking into account the evidence which was presented at the hearing, i.e. the explanations and memoranda of the parties, the testimonies of witnesses, the experts' opinions and the submitted evidence, 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. Also, it has the discretion to issue a preliminary ruling and refer the case back to the DGC for further investigation.³⁷ HCC decisions must be specifically reasoned. The decision includes any dissenting opinions with reference, for transparency reasons, to the names of the dissenting members. 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.³⁸ The decisions (or confidential versions thereof) and opinions of the HCC are published in the Government Gazette, as well as uploaded on the internet.³⁹

5. **Merger control proceedings**

Finally, law 3959/2011 introduces changes to the merger control proceedings: It abolishes post-merger notifications, as well as the power of the Minister to approve, for reasons pertaining to the national economy, a merger prohibited by the HCC, it increases the period for notification of the merger to 30 days, it changes procedural aspects and time-limits of the proceedings and regulates in more detail the adoption of remedies with a view to aligning its procedures with those of the European Commission.

6. **Relationship between the HCC and courts**

6.1 *General remarks*

As mentioned above, the decisions of the HCC are administrative acts that can be challenged before the Athens Administrative Court of Appeals. The decision of the latter can be further appealed (cassation) before the Council of the State.^{40 41} The judgements of both the Athens Administrative Court of Appeals and the Council of State are vested with the effect of *res judicata*.⁴²

³⁷ 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.

³⁸ See Article 27(3) of the Procedural Regulation.

³⁹ Article 47.

⁴⁰ Article 32.

⁴¹ Article 45 stipulates the court duties for the exercise of legal remedies.

⁴² Article 35.

6.2 *Procedure before the Athens Administrative Court of Appeals – Full review on the merits*

HCC decisions are subject to appeal on the merits before the Athens Administrative Court of Appeals (AACAA) within 60 days from notification thereof.⁴³ According to law 3959/2011⁴⁴ the said appeal shall take precedence over others (adjournment on significant grounds is possible only once, for the nearest possible date) and the HCC must be summoned. The AACAA applies in all cases pending before it, hence also the appeals of the HCC decisions, the general provisions of the Code for Administrative Procedure.⁴⁵ According to the said provisions,⁴⁶ the AACAA may conduct a full merits review of all issues in the decision challenged by the parties to the appeal. Also, the AACAA may ex officio examine matters relating to lack of competence, unlawful constitution or composition of the HCC, lack of jurisdiction, opposition to precedent, or flawed attribution of a legal basis to the contested decision. They may also make new allegations, provided it is deemed justifiable that these were not raised at the HCC hearing stage. The parties may present new evidence to support their claims, while supplementary evidence may also be ordered by the Court itself. In this sense, the AACAA enjoys extensive review powers; therefore, the AACAA may confirm, set aside or modify the decision under appeal, it may impose, modify or revoke the amount of fines ordered thereby, adopt interim measures, propose remedies or remit the matter to the HCC or a sectoral regulator.

The deadline for filing an appeal, as well as the appeal itself, does not, as a rule, suspend the execution of the decision of the HCC (the same stands true with regard to the petition of annulment – cassation- of the judgment of the Administrative Court of Appeals before the Council of the State). However, the appeal may suspend the execution of the decision of the HCC if there are significant reasons, namely in case its execution would cause irreparable damage to the appellant. By way of exception, decisions imposing fines, the Council of the Athens' Administrative Court of Appeals may, by reasoned decision, order suspension for part of the fine not exceeding 80% (unless, in the view of the Court, the appeal is manifestly well-founded, in which case it can order suspension of the whole fine). The Court can order any measure it deems necessary for securing the payment (e.g. collaterals).⁴⁷

Law 3959/2011 further provides for the issuance of a presidential decree by virtue of which specialized chambers shall be established in the Athens' Administrative Court of Appeals for the adjudication of appeals, petitions, interventions and other remedies exercised by virtue of the same law.

6.3 *Procedure before the Council of State – Judicial review*

AACAA decisions issued according to the procedure outlined above are subject to judicial review by the Council of State, provided that a petition of annulment⁴⁸ is filed by the parties to the hearing before the AACAA⁴⁹ within sixty (60) days⁵⁰ from notification of the contested decision. At this stage a procedural

⁴³ Article 30. According to article 30(3), the following parties are entitled to file for appeal against an HCC decision: “a) the undertakings or associations of undertakings, to the detriment of which the decision was issued; b) the party which has filed a complaint regarding an infringement of the law 3959; c) the State via the Minister of Development; d) any third party with equitable interest therein”.

⁴⁴ Article 30(4) and 30(5).

⁴⁵ Code for Administrative Procedure, i.e. Law 2717/2009, Official Journal Issue A' 97/17.05.1999.

⁴⁶ Articles 95, 96, 97, 98, 79 of the Code for Administrative Procedure.

⁴⁷ Article 30 of law 3959/2011.

⁴⁸ Article 32.

review is performed and not a review on the merits of the case. An AACA decision may be annulled exclusively on the following grounds:⁵¹

- misuse of powers, lack of competence, unlawful constitution or composition of the Court, which has issued the contested decision;
- infringement of an essential procedural requirement;
- wrongful interpretation or application of the legal provisions pertaining to the case in question;
- existence of two or more contradictory final decisions relating to the same case / parties.

According to law 3959/2011⁵² these petitions shall be examined on a priority basis, whereas adjournment on significant grounds is possible only for one time, for the nearest possible date.

6.4 Relationship of the HCC with other courts

Without prejudice to the procedure before the AACA and the Council of State, the courts of any jurisdiction (civil and criminal) apply articles 1 and 2 of law 3959/2011 and articles 101 and 102 TFEU. Their adjudication does not, however, bind the HCC, the AACA and the Council of State, in their judgments on the basis of the law in question.

With the exception of the proceedings before the Athens Administrative Court of Appeals and the proceedings before the Council of State, the HCC may deliver, at its own initiative, a written or oral (the latter with permission of the court) opinion addressed to the courts on matters of application of articles 1 and 2 of law 3959/2011 and 101 and 102 TFEU.

7. Conclusion

In the context of the recent competition law reform examined above, the HCC's procedural rules are prescribed in a clear and detailed manner, granting the undertakings which are subject to the investigation extensive defence rights. Undertakings enjoy 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 exculpatory evidence. All types of evidence are freely considered by the decision-making body.

⁴⁹ Article 32(2) of Law 703/1977 grants the right to the General State Commissioner for Ordinary Administrative Courts to file for annulment, even if it were not a litigant party during the proceedings, which led to the contested decision. In this case the time-limit for filing the legal remedy is three (3) months from publication of the AACA decision in question.

⁵⁰ Article 53 § 1 of Presidential Decree 18/1989. According to article 32(5) of the Competition Act petitions for annulment of AACA decisions regarding the enforcement of competition law provisions are governed by the general provisions on annulment petitions before the Council of State, i.e. Presidential Decree 18/1989 ("Codification of Legal Provisions on the Council of State", Official Journal Issue A' 8/09.10.1998).

⁵¹ Article 56 of Presidential Decree 18/1989.

⁵² Article 32(3).

In the fine balance between fairness and transparency on the one hand, and efficiency of the proceedings, on the other, the first considerations seem to weigh more in the context of the Greek administrative enforcement system. However, speed and administrability is expected to be significantly enhanced by the procedure for prioritizing pending cases and filing away both complaints falling outside HCC's competence and unsubstantiated complaints,⁵³ as well as old/prescribed or low priority cases, which will alleviate the HCC from a substantial backlog of cases of minimal importance for the competitive environment in Greece.

⁵³

Article 37.

JAPAN

1. Introduction

The Antimonopoly Act sets down basic rules concerning economic activities carried out amid complicated and wide-ranging economic conditions that are continually undergoing changes. Whether an economic activity of an enterprise is in violation of the provisions of the Antimonopoly Act will be decided after individually and specifically judging the effects of the concerned act on market competition. Therefore, the Antimonopoly Act needs to be implemented continuously in a specialized and consistent manner by a neutral and fair institution free from political influence. Accordingly, the Antimonopoly Act provides that the chairman and the commissioners of the Japan Fair Trade Commission (hereinafter referred to as “the JFTC”) shall be appointed among persons who have knowledge and experience in law or economics (Article 29), the independence of the performance of authority of the chairman and the commissioners shall be secured (Article 28), and the Antimonopoly Act shall be applied through decisions made with the concurrence of all commissioners and the chairman (Article 34). With respect to legal procedures concerning acts in violation of the Antimonopoly Act, a special procedure has been established in consideration of the JFTC’s specialization.

In part II and III below, we will introduce (i) the characteristics of the administrative lawsuit to rescind a decision of the hearing procedures and (ii) the characteristics of civil actions relating to acts in violation of the Antimonopoly Act, while paying attention to the relationship between the courts and the JFTC.

Furthermore, part IV explains the revision of the procedure for reviewing business combinations by the JFTC in response to recent requests to improve its speediness and transparency.

2. Characteristics of the suit to rescind a decision (see Annex 1)

2.1 Outline

The JFTC inspects cases through on-the-spot inspections and other measures. When it is found that an activity has indeed violated the provisions of the Antimonopoly Act, the JFTC will impose an administrative disposition, such as a cease and desist order and a surcharge payment order, after carrying out an advance procedure that allows an opportunity for stating opinions and providing evidence.

In the event of an objection to an administrative disposition imposed by an administrative agency, the person subject to the measures may, in general, submit an action for the declaration of nullity in accordance with the Administrative Case Litigation Act, which is a general law. It is not always necessary for the motion to be preceded by a request for an administrative review (Article 3 (3) of the Administrative Case Litigation Act) as provided in the main clause of Article 8 (1) of the Administrative Case Litigation Act. However, under the Antimonopoly Act, cease and desist orders and surcharge payment orders, which are issued by the JFTC, are preceded by a hearing (principle of being preceded by petitioning the administration for redress of a grievance). In addition, several exceptions, which differ from normal administrative litigations, are provided, such as the adoption of a scheme under which a decision which is made after an examination in a hearing will become the object of an action for revocation of administrative disposition (decision principle). Major exceptions are as follows.

2.2 *Exceptions to the Administrative Case Litigation Act*

2.2.1 *Grant of the jurisdiction of the first instance to the Tokyo High Court*

Under the Administrative Case Litigation Act (and the Court Act), in principle, an action for the revocation of an administrative disposition should be brought to a district court with jurisdiction over the location of an administrative agency.

However, under the Antimonopoly Act, the Tokyo High Court shall become the court of the jurisdiction of the first instance for the action for the judicial review of an administrative disposition (Article 3 (1) of the Administrative Case Litigation Act) as provided in Article 85 (i) of the Antimonopoly Act. Accordingly, when a concerned party has a grievance against the decision of the JFTC, the concerned party should bring an action for the revocation of administrative disposition to the Tokyo High Court.

2.2.2 *Substantial evidence rule and restriction on the submission of new evidence*

The Antimonopoly Act provides that the facts found by the JFTC shall, if supported by substantial be binding in a court (Article 80 (1)). Hence, a court should examine whether it is reasonable to find facts based on the evidence examined in a hearing and judge whether the requirements provided in the Antimonopoly Act have been satisfied on the premise of the facts found by the JFTC if such findings of the facts are recognized as reasonable.

Concerning the submission of new evidence relevant to the facts found by the JFTC at the court, the party cannot submit such evidence unless the JFTC fails to adopt the evidence without justifiable grounds or unless it was impossible for the party to submit the evidence at the hearing of the JFTC and there was no gross negligence on the part of the party in failing to submit such evidence (Article 81 (1)).

2.3 *Revision of judicial review of the orders of the JFTC*

As to the above hearing procedures, it has been pointed out that a system under which the JFTC—the institution that imposes an administrative disposition—judges the appropriateness of that very administrative disposition is considered to be lacking in fairness.

With a view to respond to such criticisms concerning the procedural fairness, a bill for the amendment of the Antimonopoly Act, including the abolition of the hearing procedures, was submitted to the 174th ordinary session of the Diet in March 2010.¹ If the bill is passed, the systems mentioned in 2 (1) and 2 (2), which are premised on the hearing procedures, will be abolished. The above bill was determined in the 177th ordinary session on August 31, 2011 to remain under deliberation while the Diet is closed.

3. *Characteristics of civil actions brought against violations of the Antimonopoly Act*

3.1 *Outline*

An act that violates the provisions of the Antimonopoly Act infringes upon not only free competition but also certain interests of consumers and enterprises under private laws. However, an administrative disposition by the JFTC will not necessarily result in the recovery of such interests under private laws. Therefore, under the Antimonopoly Act, any person whose interests under private laws are likely to be infringed are granted the right to request an injunction and the right to claim compensation for damages to prevent such infringements and recover the infringed interests. However, even if the requirements for

¹ Refer to the documents submitted to the meeting held in June 2010.

requests based on the Antimonopoly Act are not satisfied, a claim, such as for damages, may be brought forward based on the Civil Code.

3.2 *Request for injunction based on Article 24 of the Antimonopoly Act*

3.2.1 *Outline*

Under the Antimonopoly Act, a person whose interests are infringed upon or likely to be infringed upon, due to unfair trade practices, and who is thereby suffering or likely to suffer extreme damages as a result, is entitled to seek the suspension or prevention of such infringements from the enterprise, etc. who infringed or is likely to infringe the interests. This system was introduced through the law for the amendment of the Antimonopoly Act in 2000 with the purpose of improving the methods of offering relief to victims and strengthening deterrence to performing acts in violation of the Antimonopoly Act.

3.2.2 *Relationship between the courts and the JFTC*

A. Court's notice to the JFTC

When a request for an injunction is submitted, a court shall notify the JFTC to that effect (Article 83-3 (1)). This will enable the JFTC to be provided with the information on acts in violation of the Antimonopoly Act.

B. System to ask for voluntary opinions

When a request for an injunction is submitted, a court may ask for the opinion of the JFTC with respect to the application of the Antimonopoly Act for the case concerned and other necessary matters (Article 83-3 (2)). The reasons for this are as follows: (i) a private person's request for injunction against acts in violation of the Antimonopoly Act will serve not only as a means of offering relief to victims but also as a realization of a public benefit—the maintenance and promotion of fair and free competition. Therefore, it is appropriate for the JFTC, tasked with realizing such public benefits, to be involved in the request in one way or another. (ii) If the court takes into account the opinions of the JFTC, with its knowledge and experience as an administrative organization specializing in the Antimonopoly Act, it would be beneficial in terms of judicial economy. (iii) The system would prevent and rule out the possibilities that inconsistencies will arise in the standards for judgment of illegality among the courts or between the courts and the JFTC, which might result in confusion in the interpretation and application of the Antimonopoly Act and repress the business activities of enterprises. For a similar reason, the JFTC may, with the permission of a court, state an opinion to the court on the application of the Antimonopoly Act and other necessary matters (Article 83-3 (3)). However, the opinion of the JFTC is not binding on courts.

3.3 *Claim for damages based on the Antimonopoly Act and the Civil Code*

3.2.1 *Claim for damages based on Article 25 of the Antimonopoly Act*

A. Outline

Under the Antimonopoly Act, any enterprise or trade association that has committed a certain act in violation of certain provisions of the Antimonopoly Act shall be liable for damages suffered by another party (Article 25 (1)), who will be known as the plaintiff. No enterprise or trade association that has committed the above act may be exempted from the liability for the damages by proving the non-existence of intention or negligence on its part (Article 25 (2)). These provisions appear to be designed for increasing

the deterrent effect against acts in violation of the Antimonopoly Act by imposing heavier responsibilities than under a tort liability system.

However, to allege the above right of claim for damages in a court, the cease and desist order (Article 49 (1)) (in the case that no such order is issued, the surcharge payment order (Article 50 (1)) or the declaration of illegality by a decision (Article 66 (4)) (hereinafter referred to as “the orders, etc.”) shall be required to be firmly determined (Article 26). It is considered that this determination will have effects to alleviate a plaintiff’s burden of proof.

B. Relations between the courts and the JFTC

- System to ask for voluntary opinions

When a suit for damages has been filed based on Article 25 of the Antimonopoly Act, the court may ask for the opinion of the JFTC with respect to the amount of damages caused by such violations as provided in the said article (Article 84).

This system of asking for the opinion of the JFTC will alleviate the burden of proof of a plaintiff in a suit. However, the opinion of the JFTC is not binding on courts.

- Grant of the jurisdiction of the first instance to the Tokyo High Court

The Tokyo High Court shall become the court of the jurisdiction of the first instance for any suit concerning compensation for damages based on Article 25 of the Antimonopoly Act. A panel of judges invested with the authority to exclusively hear the cases concerning the Antimonopoly Act shall be established within the Tokyo High Court (Article 85 (ii) and Article 87).²

This system appears to allow one court to concentrate on the hearing and judgment, which would enable the victims of the violation to be compensated more quickly. It is based on the premise that the suit is brought after the determination by the JFTC relating to an act in violation of the Antimonopoly Act which requires specialized and standardized judgment.

3.3.2 *Claim for damages based on Article 709 of the Civil Code*

As stated above, based on Article 25 of the Antimonopoly Act, any enterprise or trade association that has committed an act in violation of certain provisions of the Antimonopoly Act shall be liable for no-fault compensation for damages suffered by another party. However, the right of claim for damages based on the said article may not be exercised for a suit unless the orders, etc., have become final. But, even if the orders, etc. do not exist or have not become final and binding, compensation for damages may be claimed against a party who has committed an act in violation of the Antimonopoly Act based on Article 709 of the Civil Code.

3.3.3 *Support by the JFTC in the above suits for damages*

If requested by a court or by parties to a lawsuit, the JFTC will provide the material as shown below to make effective use of the damage suit system based on Article 25 of the Antimonopoly Act and serve for a suit for damages based on Article 709 of the Civil Code.

² However, if the bill mentioned in II-3, this system, which is premised on the hearing system, also will be abolished.

A. Provision of material after orders, etc. have become final

- Procedure before a damage suit is brought to court

When a cease and desist order or a surcharge payment order (hereinafter referred to as “the Order”) has become final and binding without a hearing procedure and if the provision of material relating to the final and binding Order is requested by the plaintiff or a lawyer representing the plaintiff, the JFTC shall provide the authenticated transcript or extract of the written cease and desist order or the written surcharge payment order related to the violation.

When the Order has become final and binding through a decision or the declaration of illegality has become final and binding by a decision after the initiation of a hearing procedure, a written decision shall be provided in addition to the above documents. Furthermore, if requested as provided in Article 70-15 of the Antimonopoly Act, the inspection or the copy of the records of cases will be accepted.

- Procedure after a damage suit is brought to court

When a damage suit is brought to court with respect to a violation for which the final and binding orders, etc. exists, and the court in charge of the case requests the sending of documents based on Article 226 of the Code of Civil Procedure, (i) material relating to the proof of existence of a violation³ and (ii) material relating to the proof of a relation or a causal relationship between a violation and damages as well as the amount of damages⁴ shall be submitted to the court.

However, divulging any of the “secrets of enterprises”⁵ that come to the knowledge in the course of duties is prohibited under Article 39 of the Antimonopoly Act. When material, including “secrets of enterprises,” is submitted to a court, the JFTC shall pay attention to their confidentiality. This will similarly apply to cases in which, if the source of provision of material is made clear, the provider of the material will receive disadvantageous treatment, thereby hinder the handling of the case, or cases in which matters infringing upon individual persons’ privacy are included.

B. Provision of material before the orders, etc. have become final and binding

Under the condition where the orders, etc. have not yet become final and binding, such as the cases in which a hearing procedure related to the Order is being carried out, a suit to rescind the decision is being brought, etc., if the provision of material is requested by the victims, etc. of the violation as necessary for filing a suit for damages or by the plaintiff or lawyer representing the plaintiff after a lawsuit is brought to court, the authenticated transcription or extract of the written cease and desist order, the written surcharge payment order, or the written decision shall be provided. In addition, if requested as provided in Article 70-15 of the Antimonopoly Act, the inspection and copy of the records of cases will be accepted.

C. Under the above framework, the JFTC provides support to the parties concerned, including the courts and local public entities.

³ For example, material supporting the recognition of a fact in the Order.

⁴ For example, material concerning products, service transactions, distribution practices, etc. that are the object of a violation.

⁵ The secret of enterprises denotes a fact that (i) is not publicly known, (ii) is desired to be secret by concerned enterprises, and (iii) can be objectively determined to have sufficient reasons for being described as secret. Such items as manufacturing costs and the purchase price of individual products as well as business know-how fall into this category.

4. Recent efforts aimed at improving procedural fairness and transparency (review of investigation procedures for business combination (see Annex 2))

The JFTC reviewed the business combination regulations in accordance with “the New Growth Strategy,” which was approved at a Cabinet meeting on June 18, 2010. Based on the result of these reviews and to further improve the swiftness, transparency, and predictability of business combination investigation while enhancing international conformity, the JFTC published and requested public comments on a draft for the partial amendment, etc. of the Fair Trade Commission Rules on March 4, 2011. The JFTC carefully reviewed all comments and partially amended the draft based on this review. The JFTC, on June 14, 2011, published⁶ that the Fair Trade Commission Rules would be partially amended, and put them into effect on July 1, 2011.

Main points of the amendments are as follows.

4.1 Abolition of prior consultation

Before the amendments, for any prior consultation which has been brought to the JFTC regarding whether or not a specific business combination plan will raise any problems with regard to the stipulations of the Antimonopoly Act, the JFTC has responded pursuant to the “Prior Consultation Response Policy” and provided its judgment under the Antimonopoly Act. However, the competition authorities in Europe and the US do not respond with judgment under their competition laws in their pre-notification consultations. Furthermore, the significance of the prior consultation system for obtaining judgment of the JFTC has declined because the prior notification became required for acquisitions of shares like other business combinations (e.g., mergers) as a result of the amendment of the Antimonopoly Act in 2010. In light of these situations, the judgment by the JFTC with regard to the notified business combination will be indicated in the procedures following the submission of the notification. And if the notifying company desires so, it can voluntarily consult the JFTC regarding the method of completing the notification form before reporting, etc.

4.2 Enhancement of communications between the notifying company and the JFTC

- On the grounds that more detailed investigation (Second Phase Investigation) is needed, when the JFTC requests reports, etc. as stipulated in the Antimonopoly Act from the notifying company, the reason why the reports are being requested will be indicated in the request for the reports, etc.
- When a request has been made by the notifying company or when it is necessary during the review period, the JFTC shall provide an explanation of the issues in the business combination plan at that point in time.
- The notifying company may submit opinions or relevant documents it considers to be necessary (including proposals for remedial measures for resolving the problems) to the JFTC at any time during the Review Period.

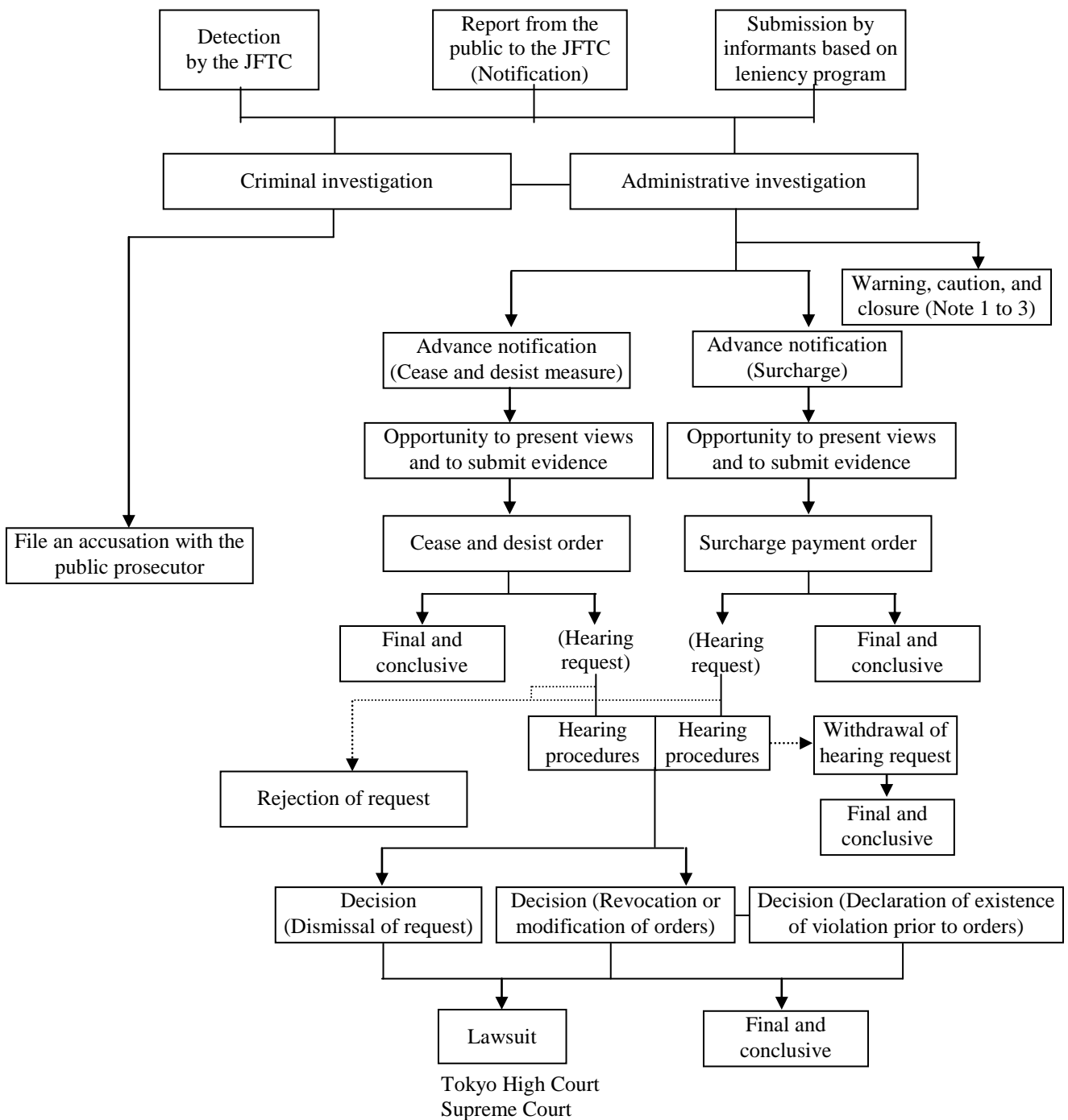
4.3 Improvement of procedures at the end of the business combination review

- For cases where there are no problems under the Antimonopoly Act and where no requests for reports, etc. are to be made, written notice is to be provided for stating that no cease and desist order will be given.

⁶ <http://www.jftc.go.jp/en/pressreleases/archives/individual-000432.html>

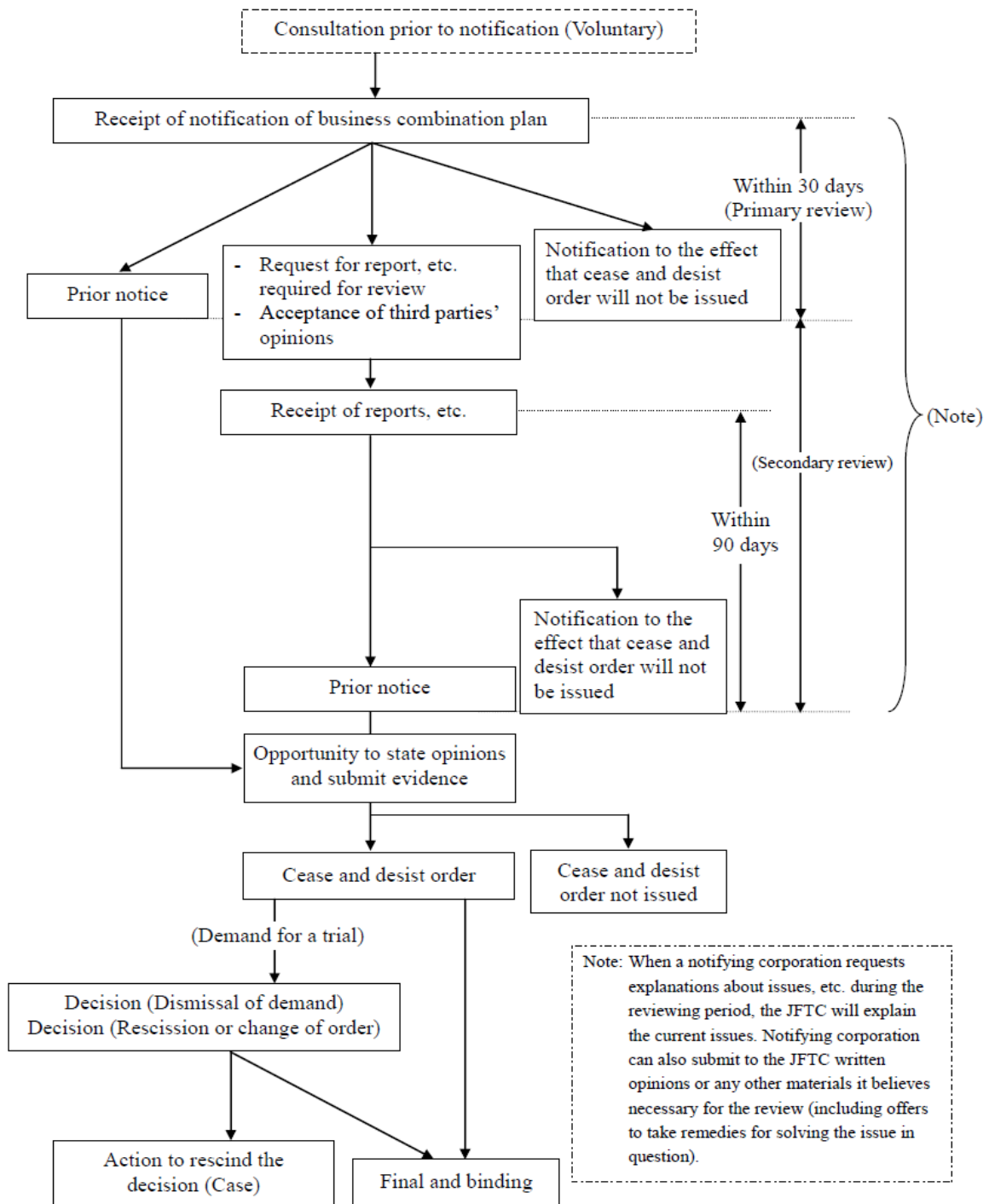
- For cases where the JFTC has made requests for reports, etc. and judges that there are no problems under the Antimonopoly Act, the JFTC shall notify the notifying company in writing that no cease and desist order will be given and the review results will be provided including the reasons for the results.
- The JFTC publicly announces the cases mentioned in (2) above and any other cases which will be of reference to other business operators.
- Cases where the waiting period will be shortened are to be expanded.

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
- Note 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
- Note 3. Closure: A case where the investigation is terminated because there is no conduct violating the Antimonopoly Law

ANNEX 2: FLOWCHART OF BUSINESS COMBINATION REVIEW



KOREA

1. Introduction

The objective of competition law enforcement is to promote fair and free competition, thereby ensuring creative business activities, protecting consumers and achieving balanced development of the national economy. In order to accomplish such objective, the Korea Fair Trade Commission (KFTC) and the court are performing their roles independently.

This report will look into how KFTC's relationship with the court is different from other government agencies' relationship with it and what the reasons are, and explain judicial process of handling competition law violations as well as various institutional tools to ensure fairness and transparency in the case-handling process.

2. Relationship between KFTC and courts

2.1 *Basic principles on relationship between KFTC and courts*

The KFTC is a competition agency that enforces, among others, the Monopoly Regulation and Fair Trade Act (MRFTA), Korea's general competition law. In the meantime, the court assesses legality of remedies imposed by the KFTC against competition law violations- such as corrective order and surcharges- *ex post facto*, and rules on criminal antitrust cases brought by the prosecution and damages claim raised by individuals. KFTC decisions are required to go through judicial review by the court *ex post facto*, but this is a result of separation of powers under the Constitution, not because the KFTC is a subordinate agency of the court.

Furthermore, since KFTC's decisions have the effect of those of the court of the first instance, the KFTC enjoys the same level of independence as the court.

Unlike other government agencies whose decisions are appealed in the administrative court, the court of the first instance, KFTC decisions are challenged exclusively in the Seoul High Court. The Seoul High court has two tribunals that are dedicated to KFTC cases to make a more specialized assessment on antitrust violations.

2.2 *Institutional nature of KFTC*

2.2.1 *Consensus-based administrative agency*

The KFTC is an enforcer of Korea's competition law pursuant to Article 35 of the MRFTA which stipulates that "the Korea Fair Trade Commission shall be established under the jurisdiction of the Prime Minister for the purpose of promoting the objective of this Act". Unlike single-headed administrative agencies, the KFTC is a consensus-based administrative agency that is composed of 9 Commissioners. The purpose of such organizational system is to ensure specialized quality and independence of the KFTC.

2.2.2 *Quasi-judicial body*

The KFTC is an “administrative agency” in principle [Article 35.(2) of the MRFTA], but considered to have the quasi-judicial nature. This can be demonstrated in the facts that: KFTC’s main function is to deliberate and decide on violations of laws enforced by the KFTC including the MRFTA; such decisions by the KFTC have the effect of those made in the court of first instance; and KFTC’s Committee (decision-making body of the KFTC) proceedings share many similarities with the court’s trial procedures such as adversarial system intended to ensure a respondent’s defence rights.

Institutional tools that show the quasi-judicial nature of the KFTC are:

- Commissioners are granted legal guarantee of tenure and status, and required to remain politically neutral (Article 39 through 41 of the MRFTA);
- Deliberation and decision-making process of the Committee shall be disclosed in principle, and challenge, discharge and withdrawal of Commissioners is possible in the Committee proceedings; and
- A written decision of the KFTC specifies the grounds on which such decision is based and is signed and sealed by Commissioners (Article 43 through 45 of the MRFTA).

In addition, under the Rules on KFTC’s Committee Operation and Case-handling Procedures, KFTC operates strong adversarial system in the Committee hearing to guarantee respondents defence rights through various systems like delivery of Examination Report in advance and invitation of comments on the delivered Examination Report (Articles 28 and 29 of the Rule), application for accessing and copying attached materials of Examination Report (Article 29-2), hearing preparatory procedure (Article 30-2), notification of the date of the Committee hearing (Article 33), guarantee of respondents’ rights to attend the Committee hearing (Article 34) and assurance of respondents’ rights to make statements and investigate evidences (Article 38 through 41 and 43).

As shown above, KFTC’s case-handling procedures have more reinvigorated systems for ensuring procedural fairness and respondent’s defence rights than other administrative agencies’, and are similar to the court proceedings. Considering this, matters that go through the KFTC decision-making process are exempted from the Administrative Procedures Act (Article 2.6 of the Enforcement Decree of the Administrative Procedures Act).

2.3 *Relationship between KFTC and court on case-related issues*

2.3.1 *Binding force of court’s final ruling*

The court’s final ruling in an administrative lawsuit challenging KFTC’s decisions is binding on the KFTC. Therefore, the KFTC should not take the same measures in the same case for the same grounds going against the court’s ruling. The binding force of the final ruling extends only to the concerned case, but a decision by the Supreme Court is respected in other cases as well.

2.3.2 *Court’s decision on surcharge imposition*

Where surcharge imposition by the KFTC is appealed in the court and it is decided that the surcharge imposition itself is legitimate but there was deviation or abuse of authority by the KFTC in estimating the amount of surcharges, the question would be whether to revoke the surcharge as a whole or only the

amount in excess of the legitimate level. Regarding this, the court has consistently revoked the whole surcharge.

That is because given that the authority of imposing surcharge is assumed by the administrative branch, the judicial body, it is deemed, has no authority to calculate and impose surcharges under the principle of separation of powers. In this case, the KFTC re-estimates the amount of surcharges reflecting the intention of the court's ruling.

2.3.3 *Binding force of KFTC decision in civil litigation*

Concerning the question of whether KFTC's confirmation and determination on factual matters is binding on the court in private damages suit, the court held that "findings admitted by the KFTC in taking corrective measures are only presumed to be facts in a civil litigation raised by victims to claim compensation for their losses from unfair business conduct targeted by the corrective measures". This means that the court can make a judgment independently from what was decided by the KFTC.

3. **Judicial review on antitrust cases**

In the case where an individual company or business association violates competition law, such violation is subject to public enforcement by a competition agency or the criminal prosecution agency, or private enforcement where victims claim damages to prohibit certain law violations. Public enforcement is divided into administrative sanction (by a competition agency) and criminal sanction (by criminal prosecution agency).

3.1 *Judicial procedure on administrative sanction*

3.1.1 *Basic procedures*

Those who are dissatisfied with KFTC's decisions may file an appeal to the Seoul High Court within 30 days from the date of receiving a notice on disposition in question. [Articles 54 (1) and 55 of the MRFTA].

As mentioned above, administrative measures are usually subject to a first trial in the administrative court and then transferred to the appellate court, High Court. KFTC decisions, however, are handled exclusively by the Seoul High Court, as the KFTC practically serves as the court of the first instance with its quasi-judicial nature, which is shown in the adversarial proceedings. Such exclusive jurisdiction of High Court is limited to administrative lawsuits, and the first trial for criminal and civil lawsuits on antitrust cases takes place in the district court as in other cases.

Apart from the jurisdiction, other trial proceedings on antitrust cases are the same as other administrative litigations. In antitrust litigations, a decision of the Seoul High Court is appealed against in the Supreme Court.

3.1.2 *Suspension of execution*

In case where a revocation litigation is instituted, if it is deemed urgently necessary to prevent irreparable damage from being caused by a disposition, etc. or execution or the continuation of procedure thereof, the court, in which the merits are pending, upon a request from the party or ex officio, may decide to suspend wholly or partly the effect, execution or the continuation of procedure of the disposition, etc. [Article 23 (2) of the Administrative Litigation Act]

The court does not see an order to pay surcharges as causing irrecoverable damage in principle since this is limited to paying monetary penalty. But, in the case where the amount of surcharge is so huge to the extent that it could decide the fate of a company, the court suspends the surcharge payment.

3.1.3 Appeal against KFTC's decision of exoneration

Any person discovering a violation of the provisions of this Act may report the occurrence of such to the Korea Fair Trade Commission. [Article 49 (2) of the MRFTA]

An issue that may arise from the provision above is whether the person who files a complaint to the KFTC on alleged violation of competition law can appeal KFTC's decision to not launch or close case proceedings or clear the alleged violator of suspicion. Regarding this, the court held that an act of filing a "complaint" only provides the KFTC with a clue that provokes *ex officio* investigation, and does not grant the complainant the right to petition for specific measures. Thus, the complainant cannot appeal such decision by the KFTC in a revocation suit.

Nevertheless, according to the Constitutional Court, "KFTC's decision to exonerate the person against whom a complaint is filed, as a measure that corresponds to corrective measure taken when law violation is admitted, constitutes exercise of 'public authority' provided for in the Constitution Court Act. Arbitrary exoneration, however, would be subject to constitutional petition since it has possibility to infringe the equal right".

To sum up, a complainant can challenge KFTC's decision to not launch case proceedings or exonerate an alleged violator only through constitutional petition, not administrative litigation.

3.2 Judicial procedures on criminal sanction

3.2.1 Legal provisions

The MRFTA divides penalty into 3 categories depending on the graveness of violations; imprisonment not exceeding 3 years or fines of not exceeding KRW 200 million, imprisonment of not exceeding 2 years or fines of not exceeding KRW 150 million and fines of not exceeding KRW 100 million. [Article 66 through 68 of the MRFTA]

3.2.2 Exclusive Accusation Authority of KFTC

Under the Criminal Procedure Act, an "accusation" is merely a proviso of a criminal investigation, and there is no limitation in the scope of accuser, i.e. anyone can file an accusation. [Article 234 (1) of the Criminal Procedure Act]

However, Article 71 (1) of the MRFTA stipulates that "any offense in violation of Articles 66 and 67 shall be prosecuted through public action only after a complaint is filed by the Korea Fair Trade Commission". Under such exclusive accusation system, public prosecution instituted without a charge brought by the KFTC is dismissed.

The authority for filing an accusation in an antitrust case is exclusively granted to the KFTC as it is deemed that 1) assessing anti-competitiveness, an essential element for proving illegality of an act should be done by the KFTC which has expertise on such matter, and 2) without such restriction, criminal indictment could increase excessively, restraining business activities.

Nevertheless, the MRFTA has several provisions to prevent arbitrary exercise of KFTC's accusation authority:

- The Korea Fair Trade Commission shall file an accusation with the Prosecutor General for violations listed in Articles 66 and 67 where it is deemed that such violations may substantially hamper competition because the degree of violations is obvious and grave from an objective point of view [Article 71 (2)];
- The Prosecutor General may notify the Korea Fair Trade Commission of the existence of factors requiring the filing of an accusation, and may request the KFTC to file with him [Article 71 (3)];
- The Korea Fair Trade Commission may not withdraw an accusation after the prosecution has commenced [Article 71 (4)].

Related to this, an issue was once raised whether the prosecution can press charges against cartel members excluded from an accusation filed by the KFTC under the “principle of indivisibility of complaint” provided in the Criminal Procedure Act. Regarding this, the Supreme Court ruled that “if the Article 233 of Criminal Procedure Act which prescribes the principle of indivisibility of complaint is interpreted to extend to the KFTC’s filing of accusation, the scope of criminal enforcement would be expanded to include those the KFTC chose not to file a charge against to the prosecution. Such interpretation would be disadvantageous to respondents, going against the principle of *nulla poena sine lege*- no penalty without a law, thus shall not be allowed”.

3.3 Judicial procedures for private enforcement

Private person’s rights to request prohibition of antitrust violations and private damages claim are two main pillars of private enforcement of antitrust law. In Korea, individuals should not bring a lawsuit to seek prohibition of antitrust violations under the MRFTA while they may claim compensation for their losses from law violations. Unlike in the U.S where the punitive damages system such as treble damages is in place, individuals in Korea can only pursue a recovery of the actual amount of losses suffered.

Nevertheless, with the amendment of the MRFTA in 2004, court’s recognition of amount of damage is allowed given that proving the amount of losses from law violations in a damages suit is difficult.

“In case where it is recognized that damage is caused by the act of violating the provisions of this Act and it is extremely difficult to verify the fact that is necessary to determine the amount of such damage in light of the character of the fact, the court may recognize a reasonable amount of damage based on the gist of entire arguments and the outcome of investigating evidences [Article 57]”

In addition, in order to promote the use of civil damages action, the MRFTA provides that those who violate the law shall have the burden of proving that the law violation was not committed due to deliberation or negligence.

4. Recent developments in procedural fairness and transparency

The KFTC operates numerous notifications and guidelines to ensure fairness and transparency in the case-handling process, and discloses them to the public so that anyone can check such process on demand. The KFTC amended several notifications and guidelines recently. Here are major amendments on the case proceedings of the KFTC.

4.1 *Notification on implementation of cartel leniency program (July 20, 2011)*

The Notification on Implementation of Cartel Leniency Program was amended to stipulate reasons for which the KFTC (Secretary General of KFTC) may cancel leniency status. Under the amendment, leniency status can be cancelled when: i) the leniency applicant fails to provide full co-operation until the completion of deliberation by the Committee; ii) the leniency applicant submits falsified documents; iii) the leniency applicant does not terminate its involvement in the concerned cartel being reported; iv) the leniency applicant coerced other members to participated in the cartel; and v) evidence submitted by the leniency applicant is not considered to prove the concerned cartel behaviour. Furthermore, the amended notification has expanded the scope of supplementary documents submitted for leniency application, which was previously limited to written documents, objects or computerized data, by inserting the phrase “other evidential materials which help prove cartel behaviour”. As a result, the use of evidential materials of any forms has become possible only if such materials can prove cartel schemes, further enhancing transparency and fairness in operating the leniency program.

4.2 *Notification on rules on imposing surcharges (October 20, 2010)*

The Notification on Rules on Imposing Surcharges was amended to specify grounds under which surcharges are reduced exceeding 50% of the original amount in the final stage of estimating the amount of surcharges. Moreover, the amended notification has increased the ceiling of aggravating and mitigating surcharges respectively for obstruction of investigation and co-operation in an investigation to 30%. Predictability of surcharge aggravation and mitigation has also been enhanced by providing that surcharge may be decreased by up to 15% when respondents admit law violations or offer other co-operation in the course of the Committee proceedings.

4.3 *Guidelines on referring antitrust cases to the prosecution (June 9, 2010, March 3 and August 1, 2011)*

Through the three rounds of amendment of the Guidelines on Referring Antitrust Cases to the Prosecution in recent years, the scope of subjects against which the KFTC brings a charge has been expanded from “enterpriser or business association” to “ enterpriser or business association, head of business association, representative, employer and employee”. Moreover, the revised guidelines specify grounds under which the KFTC refers a case to the prosecution exceptionally, includes obstruction of investigation in such exceptional grounds to make institutional improvement for fair and transparent exercise of exclusive accusation authority in antitrust cases.

MEXICO

1. Describe the relationship between the courts and the competition authority(ies) in your jurisdiction.

In Mexico, the ultimate instance for revising and deciding on competition cases is the judiciary. In this regard, the specific bodies within the judiciary entitled to review competition cases are the Collegiate Tribunals or the Supreme Court. Besides these instances, the Administrative Tribunal, created by the Executive (Federal Court of Fiscal and Administrative Justice, can also review competition case only in regards to economic sanctions. It is worth noting that decisions by the Administrative Tribunal may be subject for revision by the Judiciary (as mentioned in paragraph 9).

Therefore, the country has a dual competence system for administrative resolutions related to competition cases. This system comprises resolutions by the Mexican Federal Competition Commission (CFC for its acronym in Spanish) and decisions made on CFC's resolutions by the judiciary or the administrative tribunal. It is optional for individuals to submit to either of these two bodies CFC's resolutions for review.

1.1 Judiciary bodies

District Courts are the first review instance within the judiciary for CFC's resolutions. These courts will qualify both, the legality and constitutionality, of the resolution issued. They can also pronounce on the constitutionality of norms that support the contested decision.

If requested by individuals these courts can halt the effects of the resolution under review.

The decision of this judicial body may protect or not an individual, or dismiss the matter. The resolution issued by this body could be reviewed by a Collegiate Circuit Court. These circuit courts are hierarchically superior to district courts. It is optional for individuals to resort to this instance.

If there are questions of constitutionality regarding the grounds that support the CFC's resolution, the circuit courts will submit the case to the Supreme Court for its revision. The Supreme Court will decide on the constitutionality and return the matter to the circuit court for revision of pending issues related to the Federal Law of Economic Competition (FLEC) enforcement.

1.2 Administrative tribunal

This tribunal is vested with full jurisdiction to review competition cases only in regards to economic sanctions. It may not pronounce on the constitutionality of the resolution or its grounds.

On a case by case analysis, the tribunal may submit the CFC's resolution for a higher instance review. This instance is the Superior Administrative Court.

If the superior court dismisses the review, the individual may resort to a circuit court to demand abidance to the guarantees deemed breached by the CFC's resolution. The circuit court will review the

decision of the administrative court and may guard or not the individual from it, or oversee the matter. The matters may be drawn by the Supreme Court if considered important and transcendent.

1.3 *Judges and magistrates*

Few magistrates and judges conduct an in-depth review of competition cases. For this reason, there is only a meager revision of the evidence that underpins a case and the assessment of the anti-competitive conducts is shallow. Thus, in most cases, the judicial review of competition issues is reduced to the analysis of the formalities for its issuance.

The lack of understanding on competition matter is what keeps courts and tribunals away from resolutions on economic matters and drives them to solve only mere issues of form. On the one hand the judicial review is less thorough addressing the conduct's matter and excessive in the discussion of formal issues. The court's only interest is that the decision is issued in compliance with all applicable formalities.

In recent years, however, the judiciary members have expanded its interest on the substantial part of the proceedings and, as a result, the level of deference granted to the CFC's resolutions has increased considerably. In part this could be attributed to the capacity building activities conducted by the CFC and the judiciary with the aim: 1) of training judges and magistrates on competition issues; and 2) for improving the CFC's motivation and compliance with proceedings. These actions have contributed to achieve a 73% acceptance rate of CFC's resolutions reviewed by the judiciary.

1.4 *On-going reform*

Last April 2011, the Mexican Congress approved amendments to the FLEC that allow for the implementation of an ordinary administrative trial, which is a new review instance for competition matters. With the new procedure, it is expected that the judiciary will better assess competition matters when issuing its decisions since the judges will be expected to be experts in the field.

Individuals may choose for its case to be reviewed through an ordinary administrative trial or request a reconsideration review by the CFC.

The new ordinary administrative trial procedure should be ready by the end of 2011.

2. Summarize the procedures applicable to public and private competition cases before the courts in your jurisdiction.

Competition cases between private parties in Mexico are not allowed. The investigation and sanction of cases, according to the FLEC, corresponds only to the CFC. Private parties could claim for damages caused by an anti-competitive practice in the civil courts. The claim for these damages will result in an ordinary trial in a civil court. This court will not seek to solve the anti-competitive conduct but identify the damage caused by it, assess the damage and decide on an economic compensation. In general, individuals that seek damage compensation will present as evidence a copy of the CFC's resolution.

Thus, the only procedure to sanction anti-competitive practices is conducted by the CFC. There are no other procedures other than those described in the previous section to challenge the decisions taken by the CFC.

3. Update on recent developments relating to procedural fairness and transparency in your jurisdiction.

As a result of the Commission's consultation in 2010, private practitioners, academic institutions and research centres, bar associations, non-governmental associations and the public in general expressed that the CFC should ease access and disclosure of its public information, as well as, issue guidelines. In light of these suggestions, the CFC developed a work program that yielded concrete results by making available more information on its plenum decision process; facilitating access to its public information through a custom-made on-line search engine; and developing a handbook of procedures, as well as, guidelines and reference papers to make more explicit the methodologies it uses.

In addition, in April 2011 the Mexican Congress approved amendments the competition legislation that allow the CFC with the possibility conducting oral hearings to permit the party under investigation to clarify its arguments before the CFC's Plenum prior to the issuing of an statement of objections.

3.1 *Information on the plenum decision process*

In order to improve the transparency of its decision, in the Plenum's session of February 3rd, 2011, the CFC Commissioners agreed by unanimity to make public the Commissioners' votes in all the resolutions.

3.2 *On-line search engine*

To increase transparency and to enhance the predictability and credibility of competition policy in Mexico, as well as, to respond to a longstanding demand by the Commission's stakeholders, the CFC developed a new on-line search engine.¹

This new engine allows anyone interested in getting access to a particular decision or opinion by the CFC to search it by one (or a combination) of the following criteria: keyword, file number, name of economic agent involved, date, industry, type of procedure (i.e. investigation, merger, opinion, etc.), and type of anti-competitive conduct investigated.

3.3 *Handbook of procedures*

This handbook is an internal consultation document that focuses in the activities of the CFC's areas. One of its main objectives is to define, validate and standardize the procedures, policies, mechanisms and measures for internal control and supervision of the Commission.

3.4 *Guidelines and reference papers*

Fostering competition culture among Mexican economic actors is a key objective of the Commission, just as well as providing transparent and predictable mechanisms for interacting with the authority. In this regard, the CFC acknowledges that key mechanisms, among others, to achieve the above are guidelines, reference papers, and documents in which the Commission makes explicit the methodologies it uses.

For this reason, during the last couple of years the CFC has develop the following documents to delineate, answer questions or doubts, and set parameters of the work it conducts: guidelines for opening an investigation; guidelines on confidentiality issues; guidelines for the leniency program; guidelines for trade associations; guidelines on procedural aspects of merger notification and review; guidelines on fine

¹ <http://www.cfc.gob.mx/index.php/RESOLUCIONES-Y-OPINIONES/buscador-deresoluciones-y-opiniones-de-la-cfc.html>

setting; reference paper on relevant market definition; and reference paper on the assessment of market power.

3.5 *Oral hearings*

The recent amendments to the FLEC allow the CFC to conduct oral hearings. The aim of these hearings is to guarantee that the voice of the parties involved in the proceedings is heard by the Commissioners and CFC's officials who participate directly in enforcement actions. In these hearings, individuals can make clarifications deemed relevant to the arguments, evidence, and allegations presented in written to the Commission and to the documents included in the case file.

In this regard, the CFC has created an internal working group to examine the feasibility of oral hearings on the basis of the Commission's legal framework and, where appropriate, draft guidelines for their implementation.

NETHERLANDS

The Netherlands Competition Authority (NMa) believes that a competition authority, when carrying out its function as a competition enforcer, should consistently seek to achieve transparency and deliver procedural fairness in all of its dealings. The means by which the NMa seeks to achieve this have been outlined in two papers previously submitted to the OECD by the NMa for roundtables on this subject.¹ This paper will therefore focus more specifically on transparency and procedural fairness within administrative and civil litigation cases, as they relate to competition law.

The NMa's contact with the Dutch courts regarding administrative litigation, stem from the NMa's power to issue fining decisions which are punitive and open to appeal and higher appeal.² This paper will consider the court structures for both types of proceedings. It will then discuss the procedural aspects of litigation in the field of competition law from an administrative and civil appeals perspective. It will conclude with a brief analysis of the NMa's relationship with the courts.

1. The courts

1.1 Jurisdiction

1.1.1 Administrative litigation

The administrative Chamber of the Rotterdam District Court is specially authorized to hear competition cases at first instance.³ In fact, the Rotterdam District Court (Rotterdam Court) has exclusive jurisdiction over appeals directed towards decisions of the Netherlands Competition Authority (NMa).⁴ All judgments of the Rotterdam Court may be appealed before a higher court, the Appeals Tribunal for Trade & Industry (Appeals Tribunal) in The Hague.

The Appeals Tribunal is an administrative court which generally rules, in first⁵ and last instance, on matters involving administrative decisions relating to specific rules and regulations for trade and industry. The Rotterdam Court and the Appeals Tribunal both deal with issues involving both Dutch and EU competition law.

¹ February 2010, Working Party No. 3 Netherlands. "Transparency issues in Civil and Administrative proceedings" DAF COMP WP3/WD (2010) 11. June 2010, Working Party No. 3 Netherlands. "Procedural Fairness Issues in Civil and Administrative Enforcement" DAF COMP WP3/WD (2010) 41.

² An English version of the Dutch Competition Act is available at <http://www.dutchcivillaw.com/legislation/competitionact.htm>

³ Article 14(5) of the UN Covenant on Civil and Political Rights prescribes the right to review cases involving punitive sanctions. However, as it is preferable to maintain a single unified system, the Dutch Competition Act determines that all of the NMa's decisions may be appealed before the Rotterdam Court with a possibility of higher appeal before the Appeals Tribunal.

⁴ Article 93 Dutch Competition Act.

⁵ The Appeals Tribunal does not rule at first instance in competition related cases.

1.1.2 *Civil litigation*

There are no specialised competition law courts in the Netherlands for civil matters. Civil claims for breach of competition law must be brought before one of the 19 Dutch district courts. Damage claims of up to EUR25,000 must be brought before the sub-district court (kantonrechter), in all other cases the civil district court (rechtbank) is competent.⁶

Judgments rendered by district courts may be appealed to the Dutch courts of appeal (gerechtshoven). The 19 districts are divided into five jurisdictions for which a different court of appeal has jurisdiction. In recent years, the number of civil cases involving competition law issues has been approximately 45 cases per year. Issues related to questions of law in appeal cases may subsequently be appealed to the Supreme Court (Hoge Raad).⁷

1.2 *Specialization of the Rotterdam District Court*

Questions may be posed to whether competition law related civil cases should also be brought exclusively before the Rotterdam Court, rather than heard by one of the 18 other non-specialized district courts.⁸

The argument for handing exclusive jurisdiction to the Rotterdam Court for both administrative and civil trials relates to the existing expertise of its judges in the field of competition law, and the fact that this might encourage a more widespread civil enforcement of competition law in the Netherlands.⁹

However, the counterargument is that in civil cases, competition law issues are often just one of many (smaller) aspects to be determined by the court in any given case. Therefore, while the desire to adjudicate a higher concentration of cases with a competition nexus by a single specialised court would be the goal, it is more likely that the suggested concentration of cases would in fact only lead to an increase in the volume of adjudication of cases with little relevance to the strengthening of competition jurisprudence. Indeed, the general view is that because of the heterogeneous nature of the cases, the suggested concentration is not desirable and as a consequence, all 19 civil district courts continue to deal with competition law issues in civil cases.

In practice, this dissemination of adjudication of competition related cases across all district courts *has* resulted in a few cases where it would seem that the judge has failed to comprehend the complexities of competition law. However, in general, the district courts have been able to deal with competition law issues quite well. Undoubtedly, this may, in part, be attributed to the Expert Centre of the Court in Rotterdam which is open not only to the judges of the Rotterdam Court but also to judges and assistants of other courts.¹⁰ The economic expertise of the judges in the Netherlands will be discussed further below at 2.3 Judicial Development of Expertise in the Field of Competition Law.

⁶ As of 1 July 2011, Dutch sub-district courts may hear cases involving sums of up to EUR 25,000.

⁷ Article 6:162 Dutch Civil Code (“DCC”).

⁸ “The courts and the art of concentration”, Monique van Oers and Anke Prompers in ‘The Art of Supervision – Liber Amicorum – Pieter Kalbfleisch’ 2011 p131.

⁹ Further contribution to the continuity and uniformity in the interpretation and application of competition law is made by the Courts of Appeal and the Dutch Supreme Court which ultimately rules in civil cases (with, in addition, the possibility of prejudicial questions to the Court of Justice in Luxemburg when interpretation of EU-law is involved).

¹⁰ See Article 89 under h. to j. Competition Act and Article 44 Dutch Code on Civil Proceedings.

1.3 *The courts' relationship with economic theory*

Another interesting question is whether the courts should include members with an economic background (economists) when they are assessing competition cases. As competition law is characterised by economic theory and principles, a call for more economic expertise is understandable. However, as mentioned above, the judges in the courts with jurisdiction over competition law related matters have demonstrated their ability to develop sufficient (economic) expertise to deal with the competition issues at hand. In fact, what may be needed is not more economic theory but more access to, and understanding of, the relevant facts, in particular the markets at stake, and their characteristics, in relation to the facts constituting the alleged infringement.

Over the years, the courts seem to have become more critical of the NMa's analyses of the facts in its competition law decisions and the subsequent evidence presented to support suggested theories of harm. To the extent that the courts need further information on economic concepts or theories, they may call upon the parties or independent experts to present economic reports. Indeed, it remains crucial that the NMa and the courts assess the facts in view of such theories.

Due to the system of permanent circulation of judges (common within the Dutch judiciary), judges generally change position quite regularly. In fact, switches after a period of four years are quite common. However, in practice, the tenures within the specialized team of the Rotterdam Court have become much longer, this has helped with the accumulation of knowledge on economic theory; the NMa therefore welcomes this development. In addition to the involvement of part-time judges specialized in competition law; the institutional framework (Expert Centre); and the working methods of the courts, the longer tenure of judges in the Rotterdam Court seems to have fostered continuous development through the sharing of expertise.

A recent study carried out by the University of Nijmegen in the Netherlands shows, more generally, that the establishment of special courts (such as the Rotterdam Court) is considered to contribute to the substantive quality of the courts' judgments.¹¹ This report summarizes the opinions of various stakeholders - including companies involved in competition procedures and their lawyers; the judges of the Rotterdam Court and Appeals Tribunal; and the NMa. All parties agreed that the concentration of jurisdiction was necessary to develop the required expertise in the administrative appeals system. It was stated that although not each individual case is equally complex, the fact that all competition cases are judged in a consistent way contributes to the overall (increasing) quality and transparency of the jurisprudence in competition law enforcement.¹²

¹¹ Research Report of Brocker A., Havinga T. , Jettinghoff A., Klaassen C. and Bakker L. , *Specialisatie loont?!*, Research Memoranda of the Raad voor de Rechtspraak, nr. 1/2010.

¹² The researchers distinguish four dimensions of quality: (a) approach of the parties, (b) impartiality, (c) legal quality of the court proceedings and its decision, (d) length of the procedure, Research Report pp. 224-225. In general, impartiality of the court (dimension a) is considered a predominant condition. Subsequently, the legal quality (dimension c) –more in particular the legal quality of the court's decisions– was considered most important.

1.4 *Influence of European case law on Dutch judgments*

1.4.1 *Recent case law*

The recent judgement of the Appeals Tribunal in the *CR Delta*-case demonstrates that the Dutch courts take the developments of the European Commission into consideration in this field.¹³ In its original *CR Delta* decision of 2003, the NMa have followed the rulings of the Court of Justice in *Michelin II* and *British Airways* on fidelity rebates, which can be characterized as examples of a formal (i.e. legal) based approach of the concept of “abuse”. During the national appeal proceedings, the European Commission initiated a public consultation on the scope of Article 102 TFEU. In view of its attempt to modernize the concept of (exclusionary) abuse, the Commission opted for a more effects based approach.¹⁴ Although the NMa in general favours such an approach, it could not apply this new approach (with retroactive effect) in an (‘old’) case which was already pending before the Appeals Tribunal. In line with the new approach of the European Commission, the Appeals Tribunal decided that in abuse cases the potential economic effects had to be analysed in order to establish an infringement of Article 24 Competition Act. Consequently, the fining decision of the NMa for alleged abuse of dominance was annulled as the result of more recent developments at European level. The *CR Delta* case may be seen as an example of the ultimate consequence of the interaction between national and European competition law/policy.

1.4.2 *Development of case law*

Most crucial in view of development of case law is the standard of proof and review applied by the Courts.¹⁵ Although these are procedural matters which, in general, are considered issues of national law, the *Mobile Operators* case illustrates that European law is also relevant here. In its reference to the European Court of Justice, the Appeals Tribunal posed a question related to the autonomy of the national courts with respect to the application of national rules on the standards of proof. The Appeals Tribunal asked whether there was room to apply national rules of proof and, consequently, whether it needed to apply the ANIC-presumption developed in EU-law in the national *Mobile Operators*-case. The European Court of Justice, however, concluded that the rule of proof embedded in the ANIC presumption is part of the substantive competition rules, embedded in Articles 101 and 102 TFEU, which must be applied in a uniform way throughout the European Union. The NMa expects the border between national procedural rules (including issues of proof) and the European substantive competition law rules to remain a topic of discussion in future. The interrelation between national law and European law is naturally affected by the development of national competition law.

1.4.3 *Duration of cases*

A negative consequence of the interrelation between Dutch and European judgments is surely the duration of judicial proceedings. The above mentioned leading judgements, which brought about important clarity on major issues of Dutch competition law, took close to ten years. The *Mobile Operators* case, which started in 2001, has not even come to an end yet. On average, an appeal before the Rotterdam Court

¹³ CR Delta, Appeals Tribunal for Trade & Industry, 7 October 2010, AWB 07/596, (www.rechtspraak.nl, LJN: BN 9947).

¹⁴ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ 2009/C 45/02.

¹⁵ See also Parret L., Side effects of the modernisation of EU competition law, Wolf Legal publishers, Nijmegen, 2010, pp. 61-92.

currently takes 1 to 1.5 years. A higher appeal before the Appeals Tribunal takes longer, on average 2 to 3 years.¹⁶

Over the years, the average duration of proceedings before the Rotterdam Court has diminished. The caseload of the Appeals Tribunal and the relatively small group of its very specialized judges seems to give it less opportunity to shorten the duration of its proceedings.

It is possible that the introduction of an Advocate General to the Appeals Tribunal would further facilitate the sound development of competition law.¹⁷ In the Netherlands, opinions of Advocates General are common in (civil, criminal and fiscal) proceedings before the Dutch Supreme Court. So far, Advocates General do not play a role in proceedings before the administrative courts, such as the Appeals Tribunal. Although this would result in an extra procedural step, opinions of Advocates General generally include valuable preparatory instructions, which aim to facilitate the decision making process by the court. More importantly, in their opinions Advocates General may put the pending case in a broader perspective and advise on the application and consequences of new developments and new case law.¹⁸ Certainly, this can accelerate the development of national competition law, including the related procedural rules. Mr Keus¹⁹ and Mr Wattel,²⁰ both Advocates General to the Supreme Court for civil and fiscal cases, have rendered opinions which can be regarded as good examples of constructive contributions to the development of national law issues related to competition.

2. Procedural aspects of litigation

2.1 Dutch civil and administrative litigation

2.1.1 Administrative litigation

Since the entry into force of the Dutch Competition Act on January 1, 1998, NMA decisions, applying European Union and national competition law, are subject to a three-stage appeals process.

¹⁶ The Appeals Tribunal has ruled that, as a ‘basic rule’, a duration of two years, for the sanctioning and the administrative appeal phases combined, cannot be regarded as unreasonably long. The Appeals Tribunal has also stated that it may also be reasonable for an appeals procedure at the District Court to last 1,5 years and two years at the Appeals Tribunal. 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.

¹⁷ This suggestion was also put forward in discussions among experts which were organised by the University of Nijmegen (see footnote 10). Amendments to the General Administrative Law Act (bill 32 450), which are currently being debated in Parliament, include the possibility for the Appeals Tribunal to install a full Chamber and/or to appoint a Advocate General in complex (competition) matters.

¹⁸ If a court needs specific expertise, it may appoint an (court) experts pursuant to article 8:47 General Administrative Law Act. In 2010, the Rotterdam Court appointed a chartered account as a (court) expert in NMA case regarding the Weighed Average Cost of Capital (WACC) in the field of regulation of (shipping) pilotage (Court of rotterdam, 20 January 2011, AWB 08/4739 (www.rechtspraak.nl, LJN:BP 1526)...

¹⁹ Opinion of Advocate General Keus to the Supreme Court, 16 January 16, C07/170HR, concerning the issue of whether Article 101 TFEU and Article 6 Competition are a matter of public policy (www.rechtspraak.nl, LJN: BG3582). Opinion of Advocate-General Keus to the Supreme Court, 18 December 2009, 08/00899, on the definition of the relevant market (www.rechtspraak.nl, LJN: BJ9439).

²⁰ Opinion of Advocate General Wattel to the Supreme Court , 16 November 2010, HR 10/01358 on the tax deductibility of fines imposed by the European Commission in cartel cases(www.rechtspraak.nl, LJN: BO6770).

In order to appeal an NMa decision, addressees of decisions (persons/undertakings) may 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 a section of the NMa's legal department, which was not involved in the original investigative or fining process. In cases where appellants are subject to a sanction, the NMa will review its decision in the light of advice received from an independent advisory committee. The independent advisory committee also hears the appellants and the NMa. The committee's advice is published together with the NMa's decision on the administrative appeal. The NMa is legally obliged to state reasons for any deviations from the advice received from the committee. Should appellants be dissatisfied with the result of this administrative appeal procedure, they may - within six weeks of the procedure - appeal the decision to the administrative law chamber of the Rotterdam Court. The decision of the Rotterdam Court may be appealed to the Appeals Tribunal.

Both the Rotterdam Court and the Appeals Tribunal 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 i) annul a decision (in whole or partially); ii) decide that the NMa must take a new decision; iii) and/or rule on the case themselves.²¹ Either court may impose a lower fine, however they may not impose a higher fine; or find an infringement which the NMa has not found in its initial decision. Moreover, there is a general rule of law which holds 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 Court and the Appeals Tribunal also review the lawfulness and proportionality of the NMa's exercise of administrative law powers.

Given the 'time-sensitivity' of business transactions, no administrative appeal procedure exists regarding the NMa's merger decisions. Instead, such decisions may be directly appealed to the Rotterdam Court. In fact, in certain situations (i.e. in situations where there is an "urgent need") the Rotterdam Court and the Appeals Tribunal may even apply an accelerated procedure.²² In such circumstances, several time frames during the appeal procedure may be shortened. In addition, in urgent cases the courts may also grant interim relief by imposing interlocutory injunctions ('*voorlopige voorziening*'). So far, the courts have not applied such an accelerated procedure²³ and there have only been a few cases in which interim relief has been granted.²⁴

As far as the duration of the different phases is concerned, it is first of all important to note that decision in these kinds of cases must be given within a reasonable time frame.²⁵ According to case law, the starting moment of the reasonable time frame is, in principle, the moment at which 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.

²¹ Under article 8:72 of the General Administrative Law Act.

²² Under article 8:52 of the General Administrative Law Act.

²³ Under article 8:81 of the General Administrative Law Act.

²⁴ See e.g. judgment of the Rotterdam 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 54Omroep Stichting v. director-general of the NMa* of 9 April 2003 and judgment of the Rotterdam Court in case MEDED 04/1243, *Nuon N.V. v. director-general of the NMa* of 3 June 2004.

²⁵ 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.

An interesting development in the procedural law of competition related cases is that the Appeals Tribunal and the Rotterdam Court may now grant the NMa an interlocutory judgment allowing it to correct a mistake in its decisions.²⁶ Such an interlocutory judgment, available since 1 January 2010, means that the NMa need no longer go through the arduous process of formally annulling a decision and subsequently handing down a revised one. This development has contributed to substantially reducing the time involved in the entire (administrative) appeal procedure.²⁷ At the time of writing, the NMa had not benefitted from this new development, although there are two merger cases in which such an interlocutory judgment is pending. It remains to be seen whether such measures will also be suitable for use in sanction procedures.

2.1.2 *Civil litigation*

As mentioned above, in the Netherlands, it is possible to bring private enforcement actions against those who breach competition laws. Although the Dutch Competition Act does not provide any explicit statutory basis for private litigation, Dutch tort law does. Disputes between civil parties may include all kind of arguments, including violation of competition rules. These will be discussed further below.

Generally speaking, in litigation related to competition laws, claimants will seek damages, restitution, injunctions and/or file joint actions. For example, fining decisions of the NMa may trigger civil disputes where victims of cartel behaviour wish to claim (follow on) damages from companies which, according to the NMa's assessment, have violated the Competition Act. In actions following a decision issued by the NMa, damages will be the key claim. An action for breach of competition law may be brought by any person, legal or natural, who has suffered damages as a result of a competition law infringement. This will normally include indirect purchasers.

Damages can be awarded to claimants who have suffered prejudice as a result of an anticompetitive practice. For a claim to be awarded an 'unlawful act' must have occurred (i.e. the defendant has committed a competition law infringement); as a result of this unlawful act, damage must have occurred; the claimant must have suffered damage (i.e. a causal link between the damage and the infringement); and the damage suffered must be able to be reasonably attributed to the defendant.

Damages are compensatory and determined on the basis of loss suffered. Parties frequently rely on reports by economic experts, as it may be extremely difficult to establish the exact level of loss the court is allowed to estimate the amount of damages.²⁸ In addition, the Dutch civil code allows a court to estimate the damages by considering the amount of profit made or a part thereof. It is important to note that no punitive or exemplary damages are available in civil liability cases in the Netherlands.²⁹ Nor do courts take the amount of fines imposed by competition authorities into account when calculating the award. Inversely, the NMa may mitigate fines when an infringer has, of its own volition, compensated victims of its anticompetitive practices.³⁰

²⁶ Under article 8:51a of the General Administrative Law Act.

²⁷ It is important to note that an interlocutory judgment cannot be utilized if third parties will be disadvantaged as a result.

²⁸ Article 6:97 DCC.

²⁹ Article 6:104 DCC.

³⁰ This was, for instance, taken into consideration in the fining procedures relating to the Dutch construction cartel cases. In this instance, the State set up a compensatory fund. The goal of this fund was to prevent the escalation of unpaid civil damages claims. It was agreed that if undertakings contributed to this fund, the NMa would deduct a maximum of 10% of the payment of the fine, as long as this deduction did not result in the total of the fine to be paid falling below a certain pre-determined level. This idea has also been

Claimants may also seek declaratory judgments, for example, a claimant may ask a court to declare that certain behaviour constitutes an abuse of a dominant position. One of the most common competition law related tort actions relates to the validity of contracts due to a clash with competition rules. An agreement that infringes competition law can be declared void (wholly or in part). Courts can furthermore issue an injunction, if necessary subject to a periodic penalty, prohibiting the continuation of conduct that constitutes a breach of competition law.

Civil proceedings on the merits have an average duration of one to three years at each level of jurisdiction. The duration generally depends on: the complexity of the matter; the work load of the court; and parties' procedural attitude.

2.2 *Leniency applicants and immunity in civil cases*

Leniency applicants are not granted immunity from civil claims. Neither the Dutch Competition Act nor the NMa's leniency guidelines provide for specific protection of the evidence disclosed by leniency applicants - in the course of the NMa's proceedings, in subsequent civil court proceedings. It is nevertheless the NMa's general policy not to disclose any corporate statements or other evidence submitted by leniency applicants to third parties. The NMa has the discretion to decide which information to hand to claimants on the basis of the Dutch Freedom of Information Act (*Wet Openbaarheid van Bestuur*).³¹

In order to avoid placing leniency applicants in a worse position than other cartel members in civil cases, the NMa's leniency programme allows applicants (who can demonstrate a legitimate interest), to submit leniency applications orally. In that case, the leniency office will record the oral statement and make a corresponding transcript. The NMa will only grant access to its transcripts of oral statements to other parties to the proceedings, provided each undertaking and its legal representative commit not to make mechanical copies of such transcripts, or to use the information obtained for any purpose other than the administrative procedure in question.

2.3 *Judicial development of expertise in the field of competition law*

Although competition law is a relatively new field of Dutch law, competition law is not new to the courts in the Netherlands. When the Dutch Competition Act entered into force in 1998, many Dutch lawyers already had an existing practice in European competition law and were well aware of the case law of the courts in Luxemburg. Judges had also encountered European competition law issues in various fields of their practice. There was, therefore, no absence of direct applicable knowledge when the district courts and the Appeals Tribunal began practising their exclusive jurisdiction in competition cases. From the outset, the NMa has also made a detailed analysis of Rotterdam Court and the Appeals Tribunal's judgments relating to competition law in order to assess the impact of these judgments on the growing body of jurisprudence and the way the NMa functions. The NMa continually tailors its processes by taking the trends of the courts' judgments in to account while conducting its daily work.

In addition, once exclusive jurisdiction was awarded to the Rotterdam Court, it trained its judges and developed its expertise in the field of competition law. The Rotterdam Court established an Expert Centre for Financial and Economic Law, which organises courses and training for judges (from Rotterdam and

applied in later cases such as Groen Maastricht. Case 5698, *Openbaar Groen Maastricht – Van der Linden*, of 22 December 2010.

³¹ The NMa has already received and rejected requests of third parties for information contained in leniency applications.

other courts) involved and/or interested in legal and economic issues related to competition law.³² Within the Rotterdam Court, competition cases are dealt with by a (fairly small) special team of judges and their assistants. This team may also call upon (part time) judges from outside with special expertise in competition law.³³ Such a basis provided an excellent foundation for a good working relationship between these courts and the NMa.

2.4 *The NMa's role in civil litigation – Amicus curiae*

The NMa may also play a role in civil proceedings. Following the entering into force of EU Regulation 1/2003, the NMa (and the European Commission) may, on its own initiative, act as *Amicus Curiae* and submit written and oral observations to the national courts on issues relating to the application of EU-rules on competition.³⁴ So far, the NMa has hardly made use of its *Amicus*-powers.³⁵ In fact, the NMa has only filed *Amicus*-briefs in one case. The civil judge involved explicitly requested the NMa to intervene as *Amicus Curiae* and largely followed the NMa's reasoning in his ruling. Indeed, the *Amicus Curiae* position gives the NMa the possibility to contribute to the further development and a uniform application of competition law. Practice, however, does not show any special need for such intervention because most civil judges, as mentioned above, have been able to handle the core concepts of competition law quite well. The courts' difficulties in these cases are more related to discovering and assessing the facts, than to comprehending the core concepts of competition law. Explaining these factual aspects is, however, not the task of the NMa in its role as *Amicus Curiae*. Moreover, the Appeals Tribunal's rendering of instructive judgments has significantly contributed to the evolution of the understanding of the core concepts of competition law. By rendering such informative judgments, the Appeals Tribunal contributes to the uniform application of the Competition Act, not only in administrative, but also in civil law cases.

3. Transparency and confidentiality

Transparency is stimulated by the fact that one court oversees all first instance cases.³⁶ For instance, competition cases, especially cartel cases, typically involve multiple companies and often consist of very large files. These files consist of data which may include business secrets (particularly in abuse and merger cases). Often, companies involved do not wish for such information to be revealed to other parties. Under the applicable rules of administrative law, the NMa must submit its files to the court, unless there are compelling reasons not to do so.³⁷ As companies fear the intervention of competitors or complainants, they often claim the existence of such compelling reasons. On the basis of experiences in early cases, the NMa and the Rotterdam Court have been able to develop an efficient way of handling files, which is satisfactory to all parties involved. The benefit of the NMa working together with the courts on this process is that one method of review has been agreed to for all of these processes irrespective of which court hears the application. This avoided legal uncertainty for all concerned.

³² Judges of other courts may be interested in participating as they may be called upon to decide on competition law issues in civil disputes before them.

³³ Including, for example, assistant judges from the General Court in Luxemburg and academics specialised in competition law. In general, individual cases are dealt with by three judges, mostly including one outside judge.

³⁴ Articles 101 and 102 TFEU.

³⁵ It is important to note that the Dutch legislator did not extend the *Amicus Curiae* role to the application of the national rules on competition in Dutch competition legislation. *Distributors vs Kia*, Court of Amsterdam, 3 December 2009 (www.rechtspraak.nl): LJN: BK6496, 437668/KG ZA 09-1941.

³⁶ See footnote 3.

³⁷ Article 8:29 General Administrative Law Act.

A recent development which ought to increase procedural fairness is the pilot project of the Rotterdam Court concerning digital files and procedures. Although some teething troubles have meant that the Rotterdam Court has not yet been able to formally adopt digital operations in all its proceedings, the NMa believes that in the near future competition cases will consist of electronic files. Such files will also be used during the administrative proceedings within the NMa. The NMa, therefore, favours the further testing of the possibilities of electronic files by the Rotterdam Court and the Appeals Tribunal.³⁸

The NMa's ability to collect certain information and the use of certain digital techniques during the investigation has also recently been brought to trial before the civil court in The Hague.³⁹ A company opposing the exchange of information between the public prosecutor and the NMa initiated proceedings for interim relief before this civil court.⁴⁰ In this case, the civil court ruled in favour of the NMa, which could then continue its cartel investigations using the said information. The NMa's fining decision in this case is currently subject to appeal before the Rotterdam Court.

Although it may be assumed that the Rotterdam Court will take the preliminary rulings of the civil court in the Hague into account in appeal proceedings, the Rotterdam Court will look into all arguments put forward by the parties, including possible claims disputing the legitimacy of the acquisition of evidence by the NMa,

The current separation of jurisdiction follows from the application of the legal framework of the General Administrative Law Act for the resolution of issues relating to the Competition Act. It might however, be more useful if crucial issues related to the (investigative) powers of the NMa could also be brought to trial directly before the Rotterdam Court as this court is in a better position to evaluate the merits of the case and the direct consequence of its rulings.

The NMa depends on the Rotterdam Court and the Appeals Tribunal for the development of its enforcement practice. It is for example crucial for the NMa to receive clarity on the interpretation and application of core concepts of competition law, such as 'restriction of competition (by object or effect)'; 'appreciable effect'; 'dominance'; and 'abuse'. These concepts are closely related with more general issues concerning procedural law and standards of proof and review: i.e. how the courts apply existing (national) standards in the field of competition law; and to what extent the rulings of the court are influenced by economic theories and evidence.

4. Concluding remarks

Within the Dutch legal system, competition law is still a relatively new field of law. Over the last 12 years, however, the practice of the NMa - and the subsequent legal proceedings before the courts - have resulted in a solid body of relevant case law. The clearly notable consistent development of this body of competition law may be accredited to the special Court in Rotterdam and the Appeals Tribunal.

³⁸ A pilot project introducing digital filings was initiated by the Rotterdam Court. However it has recently been put on hold due to technical issues.

³⁹ In civil cases, competition related cases are heard at the place of residence of the defendant. As the NMa and the Ministry of Economic Affairs, Agriculture and Innovation (EL&I), are located in The Hague, the civil courts in The Hague have jurisdiction in civil cases where the NMa appears as the defendant.

⁴⁰ *Janssen de Jong Groep BV vs the Public Prosecutor, the NMa and the State of The Netherlands*, Judgment of 26 June 2009 in interim proceeding before the civil court in The Hague. (www.rechtspraak.nl, LJN: BJ0047, 337607 / KG ZA 09-616).

In order to ensure the continued consistent development of competition law, it is crucial that the courts continue to consider not only the core concepts of competition law and the procedural framework within which the NMa operates, but that it also clarifies the extent of the NMa's (investigative) powers.

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POLAND

1. Introduction

In its modern shape, the Polish competition protection structure was established in the 1990s. Although it is true that two decades of public antitrust enforcement allowed the Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów* – “UOKiK”) and the courts to thrive in their respective roles, the existing system of judicial review of the Office’s decisions may be subject to debate.

Another issue of interest pertains to the underdevelopment of private enforcement in Poland. The absence of specific legal basis to undertake private judicial action in competition violation cases, as well as the lack of regulations determining the relationship between UOKiK’s decisional practice and private enforcement, leave it up to the case law to work out certain standards. As few private suits are filed in antitrust matters, the elaboration of jurisprudence in this area might take some time.

As regards due process within the framework of court proceedings related to competition infringements, forthcoming legislative amendments to the applicable procedure might negatively impact public antitrust enforcement in the name of procedural fairness.

In order to address the abovementioned issues, this paper will examine the relationship between UOKiK and judicial review courts, the procedure applicable in public and private enforcement cases and the recent developments in procedural fairness.

2. Relationship between UOKiK and the courts

The President of UOKiK is a central organ of the government administration responsible for *inter alia* the protection of competition in public interest, established as the exclusive competition authority in Poland.¹ UOKiK is therefore competent for assessing intended concentration transactions, conducting explanatory and antitrust proceedings, issuing decisions and sanctioning undertakings infringing competition law. In this context, the role of the courts is limited to carrying out the judicial review of UOKiK’s decisions.²

Proceedings before UOKiK are initiated exclusively *ex officio* and mostly governed by the rules set out in the Act of 16 February 2007 on competition and consumer protection³ (“the Act”) and the Code of Administrative Procedure. Certain procedural issues are regulated by the Act and other provisions, such as the Code of Civil Procedure in matters relating to evidence or the Act of 2 July 2004 on freedom of

¹ As mentioned, the President of UOKiK is the competition authority in Poland, UOKiK itself being an administrative body allowing the President to carry out their statutory obligations. However, for the purposes of this paper, the President of UOKiK and UOKiK will be both referred to as “UOKiK” or “the Office”.

² Within the framework of public enforcement, it is not possible to initiate judicial action in the absence of UOKiK’s decision.

³ Journal of Laws no. 50, item 331, as amended.

economic activity⁴ and the Code of Criminal Procedure applicable within the framework of inspections. That is why the nature of the proceedings conducted by the Office is sometimes qualified as “mixed”. Nevertheless, it is not disputed that the administrative character of these proceedings prevails.

The principles of organization of the judiciary system in Poland normally require appeals against administrative decisions to be lodged before administrative courts. The judicial review in antitrust and merger cases constitutes an exception in this regard. UOKiK’s resolutions and decisions are therefore challenged before a common court. The Court of Competition and Consumer Protection (*Sąd Ochrony Konkurencji I Konsumentów* - “SOKiK”), section of the Warsaw District Court, deals with such cases as the first judicial instance. SOKiK’s resolutions and judgments may in turn be appealed against before the Warsaw Court of Appeal (*Sąd Apelacyjny* - “SA”), second judicial instance in competition protection matters. Both SOKiK and SA examine the submitted cases on the merits. An appeal in cassation is also possible. The Supreme Court (*Sąd Najwyższy* - “SN”) however rules only on the legal aspects of the matter at issue.

The hybrid structure of antitrust enforcement in Poland appears clearly, UOKiK’s administrative decisions being reviewed by common courts of law following the civil procedure. This shift from the administrative, inquisitorial method to contradictory civil proceedings is debated by the doctrine. Some consider that it would be more coherent and pertinent to confer the judicial review in competition protection cases to the administrative judiciary.⁵

In 1990, the main argument for entrusting public competition protection cases to SOKiK’s predecessor, the Antimonopoly Court,⁶ consisted in the fact that administrative courts acted exclusively as cassation courts, controlling the legality of the decisions issued by public administration bodies. Common courts on the other hand examined submitted claims on the merits. At this point, it is necessary to mention that since May 2011, SOKiK has been obliged to not only act as reformatory court, but to control the legality of administrative proceedings carried out by the Office.⁷ This appears to be a rather problematic solution, a common court being empowered to carry out an analysis until now reserved for the competence of the administrative judiciary. Time will tell how this amendment will impact public antitrust case law in Poland.

There could however be no differentiation between the administrative and the common judiciary as far as the number of judicial instances was concerned. Proceedings before administrative courts could only be conducted as the first and last instance. As regards the Antimonopoly Court, at the beginning of its existence it delivered final and enforceable judgments, not subject to appeal. Only appeal in cassation before the Supreme Court was admitted. Proceedings before the common court in public antitrust cases were therefore possible in a single instance only. The right to lodge an appeal before SA was introduced in 2004, subsequently to the delivery of the Constitutional Tribunal’s judgment declaring the single instance system applied in antitrust cases as unconstitutional.⁸ The review of cases in second instance was also introduced within the structure of administrative courts that same year. Thus, it would be difficult to argue that the competence of these courts in antitrust cases should be excluded due to lack of second instance review.

⁴ Journal of Laws no. 173, item 1807, as amended.

⁵ See S. Gronowski, *Sądownictwo z zakresu ochrony konkurencji w Polsce (wybrane problemy)*, in *Prawo konkurencji – stan obecny oraz przewidywane kierunki zmian*, ed. C. Banasiński, UOKiK, Warsaw 2006.

⁶ In 2002, the Antimonopoly Court was renamed the Court of Competition and Consumer Protection.

⁷ The scope of SOKiK’s competence was extended by the Act of 20 January 2011 on financial responsibility of civil servants for blatant breach of law (Journal of Laws, no. 34, item 173).

⁸ Judgment of 12.06.2002 (P 13/01), OTK-A 2002 no. 4, item 42.

Ultimately, advocates of preserving the *status quo* with regard to judicial review of UOKiK's decisions indicate that compared to the administrative judiciary, common courts are better placed to deal with antitrust matters. As they specialize in economic disputes and over the years have accumulated considerable experience in this area, common courts are indeed well equipped to examine complex competition protection cases.

3. Procedure in public and private enforcement cases

In public enforcement cases⁹, the undertaking party to the proceedings conducted by the Office may challenge the latter's decision¹⁰ before SOKiK within two weeks counting from the day the decision was delivered.¹¹ If the appeal is lodged within the statutory timeframe, the decision is automatically non-enforceable.¹²

The plaintiff submits the appeal to UOKiK, which is bound by the obligation to remit it to the court without delay. However, if the Office considers the appeal as justified, it can engage in a procedure of "auto-review", revoking or changing the decision in its entirety or in part.¹³ In that case, the appeal is not handed over to the court. UOKiK's new decision is notified to the undertaking and may be questioned according to the same procedure. Whether UOKiK decides to remit the appeal to the court of first instance or to review the contested decision on its own, it may perform additional activities, such as further market studies, in order to clarify the objections formulated in the appeal. Once the appeal reaches SOKiK, the court proceeds to determine its receivability¹⁴. SOKiK may reject the appeal or decide to examine the case on the substance.

During proceedings before the court, UOKiK acts as the defendant and enjoys no more rights than the plaintiff. For example, both UOKiK and the undertaking must observe the rule of evidence preclusion. The plaintiff should clearly invoke all its claims and evidence supporting them when filing the appeal. The defendant is bound by the same obligation when responding to that appeal. Claims and evidence submitted at later stages of the proceedings are not taken into consideration by the judge, unless the party proves that their submission was not possible at the time the appeal was lodged or that such necessity arose subsequently. It is however worth pointing out that an imbalance between the parties appears where the undertaking's access to evidence is limited by the court in order to protect business or other secrets. Since UOKiK is acting in public interest, it is not subject to such restrictions.

⁹ For a detailed description of the procedure before UOKiK and judicial review courts in antitrust cases see K. Różiewicz-Ładoń, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji I Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję*, Wolters Kluwer Polska, Warsaw 2011.

¹⁰ All decisions delivered by the Office may be appealed against. However, this solution does not extend to UOKiK's procedural resolutions, which may only be challenged if such possibility is provided for *expressis verbis* in the Act or the relevant provisions of the Code of Administrative Procedure. The other divergence consists in the fact that although decisions may be questioned exclusively by the party to the proceedings before UOKiK, resolutions may be challenged by any entity whose rights they violate.

¹¹ The deadline to submit an appeal against a resolution is reduced to one week.

¹² The Act provides for an exception – UOKiK may render its decision immediately enforceable if the protection of competition so requires. In case of an appeal, the enforceability of the decision could only be suspended by the court upon request.

¹³ UOKiK is not empowered to examine whether the appeal meets formal requirements.

¹⁴ The economic value of the dispute is of no importance here.

Having examined all the factual and legal aspects, SOKiK may either invalidate the disputed decision, in which case the Office would be required to issue a new decision, revise or uphold it. The delivered judgment may be appealed before SA.

As the court of second instance, SA also considers both the factual and legal dimension of the case. It may oblige SOKiK to examine the matter once again in a different formation, revise or uphold the judgment. In the two last scenarios, UOKiK's decision becomes final and enforceable.

The party unsatisfied with the outcome of the proceedings before SA has the possibility to file an appeal in cassation before SN, but only on legal points. Such an appeal does not stay the enforceability of the decision. Its suspension may nonetheless be ordered by the SA upon request for the duration of cassation proceedings. The latter may be concluded with SN deciding to transfer the case back to SA for another trial or to uphold SA's judgment.

It is worth mentioning that additional obligations are imposed on the courts when applying EU law in parallel of domestic competition protection provisions. Pursuant to Regulation 1/2003,¹⁵ all written judgments involving the application of Art. 101 and/or 102 TFEU¹⁶ must be in line with the European Commission's decisional practice and notified to the Commission without delay after notification to the parties. Moreover, that same Regulation introduced the possibility for UOKiK and the Commission to make written *amicus curiae* observations before SOKiK, SA and SN within the framework of proceedings conducted under EU law. Although the courts are not bound by these observations, they are obliged to accept them. Finally, in problematic cases, in order to ensure the uniform application of the provisions of the Treaty, courts may consult the Commission or refer to the Court of Justice of the European Union for a preliminary ruling. So far, only one prejudicial question in the field of competition protection was addressed to the Court of Justice by a Polish court.¹⁷

Moving on to private enforcement, it cannot go without saying that it is still a novelty in antitrust cases in Poland.¹⁸ Very few suits are being filed before civil courts. The reason behind this is that gathering evidence is rather difficult and the proceedings quite costly, thus discouraging private claimants from undertaking legal action.

There are no specific rules to be invoked in private antitrust cases. The legal basis for individual private enforcement consists of the provisions of the Act of 16 April 1993 on combating unfair competition¹⁹ ("Act on unfair competition") and the Civil Code. The Act in question defines unfair competition rather broadly, as the "activity contrary to the law or good practice which threatens or infringes the interest of another entrepreneur or customer". An undertaking threatened or violated by another's competition restricting practices may seek the following remedies before civil courts:

- relinquishment of prohibited practices,
- removing effects of prohibited practices,

¹⁵ Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Official Journal L1, 4.01.2003, p. 1-25).

¹⁶ Treaty on the Functioning of the European Union (Official Journal C83, 30.03.2010).

¹⁷ Judgment of the Court (Grand Chamber) of 3.03.2011 in case C-375/09 (Official Journal C186/4, 25.06.2011).

¹⁸ For a detailed analysis of private enforcement in Poland see A. Jurkowska, Antitrust Private Enforcement – Case of Poland, Yearbook of Antitrust and Regulatory Studies, Vol. 2008, 1(1).

¹⁹ Journal of Laws no. 47, item 211, as amended.

- making one or repeated statement of appropriate content and form,
- repairing the damage, pursuant to general (civil) rules,
- handing over unjustified benefits, pursuant to general (civil) rules,
- adjudication of an adequate amount of money to the determined social goal connected with support for the Polish culture or related to the protection of national heritage (where the act of unfair competition has been deliberate).

Claims on the basis of the Act on unfair competition may only be submitted by undertakings individually or by national or regional organizations with the statutory objective to protect entrepreneurs' interests. Its provisions may not be invoked by consumers suffering from competition law violations. However, weaker market participants have the possibility to undertake legal action for damages in antitrust cases pursuant to the provisions of the Civil Code. More precisely, the undertaking breaching competition law may be held liable for committed torts or contract violations. Civil rules on unjust enrichment may constitute another basis for legal action.

Since July 2010, both consumers and entrepreneurs are also able to form class actions in accordance with the new Act of 17 December 2009 on collective redress.²⁰ A group composed of ten persons may choose to file a single suit on the same factual and/or legal grounds. Both pecuniary and non-pecuniary claims may be formulated. The group is represented in court by one of its members or a Consumer Ombudsman. Needless to say that the entry into force of these provisions will greatly contribute to the development of private enforcement culture in Poland.

The above mentioned Act does not limit consumer claims as to their object. It could therefore be affirmed that these claims could result from antitrust infringements. However, according to UOKiK, as regards undertakings victims of competition law violations, provisions on collective redress could only be applied in case of tortious liability of the defendant. Since the entry into force of the Act in question is quite recent, there is no case law available with relation to pursuing antitrust claims within the framework of group proceedings.

Whether in individual or group actions, the issue of the impact of UOKiK's decisions on private enforcement proceedings is crucial. In general, case law in this regard seems to favor the solution that these proceedings should be suspended if the matter at issue is being examined by UOKiK or judicial review courts.²¹ Further, the Office's decisions are considered of prejudicial character, although there is no specific legal basis for such a restriction of judicial discretion. If issues disputed within the framework of private enforcement were already resolved by UOKiK, they do not require additional examination by the common court.²² Finally, civil courts may autonomously conclude that an undertaking abused its dominant position, as a prerequisite to declare a contract null, unless UOKiK had already delivered a decision in this respect, in which case this decision is binding for the courts.²³ However, this solution does not apply to commitment decisions, as they do not determine whether the undertaking indeed infringed competition law.

²⁰ Journal of Laws no. 7, item 44.

²¹ Judgment of 28.04.2004, III CK 521/02.

²² Judgment of 4.03.2008, IV CSK 441/07.

²³ Resolution of 23.07.2008, III CZP 52/08.

Another issue of vital importance is the interaction between private enforcement and the leniency programme. The Act on competition and consumer protection does not regulate this matter *expressis verbis*, but should be interpreted as excluding the possibility for UOKiK to disclose information contained in a leniency application to plaintiffs within the framework of private lawsuits without the applicant's consent. Admitting the contrary would discourage undertakings from submitting leniency requests, thus depriving UOKiK from a powerful cartel detection tool. However, there is still no case law in this regard, so drawing definite conclusions would be premature at this stage.²⁴

4. Update on procedural fairness

Procedural fairness in proceedings before common courts is the question of the hour in Poland. On 16 September this year, the Parliament has adopted the Act amending the Act – Code of Civil Procedure and other Acts.²⁵ Once in force, the new legislation will significantly impact proceedings before common courts in economic matters. Currently, the Code of Civil Procedure sets out specific provisions with regard to proceedings in disputes between entrepreneurs and in public antitrust cases. Procedurally separating economic and civil suits is aimed at accelerating proceedings in delicate economic and commercial matters by means of increased formalism. As a result of the forthcoming legislative amendments, the general procedure applicable in these types of cases will be fully aligned with the procedure in civil suits, thus deformalized. That will be the case of private enforcement on the basis of the Act on unfair competition. As regards public antitrust cases, some particularities will persist. Provisions relating to the specific competence of SOKiK, SA and SN within the framework of judicial review of UOKiK's decisions will remain intact. However, some major legislative changes will affect not only private but also public enforcement proceedings. Such is the case of the new provisions on evidence preclusion.

As mentioned previously, parties to the proceedings before SOKiK should state all their claims and relevant evidence at the stage of filing and responding to the appeal. Two exceptions are admitted – the party could prove that it was not possible to submit given claims or evidence at that time or that such necessity appeared at later stages of the proceedings. This preclusion mechanism is of vital importance in antitrust cases, where proceedings need to be particularly swift due to serious changes that could take place in the relevant market's structure or the undertaking's position by the time a judgment is delivered. Moreover, evidence preclusion finds its justification in the fact that proceedings before UOKiK are of "pre-judicial instance" character, the Office disposing of strong investigative powers. Evidence necessary for the court to examine the appeal is already gathered when UOKiK issues its decision. Furthermore, prior to the delivery of the decision, the undertaking party to the proceedings conducted by the Office has the right to access the files of the case and submit additional evidence.

The new regulations will render evidence preclusion less strict, widening the margin of discretion of the judge. According to these provisions, the court shall not accept belated claims and evidence unless the party is able to prove that it was not at fault for not submitting them on time or that taking them into consideration will not lengthen the proceedings or that other exceptional circumstances justify their admission. It will be up to the judge to decide whether one of these conditions is fulfilled. In UOKiK's opinion, the provision in question is not precise enough and might be interpreted by SOKiK broadly, especially because first instance judgments could be appealed before SA for violation of that provision. The overall result could consist in the lengthening of the proceedings before the court, rendering the judicial review of UOKiK's decisions less efficient.

²⁴ For more details as to the possible interaction of private enforcement and the leniency programme, see E. Rumak and P. Sitarek, *Polish Leniency Programme and its Intersection with Private Enforcement of Competition Law*, Yearbook of Antitrust and Regulatory Studies, Vol. 2009 2(2).

²⁵ The Act still needs to be signed by the President of the Republic of Poland.

5. Conclusion

Although the institutional stability of the public antitrust enforcement system could not be seriously questioned in Poland, much can still change with regard to procedural aspects. However, private enforcement constitutes the area most prone to evolving in the coming years, especially now that collective redress became reality.

SLOVAK REPUBLIC

1. Describe the relationship between courts and the competition authority in your jurisdiction.

1.1 *Introduction. Background information*

In the Slovak Republic, administrative decisions passed by administrative authorities are subject to judicial review upon the filed action of the undertaking. Antimonopoly Office of the Slovak Republic (hereinafter only the “Office”) decides in two instances, first instance decision is passed by the relevant division, Council of the Office decides on the appeal as a second instance decision making body. The decision of the Council of the Office is the final enforceable decision provided the undertaking which is an addressee of the decision does not file an action to the Regional Court in Bratislava (hereinafter only the “Regional Court”) and does not successfully seek for the suspension of the enforceability of the decision.¹ An appeal against the decision of the Regional Court can be filed to the Supreme Court of the Slovak Republic (hereinafter only the “Supreme Court”) as the court of the last instance. Both Regional Court and the Supreme Court are the courts of general jurisdiction.

Competition decisions pursuant to the Act on Protection of Competition² are reviewed by the panels of three judges from the administrative collegium of the relevant court. These judges are not specialised for competition matters only, but are reviewing also other administrative decisions from tax law, social security law, environmental law, decisions on offences, traffic offences, building/planning permissions, healthcare administrative decisions, administrative decisions concerning the Industrial Property Office, etc. Thus, the judges have to deal with diverse legal matters.

The court may uphold the decision or annul it and return the case to new proceedings, or modify the sanction that was imposed.

In the past, the Code of the Civil Procedure³ 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 decisions 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

¹ Please see [DAF/COMP/WP3/WD\(2010\)42](#) further on the procedure and the decision-making process of the Office and the judicial review procedure.

² 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.

³ Act No. 99/1963 Coll. Code of Civil Procedure as amended.

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.

1.2 Relationship of the NCA⁴ and the national courts

In the past, the decisions of the Office were reviewed by the Supreme Court only, and the prevailing majority of decisions were upheld. However, after the amendment to the Code of Civil Procedure, in October 2004, the Regional Court became the first instance court in competition (and other administrative) cases (competition agenda was new agenda for this court). In 2004 and 2005 the Office also imposed a few heavier fines for the abuse of dominant position (37 mil SKK, 885 mil SKK). The Regional Court annulled a few decisions of the Office in line. Since the Office did not have the right to appeal,⁵ the cases were returned back to the Office for further investigation. Most of the decisions of the Office were annulled on the procedural grounds on the reasons that were not questioned before and on the application per analogiam of principles of criminal law. However, the Office did not get the clear opinion from the court on merits of the case and thus, often lacked the instruction how to proceed in the case further. Moreover, the court had often different view on certain competition issues and institutes than the Court of Justice of the EU in Luxembourg or other neighbouring/European jurisdictions.⁶

Although, one has to admit that the decisions of the Office are not always flawless, if these are annulled on the reasons that were not subject to dispute before courts previously or upon the reasons that are diverting from the EU competition law and case law of the Court of Justice for instance, then the decisions of the national courts are unpredictable, and the Office is not able to remedy the markets by a swift and effective intervention in the market.

The Office tried to initiate open public discussion with courts/judges on specifics of competition law and to learn their views, nevertheless, without any significant success. The experience shows that judges seem to be very hesitating and not very leaned towards the discussion either on closed cases or competition issues with the Office, even in a public forum.

Speaking about relationship with courts, we are thus talking mainly about relationship with regard to the body that guards fundamental rights of persons in administrative proceedings within the review process. On the other hand, there are persons that are being harmed by anticompetitive conduct, i.e. other competitors, consumers and competition in general whose hopes for possibility of successful damages actions are lowered if the prohibition decision of the Office is overturned.

⁴ National competition authority.

⁵ Until the amendment in by the Act No. 384/2008 Coll. In force since October 15, 2008) the Office did not have a general right to appeal and could appeal only in some cases (specific reasons for the annulment) which was in practice very rarely.

⁶ For instance, the court required a view of the expert in a margin squeeze case, where the Office applied common calculation method that was used in the case of the European Commission or other competition authorities. For the court an expert view was required on the question that was not even subject to dispute between the Office and the undertaking. Reference to the EU case law proving that the Office used the common methods acknowledged by the European courts for assessment of the margin squeeze cases was not persuasive.

The Office is following new trends, case law, supports further education of its experts in competition law and learns from the exchange of information from its colleagues at different forums (such as OECD, ICN, ECN, ECA, etc.). We all try, especially within ECN to converge our procedures, assessment and discuss lot of issues so that we do not sanction conduct that would be allowed in other member state and undertaking do not meet with different rules across EU.⁷ Although, we put our efforts together with the aim for coherent approach, the last say is on the court. As our experience shows so far, Slovak national courts are very reluctant to uphold decision when big company and heavy fines are involved. Nevertheless, the courts in their decisions do not deal with competition issues that we would like to hear their opinion on (that would instruct us for further and other investigation) but tend to stick to procedural issues, principles of criminal sanctioning (although it is an administrative procedure) and procedural rights.⁸ Moreover, they often require the Office to investigate and prove clear issues established and repeatedly upheld by the EU case law. The Office finds it very difficult to persuade court that competition law infringements are of the same relevance and jeopardy for the society as tax law infringements for instance and that similar cases are being upheld in other jurisdictions.

Thus, we think that judges miss the similar international forum for sharing their views and ideas in competition matters as competition authorities have. As the competition law is rather complex legal discipline bound with economic assessment and legal provisions on anticompetitive infringements are not that clear as in tax law for instance, but rather allow some discretion for the competition authorities and further interpretation of courts, it is not possible for the successful application of competition rules for judges to isolate from their international 'mates'. Otherwise, our efforts for convergence and common approaches, especially regarding our jurisdiction, remain only ineffectively applied. Furthermore, ineffective application of competition rules has further effects. Not only markets are not remedied, but there are not sufficient incentives for the undertakings to apply for leniency, commitment procedure and the system of civil actions for damages for antitrust infringement lacks an "underpinning".

Thus, we think that an international forum for judges joined to some of the existing competition forums would be a good start in this regard.

2. Summarize the procedures applicable to public and private competition cases before the courts in your jurisdiction

Court procedures regarding public and private competition cases have some commonalities and some differences.

⁷ Moreover, within the EU, with the aim of coherent application of Art. 101 and 102 of the Treaty on the functioning of the European union (TFEU) pursuant to Art 11 (4) of COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 (O.J. L 001, 04/01/2003 p. 0001 – 0025) on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty no later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the European Commission. However, if such decision passed by national competition authority is later subject to review by a national court, the coherent application relies on the measures such as amicus curiae interventions of the European Commission (Art 15(3) Regulation 1/2003), and/or activity of the national court to refer preliminary questions to the European Commission or the Court of Justice of the EU (pursuant to Regulation 1/2003 and the TFEU).

⁸ The Office does not object the guarding of the rights and review the legality of the procedure of the Office by the court, however, we often lack the view of the court on merits and new trends and issues in competition law.

Firstly, as explained above, public enforcement of competition rules is, in the Slovak Republic, ensured via administrative proceedings at the Office pursuant to the Act on Protection of Competition. The Office is acting as a public administrative authority whose decision is reviewed by the court.

The review proceedings upon the filed action of the undertaking concerned by the decision of the Office within two months after the delivery of the decision (of the administrative body of the last instance) are governed by the Code of Civil Procedure. A special part⁹ of the Code of Civil Procedure is dedicated to the judicial review process where certain specificities of the procedure are stipulated.

The main feature of the proceedings is the fact that the Office is the party to the proceeding, however, does not possess all the procedural rights like in regular civil proceedings which was until recent time also expressed by the right to appeal where the applicant had (and still has) right to appeal in any case while the right to appeal the judgment of the Regional Court of the Office was limited. At the same time, the applicant has right to challenge the decision of the Supreme Court (which is the last review instance) before the Constitutional Court if their rights were breached. However, the Office, as the administrative authority does not have such right. The Constitutional Court repeatedly ruled that a public authority, in the review process of its decision as the body of executive power does not possess constitutional rights in such proceedings.

However, such unbalance had of its effect sometimes according to the Office arbitrary court decisions just rewriting all of the arguments of the plaintiff without any reflection on the arguments of the Office. Moreover, parties are often providing objections and arguments that they did not claim in the proceedings before the Office, and thus the Office did not have chance to reflect on them in the administrative proceedings. The court has ruled in this regard that even such arguments can be heard if they relate to the illegality of the decision. Furthermore, the court even said that these arguments can be even heard and reviewed if these were provided after the limitation period for the action to be filed and that the principle of concentration in the proceedings does not apply in the cases of objections concerning illegality of the decision. Therefore, the Office had initiated the amendment to the Code of Civil Procedure to open a possibility for the administrative authority at least the chance to appeal the annulment judgment which was introduced in 2008.

Furthermore, legal provisions of the Code of Civil Procedure with regard to the judicial review process elaborate on the reasons for example on which the court shall dismiss the action, annul the decision of the Office or decide otherwise on the sanction that was imposed.

The specialised proceedings are open in the cases of unlawful intervention of the public body that is not in the form of the decision, if, as the effect of the intervention, the rights of the person were breached and the intervention or its effect is still lasting. An action has to be filed within thirty days after such an intervention. In the cases of the Office, this procedure could refer to the conducted inspections for example.

Other specialised proceedings refer to the election process and issues relating thereto, for instance.

Private litigation procedure is slightly different. Firstly, it is important to note that actions for damages for breaches of antitrust rules are rather rare. There might be several reasons for that.

Firstly, anybody who suffered damage can claim the harm pursuant to general provision on damages in Civil Code¹⁰ while action of damage suffered from antitrust infringement based on the general

⁹ Fifth part.

¹⁰ Act. No. 40/1964 Coll. Civil Code as amended (Art. 420).

provisions on damages in Commercial Code should not be excluded.¹¹ Moreover, according to the Art. 42 of the Act on Protection of Competition, consumers whose rights have been violated by unlawful restriction of competition may demand in court that the violating party refrain from this conduct and remedy the unlawful state of affairs. This right may also be claimed by a legal person authorized to protect the interests of consumers. According to the Act on Seats and Districts of the Courts,¹² such damages should be claimed at the District Court Bratislava II. Code of Civil Procedure also provides for possibility for collective claims/action but not for so known “opt out system”.

According to these provisions the Office has yearly, since 2005 turned to the District Court Bratislava II, higher Regional Court and the Supreme Court as possible appeal courts in these matters with the query on numbers of the open and closed proceedings in such matters. The answer was always negative, no cases were reported.

However, a few years ago, the Office was requested to submit a complete administrative file in the closed proceedings on the abuse of dominant position by one district court. After the decision of the Office on the abuse of dominant position was upheld by the Supreme Court, the company which previously filed a complaint to the Office, claimed damage suffered after the proceedings were closed with the prohibition decision. However, the last state of play that the Office has information about¹³ showed that after six years since the action was filed, the first instance court did not even close the procedure of gathering the evidence in this case.

As it was obvious that there might be some litigations concerning the antitrust damages claims ongoing, the Office opened a public consultation in this regard in March 2010¹⁴ within which it addressed questions to some individual companies and persons. Although the number of responses was rather small, a consultation pointed out some interesting issues.

Firstly, in general, proceedings concerning antitrust damages actions were considered as lengthy, costly with unpredictable results.

Secondly, the party claiming harmed suffered has the burden of proof. Since the Slovak system does not know the “disclosure procedure”, it is very difficult for the plaintiff to identify all the evidence to prove the claim, as this is mainly in the possession of the defendant. Thus, with regard to principle of concentration pursuant to which the party claiming the damage has to identify or provide all the evidence, it is very difficult to do so (although, the success of the plaintiff is dependent on it). Furthermore, it is also difficult to prove the causality between the damage and the conduct in question. The fact, that under certain conditions, the abuse of competition rules may form a criminal act, and thus fall under the provisions of the Penal Code, makes it more difficult for the plaintiff to prove damage. Consequently, defendant party may even refuse to be heard in the civil proceedings under the self-incrimination principle.

Even the possibility of claiming the damage without the existence of the decision of the Office is not excluded, it would be even harder for the plaintiff to prove an infringement, and therefore it is

¹¹ There is not a unified opinion in the legal community provisions on damages of which Code should be as a basis for antitrust damages actions. The Office is of the opinion for application of Commercial Code in this regard.

¹² Act No. 371/2004, Art. 12.

¹³ End of 2010.

¹⁴ <http://www.antimon.gov.sk/files/33/2010/Vyhodnotenie%20private%20enforcement.pdf> (available in Slovak language).

advantageous to rely on the decisions of the Office. These are, however, often annulled by the courts which has implication on successful claims.

As we learned from the public consultation, there were few litigations, although, at the time of the consultation most of these were not closed cases. However, we may elaborate on some of the opinions of courts expressed in the proceedings.

To our surprise, in one of the proceedings, the court expressed the view that on the grounds of above cited Art. 42 of the Act on Protection of Competition that refers to end consumers only and their organisations, the company is not entitled for such antitrust damages.¹⁵ From our point of view, this is questionable, as the court interprets the word “consumer” as the end consumer and moreover, the damage should be possible to claim also pursuant to the above mentioned provisions of Civil Code and Commercial Code¹⁶ by anybody. At the same time, the court did not admit the objection claiming that the end consumers and their associations may only claim damage according to the Civil Code, but not the Commercial Code.

In procedures where damages are claimed, it is important to take into account time limit¹⁷ for such claims, which is a ten year period from the moment of the existence of damage and a four year subjective time limit which starts counting from the moment when the person who suffered learns about such damage.

It is questionable though, how would Slovak courts consider the possible objection of the defendant that the damage was transferred to the end consumer by other undertakings within a distribution system, for instance. Possible and likely cases like this together with the above mentioned issues should be therefore further regulated. So many times referred initiative of the European Commission is therefore welcomed by the consumers mainly. According to one company, current means for effective claim of damages are sufficient and no further legislation is necessary. On the other hand, some expressed the views that under the current system the goal of the European Commission’s White Paper¹⁸ is not possible to reach without implementation of further measures.

Regarding the proceedings, private litigation concerning antitrust damages actions, is ruled by common rules on procedure and there are no specifics with regard to other civil litigations. Parties of the proceedings are equal before court and have the same procedural rights and duties.

It is questionable if and when the above mentioned issues meet their implementation towards more effective enforcement of the rights of the parties who suffered harm by anticompetitive conduct.

The Office has developed certain initiatives with this regard to enhance the debate on these questions with the involvement of consumer associations, lawyers as well as companies. Public consultation was one of the first steps, a conference dedicated to this topic was organised at the academic ground with the co-operation of the Comenius University in Bratislava.¹⁹

¹⁵ At the time of the submission of the contribution the Office does not dispose the information whether this case is closed and what is the final ruling on this matter.

¹⁶ Art. 373 and 757 of Act No. 513/1991 Coll. Commercial Code as amended.

¹⁷ We refer to the time limits in the Commercial Code.

¹⁸ <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#link1>

¹⁹ <http://www.antimon.gov.sk/759/3946/dna-30-septembra-2010-sa-uskutocni-medzinarodna-konferencia-sukromnopravne-vymahanie-sutazneho-prava.axd>

While sanctions imposed in administrative proceedings have repressive and preventive (general and individual) function, the persons who suffered harm by the anticompetitive conduct should be provided with effective measures to obtain the redress. We believe that the efforts of our Office will move things further.

3. Update on recent developments relating to procedural fairness and transparency in your jurisdiction.

With regard to the Office's last contribution on transparency issues and due process²⁰ no new legislative was adopted in this regard, neither soft law nor the procedures of the Office has changed since that time. However, the Office was addressed a judgment of the Supreme Court on the conducted inspection where the Supreme Court expressed the view on the investigation process of the Office before official administrative proceedings are initiated. Even the law does not provide for application of general Code of Administrative Procedure²¹ which applies to proceedings of the Office besides (subsidiary to) the provisions of the Act on Protection of Competition, the Supreme Court refers to its application also in the investigation phase. We are currently analysing the judgment and its implications on future and current investigations, as application of all provisions would significantly jeopardise the success of the investigation process, mainly preparation of inspections, leniency applications as well as some of the rights of the complainants.

<http://www.antimon.gov.sk/759/4067/na-pravnickej-fakulte-uk-v-bratislave-sa-uskutocnila-medzinarodna-konferencia-na-temu-sukromne-vymahanie.axd>

²⁰ [DAF/COMP/WP3/WD\(2010\)42.](#)

²¹ Act No. 71/1967 Coll. on administrative proceedings (Code of Administrative Procedure) as amended.

SLOVENIA

1. Introduction

Since Competition protection office of Republic of Slovenia (hereinafter: CPO) was established in the year 1994, quite a lot has changed regarding legal and institutional framework governing the field of competition law. In this article we wish to point out the main solutions and characteristics that influenced competition policy in the Republic of Slovenia and were introduced over the years.

2. Relationship between the courts and CPO and procedures applicable to public and private competition cases before the courts

The first comprehensive act about protection of competition, Protection of Competition Act (PCA),¹ was adopted in 1993. Following the need for more transparency as also bringing competition legislation in line with EU acquis, the Prevention of the Restriction of Competition Act (PRCA)² was adopted on 30 June 1999. Restrictive practices covered by the law could be subject to investigation, prohibition and fines; however, fines for breaking competition rules could only be imposed by the courts. The new legislation contained a special chapter on the procedure of decision-making by the CPO, providing for the subsidiary use of Administrative Procedure Act. Final decisions of the CPO could be reviewed by the Administrative Court in an administrative dispute and an appeal could be made to the Supreme Court. This differs from the arrangement under the previous Act, under which the affected undertakings could only bring an action in civil procedure. PRCA was amended in 2004 (CPO was given the authorization to conduct proceedings for breaches of Article 81 and 82 of the Treaty. Moreover, articles about individual exemptions and negative clearance were deleted and higher fines for the infringements were set) and in 2007 (amendments to articles about protection of the source and rights of the parties to review the documents of the case).

In 2008, the new Prevention of the Restriction of Competition Act (PRCA-1)³ was adopted, which, compared to the previous Acts, introduced several novelties. The main grounds for the reform of competition legislation in Slovenia were ineffective penalization, unsuitable regulation of the duty of undertakings to co-operate with CPO and the need to introduce a different method of decision-making. The new Competition Act includes precise definitions of used terms and measures, brings the competition legislation closer to EU law and above all extends the competences of the CPO and introduces higher and more individualized fines.

Slovenia's system of courts includes courts with general and specialized jurisdiction. Courts with general jurisdiction include 44 district, 11 regional, 4 higher (appellate) courts, and the Supreme Court. Specialized courts consist of 4 labour courts, one of which also handles social security disputes, and an administrative court.

¹ Protection of Competition Act, OG RS No. 18/1993.

² Prevention of the Restriction of Competition Act, OG RS No. 56/1999.

³ Prevention of the Restriction of Competition Act-1, OG RS No. 36/2008.

The legal and institutional framework clearly determines the rules for competition protection (the substantive and procedural rules, as well as the power of the institutions, e.g. Competition Protection Office and the courts) in the PRCA-1.

Regarding the basic collaboration between courts and the CPO, the court must inform the CPO without delay of any court proceedings linked to the application of Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU). When the European Commission renders a written opinion regarding the application of Articles 101 or 102 of the TFEU in accordance with the third paragraph of Article 15 of Regulation 1/2003/EC, the court shall send a copy of the written opinion to the CPO and parties involved without delay. When the Office renders a written opinion regarding the application of Articles 101 or 102 of the TFEU in accordance with the third paragraph of Article 15 of Regulation 1/2003/EC, the court shall send a copy of the written opinion to the parties involved without delay. If the court requests the European Commission to render an opinion in accordance with the first paragraph of Article 15 of Regulation 1/2003/EC, it shall inform the parties involved of this, and after receiving the opinion of the European Commission it shall send a copy of the opinion to the CPO and the parties involved. The opinion shall not be binding. The court must send the CPO and the European Commission copies of any decisions involving the application of Articles 101 or 102 of the TFEU at the same time as serving such decisions to the parties involved. Communication between courts and the European Commission may be conducted directly or through the CPO.⁴

Slovenia's competition law and recent enforcement efforts are consistent with mainstream European practices. In antitrust cases and in merger enforcement, the CPO and courts interpret the PRCA-1 in light of EC law. As regards to types of procedures we can distinguish administrative, minor offence and private enforcement procedures, out of which the first two are performed by the CPO. Each is briefly presented below from the perspective of relationship between the courts and CPO.

2.1 *Administrative procedure*

2.1.1 *Judicial protection procedure against the decisions*

Under the previous competition laws,⁵ appeal against the CPO decisions was not possible, nevertheless a judicial protection - lawsuit with the Administrative court, which held hearings and ruled on the record, was possible. That court's ruling could then be appealed to the Supreme Court. Under the present PRCA-1 there is also no appeal in the administration procedure against the decisions and orders issued by the CPO. However, the parties and other participants to the procedure can file a lawsuit against the CPO's decisions (and orders) with the Supreme Court of the Republic of Slovenia.⁶

Although the present law, allowing for a lawsuit only directly to the Supreme Court, obviates the possibility of a lower court⁷ clarifying and/or narrowing the issues, it is consistent with the treatment of several other agencies' appeals, including matters concerning securities violations. In such a procedure, parties are not allowed to state new facts and to propose new evidence. The Supreme Court would in principle review the legality of the decision and would, after the completion of the judicial review and in principle without hearing of parties, uphold the challenged decision or annul it and remand it to the CPO for a new procedure. In exceptional cases (e.g. where the facts were correctly established, but the law was

⁴ Art 63. PRCA-1.

⁵ PCA - Protection of Competition Act OGRS, No. 18/1993 and PRCA - Prevention of Restriction of Competition Act, OG RS, No. 56/1999.

⁶ The decisions cannot be appealed within the CPO or the Ministry, or to a lower court.

⁷ Previously, as mentioned above, to the Administrative court.

wrongly applied, or where the circumstances of the case allow the court to establish the relevant facts through a hearing), the court can also annul the challenged decision and decide on the merits of the case by itself.

The Supreme Court is to rule on CPO cases as a priority, using a three judge panel. The party appealing cannot introduce new evidence and the court shall ordinarily rule without a hearing. No appeal shall be allowed against a judgment or decision delivered in judicial protection procedure before the Supreme Court.⁸

The Supreme Court has forty judges, none of whom have a great deal of experience in competition law. Concerns have been raised about this lack of expertise, particularly since no lower court initially reviews CPO cases. Training for Supreme Court judges, along with their gaining experience in handling competition cases, may alleviate this concern. The regulation that the Supreme Court is the first (and last) instance institution is unique besides appeals against a few acts in election procedure. Since the Supreme Court is the last instance, which in all other judicial procedures deals also with extraordinary legal remedies, there is no possibility of filling extraordinary legal remedies from either of the parties.

2.1.2 *Judicial protection procedure against the orders*

Judicial protection proceedings against the orders issued by the CPO in accordance with the PRCA-1 are permitted unless explicitly excluded.⁹ Notwithstanding the preceding, judicial protection proceedings against a decision may be used to contest an order which excludes judicial protection proceedings under the PRCA-1, in the following cases:

- order whereby the CPO requires an undertaking to submit data and
- order on investigative action.

Special judicial protection proceedings are permissible to contest an order against which a complaint may be lodged according to regulations governing general administrative procedure (i.e. order denying persons involvement as an intervenient...).

2.1.3 *Orders issued by judicial authority*

According to the provisions art. 33 of PRCA-1, a court order is needed by the CPO when investigation takes place in the premises of undertakings which are not subject to investigation (i.e. investigation at third parties), or on residential premises of members of the undertaking's governing or supervisory bodies, of employees or other associates of the undertaking against which proceedings have been initiated. In all other circumstances CPO has all the competences for conducting investigations based upon the orders issued by the CPO.

2.2 *Minor offence procedure*

Regarding the pecuniary sanctions imposed, complex changes about the competences of the CPO have been made in the last years. Before the 2004 amendments, to obtain fines the CPO had to submit a proposal for launching a minor offence procedure at the court. In this period, CPO has submitted 62 proposals (out of these, 5 on restrictive agreements, 5 on abuses of dominant position and the rest 52 for

⁸ PRCA-1, Article 61.

⁹ For example: decision postponing the right to inspection of documents (PRCA-1 art.18/3), Order on the commencement of procedure (art. 24 PRCA-1), order terminating the proceedings (art. 25. PRCA-1).

late notification or failure to notify a concentration). The minor offences procedure in this period was not launched or stopped in half of the cases, some are still waiting to be ruled upon by courts, in about fifth of the cases sanctions were not imposed.¹⁰

CPO was given the authority to conduct minor offences in 2005; however, it first conducted such procedures in 2006. In case of violations of previously valid PRCA, CPO could impose the lowest fines as determined by the act (€ 125,000 on legal entity and € 4,100 on the responsible individual). With the enactment of PRCA-1 in 2008, fines have been set as percentage (up to 10%) of undertaking's annual turnover in the preceding financial period. Sanctions in the new legislation are though more proportionate and individualized.

Pursuant to currently valid legislation, if the CPO determines that fines should be imposed to parties subject to a final decision in the administrative procedure, it can do so in a separate – minor offence procedure. The parties can then file a case in the District court of Ljubljana – Minor offence department, seeking to have the fine overturned or reduced with the possibility of an appeal to Higher Court and file extraordinary legal remedies with the Supreme Court.

2.3 Private enforcement procedure

Anyone violating, either deliberately or out of negligence, the provisions of PRCA is liable for any damages arising from such violation. If the damage is caused through violation of Articles 6 (Prohibition of restrictive agreements) or 9 (Prohibition of the abuse of a dominant position) of PRCA-1 or Articles 101 and 102 of the TFEU, the court is bound by the final decision determining the existence of violation rendered by the CPO and the European Commission. This liability does not infringe upon the rights and obligations stipulated in Article 234 of the Treaty on the European Union. The statute of limitations¹¹ for damage claims shall be suspended from the date of initiating proceedings before the CPO or the European Commission to the date when such proceedings are concluded and final. The Court must also immediately notify the CPO of any action brought before it, demanding compensation on the grounds of violation of Articles 6 or 9 of PRCA-1 or Articles 101 and 102 of the TFEU. Private actions for violation of the competition law can be filed in the District court of Ljubljana. District court judgments can be appealed to higher courts, while extraordinary legal remedies are decided by the Supreme Court. Private actions are not frequent, although competitors in the telecommunications sector recently filed complaints of abuse of dominant position against Telekom Slovenije and its subsidiary Mobitel.

3. Recent developments relating to procedural fairness and transparency

3.1 Developments in decision making

Initially, according to PCA¹² and PRCA,¹³ the Director was responsible for all activities carried out by the office, including also the decision making. After the enforcement of PRCA-1 in 2008, the decision making procedure has been changed. In order to reach a decision in an administrative and minor offences procedure, by which the procedure before the Office is concluded, a panel is set up in each case. The panel

¹⁰ Detailed analysis was given in the Annual Report 2006:
http://www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/Annual_Report_2006.pdf

¹¹ Art 352. Code of Obligations states that in general Compensation claims for damage inflicted shall become statute-barred three years after the party learnt of the damage and of the person that inflicted it. In each case the claim shall become statute-barred five years after the damage occurred.

¹² Art. 22 PCA.

¹³ Art. 14, PRCA.

consists of Director of the CPO acting as chairman, and two CPO employees appointed by Director of the CPO. The panel, after consultation, adopts decisions by voting in a session, which is not public. Decisions are adopted by majority vote. The Director of the CPO issues other acts under the CPO's competence.

Currently, CPO is organized as a body within the Ministry of Economy and is to be, according to the Act amending the PRCA-1 in force since 23.4.2011, as of from 1.1.2012 transformed into Agency, an independent regulatory body. In line with the recent amendments of the PRCA-1 and provisions regarding the institutional structure of the newly established Agency, the decision making body – the Competition Protection Commission, will be established. Competition Protection Commission will be a professional body with duties and responsibilities that are specifically defined and limited only to decide in concrete cases, which follows the need for more transparency and ensures greatest possible autonomy, independence and professionalism in decision-making process. The five members of the Competition Protection Commission will be elected by the National Assembly: one member among competition protection experts and three Agency officials working in the field of competition will be nominated to the National Assembly by the Government; one member will be proposed to National Assembly by the Judicial Council. According to the PRCA, decisions will be made by a panel consisted of three members of the Competition Protection Commission, which are to be determined in random order in a manner which is determined by the rules of the Agency. Other acts under the Agency's competence will be, same as at present, issued by the Director.

4. Conclusion

Competition protection and its enforcement in Slovenian institutional and legal framework for the time being provides sufficient grounds for effective protection of competition, nevertheless there is still room for improvement. As it can be seen from the above mentioned procedures applicable in the field of public enforcement, cases are dealt in administrative and minor offence procedure, both at the initial stage in front of the CPO, but at the appellate procedure from the side of different courts – i.e. Administrative court and District court in Ljubljana – Minor offence department. In both appellate procedures courts are basically dealing with the same substance although the procedure and number of instances in each, as shown above, differs from one to another. In the future it would be worthwhile to make an effort and with legislative changes merge the two public enforcement procedures. Beyond all doubt such a change would take off much of the burden from the courts that are dealing with such cases, shorten the time in which parties to the procedure would get the final decision regarding the substance dealt with, and last but not least – take also significant amount of the workload off the CPO and the court system.

SPAIN

In order to ensure fairness and transparency in competition procedures, particularly infringement procedures, it is very important to guarantee that all agents involved can rely on a minimum degree of certainty over the criteria underlining the decisions adopted by the competition authority during the procedure.

This aspect is also important for a better motivation of the decisions by the competition authority, which will facilitate its judicial review by better transmitting the criteria guiding its appealed resolutions.

The principal instrument available for achieving these goals is guidelines, which allow for the development of certain aspects of competition law.

Competition law is filled with legal concepts based on economic ideas, which are difficult to delineate on legal terms. Moreover, many times competition authorities have a margin of appreciation when applying competition law, which may make quite difficult for third actors to anticipate how the competition authority will act.

Guidelines are a novel instrument within Spanish Competition Law, which was introduced in 2007, following the example of the European Commission guidelines on competition law.

The first guidelines issued by the Spanish Competition Authority (Comisión Nacional de la Competencia, CNC) involved the quantification of sanctions imposed by the CNC arising from violations of competition law, and was published in February 2009, following a public consultation in which an important number of actors from the Spanish competition law field, including the main legal firms involved in competition procedures with the CNC, participated.

These first guidelines paved the way for future guidelines concerning other aspects of Spanish competition law, where clarifications and guidance might be urgently needed.

One of these guidelines involved termination of infringement procedures with commitment decisions, which makes the commitments presented by the investigated parties legally binding, in exchange for an exemption from sanctions.

Commitment decisions in competition law infringement procedures were allowed in Spain since 2001. However, during the first years this legal figure was hardly applied (only on three occasions between 2001 and 2007), mainly because all parties involved in the proceedings (including the complainant and the Competition Authority) had to expressly accept the proposed commitments in order to terminate the procedure.

With the new Spanish Competition Act of 2007, commitment decisions were made easier in so far as the commitments need only be accepted by the CNC in order to become binding and allow for termination of the procedure.

This change proved quite effective, as can be deduced from the number of commitment decisions, which increased significantly between 2007 and the first semester 2011, reaching 14.

Even so, this development also involved a huge increase in the number of proposals to initiate a commitments procedure, of which a significant number (16 in the same 2007-2011 period) were denied because the CNC did not consider a commitment decision viable in those cases.

This high number of cases made it evident that guidelines were needed in order to ensure greater transparency and predictability of commitment decisions by the CNC, and so reduce the number of unsuccessful commitment applications.

In June 2011, the CNC opened a public consultation on its draft text of the guidelines on the adoption of commitment decisions in infringement procedures.

This draft was prepared after an extended period of internal consultation within the CNC, where all precedents involving commitment proposals were analyzed, along with relevant case-law and guidelines in other European countries, which were compiled in a working group of the European Competition Network, a successful example of collaboration in competition law within the European Union.

After receiving comments from the main legal firms involved in Spanish competition law cases, the CNC has adopted its final version of the guidelines¹ on the last week of September.

These guidelines on commitments are structured in three main sections (excluding the introduction). The first section develops the objectives of the guidelines and the second states the criteria used by the CNC in order to accept or deny a commitments proposal. The final section develops the main aspects of the procedure for the adoption and surveillance of a commitments decision.

One of the most debated aspects during the public consultation was whether settlement decisions were allowed under Spanish competition law, and if they should be developed in the guidelines.

The main difference between a settlement procedure and a commitment procedure is that in the first case the party proposing a settlement acknowledges that it has infringed competition law in exchange for a reduction of the fine imposed by the competition authority.

In the second case, the party proposing commitments does not expressly accept it has infringed competition law, and no fine is imposed.

The guidelines finally concluded that settlement decisions are not covered by the Spanish Competition Act, helping to reduce the uncertainty concerning this controversy. However, a reform of this Act might be desirable in order to allow the use of settlements as another tool to ensure the best use of CNC resources.

A very important aspect of the guidelines is that it clarifies what are the main objectives of the CNC when adopting a commitments decision, which allows for greater transparency and certainty in the actions of the CNC on this issue.

It firstly states that a commitment decision is an exceptional way of terminating an infringement procedure, which means it should be applied sparingly.

Moreover, the main criteria for the adoption of a commitment decision are:

¹ http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=104808&Command=Core_Download&Method=attachment

- The commitments should allow for a swift restoration of the prior competitive situation, by eliminating the competition problems raised by the investigated conduct.
- The proposal should be issued as soon as possible during the infringement procedure, in order to allow for real savings in the use of the CNC resources. Late applications risk being denied once the main part of the investigation is finished (with the statement of objections).

In the second section, the guidelines clarify the criteria used by the CNC when initiating proceedings involving commitments. It sets out two types of elements:

- Procedural elements. In order to ensure procedural savings, the guidelines strongly recommend prior consultations with the CNC before submitting a formal commitments proposal. It also recommends that the proposal should be made before the end of the term to make allegations to the statement of objections.
- Substantive elements. Some types of infringements are excluded (e.g. cartels, long term conducts which affect a significant part of the relevant markets, etc.) and competition law reoffenders are discouraged from applying.

Moreover, the proposed commitments should be clear, easy to implement and to survey, and not put at risk the effectiveness and deterrence factor of competition law.

In the final section, the guidelines clarify the procedure used for the adoption of the commitments decision, by delineating the participation of the different parties of the investigation and third parties, the number of proposals that can be made, the roles of the different units within the CNC, etc.

The guidelines also state that the start of the proceedings for the adoption a commitments decision cannot prejudice the final adoption of that kind of decision. This is an important element, which is useful to deter commitment proposals which only aim to produce delays in the investigation, or when the party proposing the commitments does not diligently answer the concerns of the CNC over the insufficiencies of the first drafts of commitments.

In conclusion, with the guidelines on commitments the CNC has issued useful guidelines which will increase de transparency and predictability of CNC's commitment decisions. In addition, these guidelines will be useful to deter the submission of commitment proposals that do not have a reasonable chance of being successful, avoiding undue delays in the investigation and the diversion of CNC resources.

SWEDEN

1. Describe the relationship between the courts and the competition authority in your jurisdiction

1.1 Introduction

Swedish competition law basically follows the same principles that apply within the EU. The Swedish Competition Act contains two main provisions: The prohibition of anti-competitive co-operation between undertakings¹ and the prohibition of abuse of a dominant position.² These provisions are based on Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) respectively. The Competition Act also contains, inter alia, a prohibition against anti-competitive sales activities by public entities and rules on the control of concentrations. Such infringements are not criminalized, but at the request of the SCA the Stockholm City Court may impose disqualifications from exercising commercial activities on a person who exercises control of an undertaking that participates in cartel activities.³

The division of competences to take decisions and impose fines between the SCA and the courts can briefly be described as follows.

The SCA may require an undertaking to terminate an infringement of the prohibitions against anti-competitive co-operations between undertakings or abuse of a dominant position in the Competition Act or TFEU. The obligation imposed may be that the undertaking must stop applying a certain agreement, terms of agreement or some other prohibited practice. The order may also relate to an obligation concerning sales, rectification or prices. Such obligations take effect immediately unless other provisions are made, and are normally subject to the penalty of a fine. If particular grounds exist, the SCA may impose such an obligation for the period until a final decision is taken.⁴

The SCA is not entitled to decide on financial penalties for infringing competition rules. If an undertaking has, intentionally or negligently, infringed the prohibition against anti-competitive co-operations between undertakings or the prohibition against abuse of a dominant position, the SCA may request the Stockholm City Court to impose an administrative fine on that undertaking in a summons application.⁵ However, if the SCA considers that the material circumstances regarding an infringement are clear, it may issue a fine order in cases that are not contested. If an undertaking consents to a fine order within a specified time, the SCA may not institute proceedings against that undertaking. It is always up to the SCA to decide whether a fine order is considered appropriate in an individual case. A fine order that

¹ Chapter 2, Article 1.

² Chapter 2, Article 7.

³ Chapter 3, Article 24, the Competition Act.

⁴ Chapter 3, Articles 1 and 3, and Chapter 6, Article 1, the Competition Act.

⁵ Chapter 3, Article 5, the Competition Act.

has been accepted is regarded to be a legally binding judgment, but it can under specific conditions be set aside upon appeal to the Stockholm City Court.⁶

The SCA may also institute proceedings at the Stockholm City Court to prohibit anti-competitive sales activities by public entities.⁷ Concentrations between undertakings can be prohibited by the Stockholm City Court on the request of the SCA.⁸ Prohibitions are normally subject to the penalty of a fine.

If an undertaking that has allegedly infringed any of the prohibitions against anti-competitive co-operations between undertakings or abuse of a dominant position offers to make commitments, the SCA may decide that there are no longer grounds for action. Such decisions may cover a specific period. The SCA's decisions to accept commitments take effect immediately and are as a general rule subject to the penalty of a fine.⁹

Appeals against judgments and decisions of the Stockholm City Court relating to competition law issues may be lodged with the Market Court; which is a specialized court and the final instance when it comes to cases regarding competition and marketing law. A leave to appeal is always required for the Market Court to review the Stockholm City Court's rulings.¹⁰ The Market Court has so far only refused leave to appeal regarding various procedural matters. A leave to appeal is not required for the Market Court to review the SCA's decisions.

There is no possibility to appeal the SCA's decisions to not give priority to a case and close it. However, if the SCA has decided not to intervene against an alleged infringement, affected undertakings are entitled to institute proceedings before the Market Court.¹¹ Such subsidiary right to legal action does not exist if the SCA's decision to close a case is based on Article 13 of the Council regulation (EC) No 1/2003.¹²

1.2 Anti-competitive sales activities by public entities

When municipal authorities, county councils or the central government are engaged in business operations in a competitive market, this may result in competition being restricted. As mentioned above, the SCA may request the Stockholm City Court to prohibit through an injunction sales activities or conducts by public entities, if such activities or conducts, by object or effect, distorts or impedes competition. However, injunctions may not be imposed in relation to conducts that can be justified by public interest considerations or sales activities that are compatible with law. With regard to the central government only conducts and not sales activities as such may be prohibited. Prohibitions take effect immediately, unless decided otherwise, and may be imposed under penalty of a fine. If the SCA decides not to intervene, undertakings that are affected by the alleged anti-competitive sales activities may institute

⁶ Chapter 3, Articles 16-19, the Competition Act.

⁷ Chapter 3, Articles 27-30, the Competition Act.

⁸ Chapter 4, Article 1, the Competition Act.

⁹ Chapter 3, Article 4, and Chapter 6, Article 1, the Competition Act.

¹⁰ Chapter 8, Article 3, the Competition Act.

¹¹ With regard to infringements of the prohibition against anti-competitive sales activities by public entities such actions are brought before the Stockholm City Court, see Chapter 3, Article 32, the Competition Act.

¹² Chapter 3, Article 2, the Competition Act.

proceedings before the Stockholm City Court.¹³ The City Court's ruling may then be appealed to the Market Court.

For further discussion about the provisions regarding anti-competitive sales activities by public entities see, e.g. Sweden's contribution to the WP3 Discussion on corporate governance, SOEs and Competitive neutrality.¹⁴

1.3 Concentrations between undertakings

The SCA shall be notified of a concentration if the aggregate annual turnover in Sweden of the undertakings concerned exceeds SEK 1 billion (approximately EUR 110 million) and at least two of the undertakings concerned have a turnover in Sweden that exceeds SEK 200 million (approximately EUR 22 million) for each of the undertakings. The SCA may request the Stockholm City Court to prohibit a concentration between undertakings when the concentration would seriously impede effective competition (SIEC-test) or would result in the total elimination of competition. If it is sufficient to eliminate the adverse effects of a concentration, a party to a concentration may, instead of being subject to a prohibition of the concentration, be required to divest an undertaking or a part of an undertaking, or to take some other measure having a favorable effect on competition. Such prohibitions are normally subject to the penalty of a fine.¹⁵

If an undertaking takes on voluntary commitments to eliminate the anti-competitive effects of the concentration, the SCA may decide to accept these commitments subject to the penalty of a fine.¹⁶

1.4 Imposition of fines

Actions for the imposition of fines pursuant to the provisions of the Competition Act may be brought by the SCA before any competent district court (normally where the defendant undertaking has its domicile). However, the Stockholm City Court is always competent to examine such cases, and the SCA has so far never instituted proceedings elsewhere.¹⁷

2. Summarize the procedures applicable to public and private competition cases before the courts in your jurisdiction

2.1 Public competition cases

During an investigation, the SCA may require undertakings or other parties to supply necessary information, documents or other material and persons to appear at a hearing. Such obligations may ultimately be imposed under penalty of a fine.¹⁸

The SCA may conduct inspections at the premises of undertakings to establish whether they have infringed the prohibitions on anti-competitive co-operations between undertakings and abuse of a dominant

¹³ Chapter 3, Articles 27-32, and Chapter 6, Article 1, the Competition Act.

¹⁴ [DAF/COMP/WP3/WD\(2010\)12](#).

¹⁵ Chapter 4, Articles 1-3, and Chapter 6, Article 1, the Competition Act.

¹⁶ Chapter 4, Articles 4-5, and Chapter 6, Article 1, the Competition Act.

¹⁷ Chapter 6, Article 2, the Competition Act.

¹⁸ Chapter 5, Articles 1-2, and Chapter 6, Article 1, the Competition Act.

position.¹⁹ Such inspections may also under certain conditions refer to homes and other premises of the board and employees of the undertaking which is subject to investigation. Permission must always be granted by the Stockholm City Court.²⁰

Public competition cases, i.e. cases where the SCA is a party, are not amenable to out of court settlement. However, as mentioned above undertakings can make commitments. Discussions regarding commitments normally take place before a case is taken to court. Undertakings can also accept fine orders issued by the SCA. It is quite common that cases are settled as just described. The parties' incentive to make commitments or accept fine orders may be to avoid the costs, the uncertainty and the presumptive negative publicity of a procedure before court. It is always up to the SCA to decide in each individual case whether it considers it appropriate to accept a commitment or a fine order. Under certain conditions undertakings that acknowledge their involvement in an illicit cartel may also be granted leniency or reduction of administrative fine.²¹

Parties in public competition cases have more extensive rights to invoke new evidence – both documentary and oral – and new circumstances, than in most other civil cases. The SCA always has the option to close a case before it is taken to court and thereafter to withdraw its action. If the SCA decides to withdraw its action or loses a case, the defendant may have its litigation costs reimbursed. The SCA on the other hand may only have its litigation costs reimbursed if a party intentionally or negligently has occasioned unnecessary litigation.²²

2.2 *Private competition cases*

Any anti-competitive agreements or provisions included in such agreements are void.²³ Civil cases regarding nullity are tried by a district court in the first instance.

If an undertaking intentionally or negligently infringes any of the prohibitions on anti-competitive co-operations between undertakings or abuse of a dominant position, the undertaking shall compensate the damage that is caused thereby. A party that has been adversely affected by such an infringement may institute an action for damages before a competent district court. The Stockholm City Court is always competent to examine cases relating to such damages.²⁴

Nullity and damages cases are amenable to out of court settlement. Appeals in such cases may be lodged with a competent court of appeals where a leave to appeal is required. There are limited possibilities to invoke new evidence and circumstances before the court of appeals. The court of appeals' ruling may be appealed to the Supreme Court, where the terms for leave to appeal are very strict.

¹⁹ Chapter 2, Articles 1 and 7, the Competition Act, and Articles 101 and 102 TFEU.

²⁰ Chapter 5, Articles 3-13, the Competition Act.

²¹ Chapter 3, Articles 12-15, the Competition Act.

²² Chapter 8, Articles 15-17, the Competition Act.

²³ Chapter 2, Article 6, the Competition Act.

²⁴ Chapter 3, Articles 25-26, the Competition Act.

However, if an action for damages is dealt with alongside an action regarding an administrative fine,²⁵ appeals against the judgment of the Stockholm City Court are lodged with The Market Court. Otherwise the Market Court does not have competence over competition law damages cases.

According to the Arbitration Act, arbitrators may also rule on the civil law effects of competition law as between the parties, e.g. damages relating to infringements of the Competition Act or the nullity of anti-competitive agreements.²⁶

2.3 *Different court hierarchies*

As described above, competition cases are generally handled by the Stockholm City Court as the first instance. Cases regarding administrative fines are handled by the Market Court as the second and final instance whereas cases regarding nullity and damages are handled by a court of appeals in the second instance, and then ultimately by the Supreme Court. Theoretically, these different court hierarchies could lead to conflicting case law regarding certain aspects of competition cases and it has been of some debate whether the current court hierarchy is optimal. However, the risk for conflicting case law is reduced by the fact that Swedish competition law is based on EU law and follows the same principles that apply within the EU. Furthermore, the Supreme Court has so far only tried a few cases relating to competition law, mainly concerning the nullity of anti-competitive agreements and what constitutes a dominant position on a relevant market.²⁷

3. Update on recent developments relating to procedural fairness and transparency in your jurisdiction

3.1 *Introduction*

The general Swedish legislation on public access to official documents provides an extensive right of access to documents for the public at large, and an even more extensive right of access to file for parties in e.g. competition cases. However, access to official documents is not unlimited. Firstly, there is no right of access to documents that are internal memoranda, in a preparatory stage etc.²⁸ Secondly, there is no right of access to information which is secret according to the Public Access to Information and Secrecy Act.

For a further general discussion regarding procedural fairness and transparency in Sweden, see e.g. Sweden's contribution to the WP3 roundtable on procedural fairness: Transparency issues in civil and administrative proceedings.²⁹

3.2 *Prohibitions to disclose information*

3.2.1 *Cases before the SCA*

It follows from the Administrative Act that a party in a case before the SCA is in principle entitled to see all information in the case.³⁰ It is only under extraordinary circumstances that the SCA can keep

²⁵ Chapter 8, Article 7, the Competition Act. A case concerning damages has so far never been jointly processed with a case concerning administrative fine.

²⁶ Article 1, the Arbitration Act.

²⁷ See e.g. case T 2808-05, judgment of 19 February 2008 (NJA 2008 s. 120) and case T 2280-02, judgment of 23 December 2004 (NJA 2004 s. 804).

²⁸ Chapter 2, Article 9, the Freedom of the Press Act.

²⁹ DAF/COMP/WP3/WD(2010)12.

information in a case secret from a party, and such information cannot then be invoked as evidence before a court.³¹ However, if information that is subject to secrecy, e.g. business secrets, is provided to a party, the SCA may make a reservation when the information is provided.³² Such reservations normally include provisions regarding which persons may take part of the information and for what purpose (normally to defend the party's right in the case) and about how the documents shall be kept and that they must be destroyed when a case is finally settled.

Third persons may also receive information subject to reservations, e.g. for research purposes. The same rules apply.

A person who discloses or makes use of information in violation of a reservation under the Public Access to Information and Secrecy Act may be subject to a fine or ultimately one year in prison for breach of confidentiality which is criminalized in the Penal Code.³³

A person who requests to obtain an official document need not be satisfied with receiving the document subject to a reservation, but can appeal and have the reservation considered by a superior instance.

3.2.2 *Cases before courts*

According to fundamental procedural legal principles parties have a right to take part of all information that is of relevance to a court's ruling. This right is absolute and includes confidential information such as business secrets.

It follows from the Code of Judicial Procedure that court hearings are public. However, if it is probable that information which is secret according to the Public Access to Information and Secrecy Act will be disclosed during a hearing and the court finds it to be of extraordinary importance that the information is not revealed, part of the hearing may be held behind closed doors.³⁴ This is not unusual for competition cases where business secrets are often revealed. If confidential information is provided behind closed doors, the court may direct that the information must not be disclosed. Violations are not criminalized according to the Penal Code but are subject to a fine according to the Code of Judicial Procedure.³⁵

3.3 *Current practical issues*

3.3.1 *Parties access to file and reservations*

When the SCA investigates a concentration, the parties to the concentration are normally required to supply information about various business secrets. As mentioned above parties have a right to access to file, but during the early stages of an investigation the SCA has a rather wide margin of keeping information secret from parties.³⁶ As mentioned above, the SCA also has the option to provide information

³⁰ Article 16.

³¹ Chapter 10, Article 3, the Public Access to Information and Secrecy Act.

³² Chapter 10, Article 4, the Public Access to Information and Secrecy Act.

³³ Chapter 20, Article 3.

³⁴ Chapter 5, Articles 1 and 4, the Code of Judicial Procedure.

³⁵ Chapter 9, Article 6.

³⁶ Chapter 17, Article 3, and Chapter 30, Articles 1-3, the Public Access to Information and Secrecy Act.

subject to reservations. When the SCA sends a statement of objections to a party, all relevant material from the file is generally enclosed.

If the SCA makes a summons application to the Stockholm City Court to prohibit a concentration, the supportive evidence normally include business secrets, such as sales margins, regarding the defending parties. In order to meet these parties right to defense, they will have right of access to all information that can reasonably be of relevance to the court's ruling. For these situations there is an obvious need for the court to be able to provide confidential information with reservations such as prohibitions to disclose the information. Even though concentration cases normally contain the most sensitive information, business secrets may sometimes be invoked as evidence in cartel or abuse of dominant position cases as well. However, it is being debated whether a court's prohibition to disclose confidential information etc. is compatible with fundamental principles of the Code of Judicial Procedure and the Supreme Court's case law.

The Department of Justice is currently investigating if an amendment to the Access to Information and Secrecy Act should be made according to which such reservations are expressly allowed.³⁷ The SCA follows this development with interest.

The SCA is currently having internal discussions regarding alternative ways of minimizing harmful effects on competition from business secrets being revealed to the parties when a concentration case is being handled at court. One option that is being considered is that the SCA should only invoke an analysis of the economic data as evidence and then provide the underlying economic information concerning e.g. sales margins to the parties with reservations. Another option is to provide a data room at the SCA where the parties can examine the underlying information.³⁸

Administrative competition cases are not amenable to out of court settlement and the SCA has the burden of proof. However, if the parties' objections to the SCA's economic analysis only concern the argumentation and not the underlying data, the courts should be able to rely on such analysis without access to that data.

3.3.2 *Subsidiary right of action and access to evidence*

As already mentioned, the SCA may require undertakings or other parties to supply necessary information, documents or other material and persons to appear at a hearing.³⁹ The SCA can therefore generally get access to all relevant information before it decides whether to intervene or not against an alleged infringement of the Competition Act. The addressee of an obligation is normally required to indicate which information, if any, is considered confidential.

As mentioned above, if the SCA decides to not give priority to a case or closes it without further action an undertaking that is affected by an alleged infringement is entitled to institute proceedings before the Market Court.⁴⁰ Since this is not considered as an appeal against the SCA's decision, the SCA's file is not provided to the Market Court. Also, the affected undertaking is normally not considered a party during the proceedings at the SCA and therefore does not have access to the file. Even though everyone in Sweden has an extensive right of access to official documents, sensitive business information relating to an

³⁷ See e.g. SOU 2010:14 Partsinsyn enligt rättegångsbalken.

³⁸ See also DG Competition Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU, para. 85.

³⁹ Chapter 5, Article 1, the Competition Act.

⁴⁰ Chapter 3, Article 2, the Competition Act.

undertaking that has been under an investigation will generally be kept secret. Furthermore, the SCA's internal memoranda etc. are not considered official documents.

During the proceedings at the Market Court the plaintiff may request that the court order the dominant undertaking to provide documentary evidence, but information about business secrets must only be provided if there is extraordinary reason for it.⁴¹ In many cases, the plaintiff will therefore not have access to all relevant economic information concerning the dominant undertaking. This sometimes raises interesting questions.

For example, the SCA may close a case after performing an economic analysis, e.g. an "as efficient competitor test" analysis, based on all relevant information regarding a dominant undertaking. That analysis will generally be considered as such internal material that neither the dominant undertaking nor the complainant has a right to take part of. The economic data that the analysis is based on are generally considered as official documents but will normally not be disclosed since it contains business secrets. If the plaintiff does not request the Market Court to order the dominant undertaking to provide the economic data, or if the Court dismisses such a request, neither the plaintiff nor the Court will have access to that specific data. Furthermore, the dominant undertaking, may not find it worth to reveal its business secrets in order to defend itself from the accusation of abuse. The Market Court would then have to settle the case without having access to all the relevant economic information as the SCA had.

If this situation arises in the future, the SCA will consider submitting a written observation to the Market Court according to Article 15.3 of the Council regulation (EC) No 1/2003.

⁴¹ Chapter 36, Article 6, and Chapter 38, Article 2, the Code of Judicial Procedure.

TURKEY

This contribution tackles the following issues with respect to the practices of the Turkish Competition Authority (TCA):

- Relationship between courts and the TCA,
- Procedures that private law and public law competition cases are faced with before courts,
- Latest developments concerning fair procedural rules and transparency - within the context of courts.

To this end, it starts with an overview of the Turkish judiciary system. Then it touches upon the relationship between the decisions of the Competition Board, the decision making body of the TCA, and the judiciary system. Last but not least, it explains the appeal against the TCA's proceedings.

1. Overview of Turkish judiciary system

Judiciary in the Turkish legal system is generally examined under three main headings, i.e. administrative, ordinary, and military. While the subject/scope of duty of the administrative judiciary system are those cases relating to the acts and proceedings of the administration (public entities); the subject of ordinary judiciary are the disputes between persons that are subject to private law along with those acts and proceedings of public entities that are subject to private law. Military judiciary system deals wholly with the trial of offenses related to military personnel.¹ Ordinary judiciary system is also divided in itself as civil and criminal courts. While criminal courts deal with criminal judgments, civil courts deal with judgments in all areas other than criminal sanctions. As sanction, criminal courts adjudicate imprisonment and criminal fines (Turkish Penal Code, Art. 45). Imprisonment is divided into three categories as aggravated life imprisonment, life imprisonment and periodical imprisonment (Turkish Penal Code, Art. 46). Civil courts, on the other hand, adjudicate that a transaction is invalid or compensation shall be paid.

All courts are established based on a statute under Turkish law. Courts of First Instance in administrative judiciary system have been defined as regional administrative courts, administrative courts and tax courts.² Regional administrative courts function as courts of first instance in certain cases, while also having the nature of a high court where decisions of administrative courts and tax courts are appealed. The court of appeal for administrative judiciary system is the Council of State, operation of which is regulated with a special statute.³ Trial procedure in the administrative judiciary system is regulated with a special statute.⁴

¹ Military judiciary system is not discussed here because it is not related to the TCA.

² Act No. 2576 on the Establishment and Duties of Regional Administrative Courts, Administrative Courts and Tax Courts, Official Gazette No. RG. 20.01.1982, p. 17580.

³ Act No. 2575 on the Council of State, Official Gazette No. RG. 20.1.1982, p. 17580.

⁴ Act No. 2577 on Administrative Trial Procedure, Official Gazette No. RG. 20.1.1982, p. 17580.

Ordinary judiciary system is made up of courts of first instance⁵ and appeal courts. Ordinary courts of first instance are also divided into two categories according to their scope of duty as general and special courts. Special courts are generally those that have been established based on special statutes and are charged with hearing those cases that are specified in those statutes. Examples for special courts are Civil/Criminal Court for Intellectual and Industrial Rights which serves in disputes arising from intellectual property rights, Labor Court which hears disputes arising from labor contracts, Trade Court which hears disputes arising from trade relations, Family Court which hears disputes arising from family life. All other cases that do not fall in the scope of duty of special courts are heard by general courts.

Courts of first instance are also divided into two categories as criminal and civil courts. While civil courts are divided into two as civil courts of peace and civil courts of first instance; criminal courts are divided into three as criminal courts of peace, criminal courts of first instance and criminal assize courts. Appeal courts are Regional Ordinary Courts and the Supreme Court of Appeals. The operation of the Supreme Court of Appeals is regulated with a special statute.⁶

Duties and operation of general courts of first instance are regulated under the Code of Civil Procedure.⁷

In the ordinary judiciary system, the area in which general and special courts may exercise their jurisdiction is the administrative boundaries of the provincial centres and districts where they are located as well as other districts that are judicially affiliated therewith. In provinces having a metropolitan municipality, the jurisdiction of courts is determined by the Supreme Board of Judges and Prosecutors upon the proposal of Ministry of Justice (Act No. 5235, Art. 7). Judges to serve at courts are also appointed or assigned by this Board.

While civil courts generally operate with one judge only, criminal courts of peace and first instance operate with one judge, criminal assize courts operate in the form of a committee (made up of a total of three judges as one chairman and two members).

⁵ Act No. 5235 on the Establishment and Powers of Ordinary Courts of First Instance and Regional Ordinary Courts, Official Gazette No. RG 07.10.2004; p. 25606).

⁶ Act No. 2797 on the Supreme Court of Appeals, Official Gazette No. RG 08.02.1983, p. 17953.

⁷ Code No. 1086 on Civil Procedure, Official Gazette No. RG 02.07.1927, p. 622. Code No. 1086 on Civil Procedure was abolished by the Code of Civil Procedure No. 6100, which was adopted on 12.01.2011 (RG 04.02.2011, p. 27836.) The new Act No. 6100 will enter into force on 01/10/2011. The new Act No. 6100 enumerates the duties of civil courts of first instance and civil courts of peace. Accordingly, "(1) For lawsuits concerning asset rights and lawsuits concerning personal assets, regardless of the value and amount of the subject of the lawsuit, the court of jurisdiction is the civil court of first instance unless otherwise stipulated. (2) Unless otherwise stipulated in this Act or other statutes, the civil court of first instance also has jurisdiction over other lawsuits and transactions." On the other hand, "Civil courts of peace shall hear, regardless of the value or amount of the subject of the lawsuit;

a) with the exception of the provisions concerning the evacuation of rental immovables via seizure without court order in accordance with the Act on Seizure and Bankruptcy dated 9/6/1932 and numbered 2004, lawsuits concerning all disputes - also including actions of debts - arising from a rental relationship, and appeals of such lawsuits, b) lawsuits concerning the sharing of movable and immovable property or right and elimination of joint ownership, c) For movable and immovable properties, those lawsuits that concern only the protection of possession, d) lawsuits for which a civil court of peace or civil judge of peace is assigned by this Act or other statutes."

2. Relationship between the Competition Board and judiciary systems

Due to the position of the TCA in the Turkish administrative organization and the powers employed during the decision making process of the Competition Board, it has close relations with different judicial bodies.

Firstly, the TCA is a public legal entity having administrative and financial autonomy pursuant to the Act No. 4054 on the Protection of Competition (Act No. 4054) (Art. 20). It is therefore an administrative body. According to the Turkish Constitution, all acts and proceedings of the administration can be appealed (Art. 125/1). Thus it is possible to appeal all the decisions made by the TCA to administrative judicial bodies. In other words, all acts and proceedings of the TCA are reviewable by administrative judiciary. This established the relationship between the TCA and the administrative judiciary system.

On the other hand, decisions made by the TCA generally concern natural or legal personalities that are subject to private law, and deal with the actions thereof. In other words, decisions by the Competition Board bring about consequences for private law persons. Particularly, determination by the Competition Board that an infringement of competition took place leads to compensation claims and lawsuits. As a matter of fact, special provisions were made under the Act No. 4054 section five (Art. 56 et. seq.) relating to the private law consequences of competition infringements. Courts of jurisdiction in actions for damages arising from competition law are ordinary courts of first instance. Therefore, there is also a direct relationship between the TCA and ordinary courts of first instance.

There is also a relative relationship between the TCA and ordinary criminal courts. This is because the Competition Board has the power to carry out on-the-spot inspections while performing its duties under Act No. 4054 (Art. 15/1). According to the Act No. 4054, in case on-the-spot inspection is prevented or is likely to be prevented, on-the-spot inspection is carried out with a criminal court of peace decision (Art. 15/3).

The relationship between the TCA and judicial bodies begins as soon as the TCA starts to inquire an action or transaction that is restrictive of competition, and continues after the TCA makes a decision about the action or transaction, with increasing intensity. That is because the review of such decision is carried out by administrative judicial bodies; whereas the private law consequences of the decision are pursued at ordinary courts.

3. Appeal against the TCA's proceedings

3.1 *Against the on-the-spot inspection decision by a Criminal Court of Peace*

As mentioned above, in case on-the-spot inspection is prevented or is likely to be prevented, Competition Board may carry out on-the-spot inspection with a criminal court of peace decision. Appealing against the decision of a criminal court of peace is not regulated under the Act No. 4054. Working procedures and principles of criminal courts are regulated with a special statute.⁸ According to this Act, the concerned may apply to the decision-making authority within seven days of the date on which they learned about the decision and appeal against it (Art. 268/1). Likewise, according to this article, the authority to review the appeal against the decision by the criminal judge of peace rests with the judge of the criminal court of first instance that has jurisdiction over them (Art. 268/3). It must be straight away stated that, because on-the-spot inspection takes place immediately following the judge's decision, appealing against such decision is not a practical way to attain an outcome.

⁸ Code No. 5271 on Criminal Procedure, Official Gazette No. RG 17.12.2004, p. 25673.

3.2 *Against the administrative proceedings of the TCA*

Two different administrative procedures may be applied against the proceedings of the TCA. The concerned may apply to the TCA and request that the decision be revised or go to court directly and request that the decision be cancelled.

Appealing against the decisions of the Competition Board is clearly regulated in the Act No. 4054. According to Article 55 of the Act No. 4054, nullity suits against final decisions, injunction decisions and administrative fine decisions of the Competition Board are heard at the Council of State as the court of first instance. Appealing against decisions of the Competition Board does not cease the implementation of decisions, and the follow up and collection of administrative fines.

The importance and consequence of this specific provision is that the resorts for appeal against the decisions of the Competition Board are different from usual administrative judiciary authorities. The usual practice in the administrative judiciary system is that actions against the acts and proceedings of the administration are brought in the court of first instance where the administration in question is located. According to Article 20 of the Act No. 4054, the headquarters of the TCA is based in Ankara. Thus, if there were not a specific provision in the Act No. 4054, actions against the proceedings of the TCA would be brought in the administrative court in Ankara. However, due to the specific provision in the Act No. 4054, the court of first instance is changed and the Council of State, which is primarily a high judicial body, is assigned as the court of first instance.

Moreover, the Council of State is not assigned for every decision of the Competition Board. Only appeals against the decisions listed in the act - final decisions, injunction decisions and administrative fine decisions - can be made at the Council of State. For other decisions, for instance, assignment of the personnel, taking leaves, disciplinary proceedings and proceedings related to salary and financial rights, appeals can be made to usual administrative judiciary bodies.

On the other hand, the rights of those concerned to apply to the administration for re-evaluation of the decision are not covered by the Act No. 4054. This right is regulated in the Administrative Trial Procedure Act (Art. 11). According to the said provision, those concerned may request from the higher authority, if there is not a higher authority, from the authority that has realized the proceeding, that the administrative proceeding be abolished, withdrawn, amended or a new proceeding be made before filing an administrative action. This request suspends the term of litigation for an administrative case.

According to the practices of the TCA and the Council of State, this provision had been regarded as inapplicable with respect to the TCA for a long time. According to the TCA, appealing against the decision of the Competition Board was regulated in the Act No. 4054 and re-evaluation of a decision was not possible. Therefore, the TCA was rejecting the requests for re-evaluation of a decision. The Council of State rejected the actions brought against those decisions of rejection by the Competition Board on the same grounds. However, the Council of State has changed its decisions recently and accepted that the provision in the Act No. 4054 does not prevent the application of Article 11 of Administrative Trial Procedure Act (ATPA).⁹ Currently, according to the recent decisions of the Council of State, the Competition Board accepts the requests for re-evaluation of decisions and takes new decisions after making an examination.

Those concerned have right to bring an action before administrative judiciary bodies directly without applying to the administration. As stated above, every action and proceeding of the administration is subject to appeal. Two types of administrative actions can be filed against an administrative proceeding.

⁹ The Council of State, the Board of Administrative Cases E. 2006/2169, K. 2010/562.

First, those whose interest is injured due to an act or proceeding can bring an action to abolish the act or proceeding claiming that the act or proceeding is contrary to law with respect to certain reasons - power, form, cause, subject and aim (ATPA, Art. 2/1-a).

Secondly, those who are directly injured by the act or proceeding can file an action for damages for the compensation of their damage by the administration (ATPA, Art. 2/1-b). While both types of actions can be filed, an action for damages may be filed after the nullity suit is concluded.

According to the ATPA, a request can be made for determination of evidence; besides, the parties may benefit from expert witnesses and viewing.

The term of litigation in administrative judiciary is 60 days in the Council of State and administrative courts and 30 days in tax courts unless the term is specified in particular acts (ATPA, Art. 7). As a rule, the term of litigation commences as of the date when the proceeding is notified to the concerned in writing.

According to article one, paragraph two of the ATPA, written trial procedure is applied in administrative judiciary bodies and the examination is made on documents. Moreover, according to Article 17 of the same Act, in case one of the parties requests, the administrative judiciary body has to hold a hearing in nullity suits before the administrative judiciary bodies as well as in actions for damages and tax suits exceeding TL 8,380. Where the decision of the court of first instance is appealed or objected, hearing is subject to the request of the parties and the decision of the higher court (the Council of State or regional administrative court). On the other hand, administrative judiciary bodies may decide to hold a hearing *ex officio*. Practical consequence of a case with a hearing is that the court has to take a decision within 15 days as of the hearing (ATPA, Art. 19).

Filing an action before administrative judiciary bodies does not automatically suspend the execution of the administrative proceeding that is the subject of the action (ATPA, Art. 27/1). In addition, administrative judiciary bodies may decide for stay of execution by giving justifications in case the requirements that injuries, which are hard or impossible to be compensated, will occur as a result of the administrative proceeding and the administrative proceeding is obviously illegal are fulfilled together (ATPA, Art. 27/2). The decision for a stay of execution may be taken with or without a request for guarantee (ATPA, Art. 27/5). The files, in which a decision for stay of execution is taken, are examined and concluded primarily (ATPA, Art. 27/7).

Where the administrative judiciary body takes a decision for stay of execution, the administration concerned has to start a proceeding or take action as required by the decision within 30 days as of the date when the court decision is notified (ATPA, Art. 28). An action for pecuniary and non-pecuniary damages can be filed against the administration or public servant who fails to fulfill the requirements of the decision intentionally (ATPA, Art. 28/3-4) within this period. Besides, with respect to criminal law, the acts of public servants who fail to fulfill the requirements of a ruling are defined as arbitrary act and deemed as an offense according to Article 257 of the Turkish Penal Code No. 5237 (Official Gazette date: 12.10.2004 and No. 25611) as they injure personal rights. While assessing the existence of a crime, the Supreme Court of Appeals considers whether personal injury has occurred.¹⁰

3.3 *Appealing against a decision in administrative judiciary system*

In administrative judiciary system, there are four types of legal remedies against the decisions of courts of first instance: exception, appeal, new trial and correction. A request for exception can be made to a higher court (regional administrative court) against certain decisions by administrative courts within 30

¹⁰ See Criminal General Council of the Supreme Court of Appeals 2003/4-63E. and 2003/37K.

days as of the notification of the decision (ATPA, Art. 45). The decisions of regional administrative courts are final, they cannot be appealed (ATPA, Art. 45/5). Other decisions of the chambers of cases of the Council of State and of administrative courts that are not subject to exception - final decisions - can be appealed before the Council of State within 30 days as of the notification of the decision (ATPA, Art. 46).¹¹ As a rule, the parties of the decision may appeal. However, decisions of administrative judiciary bodies that are finalized without being appealed may be appealed upon the request of the related ministries or by the attorney general of the Council of State for the sake of law (ATPA, Art. 51). Request for a new trial can be made for the decisions taken by administrative judiciary bodies depending on the reasons prescribed by the law.¹² The request for a new trial is assessed by the court that has taken the decision (ATPA, Art. 53/2).¹³ Parties may request for correction depending on the reasons listed in the Act with respect to the decisions taken by the Chambers of Administrative Cases and the Board of the Chambers of Administrative Cases of the Council of State upon appeal and decisions taken by regional administrative courts upon a request of exception within 15 days as of the notification of the decision. The request for the correction of a decision is assessed by the chamber, the board and the regional administrative court that has taken the decision (ATPA, Art. 54).

3.3.1 *The issue of capacity to sue:*

One of the most contentious issues between the TCA and administrative judiciary bodies is the relation between the TCA and the regulations of professional associations. The TCA found in preliminary inquiries and investigations on several dates that professional associations made price regulations or carried out practices for ensuring solidarity among members such as bulk purchase, mass distribution and serial distribution. It was seen that while some of those regulations obviously depended on legal power, others depended on bylaws according to the power to issue bylaws given by the law. Referring to the fact that bylaws cannot be contrary to imperative provisions of the Act No. 4054, the Competition Board imposed sanctions to professional associations on the grounds that those practices restricted competition. When those decisions were sued, the Council of State annulled the Competition Board decisions by ruling that the Competition Board did not have power to make examination on those fields because there were regulations (bylaws) and whether the bylaw was contrary to the law could be assessed in an action to be filed. Thus, the TCA filed cases for the annulment of the bylaws that constitute the basis of the activities of professional associations. However, those cases were rejected by the Council of State on the ground that the TCA does not have capacity to sue with respect to the regulations of professional associations.

The Act No. 4054 has specific regulations concerning the private law consequences of competition infringements. The first of these consequences is that all agreements and decisions infringing competition are deemed invalid (Art. 56). In other words, legal transactions which limit competition are invalid. The execution of any particular act may not be requested based on these invalid legal transactions, and moreover any acts so executed must be reversed.

The second consequence is that individuals injured by the infringement of competition are given a right to compensation. According to Article 57 of the Act No. 4054, anyone who infringes competition through illegal practices must compensate all damages to those who are injured by these practices. In case

¹¹ Decisions subject to exception cannot be appealed.

¹² For the reasons, see ATPA Art. 53.

¹³ The request for a new trial must be made within 10 years in case a decision is taken contrary to the decision taken in an action whose parties, subject and reason are the same, unless a new reason exists; within one year as of the date when the decision is finalized in case the provision is found to be contrary to law by a finalized decision of the European Court of Human Rights and within 60 days for other cases (ATPA Art. 53/3).

the injury occurs as a result of the practices of more than one person, they are jointly responsible for the damages.

The third consequence is that it is explained in the Act No. 4054 how to determine the damages to be compensated (Art. 58/1). Accordingly, those injured by the infringement of competition may demand as damages the difference between the amount they paid and the amount they would have paid in case competition had not been restricted. Competing undertakings affected by the restriction of competition may request compensation for all of their losses from the undertaking or undertakings which restricted competition. When determining damages, all profits expected by the undertaking injured (lost profits) are taken into consideration. Balance sheets for the previous years are taken into account in the calculation of the damages.

The fourth consequence is that it is possible to increase the amount of the damages to be granted. If the resulting damage arises from an agreement or decision or from gross negligence of those committing the infringement of competition, the judge may, upon the request of the injured, award compensation by three fold of the material damage incurred, or of the profits gained or likely to be gained by those who caused the damage (Art. 58/2).

The fifth consequence is that the burden of proof has been simplified for the actions brought by those injured. First of all, Article 4 of the Act No. 4054 introduces the presumption of concerted practice. Accordingly, in cases where the existence of an agreement cannot be proved, any similarity that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice (Art. 4/3). Therefore, Article 59 of the Act No. 4054 regulates that in case the injured submit to the jurisdictional bodies proofs such as, particularly, the actual partitioning of markets, stability observed in the market price for quite a long time, the price increase within close intervals by the undertakings operating in the market, which give the impression of the existence of an agreement, or the distortion of competition in the market, then the burden of proof is for the defendants (those undertakings engaging in concerted practices) that the undertakings are not engaged in concerted practice. Secondly, it is specified that the existence of agreements, decisions and practices limiting competition may be proven through all types of evidence.

Tort liability forms the basis for actions for damages. However, unlike conventional tort liability, it is not necessary for those who infringe competition to be at fault in order for them to be liable.

3.3.2 *Court of jurisdiction and competent courts:*

In terms of actions for damages, the Act No. 4054 does not specify competent courts or courts of jurisdiction. Therefore, competent courts and courts of jurisdiction in actions for damages are determined in accordance with general provisions – under the Code of Civil Procedure (CCP). Accordingly, actions for damages are those actions whose subjects may be measured in pecuniary terms, in other words those actions related to assets. Courts of jurisdiction for such actions are civil courts of first instance (CCP, Art. 2). Competent courts must be determined after various probabilities are taken into account. First of all, the competent court, according the general authorization rules, is the court of place of domicile of the defendant (CCP, Art. 5). In case there is more than one defendant, the action may be filed at the court of place of domicile for any defendant (CCP, Art. 7/1). Secondly, since infringements of competition are regarded as torts, competent court may be the court at the district where the tort is committed (CCP, Art. 16). Thirdly, where infringements of competition also violate personal rights, as in cases of limiting competition through boycotts or discriminatory practices, those whose personal rights are violated may also file actions before the court of their own place of domicile (Civil Code, Art. 25). The plaintiff holds the right to choose at which competent court the action should be filed.

3.3.3 *Dilatory question*

The Competition Board is granted the power and duty of determining whether an act constitutes a restriction of competition by the Act No. 4054. On the other hand, the same Act establishes ordinary courts as competent courts and courts of jurisdiction for the private law consequences of restrictions of competition. This situation may lead to compliance problems between the decisions of the Competition Board and ordinary courts. This is because consumers or competing undertakings who claim to have suffered damages due to the restriction of competition may file for damages before ordinary courts directly. In this case, ordinary judicial authorities have to first establish whether a restriction of competition took place in order to be able to rule on the claim for damages. A court facing a claim for damages may act in two ways. First, the court may itself evaluate the subject matter of the conflict and come to a decision. Secondly, the court may apply to the Competition Board, or it may grant an extension to the relevant party for application to the Competition Board, in order to establish whether the act on which the claim for damages is based constitutes a restriction of competition. It is accepted both in the doctrine and by the Supreme Court of Appeals that, in order to prevent conflicts between Competition Board decisions and court decisions as well as to ensure legal security, ordinary courts should seek the Competition Board's decision on the subject. In the Turkish practice, the Supreme Court of Appeals annuls the decisions of the courts of first instance if they are taken without an application to the Competition Board. According to the Supreme Court of Appeals, if there are no applications to the Competition Board, the court of first instance should grant an extension to the party concerned and await the decision of the Competition Board.¹⁴

It is possible to apply to the ordinary courts following the Competition Board decision. In this case, the doctrine accepts that the ordinary judicial authorities should take the Competition Board decision into account and should not disagree with it unless there is new evidence justifying a new decision by the court in opposition to the Competition Board decision. Even though there are no legal regulations stating that Competition Board decisions are binding for ordinary judicial authorities, it is emphasized that the Competition Board's holding exclusive jurisdiction on subjects such as exemption and negative clearance as well as its status as the specialized authority in other areas makes it necessary for ordinary courts to take the Competition Board decisions into account.

3.3 *Appealing against the decision in the judicial jurisdiction system*

Ordinary judicial system provides three types of appeal for the decisions of the first instance courts: appeal before the intermediate courts of appeals, appeal before the last-instance appeals court and new trials. For the decisions of the courts of first instance concerning an amount above TL 1,500, an appeal may be made before the intermediate court of appeals. In such cases, the period for appeal to the Regional Courts of Justice (Act No. 6100, Art. 341) is two weeks (Art. 345) after the decision is duly notified to each of the parties, without prejudice to the provisions of any special laws. Decisions of the Regional Courts of Justice may be appealed within one month following the notification of the decision. In this case the appeal is made before the Supreme Court of Appeals. As a rule, appeal does not interrupt the execution of the decision (Art. 367/1). Decisions concerning the law of persons, family law and real rights over immovable properties may not be implemented before they are finalized. Lastly, in the existence of certain reasons listed in the Act, a new trial may be possible. The petition including the request for a new trial is evaluated by the court that took the decision (Art. 378).

¹⁴ The Supreme Court of Appeals 19. HD. E. 99/3350, K.99/ 6364.

UNITED KINGDOM

This submission provides an update on UK developments in procedural fairness and transparency that have taken place since previous discussions on procedural fairness took place in 2010.

1. Guide to the OFT's investigation procedures in competition cases

In March 2011, the Office of Fair Trading (OFT) published a guide to its investigation procedures in competition cases. The guidance is available on the OFT website¹ and is also attached in the Annex.

The guidance sets out clearly the procedures the OFT follows in Competition Act investigations, from the opening of cases through to their final resolution. It includes discussion of a number of new measures for companies reporting anti-competitive behaviour and those being investigated, including:

- offering informal pre-complaint discussions to help potential complainants decide whether to commit the necessary time and effort to prepare a formal, reasoned complaint, based on whether the OFT would be likely to investigate;
- a commitment to reach a decision on whether to formally open a case no later than four months after receiving a substantiated complaint, and
- sending a case initiation letter on opening a formal investigation setting out the details and key contacts of investigators including the Senior Responsible Officer (SRO) and the case's decision maker. Parties have access to the case's decision maker, including a commitment that the decision maker will be at the oral representations meeting (unless it is impractical for them to do so). Parties are also free to contact the SRO at any stage of an investigation if they have a complaint or concern about the handling of the case.

The procedures also provide for tighter project management to improve the duration of competition cases, including engagement with the parties on the scope of draft information requests, with deadlines for completion where practical and appropriate.

The guidance also clarifies the existing approaches to decision making and quality assurance.

2. Procedural Adjudicator trial

Related to the guidance and also in March 2011, the OFT commenced a one-year trial of a Procedural Adjudicator role.² The purpose of the trial is to provide a swift, efficient and cost-effective mechanism for resolving disputes between parties and the case teams in competition investigations, in respect of the following procedural matters:

¹ http://www.offt.gov.uk/shared_offt/policy/oft1263.pdf

² The Procedural Adjudicator during the trial period is Jackie Holland, Director of Competition Policy.

- deadlines for parties to respond to information requests, submit non-confidential versions of documents or to submit written representations on the statement of objections or supplementary statement of objections
- requests for confidentiality redactions of information in documents on the OFT's case file, in a statement of objections or in a final decision
- requests for disclosure or non-disclosure of certain documents on the OFT's case file
- issues relating to oral representations meetings, such as the date of the meeting, and
- other significant procedural issues that may arise during the course of an investigation.

The Procedural Adjudicator is not able to review decisions on the scope of requests for information or other decisions relating to the substance of a case.

The Procedural Adjudicator is only able to review decisions in cases in which the OFT has decided to open a formal investigation under the Competition Act 1998, that is where the OFT has reasonable grounds to suspect that competition law has been breached and the OFT has decided to prioritise the case for investigation. These are cases in which the section 25 Competition Act 1998 threshold, that allows the OFT to use its formal powers of investigation, has been met.

The Procedural Adjudicator will only become involved in a procedural matter at the request of a party to an investigation and only after the party has been unable to resolve the dispute with the SRO of the investigation.

Further details are set out in a Briefing Note.³

To date, the Procedural Adjudicator has reached two decisions. Details of one of these (on a request by Sports Direct International plc) have already been published on the OFT website.⁴

³ http://www.of.gov.uk/shared_of/policy/pa-trial-ca98-briefing-note.pdf

⁴ <http://www.of.gov.uk/about-the-of/legal-powers/legal/competition-act-1998/procedural-adjudicator-trial>

ANNEX

**A GUIDE TO THE OFT'S INVESTIGATION PROCEDURES IN COMPETITION CASES -
GUIDANCE***

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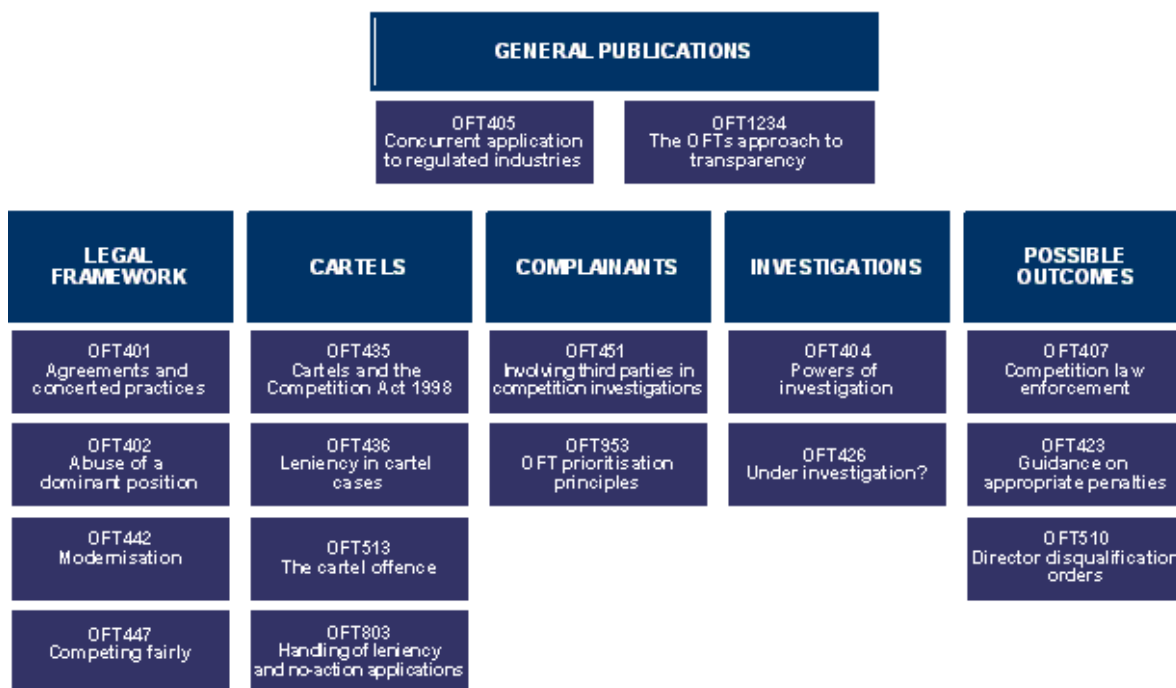
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1. Preface

We have set out in this guidance document general information for the business and legal communities and other interested parties on the processes that we use when using our powers under the Competition Act 1998 (the **Act**) to investigate suspected infringements of competition law. It supersedes our previous quick guide on how we conduct investigations under the Act entitled *Under Investigation*.¹ You may find it useful to read this document alongside other Office of Fair Trading (**OFT**) documents, including – *Enforcement*,² *OFT Prioritisation Principles*,³ *Powers of Investigation*,⁴ and *Involving third parties in Competition Act investigations*.⁵

In this guidance, we have set out our procedures and explained the way in which we conduct investigations into suspected competition law infringements. This is our current practice as at the date of publication of this document. It may be revised from time to time to reflect changes in best practice or the law and our developing experience in assessing and investigating cases. Please refer to the OFT website to ensure you have the latest version of this guidance.

Figure 1.1 Overview of OFT publications referred to in this guidance



¹ OFT 426 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_mini_guides/oft426.pdf

² OFT 407 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft407.pdf

³ OFT 953 available to download at www.of.gov.uk/shared_of/about_of/oft953.pdf

⁴ OFT 404 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft404.pdf

⁵ OFT 451 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft451.pdf

This guidance is concerned exclusively with our investigations under the Act. It does not cover OFT investigations into individuals suspected of having committed the criminal cartel offence⁶ nor does it cover director disqualification order proceedings.⁷

This guidance does not cover the procedures used by sectoral regulators⁸ in their competition law investigations. Further guidance on this is available in *Concurrent Application to Regulated Industries*⁹ or from the relevant organisation's website.

This document incorporates the commitments made in our recently published Transparency Statement insofar as they apply to investigations under the Act.¹⁰

We will apply this guidance flexibly. This means that we will have regard to the guidance when we deal with suspected competition law infringements but that, when the facts of an individual case reasonably justify it, we may adopt a different approach. For example, we may adopt a different approach in circumstances where at the same time as conducting an investigation into a suspected competition law breach by a business,¹¹ in parallel we are also looking at whether an individual has committed a criminal cartel offence.

This document is not a definitive statement of, or a substitute for, the law itself and the legal tests which we apply in assessing breaches of competition law are not addressed in this guidance. A range of OFT publications on how we carry out this substantive assessment is available on the OFT website. We recommend that any person who considers that they or their business may be affected by an investigation into suspected anti-competitive practices should seek independent legal advice.

This guidance sets out the procedures we follow within the legal framework outlined in Chapter 2. It addresses each stage of a typical investigation in turn. The key stages of an investigation into a suspected infringement and a summary of our action at these stages is set out at figure 1.2.

⁶ More information on the criminal cartel offence can be found in OFT 515 available to download at www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/enterprise_act/oft515

⁷ More information on director disqualification orders can be found in OFT 510 available to download at www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft510.pdf

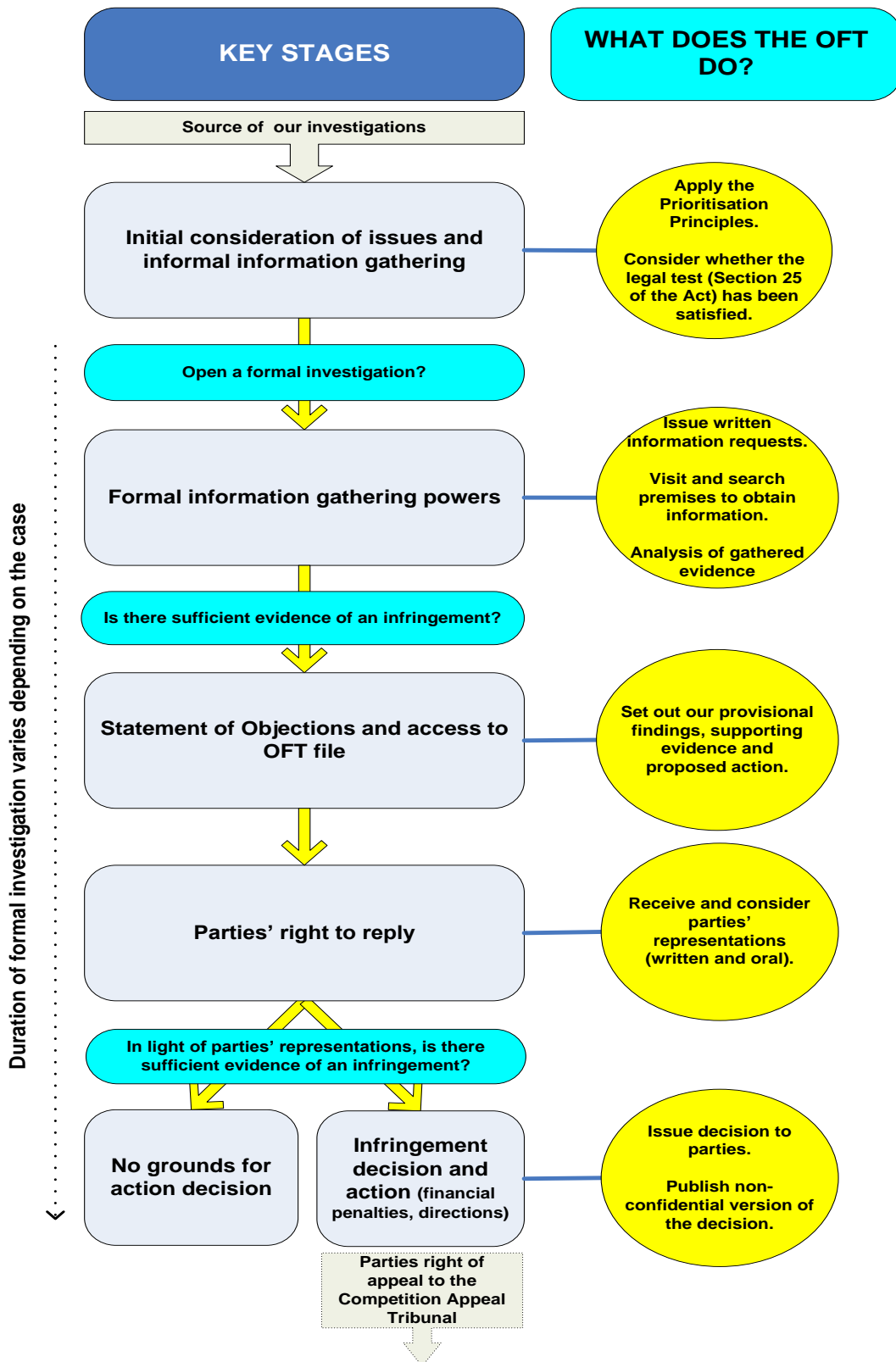
⁸ The Office of Communications, the Gas and Electricity Markets Authority, the Northern Ireland Authority for Utility Regulation, the Water Services Regulation Authority, the Office of Rail Regulation, and the Civil Aviation Authority.

⁹ OFT 405 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft405.pdf

¹⁰ OFT 1234 available to download at www.offt.gov.uk/shared_offt/consultations/668117/OFT1234.pdf

¹¹ The relevant provisions of competition law apply to agreements between, and conduct by, 'undertakings'. An undertaking means any natural or legal person carrying on commercial or economic activities relating to goods or services, irrespective of legal status. For example, a sole trader, partnership, company or a group of companies can each be an undertaking. Further guidance on the meaning of 'undertaking' can be found in OFT Guidance Agreements and concerted practices (OFT401) and relevant European case law, such as C-205/03 *Fenin*. In this Guidance the word 'business' should be understood to include all forms of undertaking.

Figure 1.2 – Key stages in an investigation



2. The legal framework

The Treaty on the Functioning of the European Union (TFEU) and the Act both prohibit, in certain circumstances, agreements and conduct which prevent, restrict or distort competition, and conduct which constitutes an abuse of a dominant position.

More information on the laws on anti-competitive behaviour is available in the OFT quick guide *Competing Fairly*¹² and in the more detailed guidance on *Agreements and Concerted Practices*¹³ and *Abuse of a dominant position*.¹⁴

In the UK, competition law is applied and enforced principally by the OFT.¹⁵ The Act gives us powers to apply, investigate and enforce the Chapter I and Chapter II prohibitions in the Act and Articles 101 and 102 TFEU.¹⁶

Under EU legislation,¹⁷ as a 'designated national competition authority', when we apply national competition law to a suspected anti-competitive agreement or abusive conduct, and the agreement or conduct may affect trade between Member States, we are also required to apply Articles 101 and 102 TFEU.

Further information on the framework for applying Articles 101 and 102 and the interaction with the Chapter I and Chapter II Prohibitions in the Act is available in the OFT guide *Modernisation*.¹⁸

There are procedural rules that apply when we take investigative or enforcement action.¹⁹ In addition, we are required to carry out our investigations and make decisions in a procedurally fair manner according to the standards of administrative law.²⁰

In exercising our functions, as a public body, we must also ensure that we act in a manner that is compatible with the Human Rights Act 1998.

¹² OFT 447 available to download at www.oft.gov.uk/shared_of/business_leaflets/ca98_mini_guides/oft447.pdf

¹³ OFT 401 available to download at www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/publications

¹⁴ OFT 402 available to download at www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/publications

¹⁵ However, it is open to any person to bring a standalone action in the High Court for an injunction and/or damages as a result of an alleged infringement of competition law. In relation to the regulated sectors (communications, gas, electricity, railways, air traffic services, water and sewerage), the respective sectoral regulators have concurrent powers with the OFT to apply and enforce the legal provisions.

¹⁶ See Chapter III (Investigation and Enforcement) of the Act.

¹⁷ Article 3 of EU Regulation 1/2003.

¹⁸ OFT 442 available to download at www.oft.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft442.pdf

¹⁹ The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (the **OFT Rules**).

²⁰ See in particular *Pernod Ricard SA and Campbell Distillers Limited v Office of Fair Trading* [2004] CAT 10.

3. The sources of our investigations

Summary

- We obtain information about possible competition law breaches through a number of sources
 - - our research and market intelligence, and other workstreams
 - - leniency applications
 - - complaints to our Enquiries and Reporting Centre or to our Cartel Hotline.
- This chapter sets out how to contact us to apply for leniency or to complain about a suspected cartel or other potential competition law breach.
- In some cases, complainants can approach us informally in the first instance.

There are a variety of ways in which information can come to the OFT's attention, leading us to investigate whether competition law may have been breached.

Our own research and market intelligence may prompt us to make initial enquiries into suspected anti-competitive conduct. Alternatively, evidence gathered through our other workstreams, such as our merger or markets functions, or use of our powers under the Regulation of Investigatory Powers Act 2000, or information received via the European Competition Network or the European Commission may reveal potentially anti-competitive behaviour. In these circumstances, we gather publicly available information and may write to businesses or individuals seeking further information that we consider could be relevant.

We also rely on information from external sources to bring to our attention potentially anti-competitive conduct. This could be from individuals with so called 'inside' information about a cartel²¹ or from a complainant.

3.1 *Cartels and leniency*

A business which is or has been involved in a cartel²² may wish to take advantage of the benefits of our leniency programme prompting them to approach us with information about its operation.

By confessing to us, a business could gain total immunity from, or a significant reduction in, any financial penalties we can impose if we decide that the arrangement breaches the Chapter I prohibition and/or Article 101 TFEU.²³

²¹ We operate a financial reward programme in exchange for information about the operation of a cartel. For more information, go to www.of.gov.uk/OFTwork/cartels-and-competition/cartels/rewards

²² A cartel is an agreement between businesses not to compete with each other. The agreement can often be verbal. Typically, illegal cartels involve cartel members agreeing on price fixing, bid rigging, output quotas or restrictions, and/or market sharing arrangements. In some cartels, more than one of these elements may be present. For the purposes of our leniency programme, price-fixing includes resale price maintenance.

²³ More information on how we set penalties is available in Part 5 of OFT guideline *Enforcement* (OFT 407) available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of407.pdf and

It is also a criminal offence for an individual to dishonestly engage in cartel arrangements in the UK. Co-operating current and former employees and directors of companies which obtain immunity from financial penalties will normally receive immunity from prosecution. Also, an individual who comes forward with information about a cartel may receive immunity from criminal prosecution.²⁴

In addition, we will not apply for a competition disqualification order against any current director of a company whose company has benefited from leniency.²⁵ However, we may apply for an order against a director who has been removed or has otherwise ceased to act as a director of a company owing to his role in the breach of competition law and/or for opposing the application for leniency, or against a director who fails to co-operate with the leniency process.

We encourage business representatives who suspect that their business has been involved in cartel activity to blow the whistle on the cartel.

For more information on what constitutes a cartel, see our quick guide *Cartels and the Competition Act*²⁶ and our guideline *Agreements and Concerted Practices*.²⁷

3.1.1 How to apply for leniency

We handle leniency applications in strict confidence. Applications for lenient treatment under the OFT's leniency programme should be made to the Senior Director or Director of our Cartels and Criminal Enforcement Group (CCEG) in the first instance. The contact details of the relevant individuals are available on our website.²⁸ More detailed information on our leniency programme is available in *Leniency in cartel cases*²⁹ and in *Leniency and no-action*.³⁰

3.2 Complaints about possible breaches of competition law

Another way in which we receive information from external sources is where an individual or a business complains to us about the behaviour of another business. Complaints can be a useful and important source of information relating to potentially anti-competitive behaviour.

Guidance as to the appropriate amount of a penalty (OFT423) available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of423.pdf

²⁴ Section 188 of the Enterprise Act 2002. Further guidance is available in *The cartel offence* (OFT 513) available to download at www.of.gov.uk/shared_of/business_leaflets/enterprise_act/of513.pdf

²⁵ In respect of the activities to which the grant of leniency relates. For further detail, see OFT guidance *Competition Disqualification Orders* (OFT 510) available to download at www.of.gov.uk/shared_of/business_leaflets/enterprise_act/of510.pdf

²⁶ OFT 435 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_mini_guides/of435.pdf

²⁷ OFT 401 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of401.pdf

²⁸ www.of.gov.uk/OFTwork/competition-act-and-cartels/cartels/confess

²⁹ OFT 436 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_mini_guides/of436.pdf

³⁰ OFT 803 available to download at www.of.gov.uk/shared_of/reports/comp_policy/of803.pdf

3.2.1 *How to make a competition complaint*

If an individual or a business suspects that another business is infringing competition law, they should contact us.

Complaints about suspected cartels should be made by calling our Cartel Hotline on **0800 085 1664** or by emailing us at cartelshotline@oft.gsi.gov.uk. These complaints are handled in confidence by CCEG. Guidance on reporting a suspected cartel to the OFT is available in the OFT quick guide *Cartels and the Competition Act*.³¹

For all other competition related complaints, please call our Enquiries and Reporting Centre (**ERC**) on **08457 22 44 99** or email us at enquiries@oft.gsi.gov.uk in the first instance. We will be able to advise whether the matter is within our remit and, if it is, how to submit a complaint in writing for consideration by our competition experts.

Complaints made to ERC which appear to relate to a suspected cartel will be redirected to the Cartel Hotline. Similarly, complaints to the Cartel Hotline about a non-cartel competition matter will be passed to ERC.

The Annexe to the OFT guideline *Involving third parties in Competition Act investigations*³² also provides guidance and further detail on the type of information that we look for in a written, reasoned complaint.

3.2.2 *Pre-complaint discussions*

The requirement for a written, reasoned complaint does not preclude complainants from approaching us informally in the first instance. Pre-complaint discussions may be helpful to businesses in deciding whether to commit the necessary time and effort in preparing a reasoned complaint.

In such cases, we will endeavour to give an initial view as to whether we would be likely to investigate the matter further if a formal complaint were to be made. This view would be based both on the likelihood of the complaint raising competition concerns and on the assessment of the complaint against our Prioritisation Principles to see if it falls within our casework priorities at the time (see Chapter 4 for more information on how we prioritise cases). However, any view given at this stage will not commit the OFT to opening an investigation.

To be able to engage in pre-complaint discussions, we would expect to receive a basic level of information in writing from the complainant covering the key aspects of their concerns. This should include:

- the identity of the complainant and the party/ies to the suspected infringement, and their relationship to one another (e.g. whether they are competitors, customers or suppliers)
- the reasons for making the complaint, including a brief description of:
 - the product(s)/service(s) concerned

³¹ OFT 435 available to download at www.oft.gov.uk/shared_oft/business_leaflets/ca98_mini_guides/oft435.pdf

³² OFT 451 available to download at www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft451.pdf

- the agreement or conduct the complainant believes to be anti-competitive
- the type of business operated by the complainant and the party(ies) to the suspected infringement (for example, manufacturer, wholesaler, retailer) and an indication of their geographic scale (for example, local, national, or international)
- if known, the size of the market and of the parties involved (for example, market shares).

Whether we engage in pre-complaint discussions will depend on the availability of resource and whether the issue(s) outlined in the basic information suggest to us that the case is one that would merit a prioritisation assessment by us. In cases where pre-complaint discussions are appropriate, we aim to suggest a date for the discussions within ten working days of receiving the required information.

If you wish to approach us about the possibility of a pre-complaint discussion, you should contact ERC (contact details above) in the first instance. If sending an email, please include the words 'Pre-Complaint Discussion' in the subject line of the email.

3.2.3 *Confidentiality of complaints*

We understand that individuals and companies may want to ensure that details of their complaints are not made public. If a complainant has specific concerns about disclosure of their identity or their commercially sensitive information, they should let us know at the same time as submitting their complaint. We are prohibited³³ from disclosing certain confidential information and while we are considering whether to pursue a complaint we aim to keep the identity of the complainant confidential.

Later on, if we have sufficient information to carry out a formal investigation and we provisionally decide that a business under investigation has infringed the law, we may have to reveal to them the identity of the complainant where they cannot properly respond to the allegations against them in the absence of such disclosure. However, before disclosing a complainant's identity or any of their information, we will discuss the matter with them and give them an opportunity to make representations to us.

4. **What we do when we receive a complaint**

Summary

- We use published Prioritisation Principles to decide which complaints to take forward to the Initial Assessment Phase.
- Prioritised cases will be allocated to one of our groups within Markets and Projects.
- We typically gather information informally at this stage (i.e. not using our formal powers of investigation).
- We aim to keep complainants informed of the progress of their complaint.

³³ Rule 1(1) and 6 of the OFT Rules and Part 9 of the Enterprise Act 2002. However, Part 9 does permit the OFT to disclose confidential information in certain specified circumstances.

4.1 *What we do when we receive a complaint*

With the exception of complaints about suspected cartels, all competition complaints should be submitted to our Enquiries and Reporting Centre (**ERC**). Complaints received by ERC about suspected cartel activity are redirected to the Cartel Hotline.

We respond to all complaints we receive. We aim to give an initial response within ten working days of receipt in at least 90 per cent of complaints. Where a competition complaint raises more complex issues, that require longer to assess, we will respond within 30 working days of receipt. All complaints that we receive are given a complaint reference number.

If ERC considers that a complaint relates to possible anti-competitive behaviour (other than cartel activity), the complaint is passed to our Preliminary Investigations team. The Preliminary Investigations team may engage in informal dialogue with the complainant if we need to clarify any information provided to us at this stage or if we require additional information.

Although we consider all complaints we receive, we cannot formally investigate all suspected infringements of competition law. We decide which cases to investigate on the basis of our Prioritisation Principles. These take into account the likely **impact** of our investigation in the form of direct or indirect benefits to consumers, the **strategic significance** of the case, the **risks** involved in taking on the case, and the **resources** required to carry out the investigation. The Preliminary Investigations team carries out an initial assessment of whether a complaint satisfies our Prioritisation Principles.

Further information on our Prioritisation Principles and how we apply them in practice is available in the OFT publication *Prioritisation Principles*³⁴.

We aim to keep complainants informed of the progress of their complaint and share with them our expected timescale for dealing with it. In all cases we aim to communicate to the complainant within four months from the date of receipt of their complaint whether we have decided to open a formal investigation.

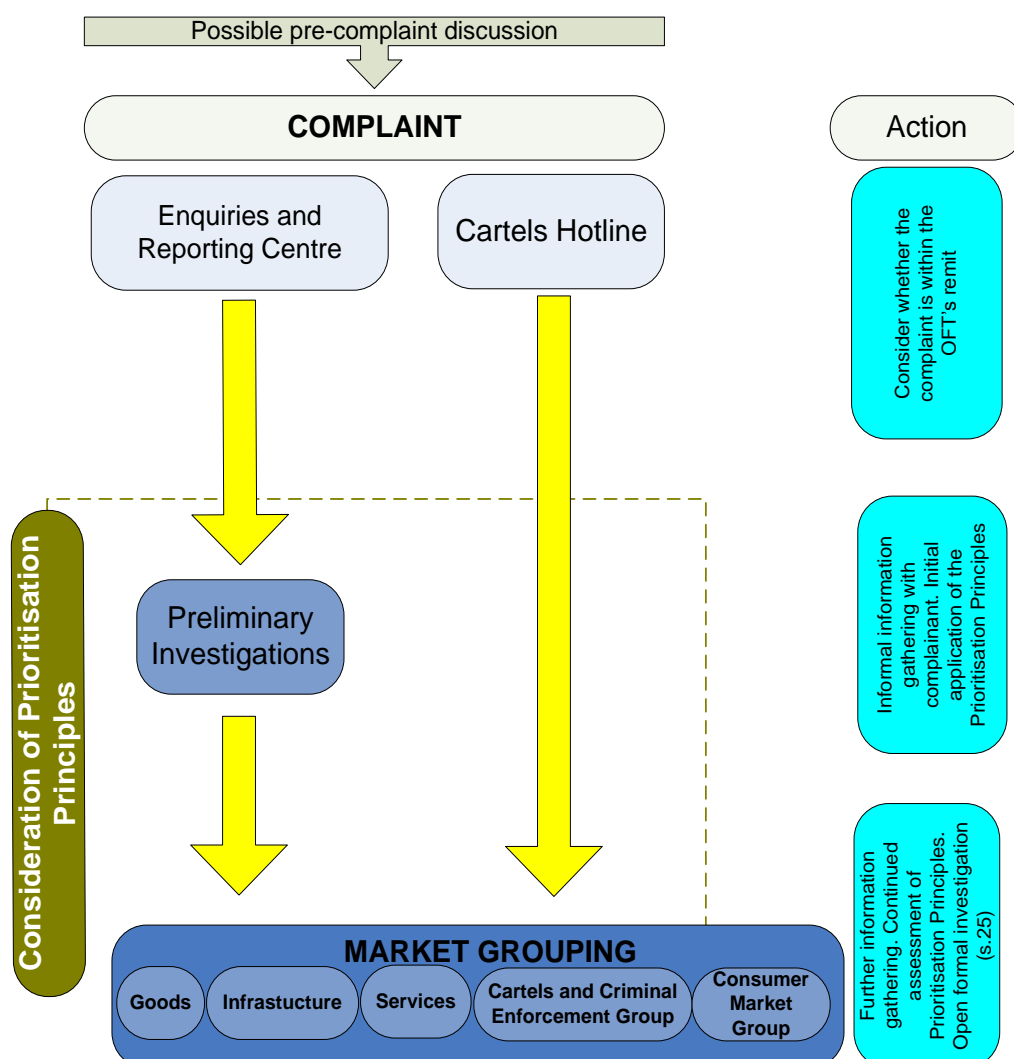
However, our ability to follow up on a complaint and to determine within four months whether to open a formal investigation depends to a great extent on the timely co-operation of the complainant and the amount and quality of information they provide us with. Well-structured written complaints supported by evidence are likely to proceed more rapidly to a prioritisation assessment and, if they are prioritised, to an investigation. They can also assist complainants in being granted Formal Complainant status if we proceed to a formal investigation. See Chapter 5 for more details on the process for becoming a Formal Complainant.

If we decide not to prioritise a complaint at this stage, we will write to the complainant to inform them of the fact. In appropriate cases, we may send a warning letter to a company to inform them that we have been made aware of a possible breach of competition law by them and that, although we are currently not minded to pursue an investigation, we may do so in future if we receive further evidence of a suspected infringement or our prioritisation assessment changes.

Where we prioritise a complaint, the case will be allocated to the appropriate OFT group for formal or further informal investigation.

³⁴ OFT 953 available to download at www.of.gov.uk/OFTwork/publications/publication-categories/corporate/general/of953

Figure 1.3 – Complaint Process



4.2 Which part of the OFT carries out the investigation?

We have four groups which carry out the majority of competition investigations. These are Services, Goods, Infrastructure, and CCEG (together referred to as the Markets and Projects groups). A chart showing the structure of the OFT is available on the OFT website.

Goods, Services, and Infrastructure are organised around sectors of the economy rather than by legal tools. This means that they are responsible for both competition and consumer casework, and market studies. For example, Services focuses on areas such as financial services and professional services. Goods is responsible for consumer goods such as food, drink, clothing, pharmaceuticals, chemicals, metals, electrical appliances and recreational goods. Infrastructure focuses on areas such as transport, construction, property, the creative industries and the knowledge economy, including information technology. Most cartel investigations are run by CCEG.

However, there is flexibility in the allocation of cases between our Markets and Projects groups. This means that a case that falls into the area covered by one group may be allocated to another group where

that group is better placed to carry out the investigation, for instance, where it has more available resources at the time. This may include allocating the case to our Consumer Market Group.

The processes underpinning our investigations and the tools available to us are identical across all our groups.³⁵ Information on the different groups within Markets and Projects is available on the OFT website.³⁶

4.3 Initial assessment phase

Once we have decided to take forward a case within Markets and Projects, we may gather more information from the complainant, the company/ies under investigation, and/or third parties on an informal basis. This may involve sending an informal request for information, a request for clarification of information already provided to us in the complaint, or an invitation to meet with us. In these circumstances, where we are not using our formal powers to gather information, we rely on voluntary co-operation.³⁷

In the case of suspected cartels, however, we are unlikely to contact the companies under investigation informally as to do so may prejudice our investigation. Instead, we typically use our formal information gathering powers from the outset.

On the basis of the information we have gathered at that time, if we consider we have reasonable grounds for suspecting that competition law has been breached, we can open a formal investigation. This allows us to use our formal information gathering powers (see Chapter 6).

5. Opening a Formal Investigation

Summary

- The decision to open a formal investigation depends upon whether
 - the legal test that allows us to use our formal investigation powers has been satisfied, and
 - whether the case continues to fall within our casework priorities.
- When we open a formal investigation, the case is allocated a Team Leader, a Project Director and a Senior Responsible Officer.
- In appropriate cases, when we open a formal investigation, we will send the companies under investigation a case initiation letter including contact details for key members of the case team and the identity of the decision maker.
- We will grant Formal Complainant status, in relation to an investigation, to any person who has submitted a written, reasoned complaint to us, who requests Formal Complainant status, and

³⁵ However, any covert surveillance or handling of covert human Intelligence sources under the Regulation of Investigatory Powers Act 2000 will only be carried out by CCEG in relation to investigations into suspected cartels.

³⁶ www.offt.gov.uk/about-the-offt/offt-structure/structure/

³⁷ We can only use our formal information gathering powers where we have reasonable grounds for suspecting that competition law has been breached.

whose interests are, or are likely to be materially affected by the subject-matter of the complaint.

- Formal Complainants have the opportunity to become involved at key stages of our investigation.

If a complaint is likely to progress to a formal investigation, the case is allocated:

- a designated Team Leader, who leads the case team and is responsible for day-to-day running of the case
- a Project Director, who directs the case and is accountable for delivery of high quality timely output, and
- a Senior Responsible Officer (**SRO**), who is accountable for delivery of the case.

The SRO decides whether there are sufficient grounds to open a formal investigation and whether the evidential requirements of an infringement have been met. In carrying out these decision-making functions, the SRO consults with other senior OFT officials as appropriate.

For these purposes, the decision to open a formal investigation means deciding whether the legal test³⁸ which allows us to use our formal investigation powers has been met and whether the case continues to fall within our casework priorities.

Once the decision has been taken to open a formal investigation, we will send the businesses under investigation a case initiation letter setting out brief details of the conduct that we are looking into, the relevant legislation, the indicative timescale – as far as we are able to say at this early stage, and key contact details for the case such as the Team Leader, Project Director and SRO.³⁹

We shall also indicate to the parties in the case initiation letter who the decision maker is. This means the person responsible for the key decisions on the case, including the decision to issue a Statement of Objections (**SO**), the decision to issue a final decision, and the decision to impose a financial penalty and/or directions. The decision maker is generally, but need not be, the SRO.

In some instances, we will send out a formal information request at the same time as sending the case initiation letter or the information request may form part of the case initiation letter. See Chapter 6 for more information on formal information requests.

In some cases, it will not be appropriate to issue a case initiation letter at the start of a case, as to do so may prejudice our investigation, such as prior to unannounced inspections or witness interviews. In these cases, we will send out the letter as soon as possible.

Also, it may be necessary to limit the information that we give in the case initiation letter, for example, to protect the identity of a whistleblower in a suspected cartel investigation or the identity of a complainant where there are good reasons for doing so.

³⁸ Under section 25 of the Act we may use our formal investigation powers where we have reasonable grounds for suspecting that competition law has been breached.

³⁹ See *Transparency – A Statement on the OFT's approach* (OFT 1234) available to download at www.of.gov.uk/shared_of/consultations/668117/OFT1234.pdf

5.1 Granting Formal Complainant status

We will grant Formal Complainant status in relation to an investigation to any person who has submitted a written, reasoned complaint to us, who requests Formal Complainant status, and whose interests are, or are likely to be materially affected by the subject-matter of the complaint. Typically, we will remind complainants who have submitted a written, reasoned complaint but who have not requested formal status that they may apply to be treated as a Formal Complainant. We may grant Formal Complainant status to more than one complainant in an investigation.

The principal advantage of acquiring this status is that Formal Complainants have the opportunity to become involved at key stages of our investigation.

For example, we will consider providing Formal Complainants with access to the same information available to companies under investigation at the outset of our formal investigation. This will depend on the circumstances of the individual case. Where we do provide such information, the Formal Complainant is under a legal obligation to respect its confidentiality. Later on, we will also invite Formal Complainants to comment, usually in writing, on the provisional findings in our SO through a structured process, before our investigation is concluded. See Chapter 12 for more detail on this.

Other interested third parties who are not Formal Complainants may also have an opportunity to become involved in our investigation. For example, we may consider inviting them to comment on our SO where we consider that it would be appropriate to do so.

More information on the involvement in OFT investigations of Formal Complainants and other interested third parties is available in the OFT guideline *Involving third parties in Competition Act investigations*.⁴⁰

6. Our formal powers of investigation

Summary

- After we have opened a formal investigation, we can use our formal powers to obtain information.
- We can issue formal information requests (section 26 notices) in writing.
- We also have the power to enter, and in some instances to search, business and domestic premises.
- It can be a criminal offence not to comply with our information-gathering process.

6.1 Information gathering powers

We have a range of powers to obtain information to help us establish whether an infringement has been committed. We can require the production of specified documents or information, enter premises without a warrant, and enter and search premises with a warrant. The entering of premises can be with or without notice.

⁴⁰ OFT 451 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of451.pdf

The following paragraphs give an overview of the extent of our formal powers and how we use them. More detailed guidance is available in the OFT guideline *Powers of Investigation*.⁴¹

6.1.1 *Written information requests*

This is the power we use most often to gather information during our investigations. We send out formal information requests (also referred to as section 26 notices)⁴² in writing to obtain information from a range of sources such as the business(es) under investigation, their competitors and customers, complainants, and suppliers. It is a criminal offence punishable by a fine or imprisonment not to comply with a formal information request without a lawful excuse,⁴³ or to provide false or misleading information,⁴⁴ or to destroy, falsify or conceal documents.⁴⁵

Under this power, we can also ask for information that is not already written down, for example market share estimates based on knowledge or experience, and we can also require past or present employees of the business providing the document to explain any document that is produced. Examples of the types of information we may ask for include internal business reports, copies of e-mails and other internal data.

Our request will tell the recipient what the investigation is about, specify or describe the documents and/or information that we require, give details of where and when they must be produced, and set out the offences that may be committed if the recipient does not comply.

We may send out more than one request to the same person or company during the course of our investigation. For example, we may ask for additional information after considering material submitted to us in response to an earlier request.

We will ask for documents or information which, in our opinion, are relevant to the investigation at the time we send out the request. Any queries about the scope of an information request or the time given to respond should be raised with the Team Leader or Project Director as soon as possible.

6.1.2 *Using draft information requests*

Where it is practical and appropriate to do so, we will send the information request in draft.⁴⁶ In this way, we can take into account comments on the scope of the request, the actions that will be needed to respond, and the deadline by which we must receive the information. The timeframe for comment on the draft will depend on the nature and scope of the request.

⁴¹ OFT 404 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of404.pdf

⁴² Section 26 of the Act gives us the power to require the production of information and documents when conducting a formal investigation.

⁴³ Section 42 of the Act. For more information on potential criminal penalties for failing to co-operate with our powers of investigation go to *Powers of Investigation* OFT 404 available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of404.pdf

⁴⁴ Section 44 of the Act.

⁴⁵ Section 43 of the Act.

⁴⁶ See *Transparency – A Statement on the OFT's approach* (OFT 1234) available to download at www.of.gov.uk/shared_of/consultations/668117/OFT1234.pdf

In certain circumstances, it would not be appropriate to send information requests in draft. For example, if in our view it would prejudice our investigation or if it would be inefficient because the request is for a small amount of information. We will assess each case on its facts to determine whether it would be appropriate to use a draft information request.

6.1.3 Advance notice of the issue of written information requests

In appropriate cases, we will seek to give recipients of large information requests advance notice so they can manage their resources accordingly. This is our usual approach.

However, in other circumstances, it may be 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 our investigation. Where we do not give advance notice of large information requests, we will explain why.

6.1.4 Setting a deadline for a response to a written information request

When we send out a request, we also set a deadline by which we must receive the response. If a request has been provided in draft and the timescale for response to the final request already discussed, we will agree to an extension only in exceptional circumstances, so as to minimise any delay to our investigation.

The deadline specified in the final request will depend on the nature and the amount of information that we have requested. It is not possible for us to apply uniform, set timescales for responses to information requests.

Where a party has a complaint about the deadline set for a response to a written information request, the party should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the party may refer the matter to the Procedural Adjudicator during the trial period.⁴⁷

6.1.5 Responding to our written information requests

As stated above, we expect recipients to comply fully with our information request within the given deadline. This is especially the case where we have engaged with them on the scope and purpose of the request, to help them comply. It is a criminal offence punishable by a fine or imprisonment not to comply with a formal information request without a lawful excuse,⁴⁸ or to provide false or misleading information,⁴⁹ or to destroy or falsify documents.⁵⁰

Unless otherwise indicated, the response should be sent to the Team Leader in electronic format and in hard copy. If the response contains commercially sensitive information or details of an individual's private affairs and the sender believes that disclosure might significantly harm their interests or the interests of the individual, a separate non-confidential version along with an explanation which justifies why certain information should be treated as confidential should be submitted at the same time and in any event no later than four weeks from the date of submitting the original response. Any extensions to this

⁴⁷ See Chapter 14, details of trial available through www.ofc.gov.uk/OFTwork/consultations/closed-awaiting/ca98-guidance/

⁴⁸ See footnote 43 above.

⁴⁹ See footnote 44 above.

⁵⁰ See footnote 45 above.

deadline should be agreed with the Team Leader in advance of the deadline. In the event that we have not received a non-confidential version within this deadline, we will give one further opportunity to make confidentiality representations to us. The timeframe for responding in this case will be set by the Team Leader. If, after this second opportunity, we have received no reply, we will assume that no confidentiality is being claimed in respect of the information. See Chapter 7 on handling of confidential information.

In some cases, we may return information sent to us in response to a request where, after careful review, we consider it is duplicate information or information that is outside the nature and scope of the request.

6.2 *Power to enter premises*

In some cases, we will visit premises to obtain information. The power we use to gain entry will depend on whether we intend to inspect business premises (such as an office or a warehouse) or domestic premises (such as the home of an employee).⁵¹

Under certain circumstances we can enter business premises, but not domestic premises, without a warrant. Where we have obtained a warrant⁵² in advance of entry, we can enter and search both business and domestic premises. These two powers (to enter premises without a warrant and to enter premises with a warrant) are explained below.

The occupier of the premises does not have to be suspected of having breached competition law.⁵³

6.2.1 *Entering premises without a warrant*⁵⁴

An OFT officer who is authorised by us in writing to enter premises but does not have a warrant may enter business premises in connection with an investigation if they have given the premises' occupier at least two working days' written notice.

In certain circumstances, we do not have to give advance notice of entry.⁵⁵ For example, we do not have to give advance notice if we have reasonable suspicion that the premises are, or have been, occupied by a party to an agreement which we are investigating or a business whose conduct we are investigating, or if our authorised officer has been unable to give notice to the occupier, despite taking all reasonably practicable steps to give notice.

⁵¹ We also have powers to gather information to assist other authorities in relation to their investigations into suspected competition infringements in other parts of the EU. For example, we may assist the European Commission in obtaining information in relation to its investigations into suspected infringements of Articles 101 and 102 TFEU. More information on these powers can be found in *Powers of Investigation* (OFT 404) which is available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of404.pdf

⁵² From the High Court in England and Wales or Northern Ireland or the Court of Session in Scotland.

⁵³ For example, we could enter the premises of a supplier or a customer of the business suspected of breaching the law, so long as we have taken all reasonably practicable steps to notify them in advance of our intended entry.

⁵⁴ Section 27 of the Act.

⁵⁵ Section 27(3) of the Act.

6.2.2 *What powers do we have when entering business premises without a warrant?*

When an inspection without a warrant is taking place, our officers may require any person to:

- produce any document that may be relevant to our investigation - our officers can take copies of, or extracts from, any document produced
- provide an explanation of any document produced
- tell us where a document can be found if our officers believe it is relevant to our investigation.

Our officers may also require any relevant information electronically stored to be produced in a form that can be read and taken away, and they may also take steps necessary to preserve documents or prevent interference with them.⁵⁶

6.2.3 *Entering and searching premises with a warrant*⁵⁷

We can apply to the court⁵⁸ for a warrant to enter and search business or domestic premises.

We would usually seek a warrant to search premises where we believe that the information relevant to our investigation may be destroyed or otherwise interfered with if we requested the material via a written request. Therefore, we mostly use this power to gather information from companies or individuals suspected of participating in a cartel.

6.2.4 *What powers do we have when entering premises with a warrant?*

An inspection carried out under a warrant will authorise our officers to enter premises using reasonably necessary force but only if they are prevented from entering the premises. Our officers cannot use force against any person.

In addition to our powers described above, the warrant also authorises our officers to search the premises for documents that appear to be of the kind covered by the warrant and take copies of or extracts from them.⁵⁹

The search may cover offices, desks, filing cabinets, electronic devices, such as computers and phones, as well as any documents. We can also take away from the premises:⁶⁰

- original documents that appear to be covered by the warrant if we think it is necessary to preserve the documents or prevent interference with them or where it is not practicable to take copies of them on the premises.

⁵⁶ Section 27(5) of the Act.

⁵⁷ Section 28 of the Act in relation to business premises. Section 28A of the Act in relation to domestic premises.

⁵⁸ The High Court in England and Wales or Northern Ireland or the Court of Session in Scotland.

⁵⁹ For business premises, section 28(2)(b) of the Act. For domestic premises, section 28A(2)(b) of the Act.

⁶⁰ For business premises, section 28(2)(c) of the Act. For domestic premises, section 28A(2)(c) of the Act. We can only retain these documents for a maximum period of three months (for business premises, section 28(7) of the Act. For domestic premises, section 28(A)(8) of the Act).

- any document, or copies of it, to determine whether it is relevant to our investigation, when it is not practicable to do so at the premises. If we consider later on that the information is outside the scope of our investigation, we will return it.⁶¹
- any relevant document, or copies of it, contained in something else where it is not practicable to separate out the relevant document at the premises. As above, we will return information if we consider later on that it is outside the scope of our investigation.
- copies of computer hard drives, mobile phones, mobile email devices and other electronic devices.

6.2.5 *What will happen upon arrival?*

Our authorised officers will normally arrive at the premises during office hours. On entry, they will provide evidence of their identity, written authorisation by the OFT, and a document setting out what the investigation is about and describing what criminal offences may be committed if a person fails to co-operate. A separate document will also be provided that sets out the powers of the authorised officers and the right of the occupier to request that a legal adviser is present.

Where we have obtained a warrant, we will produce it on entry. The warrant will list the names of the OFT officers authorised to exercise the powers under the warrant and will state what the investigation is about and describe the criminal offences that may be committed if a person fails to co-operate.

Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for our authorised officers during the inspection.

6.2.6 *Can a legal adviser be present?*

The occupier may ask legal advisers to be present during an inspection, whether conducted with or without a warrant. If the occupier has not been given notice of the visit, and there is no in-house lawyer on the premises, our officers may wait a short time for legal advisers to arrive.⁶²

During this time, we may take necessary measures to prevent tampering with evidence or warning other companies about our investigation.⁶³

6.2.7 *What if there is nobody at the premises?*

If there is no one at the premises when our officers arrive, our officers must take reasonable steps to inform the occupier that we intend to enter the premises. Once we have informed them, or taken such steps

⁶¹ However, the OFT may retain all of the material if it is not reasonably practicable to separate the relevant information from the irrelevant information without prejudicing its lawful use, for example as evidence.

⁶² Rule 3(1) of the OFT Rules.

⁶³ This could include sealing filing cabinets, keeping business records in the same state and place as when OFT officers arrived, suspending external e-mail or making and receiving calls, and/or allowing our officers to enter and remain in offices of their choosing. It may be a criminal offence to tamper with evidence protected in this way.

as we are able to inform them, we must allow the occupier or their legal or other representative a reasonable opportunity to be present when we carry out our search under the warrant.⁶⁴

If our officers have not been able to give prior notice, we must leave a copy of the warrant in a prominent place on the premises. If, having taken the necessary steps, we have entered premises that are unoccupied, on leaving we must leave them secured as effectively as we found them.⁶⁵

7. Limits on our powers of investigation

Summary

- We cannot require the production of privileged communications.
- We cannot force a business to provide answers that would require an admission that they have infringed the law.
- We are subject to strict rules governing the extent to which we are permitted to disclose confidential and sensitive information.
- We expect to receive a separate non-confidential version of any documents or materials containing sensitive or confidential information, along with a clear explanation as to why the information should be considered confidential.

7.1 Privileged communications

Under the Act, we are not allowed to use our powers of investigation to require anyone to produce privileged communications.⁶⁶

Privileged communications are communications, or parts of such communications, between a professional legal adviser and their client for the purposes of giving or receiving legal advice, or those which are made in connection with, or in contemplation of, legal proceedings, and for the purposes of those proceedings. For example, this would cover a letter from a company's lawyer to the company advising on whether a particular agreement infringed the law.

If there is a dispute during an inspection as to whether communications, or parts of communications, are privileged, our officer may request that the communications are placed in a sealed envelope or package. The officer will then discuss the arrangements for safe-keeping of these items by the OFT pending resolution of the dispute.

7.2 Privilege against self-incrimination

When we request information or explanations we cannot force a business to provide answers that would require an admission that they have infringed the law.⁶⁷ We can, however, ask for any documents

⁶⁴ Rule 3(1) of the OFT Rules.

⁶⁵ For business premises, section 28(5). For domestic premises, section 28A(6) of the Act.

⁶⁶ Section 30 of the Act.

⁶⁷ Privilege against self-incrimination is an aspect of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. This is given effect in the United Kingdom by the Human Rights Act 1998.

already in existence, or information relating to facts, such as whether a given employee attended a particular meeting.

The law on privilege is complicated. As investigators of a possible infringement, we are not able to advise on the circumstances in which a person can claim privilege. Anyone in any doubt about how it applies in practice should seek independent legal advice.

7.3 *Handling confidential information*

During the course of our investigations we acquire a large volume of confidential information relating to both businesses and individuals.

There are strict rules governing the extent to which we are permitted to disclose such information.⁶⁸ In many instances we may have to redact documents we propose to disclose to remove any confidential information, for example, by blanking out parts of documents or by aggregating figures.

If a person or company thinks that any information they are giving us or we have acquired is commercially sensitive or contains details of an individual's private affairs and that disclosing it might significantly harm the interests of the business or person, they should submit a separate non-confidential version of the information in an annexe clearly marked as confidential and set out clearly why the information should be considered confidential. We will not accept blanket or unsubstantiated confidentiality claims. The non-confidential version should be provided at the same time as the original response and in any event no later than four weeks from the date of submitting the original response. Any extension to this deadline should be agreed in advance of the deadline with the Team Leader.

In the event that we have not received a non-confidential version within this deadline, we will give one further opportunity to make confidentiality representations to us. The timeframe for responding in this case will be set by the Team Leader. If, after this second opportunity, we have received no reply, we will assume that no confidentiality is being claimed in respect of the information.

Where we propose to disclose information identified by the person or business providing it as being confidential, for example where we do not agree that the information in question is confidential and/or where we consider that disclosure of the information is nevertheless necessary, we will give them prior notice of our proposed action, and will give them a reasonable opportunity to make representations to us. We will then inform the party whether or not we still intend to disclose information, after considering all the relevant facts.

Where a party is informed that we do still intend to disclose information and the party is unhappy about this, the party should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the party may refer the matter to the Procedural Adjudicator during the trial period.⁶⁹

⁶⁸ Rule 6 of the OFT Rules and Part 9 of the Enterprise Act 2002.

⁶⁹ See Chapter 14, details of trial available through www.of.gov.uk/OFTwork/consultations/closed-awaiting/ca98-guidance/

8. Taking urgent action to prevent serious damage or to protect the public interest

Summary

- We can require a business to comply with temporary directions (interim measures) where
 - we have started but not yet concluded an investigation, and
 - we consider it necessary to act urgently either to prevent serious irreparable damage to a person or category of persons, or to protect the public interest.
- In these circumstances, we can act on our own initiative or in response to a request to do so.
- Any person who considers that the alleged anti-competitive behaviour of another business is causing them serious, irreparable damage may apply to us to take interim measures.
- If a person fails to comply with the interim measures without reasonable excuse, we would apply to court for an order to require compliance within a specified time limit.

We have the power⁷⁰ to require a business to comply with temporary directions (referred to as 'interim measures') while we complete our investigation.

We may do this where we have started but not yet concluded our investigation and we consider it necessary to act urgently either to prevent serious, irreparable damage to a person or category of persons, or to protect the public interest. We can act on our own initiative or in response to a request to do so.

In most cases, interim measures will have immediate effect. However, if a person fails to comply with them without reasonable excuse, it is our practice to apply to court for an order to require compliance within a specified time limit.

The court can require the person in default or any officer of a company responsible for the default, to pay the costs of obtaining the order.

If the measures relate to the management or administration of a business, the court order can compel the business or any of its officers to comply with them. Failure to comply with a court order will be in contempt of court.

8.1 Application for interim measures

Any person who considers that the alleged anti-competitive behaviour of another business is causing them serious, irreparable damage may apply to us to take interim measures.

They should contact the designated Team Leader who is responsible for the case in the first instance. The Team Leader will be able to discuss the information requirements and explain the procedure for dealing with such requests.

Applicants should provide as much information and evidence as possible to demonstrate their case for interim measures and they should also indicate as precisely as possible the nature of the interim measure being sought.

⁷⁰ Section 35 of the Act.

8.2 *Decision to impose interim measures*

We may provisionally decide to give an interim measures direction. In this case we will write to the business to which the directions are addressed setting out the terms of the proposed directions and our reasons for giving them. We will also allow them a reasonable opportunity to make representations to us. Given the time critical nature of the interim measures process, the time allowed may be short.

The business to which the directions are addressed will also be allowed to inspect documents on our file that relate to the proposed directions. We may withhold any documents to the extent to which they contain any confidential information.

After taking into account any representations, we will make our final decision and inform the applicant and any Formal Complainants and the business against which the order is being sought.

8.3 *Rejecting an application for interim measures*

If we provisionally decide to reject an application for interim measures, we will consult with the applicant and any other Formal Complainants before doing so by sending a provisional dismissal letter setting out our principal reasons for rejecting the application. We will give them an opportunity to submit comments and/or additional information within a certain time, the length of which will depend on the case.

If the comments from the applicant or Formal Complainant contain confidential information, a separate non-confidential version must be submitted at the same time (see Chapter 7 on handling confidential information). We may provide this to the business under investigation if we think it appropriate, such as where it may be relevant for the rights of defence.

We will consider any comments and further evidence submitted within the specified time limit. After considering the additional information provided to us, if we still decide to reject the application, we will send a letter to the applicant and any other Formal Complainants and normally the business against which the directions are sought to inform them and give our reasons.

If the additional information from any of these parties does lead us to change our provisional view and decide that we should make an interim measures direction, we will inform the applicant, any other Formal Complainants, and the business against which the directions are sought, and our investigation will continue in the normal way.

8.4 *Publication*

We maintain a register on our website of all interim measures directions.⁷¹ We may also publish them in an appropriate trade journal.

More information on interim measures directions is available in *Enforcement*⁷² and *Involving third parties in Competition Act investigations*.⁷³

⁷¹ The register can be viewed at www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/

⁷² OFT 407 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft407.pdf

⁷³ OFT 451 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft451.pdf

9. The analysis and review stage

Summary

- Regular review and scrutiny are a key part of our investigation process. Senior officials and advisors, both internal and external, can perform this function.
- We provide case updates to keep parties informed.

The evidence that we gather using our powers described above is fundamental to the outcome of our investigation. In all cases, we routinely review and analyse the information in our possession to test the factual, legal and economic arguments and to establish whether it supports or contradicts the theory/ies of competition harm.

In some cases, an investigation may start out by probing a particular set of circumstances that point to conduct of one type but information may later surface which indicates the existence of another type of potentially anti-competitive behaviour or a different theory of competition harm from that advanced earlier in the investigation. Alternatively, our early analysis may suggest that a large number of businesses have been acting unlawfully but later on it emerges that we only have enough evidence to warrant further investigation of some of them. We may also exercise our administrative discretion to focus our resources on investigating a limited set of activities or businesses.

The analysis and review stage therefore forms an essential part of our investigation process. In addition to carrying out their own analysis, our case teams seek input from other areas of the OFT to assist them.

9.1 *Internal scrutiny*

The SRO⁷⁴ decides whether there is sufficient evidence to prove an infringement. The SRO is also responsible and accountable for the consistency of OFT's decisions with the law and OFT policy. In exercising these functions the SRO consults with other senior officials as appropriate.

Throughout our competition investigations, as part of the quality assurance that we adopt in every case, we regularly scrutinise the way in which we handle our investigation and routinely assess the evidence before us to ensure that our actions and decisions are well-founded, fair and robust. This involves seeking internal advice as appropriate from specialist advisors on the legal, policy and economic issues that arise. In some instances, we may also seek advice from external sources, such as external counsel.

Our specialist advisers in the Chief Economist's Office (OCE), General Counsel's Office (GCO) and Policy analyse and review the relevant facts and highlight the risks associated with each possible course of action. They will give their recommendation on how to proceed, which may agree or disagree with the proposed approach advocated by the case team. Ultimately, the decision maker will decide which course of action to adopt after considering all the relevant facts and the full range of views articulated, including consulting other senior OFT officials as appropriate.

9.2 *Case steering committee*

Before we issue an SO or a final decision the decision maker will consult with a steering committee. The SRO or case team may also consult with a steering committee at other stages of an investigation, for

⁷⁴ See paragraph 5.2.

example where they feel a complex issue may benefit from a wider discussion. A steering committee is made up of a range of senior officials and other staff from across the OFT who have relevant experience which can be of value to that particular case.

Steering committees do not take decisions on how to run cases. Rather, their role is to provide the case team and decision maker with strategic advice and guidance. As steering committees are made up of staff from across the OFT, they also help consistency across our portfolio of competition cases. The nature of the competition concerns and the type of issues to be addressed will influence the membership of a steering committee. Steering committee meetings are chaired by the SRO.

The case team will present their analysis of the issue under consideration to the steering committee and propose their preferred option on how to proceed. The committee may carry out a number of functions, for example:

- debate the case team's proposals and give feedback
- review the substance of the issues raised by the case team and highlight strengths and weaknesses
- provide quality assurance to the analysis undertaken and the options considered by the case team
- make suggestions relating to other activities that may be carried out and strategy.

After hearing the committee's advice, the decision maker in consultation with the case team will decide how best to proceed with the investigation.

9.3 *Sharing our early thinking and giving regular updates*

The time taken to establish the facts and whether they point to an infringement of competition law will vary from case to case depending on a range of factors such as, for example, the number of parties under investigation, the extent to which they co-operate with us, and the complexity of the conduct under consideration. In many cases, the facts advanced by one party will directly contradict those put forward by another party. The purpose of our investigation is to establish which set of circumstances is more credible based on verifiable facts.

We generally provide case updates to companies under investigation and Formal Complainants either by telephone or in writing. These are often the most efficient and effective ways of sharing information on case progress for us and the parties alike.

At least once during the period before an SO is issued, we will offer all parties under investigation an opportunity to meet with representatives of the case team (including the SRO or Project Director) to ensure they are aware of the stage the investigation has reached. This meeting is generally limited to procedural matters and is not an opportunity to make representations on the substance of the case. We will inform the parties of the next stages of the investigation and the likely timing of these, subject to any restrictions we may have if the timing is market sensitive.⁷⁵ In some cases, we may decide it is appropriate to share our provisional thinking on a case.⁷⁶

⁷⁵ As to market sensitivity considerations, see para. 3.27-3.42 (and particularly para. 3.28) of *Transparency – A Statement on the OFT's approach* (OFT 1234), available to download at www.of.gov.uk/shared_of/consultations/668117/OFT1234.pdf

⁷⁶ See *Transparency – A Statement on the OFT's approach* (OFT 1234), *ibid.*

In appropriate circumstances, we may also meet with parties on other occasions. This may be where they have new information that can materially assist us in taking forward our case. Parties who believe that a meeting of this kind would be useful should contact the Team Leader in the first instance to discuss the matter.

As a matter of routine, we inform all businesses under investigation and Formal Complainants of the expected date of issue of our SO, in cases where we propose to decide that an infringement has occurred, and of our final decision. Where we are subsequently unable to meet the expected date, we will give our reasons for this.

We also publish regular updates on our website so that other interested parties are aware of case progress.

We have published a Transparency Statement on our website, setting out the steps we take to ensure our work is open and accessible.⁷⁷ If you have a concern or complaint about our procedures or the handling of a case, you should contact the SRO in the first instance. If you are unable to resolve the dispute with the SRO, certain procedural complaints may be referred to the Procedural Adjudicator during the trial period.⁷⁸ If your dispute falls outside the scope of the Procedural Adjudicator trial, the Transparency Statement sets out the options available to you to pursue the complaint.

10. Investigation outcomes

Summary

- There are a number of ways in which our investigation can be resolved.
 - We can close our investigations on the grounds of administrative priorities.
 - In these circumstances, we may also write to businesses explaining that, although we are not currently pursuing a formal investigation, we have concerns about their conduct.
 - We can issue a decision that there are no grounds for action if we have not found evidence of an infringement.
 - We can accept commitments from a business about their future conduct.
 - We will issue a Statement of Objections where our provisional view is that the conduct under investigation amounts to an infringement.
 - After issuing a Statement of Objections and receiving the parties' representations, we can issue a final decision that the conduct amounts to an infringement.

Our investigations can be resolved in a number of ways.

- We can decide to close our investigation on grounds of administrative priorities.

⁷⁷ Available at www.ofc.gov.uk/shared_ofc/consultations/668117/OFT1234.pdf

⁷⁸ See Chapter 14, details of trial available through www.ofc.gov.uk/OFTwork/consultations/closed-awaiting/ca98-guidance/

- We can issue a decision that there are no grounds for action if we have not found evidence of an infringement.
- We may accept commitments from a business relating to their future conduct where we are satisfied that these commitments fully address our competition concerns.
- We will issue an SO where our provisional view is that the conduct under investigation amounts to an infringement (see Chapter 11 below). After allowing the business(es) under investigation an opportunity to make representations on our SO (see Chapter 12 below), if we still consider that they have committed an infringement, we can issue an infringement decision against them and impose fines and/or directions to bring to an end any on-going anti-competitive conduct.

10.1 Closing our investigations on the grounds of administrative priorities

Not all of our investigations result in a finding that there has been a breach of competition law. We may decide that a formal investigation no longer merits the continued allocation of our resources because it no longer fits within our casework priorities and/or because we do not have sufficient evidence in our possession to determine whether a breach has been committed and we consider that further investigation is not warranted. We may take this decision at any stage of our investigation.

If we decide to close an investigation on the grounds of administrative priorities, we will inform any Formal Complainants in writing, setting out our principal reasons for not taking forward the investigation. The amount of detail given will vary according to the circumstances of each case. In more advanced investigations we are likely to give more details than in the case of complaints which have not been the subject of extensive investigation.

We will give Formal Complainants an opportunity to submit their comments or any additional information within a specified time frame. Generally, we will give two to four weeks to respond. In complex cases which have been extensively investigated, we may give longer.

If a Formal Complainant's response contains confidential information, they will be asked to submit a separate non-confidential version at the same time (see Chapter 7 on handling confidential information). We may provide this to the company we are investigating if we think it appropriate, such as if it is likely to change our preliminary view.

We will also give a copy of the provisional closure letter to the business under investigation giving them an opportunity to comment within the same time frame.

We will consider any comments and further evidence submitted within the specified time limit before reaching a final view on whether to close our investigation.

If we decide to close the case, we will write to the Formal Complainant and the business under investigation, explaining why any additional information sent to us has not led us to change our view. The level of detail given will depend on the case and the nature of the additional information provided.

In these circumstances, we may also write to the business under investigation to inform them that we have been made aware of a possible breach of competition law by them and that although we are currently not minded to pursue an investigation, we may do so in future if our priorities change, for example in response to further evidence we receive.

We will also issue a public statement linking to the relevant page on our website and explain why we have closed the case on administrative priority grounds.

If the response to our provisional closure letter leads us to change our preliminary view and decide that an investigation should be continued, we will inform the company under investigation and the Formal Complainant and continue our investigation in the normal way.

10.2 Issuing a no grounds for action decision

If we do not find evidence of a competition law infringement, we may publish a reasoned no grounds for action decision.⁷⁹

In such cases, we will provide a non-confidential version of our proposed decision to the Formal Complainant. The consultation process on the proposed decision will be the same as for provisional case closure letters.

Further information is available in *Involving third parties in Competition Act investigations*.⁸⁰

10.3 Accepting commitments on future conduct

If we consider that the case gives rise to competition concerns, instead of making a provisional infringement decision (see Chapter 11 below), we may be prepared to accept binding promises, called 'commitments', from a business relating to their future conduct.⁸¹ We must be satisfied that the commitments offered fully address our competition concerns. The decision to accept commitments is at our discretion.

We are likely to consider it appropriate to accept commitments only in cases where the competition concerns are readily identifiable, will be fully addressed by the commitments offered, and the proposed commitments can be implemented effectively and, if necessary, within a short period of time.

We are very unlikely to accept commitments in cases involving secret cartels between competitors or a serious abuse of a dominant position.

A business under investigation can offer commitments at any time during the course of that investigation, until a decision is made. However, we are unlikely to consider it appropriate to accept commitments at a very late stage in our investigation, such as after we have considered representations on our SO.

If a business would like to discuss offering commitments, they should contact the Team Leader in the first instance. If we think that commitments may be appropriate, we will send a summary of our competition concerns to the business. Once commitments have been offered, we may discuss them with the business to see if they would be acceptable to us.

If we propose to accept the commitments offered, we will consult those who are likely to be affected by them and give them an opportunity to give us their views within a time limit of at least 11 working days.

⁷⁹ Rule 7(3) of the OFT Rules.

⁸⁰ OFT 451 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft451.pdf

⁸¹ Section 31A of the Act.

Following this, if we intend to make significant changes to the commitments before accepting them, we will allow another opportunity for Formal Complainants and any other interested third parties to express their views within at least six working days.

Once accepted, we will publish the commitments on our website.

Further information on our approach to commitments is contained in the OFT guideline *Enforcement*.⁸²

10.4 Issuing a statement of objections

We will issue an SO where our provisional view is that the conduct under investigation amounts to an infringement. See chapter 11 for more detail on this.

11. Issuing our provisional findings – The statement of objections

Summary

- Where our provisional view is that the conduct under investigation amounts to an infringement, we will issue our Statement of Objections to each business we consider to be responsible for the infringement.
- The decision maker is responsible for the decision to issue a Statement of Objections.
- The Statement of Objections represents our provisional view and proposed next steps. It allows the business being accused of breaching competition law an opportunity to know the full case against them.
- We give each recipient of our Statement of Objections an opportunity to inspect our investigation file.
- At this stage, we may also invite the Statement of Objections recipient to contact us if they would like to enter into discussions on an early resolution to the case.

Following the analysis of the evidence on our files, if our provisional view is that the conduct under investigation amounts to an infringement, we will issue our SO to each business we consider to be responsible for the infringement and give them an opportunity to inspect our file.⁸³

At this stage, we may also invite SO recipients to contact us if they would like to enter into discussions on an early resolution to the case. The early resolution process, also known as the settlement process, applies where a business under investigation admits that it has breached competition law and co-operates with our investigation. In return for an admission and co-operation we will impose a reduced penalty on the business. Businesses may wish to approach us earlier on in our investigation to discuss the possibility of exploring early resolution. If so, they should contact the Team Leader in the first instance. Typically, however, consideration of early resolution will be appropriate when we consider that the evidential standard for an infringement is met. Early resolution will not be appropriate in every case and

⁸² OFT 407 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft407.pdf

⁸³ Rule 4 of the OFT Rules.

we will exercise our discretion on a case by case basis to decide whether or not it would be appropriate to offer to enter into early resolution discussions.

The SO represents our provisional view and proposed next steps. It allows the businesses being accused of breaching competition law an opportunity to know the full case against them and, if they choose to do so, to formally respond in writing and orally.

The SO will set out the facts and our legal and economic assessment of them which led to our provisional view that an infringement has occurred. We will also set out any action we propose to take, such as imposing financial penalties⁸⁴ and/or issuing directions⁸⁵ to stop the infringement if we believe it is on-going and our reasons for taking the action.

It is our current practice to send a hard copy of the SO and covering letter to recipients by courier or recorded delivery. Typically, we also provide an electronic copy in pdf format.

It is our normal practice publicly to announce the issue of the SO on our website and to make an announcement on the Regulatory News Service.⁸⁶

As far as possible, we aim to give the directly affected parties fair and sufficient notice, as well as advance sight of announcement documents, to enable them to prepare their response.

The timing of the announcement and any advance notice will depend on whether there is any market sensitivity about the announcement. We have to balance our responsibilities concerning the control and release of market sensitive information against our objective of, as far as possible, giving directly affected parties fair and sufficient notice.

As a general rule, if there is no market or other sensitivity about the fact or date of the announcement, we will be open about the date and publish the date on our website, up to several days before the full announcement. We will tell affected parties in advance of placing any statement on the substance of the matter on our website. The exact notice given will depend on the circumstances of the particular case in point.

Generally, in non-market sensitive announcements, we aim to give parties advance sight of the content of our announcement, in confidence, unless there is a compelling reason not to do so.

In the case of market sensitive announcements, where appropriate, we will apply the FSA's Guideline for the control and release of price sensitive information by Industry Regulators.⁸⁷

If there is no market or other sensitivity about the date of the announcement as opposed to the content of the announcement, we will be open about the date and publish that date on our website up to several

⁸⁴ More information on how we set penalties is available in Part 5 of OFT guideline *Enforcement* (OFT 407) available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft407.pdf and *Guidance as to the appropriate amount of a penalty* (OFT423) available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf

⁸⁵ More information on directions can be found in *Enforcement* (OFT407) available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft407.pdf

⁸⁶ www.investegate.co.uk

⁸⁷ www.fsa.gov.uk/pubs/ukla/ir_guidelines.pdf

days in advance of the full announcement. We will also inform media organisations. We will tell parties in advance of informing the media or placing any statement about the substance of the matter on our website.

If the date and content of the announcement may be market-sensitive, for example, where nothing about the investigation has previously been announced, we will notify affected parties after financial markets have closed including, where appropriate, financial markets in other countries.

In particular, if the date of the announcement is not in the public domain, we will inform those directly affected in strict confidence the evening before issue once relevant financial markets have closed.

More details about the way in which we publicly announce the issue of an SO is available in our *Transparency Statement*.⁸⁸

11.1 Who decides whether to issue a statement of objections?

The decision maker decides whether to issue an SO. The decision maker may consult other senior OFT officials, such as the Chief Executive, Executive Directors and/or other Senior Directors when carrying out this assessment, in addition to members of the case team.

The decision maker will be chosen at the outset of the formal investigation and companies under investigation will be informed of who the decision maker is (along with details of the other key members of the case team). The decision maker is generally, but need not be, the SRO. If, later on, it is necessary to allocate a new decision maker to the case, we will inform the companies under investigation.

The decision maker is not involved in day-to-day matters during an investigation. However, they are kept informed of case progress. They have access to all of the evidence and analysis upon which to base their decisions.

11.2 Inspection of our file

At the same time as issuing the SO, we will also give the recipients of the SO the opportunity to inspect our file. This is to ensure that they can properly defend themselves against the allegation of having breached competition law.

We allow recipients of the SO a reasonable opportunity, typically six to eight weeks, to inspect copies of disclosable documents on our file. These are documents that relate to matters contained in the SO, but excluding certain confidential information⁸⁹ and OFT internal documents.⁹⁰

Access to file is usually given by supplying the file in electronic form on a DVD. Where a business does not have the relevant electronic means to view the documents in this way or if there are only a very

⁸⁸ For a general guide to our approach when we make a public announcement, see *Transparency – A Statement on the OFT's approach* (OFT 1234) available to download at www.of.gov.uk/shared_of/consultations/668117/OFT1234.pdf

⁸⁹ Under Rule 1(1) of the OFT Rules confidential information means commercial information whose disclosure the OFT thinks might significantly harm the legitimate business interests of the company to which it relates, or information relating to the private affairs of an individual whose disclosure the OFT thinks might significantly harm the individual's interests, or information whose disclosure the OFT thinks is contrary to the public interest.

⁹⁰ Rule 5(3) of the OFT Rules.

small number of documents, we will send hard copies. In rare circumstances, businesses can inspect the file on our premises.

In addition to sending copies of disclosable documents, we will also send a separate schedule of external documents, which lists all documents held in our file other than internal documents. In some cases, we may send electronic copies of documents as well as the schedule.

We will also consider requests for access to our file by other methods, for example, by using 'confidentiality rings' or 'data rooms'. Such requests will be considered on a case by case basis. We have discretion as to whether or not to agree to such requests and are likely to do so only where there are clearly identifiable benefits in doing so and where any potential legal and practical difficulties can be resolved swiftly in agreement with the parties concerned.

12. Right to Reply

Summary

- Recipients of the Statement of Objections have an opportunity to respond to it.
- Formal Complainants and third parties who may be able materially to assist our assessment of a case will generally also be provided with an opportunity to comment.
- The decision maker will attend all oral representations meetings unless it is impractical to do so.
- We will carefully and objectively consider all written and oral representations to appraise the case as set out in the Statement of Objections and to assess whether the conclusions reached in the Statement of Objections continue to be supported by the evidence and the facts.
- If we receive new information in response to the Statement of Objections which indicates evidence of a different alleged infringement or a material change in the nature of the infringement, and we propose to rely on this information to establish an infringement, we will issue a supplementary Statement of Objections.

12.1 Written representations

When we issue an SO, we will invite each SO recipient to respond in writing. However, there is no obligation to submit a response.

Written representations provide an opportunity to comment on the matters referred to in the SO. This may involve comments regarding the facts relied on by the OFT and the legal and economic assessment set out in the SO.

The deadline for submitting written representations will be specified in the SO and will be set having regard to the circumstances of the case. Usually the deadline for an SO recipient to submit written representations will be at least 40 working days and no more than 12 weeks from the issue of the SO.

Where a party has a complaint about the deadline set for submitting written representations, the party should raise this as soon as possible with the SRO. If it is not possible to resolve the dispute with the SRO, the party may refer the matter to the Procedural Adjudicator during the trial period.⁹¹

When an SO recipient submits written representations they should also provide a non-confidential version of their representations, along with an explanation which justifies why information should be treated as confidential. We will not accept blanket or unsubstantiated confidentiality claims. The non-confidential version should be provided at the same time as the original response and in any event no later than four weeks from the date of submitting the original response. Any extension to this deadline should be agreed in advance of the deadline with the Team Leader.

In the event that we have not received a non-confidential version within this deadline, we will give one further opportunity to make confidentiality representations to us. The timeframe for responding in this case will be set by the Team Leader. If, after this second opportunity, we have received no reply, we will assume that no confidentiality is being claimed in respect of the information.

Formal Complainants and third parties who may be able materially to assist our assessment of a case will generally also be provided with an opportunity to submit written representations. In most cases, disclosure of a non-confidential version of the SO will be sufficient to enable third parties to provide the OFT with informed comments and this will not generally include any annexed documents. The document is for the Formal Complainant's benefit only and should not be disclosed to others. The deadline for a Formal Complainant or third party to submit written representations (along with a non-confidential version) will be between 20 to 30 days from the date on which we send the SO to them.

The non-confidential version of the written representations that have been submitted by a Formal Complainant or third party will be disclosed to the SO recipient to allow them an opportunity to comment. We will not generally allow Formal Complainants and other third parties an opportunity to comment on the SO recipient's written representations, although this may be appropriate in certain circumstances.⁹²

In some cases, we may decide to consult Formal Complainants and third parties to a more limited extent, or not at all, for instance in cartel cases where there is a risk of prejudice to a related criminal investigation.

Further information on the involvement of Formal Complainants and interested third parties at SO stage is available in *Involving third parties in Competition Act investigations*.⁹³

12.2 Oral representations

The SO recipient may also request a meeting to make oral representations to us on the matters referred to in the SO.⁹⁴ In this case, they should make it clear in their written representations that they would like to do so. The SO recipient can bring legal or other advisers to the meeting to assist in presenting the oral representations, subject to any reasonable limits that the OFT may set in terms of the number of persons

⁹¹ See Chapter 14, details of trial available through www.offt.gov.uk/OFTwork/consultations/closed-awaiting/ca98-guidance/

⁹² For example, when the recipient and a third party put forward different versions of the same facts and it is necessary to decide which version is more credible.

⁹³ OFT 451 available to download at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/offt451.pdf

⁹⁴ Rule 5(4) of the OFT Rules.

that may attend the meeting on behalf of the SO recipient. Formal Complainants and other interested third parties will generally not be permitted to attend the SO recipient's oral representations meeting.⁹⁵

The meeting at which oral representations are presented will be held around 10 to 20 working days after the deadline for the submission of the written representations.

The decision maker will attend all oral representations meetings unless it is impractical to do so and, where it is, the case team will notify the party in advance of who will attend the meeting on behalf of the decision maker. The meeting will also be attended by members of the case team. The meeting will be chaired by a senior OFT official who is independent of the case team.

To promote a focused and productive meeting, we will ask the SO recipient to give an indication, in advance, of the matters they propose to focus on in their oral representations.

Oral representations should be used by the SO recipient as an opportunity to highlight issues of particular importance to their case, which have been set out in the written representations. The oral representations may also provide a useful opportunity for parties to clarify the detail set out in their written representations.

As a general rule, any points raised at this stage should be limited to those already submitted to us in writing.

At the end of the presentation of the oral representations, the case team may have general questions or questions of clarification. It will be helpful for the case team, and is likely to assist the progress of the investigation, if full responses are provided to these questions but there is no obligation to answer. It is possible to respond to questions in writing after the meeting.

A transcript of the oral representations meeting will be taken and the SO recipient will be asked to confirm the accuracy of the transcript and to identify any confidential information. We will not accept blanket or unsubstantiated confidentiality claims.

If the decision maker changes after the oral representations meeting(s) but before we issue a final decision, the new decision maker will review the transcript of the oral representations meeting(s).

12.3 *Considering representations*

In some cases, the volume of information submitted as part of the representations process can be extensive. We will carefully and objectively consider all written and oral representations to appraise the case as set out in the SO and to assess whether the conclusions reached in the SO continue to be supported by the evidence and the facts.

This will primarily involve assessment of the representations by the case team. In addition, other areas of the OFT may be consulted and be involved with the assessment of the representations (see Chapter 9). An original set of all written representations and the transcript from the oral representations meeting will be placed on the case file.

⁹⁵ In some cases, we may decide that it is appropriate to hold a multi-party meeting, including Formal Complainants and/or other interested third parties.

12.4 Letter of facts

Where we acquire new evidence at this stage which supports the objection(s) contained in the SO and we propose to rely on it to establish that an infringement has been committed, we will put that evidence to the SO recipient in a letter and will give them an opportunity to respond to the new evidence. The timeframe for responding will depend on the volume and complexity of the new evidence. However, it will not be as long as the time to respond to the SO.

12.5 Supplementary statement of objections

If new information received by us in response to the SO indicates that there is evidence of a different suspected infringement or there is a material change in the nature of the infringement of which the SO recipients have already been accused, we will issue a supplementary SO setting out the new set of facts on which we propose to rely to establish an infringement.

We will give the SO recipient a further opportunity to respond in the same way as before. We will set the time frame for responding after taking into account the extent of the difference in the objections raised in the first SO compared with the supplementary SO and allow them an opportunity to inspect new documents on the file. The process will be the same as that set out in Chapter 11. The time frame for responding to a supplementary SO will almost always be shorter than the time given to respond to the original SO.

If it appears to us unlikely that engaging with Formal Complainants or other interested third parties at this stage will materially assist our investigation, we may decide to consult them on a more limited basis, or not at all. This may be the case, for example, where the supplementary SO is very narrow in scope.

13. The final decision

Summary

- If we decide that the legal test for establishing an infringement is met, we will issue an infringement decision to each business found to have infringed the law.
- The decision maker is responsible for the decision to issue an infringement decision.
- If we do not find evidence of a competition law infringement, we may publish a reasoned decision explaining why.
- A final opportunity will be given to the addressee of the decision to make confidentiality representations.
- The non-confidential version of the decision and the summary will be published on our website.

The issue of a decision represents the culmination of our investigation. If the decision maker decides that the legal test for establishing an infringement is met, we will issue an infringement decision to each company found to have infringed the law.⁹⁶

As noted in Chapter 10, if we do not find evidence of a competition law infringement, we may publish a reasoned no grounds for action decision.

⁹⁶ Section 31 of the Act and Rule 7 of the OFT Rules.

13.1 Issue of an infringement decision

In addition to an infringement decision, we will issue a press announcement, make an announcement on the Regulatory News Service and publish a page on our website which describes the case.

We will inform the addressee(s) before the issue of the infringement decision, and the announcement of the decision. As a general rule, as described in Chapter 11, in non-market-sensitive announcements, we aim to give parties advance sight of the content of the OFT's announcement, in confidence, unless there is a compelling reason not to do so. In both market-sensitive and non-market sensitive situations, we will aim to balance an open approach with the need to ensure the orderly announcement of full information.⁹⁷

The infringement decision will set out in full the facts on which we rely to prove the infringement, the action that we are taking and address any material representations that have been made during the course of our investigation. If a financial penalty is being imposed, the infringement decision will explain how the level of penalty has been calculated.⁹⁸ The infringement decision may also give directions to bring the infringement to an end.⁹⁹

If the case involves more than one party, each party will receive a copy of the decision. Information that is confidential will be disclosed through the infringement decision to other parties only if disclosure is strictly necessary. Before disclosing any confidential information, we will consider whether there is a need to exclude any information whose disclosure would be contrary to the public interest or whose disclosure might significantly harm the interests of the company or individual it relates to. If we consider that disclosure might significantly harm legitimate business interests or the interests of an individual, we will consider the extent to which disclosure of that information is nevertheless necessary for the purpose for which we are allowed to make the disclosure.¹⁰⁰

After the infringement decision and press announcement have been issued, we will generally notify Formal Complainants and other interested third parties (for example, third parties who have submitted written representations during the investigation) of our decision.

13.2 Publication

13.2.1 Confidentiality

The decision addressee will already have had the opportunity to make confidentiality representations. After the infringement decision has been issued we will allow them one final opportunity to make representations on information which they deem to be confidential and is contained in the decision. The deadline for this final set of representations will be much shorter than the deadline for representations on the SO and will normally be four weeks from the date of the issue of the decision. Any representations

⁹⁷ For a general guide to our approach when we make a public announcement, see *Transparency – A Statement on the OFT's approach* (OFT 1234) available to download at www.of.gov.uk/shared_of/consultations/668117/OFT1234.pdf

⁹⁸ More information on how we set penalties is available in Part 5 of OFT guideline *Enforcement* (OFT 407) available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of407.pdf and *Guidance as to the appropriate amount of a penalty* (OFT423) available to download at www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of423.pdf

⁹⁹ Section 32 and 33 of the Act. If a business fails to comply with our directions, we may seek a court order to enforce them under section 34 of the Act.

¹⁰⁰ Section 244 of the Enterprise Act 2002.

must be limited to confidentiality issues only and, as at the other stages in our process, we will not accept blanket or unsubstantiated confidentiality claims.

13.2.2 Summary

A summary of the infringement decision will also be prepared. This will provide a brief overview of our investigation (for example, the date the SO was issued and other key milestones in the investigation) and the infringement decision (for example, the nature of the infringement, the parties involved and the overall financial penalty).

13.2.3 Final publication

The non-confidential version of the infringement decision and the summary will be published on the page on our website which describes the case. We also maintain a register¹⁰¹ of decisions in investigations under the Act and the details of the case will be placed on the register.

14. Complaints about our investigation handling, right of appeal and reviewing our processes

We have published a Transparency Statement¹⁰² on our website setting out the steps we take to ensure our work is open and accessible. Individuals, businesses and their advisers are entitled to be treated with courtesy, respect and in a non-discriminatory manner when dealing with us. Complaints about responses from ERC should be made to the Head of ERC in the first instance.¹⁰³

Once a formal investigation has been opened, any concerns or complaints about our procedures or how we handle our investigation should be made in writing to the SRO in the first instance. If you are unable to resolve the dispute with the SRO, certain procedural complaints may be referred to the Procedural Adjudicator during the trial period. Details of the Procedural Adjudicator trial are available on our website.¹⁰⁴ If your dispute falls outside the scope of the Procedural Adjudicator trial, the Transparency Statement sets out the options available to you to pursue the complaint.

Addressees of our appealable decisions and third parties with a sufficient interest in our appealable decisions have a right to appeal them to the Competition Appeal Tribunal. Appealable decisions include decisions as to whether there has been a competition law infringement, interim measures decisions and decisions on the imposition of, or the amount of, a penalty.¹⁰⁵

Where the law does not provide for an appeal, an application for judicial review may be brought in certain circumstances.¹⁰⁶

Following the completion of an investigation, case teams routinely evaluate the investigation process undertaken to determine what went well and how things may be improved for other on-going and future

¹⁰¹ www.ofc.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/

¹⁰² See figure one in *Transparency – A Statement on the OFT's approach* (OFT 1234) available to download at www.ofc.gov.uk/shared_ofc/consultations/668117/OFT1234.pdf

¹⁰³ www.ofc.gov.uk/about-the-ofc/ofc-structure/governance/complaint

¹⁰⁴ Details of trial available through www.ofc.gov.uk/OFTwork/consultations/closed-awaiting/ca98-guidance/

¹⁰⁵ Section 46 of the Act and section 47 of the Act as substituted by section 17 of the Enterprise Act 2002.

¹⁰⁶ A judicial review application may be brought before the Administrative Court of the Queen's Bench Division under Part 54 of the Civil Procedure Rules

cases. Typically, the 'lessons learnt' are shared with colleagues across the Office. This evaluation process is unrelated to the investigation process but remains an important way in which we ensure that best practice can be applied across all our investigations under the Act.

UNITED STATES

This paper responds to the Working Party No. 3 Chair's letter of 19 July 2011, inviting submissions for the Working Party's upcoming roundtable on institutional and procedural aspects of the relationship between competition authorities and courts, and update on developments in procedural fairness and transparency. The U.S. Federal Trade Commission ("FTC") and Antitrust Division of the U.S. Department of Justice ("Department") (collectively, "the Agencies") are pleased to provide below our perspectives on these issues.

1. The relationship between the courts and competition agencies in the United States

The primary role of courts in the United States is to resolve legal disputes and vindicate rights, which inherently requires interpreting the law.¹ There are separate court systems at the federal level and in each of the states. The Federal courts handle both civil and criminal matters under federal law, as well as some civil matters under state law (mainly matters between citizens of different states with a significant monetary value at stake).²

1.1 Overview of the federal courts

The highest federal court is the Supreme Court of the United States, composed of nine justices.³ Beneath the Supreme Court are 13 Circuit Courts of Appeals, twelve of which are assigned regions into which the country is divided.⁴ Within each of the twelve regions, there are the lowest level courts, known as District Courts, in addition to the intermediate Circuit Courts of Appeals.⁵ Supreme Court Justices, judges in the Courts of Appeals, and District Court judges are appointed for life terms by the President, subject to confirmation by the United States Senate. Federal court judges are generalists; District Courts are not specialized by subject matter, and, with rare exceptions, neither are the higher courts.⁶

1.2 Overview of state courts

Each of the 50 states and territories⁷ has its own court system. These systems vary in structure. All states have a single highest court, most often called the Supreme Court of that state. Decisions of a state's

¹ Administrative Office of the United States Courts, *Understanding Federal and State Courts*, available at <http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx>

² *Id.*

³ U.S. Const. Art. III.

⁴ Administrative Office of the United States Courts, *Structure of Federal Courts*, available at <http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/StructureOfFederalCourts.aspx>

⁵ *Id.*

⁶ Administrative Office of the United States Courts, *Comparing Federal and State Courts*, available at <http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/ComparingFederalAndStateCourts.aspx>

⁷ Territories include the District of Columbia, Guam, etc.

highest court may be appealed to the (federal) Supreme Court only if they raise questions of federal law. Most states have intermediate courts of appeals; all have lower level or trial courts. Many states have specialized courts to handle special classes of matters; examples include probate court, juvenile court, and family court. Some state court judges are appointed to their position, while others are often elected. Generally, state court judges do not receive lifetime appointments and are instead installed for fixed terms (though there are some lifetime appointments).⁸

1.3 *Common law system*

Almost all court systems in the United States are common law systems.⁹ Judges are guided in their decisions by precedent, “the articulation of legal principles in a historical succession of judicial decisions.” “Common law principles can be changed by legislation.”¹⁰

1.4 *Public enforcement of the antitrust laws in the United States*

The three primary federal antitrust statutes in the United States are: the Sherman Act,¹¹ which became law in 1890; the Clayton Act,¹² which was enacted in 1914; and the Federal Trade Commission Act,¹³ which also became law in 1914. Almost every state in the United States also has its own antitrust law statute, under which the state itself and/or private parties may sue.

The United States Supreme Court has explained that: “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 clear that it expected the courts to give shape to the statute’s broad mandate by drawing on common law tradition.”¹⁴

Two government bodies, the Department, which is a part of the executive branch of government, and the FTC, which is an independent agency, are responsible for enforcing the federal antitrust laws. Enforcement also occurs through private litigation. The individual states may also bring court cases under the Sherman Act and the Clayton Act. Due to their underlying structure, the Agencies have different relationships to courts (this is discussed further below).

To enforce the Sherman Act or the Clayton Act, the Department must initiate an action in federal district court as the Plaintiff, where procedure is governed by the Federal Rules of Civil or Criminal Procedure.¹⁵ The federal district court will then determine whether the law has been violated and, if so, order appropriate remedies.

In contrast, the FTC typically enforces antitrust law by initiating an administrative proceeding, which begins with issuance of a complaint approved by the five-member Commission upon reason to believe that

⁸ *Id.*

⁹ The state of Louisiana has a civil law system.

¹⁰ Administrative Office of the United States Courts, *Glossary of Key Terms*, available at <http://www.uscourts.gov/Common/Glossary.aspx>

¹¹ 15 U.S.C. §1 *et seq.* The Sherman Act is enforced by the Department.

¹² 15 U.S.C. §12 *et seq.* The Clayton Act is enforced by both the Department and the FTC.

¹³ 15 U.S.C. §45 *et seq.* The FTC Act is enforced by the FTC. Substantively, violations of the Sherman Act are also violations of Section 5 of the FTC Act.

¹⁴ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978).

¹⁵ Fed. R. Civ. P.; Fed. R. Crim. P.

the respondent violated the Federal Trade Commission Act or the Clayton Act and that a proceeding by it would be in the public interest. Complaint issuance is followed by hearings before an Administrative Law Judge (ALJ) within the agency, not a court, and subject to the agency's rules of practice,¹⁶ not to the Federal Rules. The ALJ's determination may be appealed to the five member Commission, which conducts a *de novo* review of the ALJ's decision. Any final Commission determination may be appealed by the respondent to any regional Circuit Court of Appeals in which the respondent does business. The losing party in the court of appeals may seek review by the Supreme Court. In addition to proceeding administratively, the FTC may also seek a preliminary injunction in a federal district court in aid of its administrative proceeding. Thus, like the Department, in appropriate cases, the Commission may also initiate an action in federal district court as plaintiff. In those cases, the procedures are governed by the Federal Rules.

As described above, the FTC has adjudicative functions in addition to investigative and prosecutorial ones. Unlike the Department, the FTC has the authority to investigate, prosecute, and adjudicate enforcement matters, subject to appeal in the federal courts. This system comports with constitutional principles of due process and administrative law.¹⁷ Once the Commission issues its complaint, the Commissioners are considered to be in an adjudicative role and they are no longer involved in the investigation and prosecution of the matter. FTC staff who conduct the investigation or the prosecution of the case are prohibited from participating in the Commission's decision or review of the matter. In addition, *ex parte* contacts about the matter between FTC staff and the ALJ or the Commissioners are strictly prohibited.¹⁸

2. A summary of the procedures applicable to public and private competition cases before United States courts

2.1 *The adversarial system*

Whether a matter originates with the Department, the FTC, a State Attorney General, or a private party, once in federal court or an administrative hearing, all proceedings – public or private – employ an adversarial system: the parties submit their evidence and arguments regarding the relevant facts to a neutral fact-finder—a judge or jury.¹⁹ U.S. judges do not independently investigate the facts or assist the parties in presenting their cases; they may however ask questions and request briefing. Juries do not generally ask questions and they may not request information. Based on the parties' submissions, the court determines the ultimate facts and decides the case in accordance with the controlling law and precedent. Thus the process is highly transparent, since all, or nearly all, the evidence on which the decision is based is available for all to see, and the result (unless fully determined by a jury) is accompanied by a written explanation.

2.2 *Discovery in antitrust suits*

Before the trial is held, the parties in all types of proceedings may discover information from each other and from third parties that may be relevant to the claims or defences in the case. This ensures that all parties understand the nature and scope of the claims and ensures transparency. The rules applicable to this

¹⁶ FTC Rules of Practice, 16 C.F.R. Part 3 (2011).

¹⁷ *Withrow v. Larkin*, 421 U.S. 35 (1975); Administrative Procedure Act, 5 U.S.C. §§ 551-706.

¹⁸ 16 C.F.R. § 4.7.

¹⁹ In civil cases in federal court seeking only injunctive relief, the fact finder is the judge. Private litigants may seek damages and then they have a right to a jury as fact finder, but they may choose to rely on a judge instead. There is a right to a jury in criminal cases, but that right may generally be waived.

discovery process in antitrust cases are the same rules of discovery applied in other cases. The parties in civil cases gather information through mandatory disclosures under the Federal Rules, written interrogatories, document requests, requests for admissions, and depositions. This process of discovery lays the foundation for the facts the parties will present to the court; discovery is generally more limited in criminal cases. The pre-trial submission of facts in judicial proceedings is governed by the Federal Rules of Civil or Criminal Procedure and the Federal Rules of Evidence. Similar discovery rules apply in FTC administrative proceedings. The FTC's rules of practice 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.²⁰ The parties must also identify their experts and produce reports prepared by, and permit pre-trial discovery of, these experts.²¹

2.3 *Early proceedings in antitrust suits*

Defendants may move to dismiss the charges against them at an early stage in the proceedings. On a motion to dismiss a civil case "for failure to state a claim," the court is required to assume that the facts alleged by the plaintiff (whether an agency or private party) are true; if those alleged facts do not permissibly lead to the conclusion that the law has been violated, the case is dismissed.²² (Analogous procedures exist in criminal proceedings.) At later stages in civil proceedings, either party may seek summary determination of certain matters or disposition of the case before trial. A motion for summary judgment will be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."²³ Likewise, in administrative proceedings before the FTC, respondents may file motions to dismiss and motions for summary decision. In order to expedite the proceeding, such motions in FTC cases are directly referred to the Commission, which must rule on the motion or, in its discretion, refer it to the ALJ.²⁴

2.4 *Trial protections and processes*

In all non-criminal court cases, the defendant is afforded a number of procedural protections, including the right to call witnesses on its own behalf and to put on its own case. Defendants in U.S. judicial proceedings also have the opportunity to challenge the opposing party's factual presentations via cross-examination of witnesses. Similarly, under the FTC's rules of practice, respondents "have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing."²⁵

²⁰ 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 mandatory disclosures, 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). Parties may also obtain discovery from third parties. See, e.g., 16 C.F.R. § 3.34.

²¹ 16 C.F.R. § 3.31A.

²² *Iqbal v. Ashcroft*, 129 S.Ct. 1937, 1950-51 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 556 (2007).

²³ Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

²⁴ 16 C.F.R. § 3.22(a).

²⁵ 16 C.F.R. § 3.41(c).

In federal criminal cases,²⁶ defendants have additional procedural rights, such as the right to trial by jury²⁷ and the right against self-incrimination,²⁸ as well as pre-trial discovery rights to obtain certain documents that are in the Department's possession,²⁹ statements of government witnesses, and exculpatory information.

In the U.S. judicial system, the burden of proof lies with the plaintiff (i.e., the agency, a State Attorney General, or private plaintiff). To prevail in a civil judicial proceeding, the agency must show by a "preponderance of the evidence" (meaning that it is more likely than not) that the defendant is legally responsible for the alleged harm. This is also the applicable standard in FTC administrative proceedings. In criminal cases, the Department must prove its case "beyond a reasonable doubt."

At the end of a civil trial without a jury, the judge makes findings of facts and conclusions of law, orally on the record or written in an opinion or memorandum of decision.³⁰ In practice all, or nearly all competition cases that are not settled, conclude in a reasoned written opinion.

In federal court, the losing party in a civil action (and the losing defendant in a criminal action) has a right to appeal.³¹ In federal proceedings, the district court decision will be appealed to the court of appeals for the circuit in which the district court is located.³² Litigants may seek Supreme Court review of decisions of courts of appeals, but there is no right to such review and the Supreme Court in most cases does not grant review. Many detailed and specific procedures govern appellate practice.³³

Proceedings and appeals in state court follow similar – though not identical – procedures as the federal system. Each state, however, has its own set of procedures and requirements.

3. Factors encouraging transparency and fairness in United States litigation

Litigation in the federal courts is governed by a complex system of rules and procedures, some of which are discussed above. A number of these rules are designed to ensure transparency and fairness in decision-making. Some of these rules are explained below.

3.1 Duties of disclosure

In civil litigation, parties have a general duty of disclosure. Federal Rule of Civil Procedure 26 (a)(1) imposes an affirmative duty of disclosure on parties to a civil lawsuit to disclose to the other parties considerable information even before the other parties have sought the information through discovery. This information includes information about individuals likely to have discoverable information, copies of all documents or electronic information that may support the party's claims or defences, computation of each category of damages claimed. The parties are also required to supplement and correct these responses

²⁶ Only the Department may prosecute federal criminal matters.

²⁷ U.S. Const. amend. VI.

²⁸ U.S. Const. amend. V.

²⁹ U.S. Department of Justice Antitrust Division Manual, Fourth Edition (Dec. 2008), Ch. IV(F), *available at* <http://www.justice.gov/atr/public/divisionmanual/atrdivman.pdf>

³⁰ Fed. R. Civ. P. 52(a)(1).

³¹ Fed. R. App. P. 3 and 4.

³² A few types of cases are appealed to the one court of appeals that is not regional.

³³ *See, generally*, Federal Rules of Appellate Procedure.

when necessary. Certain initial disclosures are also required in FTC administrative proceedings. Specifically, within five days of receipt of the respondent's answer to the complaint, and without awaiting a discovery request, the parties must identify each individual likely to have information relevant to the proceeding, and produce copies (or a description by category and location) of all documents and electronically stored information relevant to the proceeding.³⁴

3.2 *Protective orders*

To protect from disclosure information that is obtained in discovery, a party or a person from whom discovery is sought may seek a protective order from the appropriate judge, who can issue an order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including orders limiting the type, manner, or extent of discovery, or to protect a trade secret or other confidential material."³⁵ Protective orders are routinely issued in FTC proceedings. However, evidence admitted during the trial in any type of proceeding is presumptively public unless a party can show that it will be harmed by the public disclosure of such information. In that case, the court may seal part of the court record. Similarly in FTC proceedings, upon motion, the ALJ may determine that the evidence should be held "in camera" pursuant to the Commission's rules of practice.

3.3 *Sanctions for failure to follow procedures*

Federal Rule of Civil Procedure 37 addresses failure to make disclosure or co-operate in discovery and provides for sanctions. A party may apply to a court for an order compelling disclosure or discovery where the person from whom the disclosure or discovery is sought refuses to comply or provides an evasive or incomplete answer. Where a motion to compel is granted, the court may require the party or deponent whose conduct necessitated the motion to pay the moving party's reasonable expenses, including attorney's fees; if the motion is denied, the court may enter a protective order and require the moving party to pay reasonable expenses. Failure by a deponent to be sworn or to answer a question after being directed to do so by a court may be considered contempt of that court and punished accordingly. Where a party fails to obey an order of the court regarding discovery, the court may issue:

- an order that certain facts be taken as established in accordance with the claim of the party obtaining the order;
- an order refusing to allow the disobedient party to support or oppose designated claims or evidence, or prohibiting that party from introducing designated matters in evidence;
- an order striking pleadings, or staying further proceedings until the order is obeyed, or dismissing the action or rendering a default judgment against the disobedient party;

In addition the court may treat the failure to obey as contempt of court. Similar penalties may be imposed for failure to disclose or to amend prior responses to discovery.

Analogous procedures exist in FTC administrative adjudications, where a party may seek an order compelling disclosure or discovery, including a determination of the sufficiency of the opposing party's answers or objections to discovery requests or required disclosures.³⁶ If a party fails to comply with any

³⁴ 16 C.F.R. § 3.31(b).

³⁵ Fed.R.Civ. P. 26(c).

³⁶ 16 C.F.R. § 3.38.

discovery obligation under the FTC's rules of practice, the ALJ or the Commission (or both) may – upon motion by the aggrieved party – take such action “as is just,” including but not limited to the following:

- Order that any answer be amended to comply with the request, subpoena, or order;
- Order that the matter be admitted or that the admission, testimony, documents, or other evidence would have been adverse to the party;
- Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;
- Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defence, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery;
- Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown; or
- Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

Court enforcement may be sought where the ALJ determines that such relief would not be sufficient, or in instances where a non-party fails to comply with a subpoena or order.

3.4 *Rules of attorney client privilege*

Certain information is protected from discovery under well-established U.S. rules of privilege, which apply in both court proceedings and administrative adjudications before the FTC.³⁷ Rule 501 of the Federal Rules of Evidence provides that a privilege “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” While a number of different privileges exist, those most commonly invoked in antitrust cases are the attorney-client privilege, which, under U.S. law, generally protects a person's request for legal advice from his or her attorney, and covers both outside counsel and in-house counsel, and the work product rule, which protects materials prepared in anticipation of litigation. Both of these privileges are subject to an exception for communications with attorneys that were made in furtherance of an on-going or future criminal or fraudulent act. The privilege against self-incrimination can be invoked in any sort of proceeding in which a witness is asked a question that he believes will require him to implicate himself criminally.

3.5 *Expert witnesses*

Expert witnesses are frequently used in civil antitrust litigation and FTC administrative adjudications. Experts may be appointed by the court, or separately hired by each party to explain complex economic issues, accounting subtleties, or substantive areas (e.g., software, technology, science). Prior to trial or

³⁷ See, e.g., 16 C.F.R. § 3.31(c)(4) (providing that “[d]iscovery [in FTC administrative proceedings] shall be denied or limited in order to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience”).

administrative hearing, a party must disclose to other parties the identity of any person who may be called as an expert witness, along with a signed written report indicating his opinion, facts and data considered, exhibits to be used, qualifications, previous testimony, and compensation.³⁸ A party may depose any person who has been identified as an expert whose opinions may be presented at trial or administrative hearing.³⁹ At trial, or during an administrative hearing before the FTC, expert witnesses are subject to cross-examination regarding their qualifications, bias, and opinions. Purely conclusory expert testimony may be accorded little or no weight.⁴⁰ Consequently, expert reports are often quite extensive and even more detailed than the eventual testimony. Expert reports have to include the opinions to be offered by the expert and the basis for each opinion, and the party offering the expert will have to make out a prima facie case for admissibility, establishing that the witness is indeed an expert on the relevant subject matter and that a basis exists in both fact and the discipline of the expert for every opinion.⁴¹

3.6 *Closing statements*

Although there are no formal rules requiring the Department to make a public announcement upon closing an antitrust investigation, it has a policy of doing so in significant civil matters.⁴² Similarly, 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 investigations.⁴³

3.7 *Settlements*

When the Department 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.⁴⁴ 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 the Department to consider those comments, and the court must ultimately determine that the settlement is in the public interest before it can take effect. The FTC'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.⁴⁵ If the FTC accepts a proposed consent agreement, the entire proposed agreement and complaint are usually 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

³⁸ Fed. R. Civ. P. 26(a)(2)(B), 16 C.F.R. § 3.31A(a)—(c).

³⁹ Fed. R. Civ. P. 26(b)(4)(A), 16 C.F.R. § 3.31A(d).

⁴⁰ See *SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 25 (1st Cir. 1999) (“Expert testimony that offers only a bare conclusion is insufficient to prove the expert’s point.”).

⁴¹ See also Fed. R. Evid. 702.

⁴² See Issuance of Public Statements Upon Closing of Investigations (2003), available at <http://www.justice.gov/atr/public/guidelines/201888.pdf>

⁴³ See, e.g., *Statement of the Commission Concerning Google/AdMob* (May 21, 2010), available at <http://www.ftc.gov/os/closings/100521google-admobstmt.pdf>

⁴⁴ 15 U.S.C. § 16.

⁴⁵ 16 C.F.R. § 2.32.

period closes, the Commission evaluates the record and determines whether to accept, change, or reject the settlement.⁴⁶

4. Update on recent United States developments relating to procedural fairness and transparency

The Agencies have made ensuring procedural fairness and increasing transparency a priority. Three examples of this are described below.

4.1 *United States Department of Justice Antitrust Division Remedies Guide*

Announced in June 2011 and addressed at the June WP3 Roundtable, the policy guide is a tool for Department staff to use in analysing proposed remedies in its merger matters.⁴⁷ It also provides transparency into the Department's approach to merger remedies for the business community, the antitrust bar and the broader public. The goal of the Department remains the same – to provide an effective remedy to eliminate the anticompetitive effects of a proposed transaction. The policy guide states that effective merger remedies typically include structural or conduct provisions, or a combination. In horizontal merger matters, the Department continues to rely predominantly on structural remedies, sometimes in combination with conduct remedies. However, the Department has found that in many vertical transactions tailored conduct relief can prevent competitive harm while allowing the merger's efficiencies to be realized.

4.2 *Horizontal Merger Guidelines*

Approximately one year ago, the Agencies announced revisions to the Horizontal Merger Guidelines, which had not been updated since 1992.⁴⁸ These Guidelines outline the principal analytical techniques, practices, and the enforcement policy of the Agencies with respect to mergers and acquisitions involving actual or potential competitors under the federal antitrust laws. The Guidelines also describe the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition. They are designed in part to assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context, based on the Agencies' long-standing expertise and experience with antitrust law cases. The Guidelines are also intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions.

4.3 *Revisions to FTC Rules of Practice*

In 2009, as part of the FTC's periodic internal review of its adjudicative proceeding process, the FTC finalized rules to expedite the prehearing, hearing, and appeal phases of its adjudications; streamline discovery and motion practice; and ensure that the agency can apply its substantive expertise, as appropriate, earlier in the process.⁴⁹ The changes are intended in part to provide greater clarity, transparency, and fairness, including by establishing a more rigorous timetable for administrative litigation so that respondents are not harmed by unnecessary delay in the determination of their rights and

⁴⁶ 16 C.F.R. § 2.34.

⁴⁷ *Antitrust Division Policy Guide to Merger Remedies*, United States Department of Justice, Antitrust Division (June 2011), available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>

⁴⁸ *Horizontal Merger Guidelines*, United States Department of Justice and Federal Trade Commission (Aug. 19, 2010), available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf>

⁴⁹ See <http://www.ftc.gov/opa/2009/04/part3.shtm>

responsibilities. Earlier this year, the FTC made further modifications to its rules of practice relating to discovery, the labelling and admissibility of certain evidence, and deadlines for oral arguments.⁵⁰

⁵⁰ See <http://www.ftc.gov/opa/2011/08/part3.shtm>

EUROPEAN UNION

1. General introduction

Antitrust authorities have a duty to remove impediments to competition, ensuring timely outcomes for markets and consumers. The result matters, but what matters equally is the manner in which the results are achieved. Indeed the legitimacy of antitrust agencies' actions is to a large degree derived from the transparent way in which an agency acts and the degree to which an agency is perceived to be fair in applying its procedures. It is these two aspects that ultimately give agencies the authority to act.

This submission addresses the way in which the European Commission, as antitrust enforcer, has embraced transparency and procedural fairness – the topics of the current roundtable – and has made them an integral part of our enforcement practices. As authorities should, the Commission actively listens to its stakeholders and continuously seeks ways of further improvement. Having come to the conclusion of a major exercise in this regard, this is an ideal opportunity to share what we have done and how we have proceeded in getting it in place. The outcome enhances transparency and procedural guarantees while maintaining the need for efficient processes. These initiatives may be a source of inspiration for authorities faced with similar issues, while bearing in mind that there is no single model in these matters and that any solutions adopted by agencies have to be embedded in and fitted to the enforcement system applicable in that jurisdiction.

1.1 *EU competition enforcement system*

The EU competition enforcement system is one where the European Commission (hereafter the "Commission") acts as an integrated public enforcer: it investigates and decides the case by administrative decision, subject to full judicial review by the General Court, with final appeal to the Court of Justice of the European Union.

As regards the enforcement of Articles 101 and 102 TFEU,¹ the Commission 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.

This system is not unique. In Europe, the majority of EU Member States have opted for similar integrated enforcement systems. The EU competition enforcement system has repeatedly been found by the EU Courts to fulfil the requirements of Article 6 ECHR on the right to a fair trial.² In *Aristrain*, the

¹ Treaty on the Functioning of the European Union, which entered into force on 1 December 2009. Article 101 covers restrictive agreements and Article 102 addresses abuses of dominant position.

² Case T-54/03 *Lafarge SA v. Commission*, [2008] ECR II-120, in particular para 39 and Case T-348/94 *Enso Espanola SA v. Commission* [1998] ECR II-1875, paras 55-65. The Charter of Fundamental Rights of the European Union does not provide for additional rights in this regard: Declaration 1 annexed to the Lisbon Treaty specifies "*The Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention for the Protection*

Court of First Instance (now the General Court) specifically rejected the argument that the scope of review by EU Courts did not comply with standards set out by the case law of the European Court of Human Rights.³

The case law of the European Court of Human Rights accepts administrative adjudication of certain matters qualified 'criminal' within the meaning of Article 6 of the ECHR as compatible with the Convention so long as the party concerned can bring any such decision affecting it before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision.⁴ In a recent judgment, the European Court of Human Rights had the occasion to apply these principles to a case in which the Italian national competition authority had imposed a fine in an antitrust enforcement case. The decision was confirmed on appeal. The Italian national competition authority is (like the European Commission) an integrated authority that adopts decisions imposing fines, subject to a two-tier judicial control. While every system has its particularities, the institutional set-up in this case is thus not very dissimilar from the EU system. In this case, the ECtHR ruled that Article 6 ECHR was complied with in particular in view of the circumstance that the decisions of the administrative competition authority were subject to judicial review in which it was assessed whether the competition authority had used its powers appropriately, and with respect to fines, the court could verify the suitability of the sanction and had the power to change the amount imposed.⁵

With regards to merger control, the EU Merger Regulation⁶ also provides for a regime of integrated public enforcement, whereby the Commission is vested with exclusive jurisdiction to review and decide upon concentrations notified to it of an EU dimension,⁷ subject to the control of the Courts of the European Union. 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) and a certain margin of appreciation is accorded to the Commission with regard to complex economic assessments.

1.2 Enforcement procedures and procedural guarantees

The Commission's enforcement procedures are governed by law. Throughout the process, there are detailed enforcement procedures which ensure that the parties are able to defend themselves in full and have a high level of procedural guarantees.⁸ Over and above the statutory provisions governing the

of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States."

³ Judgment of the Court of First Instance of 11 March 1999, *Aristrain v. Commission*, Case T-154/94, [1999] ECR p.II-645, paras 30 to 41.

⁴ See in this context *Bendenoun v France*, Judgment of the ECtHR of 24 February 1994, para 46; *Janosevic v Sweden*, Judgment of the ECtHR of 23 July 2002, para 81.

⁵ Judgment of the ECtHR of 27 September 2011, *A. Menarini Diagnostics S.R.L. v. Italy*, Application No 43509/08, paras 64 and 65.

⁶ 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).

⁷ Those concentrations that met the turnover thresholds of Article 1(2) and (3) of the EU Merger Regulation or that are referred to the Commission by Member States pursuant to Articles 4(5) and 22 thereof.

⁸ See further 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, OJ L 1, 04.01.2003, p.1, the EU Merger Regulation, *ibid* at footnote 6 above, 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, 27.04.2004, p. 18 and Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council

procedures, general principles of law including fundamental rights apply. During the investigation phase, parties in antitrust proceedings have several key rights, including the right not to self-incriminate and the right to be informed of their procedural status, that is, whether they are potentially suspected of having committed an infringement. Once the investigation is complete and the Commission reaches a preliminary position that the parties may have infringed Article 101 and/or 102 TFEU or that a proposed concentration may significantly impede effective competition in the EU, the parties have the right to be heard. Indeed, the Commission cannot base a decision on objections that the parties have not had the opportunity to comment upon. Parties receive a Statement of Objections – i.e. a written formal document setting out the Commission's objections to their conduct, the reasons for these objections and the evidence on which these objections are founded. The parties have the right of access to the Commission's investigation file in order to enable them to prepare their written and oral defence. This consists of the right to submit comments in writing on the Commission's objections. Parties can raise any point they deem appropriate, including contesting facts or evidence relied on and can submit any expert opinion they like to produce. Parties also have the right to a formal Oral Hearing – chaired by the Hearing Officer, who is an independent official - at which the parties can further develop their defence. Finally, if the Commission ultimately adopts a prohibition decision, this must be fully reasoned, so that parties are able to exercise their right of appeal to the European Courts.⁹

1.3 *Checks and balances*

Above and beyond the legal framework applicable, the Commission has put in place a plethora of internal checks and balances to ensure a robust outcome and safeguard procedural rights.

Within the European Commission, the Directorate-General for Competition ("DG Competition") is primarily responsible for enforcing Articles 101 and 102 TFEU and the EU Merger Regulation. Within DG Competition a number of safeguards have been put in place: (a) there is a priority examination of antitrust cases under which case teams submit their proposed course of action to in-house scrutiny from an early stage to assess whether cases merit further examination; (b) a case co-ordination unit provides case support throughout proceedings; (c) the Chief Economist advises on whether cases are economically sound; and (d) peer review panels are set up in complex merger and antitrust cases in order to provide a "fresh pair of eyes", advising on coherence, economic, legal and procedural issues.

DG Competition investigates under the leadership of the Commissioner responsible for competition – and decisions are taken by the College of 27 Commissioners, who are independent of national and business interests. The Commission Legal Service, attached directly to the President, advises the College on the legality of each draft decision and is involved at key steps in the investigation. The Hearing Officer is specifically tasked with safeguarding procedural rights. Before adopting decisions, the Commission routinely hears Member States' competition experts in the Advisory Committee and prior to a draft decision being submitted to the College, other Commission departments responsible for economic policy and the relevant sector at issue in a case are consulted. When the Competition Commission submits a draft decision to the College of Commissioners, the opinion of the Legal Service and other Directorate-Generals, the Hearing Officer and the Advisory Committee are included in the file.

Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p. 1.

⁹ Pursuant to Article 296 TFEU, a decision must state the reasons on which it is based. In cases where a decision has been inadequately reasoned, the EU Courts must raise this point even if the applicant does not do so, see e.g. Case C-166/95P *Commission v Daffix* [1997] ECR I-983, para 24.

Further details about the Commission's enforcement system and procedures, as well as the safeguards in its system are set out in its written submissions to the Working Party 3 on Co-operation and Enforcement for the roundtable meetings of 16 February and 15 June 2010.

1.4 *Improvements in procedural fairness and transparency*

The Commission considers that the EU enforcement system is constitutionally sound and ensures a high standard of procedural rights. That being said, as a responsible agency it is our duty to regularly reassess our handling of cases and identify where there is room for improvement, while bearing in mind the overarching need for efficient procedures. To that end, the Commission has reviewed its case handling and enforcement procedures and has requested stakeholders' input. As a result, it has decided that some adjustments are necessary and on [XX date] the Commission adopted a package with two key objectives: (i) Antitrust Best Practices and Best Practices for the submission of economic evidence to enhance the transparency and predictability of proceedings, in particular by increasing interaction with the parties; and (ii) a revised Mandate for the Hearing Officer which will strengthen the mechanisms for safeguarding procedural rights. This package is explained in more detail in sections 2 and 3 of this submission.

1.5 *Private enforcement of the EU competition rules*

For the sake of completeness, it should be noted that the private enforcement of the EU competition rules (Articles 101 and 102 TFEU) takes place before national courts in the EU Member States, where private parties invoke these Treaty provisions in actions for damages or actions relating to contracts (actions for nullity or actions for injunctive relief).¹⁰ According to the Court of Justice of the EU, any citizen or business who suffers harm as a result of a breach of Articles 101 and 102 TFEU should be able to obtain reparation from the party who caused the harm.¹¹ The Commission is currently looking into how to facilitate actions for damages on the basis of Articles 101 and 102 TFEU,¹² in particular collective actions for damages.¹³

2. *Enhancing transparency and predictability of proceedings*

2.1 *Antitrust best practices*

The Commission Notice on Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (hereafter the "Notice" or the "Antitrust Best Practices") is aimed at enhancing the transparency and predictability of the Commission proceedings under Articles 101 and 102 TFEU. Best Practices on the conduct of merger proceedings were adopted in January 2004 and have increased understanding of the merger review process, leading to greater efficiency and a high degree of predictability and transparency. It was therefore considered that antitrust proceedings would also benefit from the introduction of such measures.

¹⁰ Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C101/54, 27.4.2004.

¹¹ Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 and Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619.

¹² White Paper on damages actions for breach of the EC antitrust rules, COM/2008/165 final, which was preceded by a Green Paper - Damages actions for breach of the EC antitrust rules COM/2005/672 final.

¹³ The European Commission held from 4 February to 30 April 2011 a public consultation on collective redress on the basis of a Joint Information Note of Vice-Presidents Almunia and Reding and Commissioner Dalli on the need for a coherent European approach to Collective Redress. More information can be found at <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>

The Antitrust Best Practices enhance transparency and predictability through a number of key innovations. The Notice provides for the first time an A-Z of how antitrust proceedings take place before the Commission, ranging from the investigation phase, priority setting, the main procedural steps, to the different types of decisions which may be taken. This gives parties and other stakeholders a clear picture of what to expect at different stages of antitrust procedures before the Commission. In particular, it gives guidance as to how commitment proceedings, which were introduced in 2004, work in practice, so that parties are aware of how best to proceed if they are contemplating offering commitments. In order to better inform stakeholders, key stages in proceedings, namely the opening of cases, the sending of a Statement of Objections, the closure of proceedings and the adoption of a decision will be made public (either by way of a press release or an announcement on DG Competition's website). The Commission also commits to systematically publish all of its decisions (or at least a summary thereof) rejecting complaints alleging antitrust infringements so that stakeholders will have a more accurate picture not just of the number of complaints rejected, but also the grounds for their rejection.

The Antitrust Best Practices enhance the opportunities for parties to interact with the Commission services in the course of competition proceedings from an early stage and allows them to be better informed of the state of play of proceedings. In particular, the Notice foresees State of Play meetings for the parties at key points in the proceedings; namely shortly after the opening of formal proceedings, at a sufficiently advanced stage in the investigation and once the Statement of Objections is issued. Such State of Play meetings are not only important means for parties to know what the Commission is investigating through-out the proceedings, but are also vital to ensuring that the Commission is aware of the parties' arguments from an early stage, thereby ensuring that it only moves forward with well-founded cases. This is underscored by the commitment of the Commission to formally open proceedings earlier and (above and beyond existing legal requirements) to disclose key submissions of complaints or third parties, such as the complaint or economic studies, prior to the Statement of Objections being issued. Specific State of Play meetings are also foreseen in commitment proceedings, cartel proceedings and for complainants in cases where the Commission has formally opened proceedings and it intends to reject the complaint.

The Antitrust Best Practices contain a section on fines in the Statement of Objections which is intended to provide greater clarity about the possibilities for parties to bring arguments in this regard. The Commission commits to provide, over and above what is legally required, the parameters for the calculation of possible fines. They would not be the actual fining amounts, but elements such as the value of the cartelised sales, an indication of the gravity, issues of recidivism, as well as the year(s) that will be considered for the value of such sales. Moreover, it is also clarified that parties can present their arguments on the matters that are used in the calculation of fines at the Oral Hearing. This innovation will open a channel for dialogue with the parties prior to a final decision and give them a better and earlier idea of how the Commission calculates the fines that may later be imposed on them. This enhanced exchange of relevant information should help the Commission to ensure that the fines it imposes are as accurate as possible and help to avoid post-decision corrections. Finally, greater transparency is introduced with regard to 'Inability to Pay' requests, by clarifying at what stage such claims may be made and how and when they are assessed by the Commission. This should provide useful guidance to undertakings on the Commission's policy in this respect which has evolved in recent cases.

2.2 *Best practices on the submission of economic evidence*

Another measure which has been taken to improve interaction with parties is the adoption of a DG Competition Staff Working Paper on the submission of economic evidence. The increasing importance of economics in complex cases e.g. in articulating the theory of harm of a case or in assessing efficiency claims, means that the Commission often makes requests for substantial economic data during its investigation. Parties also often submit arguments based on complex economic theories and sometimes provide empirical analysis to support them. In order to streamline the submission and assessment of such

economic evidence, DG Competition has prepared Best Practices outlining the criteria economic and econometric analysis should fulfil. It also explains the practice of DG Competition's case team and the Chief Economist when interacting with parties which submit economic evidence.

3. Strengthening the mechanisms for safeguarding procedural rights

The above measures outlined in section 2 are aimed, in particular, at enhancing interaction between DG Competition and the parties. To the extent that parties have a dispute about the enforcement of their procedural rights, they can call on the Hearing Officer to resolve these issues.

The Hearing Officer is a key interlocutor who has guaranteed the right to be heard in our antitrust and merger proceedings since 1982. He/she is independent from the case handling services and plays a crucial role as an independent arbiter in disputes between the case teams and the parties. However, his/her role was limited to the stages in our proceedings that follow the sending of the Statement of Objections. It was decided that extending the role of the Hearing Officer would reinforce the protection of procedural fairness.

To that end a revised mandate of the Hearing Officer was adopted and will enter into force following its publication and internal confirmation of the powers delegated by the Commission.

The revised Hearing Officer's Mandate re-affirms and strengthens the role of the Hearing Officer as the guardian of procedural rights. In particular, parties now have a right of independent review of their procedural claims over the entire process. Crucially, the Hearing Officer has new functions throughout competition proceedings, including in the investigation phase and in the context of commitment decisions. However, his or her fundamental mission remains in place. While the Hearing Officer will indeed become the guarantor of procedural rights, he or she will not act as a judge on the substance of the case. That being said, the Hearing Officer continues to have the right to make observations [on substance] on any matter arising out of any competition proceeding to the Competition Commissioner and includes the right to suggest further investigative measures in antitrust proceedings. This complements the other checks and balances within the Commission's enforcement system. The essential function of the Oral Hearing is also underlined, that is, an opportunity for the parties to exercise their rights of defence by developing their arguments orally, as opposed to being a continuation of the investigation.

The revised Mandate reinforces and bolsters the independence of the Hearing Officer by explicitly specifying for the first time that the Hearing Officer shall act independently in performing his or her duties. This was always the case in practice but an explicit statement in the Mandate to this effect is an important guarantee.

With the new Mandate, the role of the Hearing Officer as a potential interlocutor on procedural rights issues becomes all-encompassing: The Hearing Officer will be able to look into procedural rights issues from the very beginning of procedures to the very end. For example, the use of investigative measures in antitrust proceedings (a request for information or an inspection) triggers the right of an undertaking to be informed of its procedural status, that is, whether it is potentially suspected of having committed an infringement. Should this not be followed the Hearing Officer now has an express power to intervene.

A significant development concerning the investigation phase is to allow the Hearing Officer to resolve legal professional privilege issues (hereafter "LPP"). The principle of LPP has been recognised by the EU Courts as a matter of fundamental rights.¹⁴ In essence, the Commission may not during its

¹⁴ Case 155/79 *AM&S Europe Limited v Commission* [1982] ECR 1575; Order in Case T-30/89 *Hilti v Commission* [1990] ECR II-163; Joined cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akros*

inspections copy documents that benefit from legal privilege. This can mean that Commission inspection teams bring back documents for which privilege is claimed in sealed envelopes. The matter must then be resolved without the documents being seen. Under the revised Mandate, a party that claims privilege could ask the Hearing Officer to review the document and formulate a view on whether the document is privileged. This would apply not just in antitrust inspections, but also to inspections and investigatory measures under the Merger Control Regulation. This new role of the Hearing Officer should go a long way to facilitating disputes about such claims and avoid unnecessary litigation. Where a consensual solution cannot be reached in the first phase, the Hearing Officer can produce a reasoned recommendation to the Commissioner responsible for Competition on the LPP issues raised. If the matter is not resolved on this basis, the Commission will examine the matter further. Where appropriate, it may adopt a decision rejecting the claim.

Parties will also be able to call upon the Hearing Officer in the investigative phase of antitrust investigations if they feel that they should not be compelled to reply to questions that might force them to admit to an infringement. The Hearing Officer is also given a new role with regard to disputes about extensions of the deadline to reply to decisions requiring information under Article 18(3) of Regulation 1/2003 in antitrust investigations.

Following the issuing of the Statement of Objections, the Hearing Officer plays a key role as the guarantor of the right to be heard. In particular, the new Mandate clarifies the Hearing Officer's dispute resolution role with regard to parties' access to the Commission's file. The Hearing Officer will continue to verify that only objections are relied upon by the Commission on which parties had an opportunity to comment. Moreover, the revised Mandate reaffirms and strengthens the key role of the Hearing Officer regarding the preparation and conduct of the Oral Hearing, for example, by empowering him/her to take all appropriate measures to prepare the hearing, such as circulating a list of participants in due time or indicating beforehand the focal areas of debate. This should help to ensure that the parties develop their arguments at the hearing effectively.

The remit of the reports which the Hearing Officer makes to the Competition Commissioner and the College is extended to cover the effective exercise of procedural rights throughout proceedings, including the investigation phase. The reports of the Hearing Officer are a crucial means to ensure the systematic follow up of procedural issues raised during proceedings.

Finally, the new and expanded role of the Hearing Officer means that they will be able to look into all major types of Commission proceedings. This is not just the case for proceedings that run towards prohibition decisions with or without fines (for substantive and procedural infringements), but also for antitrust commitment procedures, where the Hearing Officer is given a new role similar to that which already exists for cartel settlement procedures. In both types of procedures, parties can call upon the Hearing Officer at any time in relation to the effective exercise of their procedural rights.

4. Conclusion

The new package of Best Practices and the revised Hearing Officer's Mandate underlines the Commission's commitment to improving its procedures. Transparent and fair procedures benefit not just the parties, but are crucial for an effective and credible competition regime. The Commission has endeavoured to enhance the legitimacy of its actions by engaging in a process of adjustment of our practices, obtaining further stakeholder input and concluding with a package that makes good sense, and

Chemicals v Commission [2007] ECR II-3523, as confirmed by Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, judgment of 14.9.2010.

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balances more transparent procedures with the efficiency of procedures. The experience we have gained may inspire other agencies to further work, which we can only encourage.

BRAZIL

1. Introduction

This contribution analyses the institutional and procedural aspects of the relationship between Competition Authorities and Courts in Brazil. It also considers the development in procedural issues that enhance overall efficiency. First, an overview of the Brazilian Competition Policy System (BCPS) and the Brazilian Judiciary Branch is presented. Then both the interaction between the Administrative Council for Economic Defense (CADE), and the interaction between the Secretariat of Economic Law (SDE) of the Ministry of Justice with the Brazilian Courts are explained. The following section brings some statistics related to this interaction between both CADE and SDE with the Courts, including the number of judicial cases and time average to complete a judicial litigation. Finally, a few recent measures to increase procedural effectiveness are described before reaching a brief conclusion of the topic.

2. Overview of BCPS and Brazilian judiciary

The BCPS is composed of three agencies: the CADE, the SDE, and the Secretariat of Economic Monitoring (SEAE) of the Ministry of Finance. While CADE represents the adjudicative authority, SDE leads investigations on anticompetitive conducts and provides legal opinions on merger reviews. In competition matters, SEAE only provides economic opinions on merger reviews.¹

The Brazilian Judiciary Branch is present at both federal and state levels, and it is divided into ordinary (civil and criminal) and special courts (electoral, labor and military). Competition matters fall under the Federal Justice's jurisdiction. In addition, there are two high courts in the country: the Federal Supreme Court (STF) and the Superior Court of Justice (STJ). While the STF decides constitutional matters, the STJ provides a uniform interpretation of federal law.

There are many situations in which competition issues may be brought to Courts in Brazil. Actually, the judiciary system is usually called to decide on matters relating to the enforcement of competition laws even before CADE issues its final decision on cases, as individuals and companies are entitled to challenge administrative measures undertaken by SDE during investigations. Besides that, economic agents that do not agree with a decision issued by CADE, can challenge such decisions in Court (CADE's decisions are always subject to judicial review, in respect to the constitution principle that all acts that may directly or potentially violate rights are subject to the control by the Judiciary Branch - Brazilian Federal Constitution, Art. 5º, XXXV). CADE, on its turn, can also bring matters to court whenever a judicial measure is necessary to force compliance with its decision (i.e. the payment of an administrative fine). When it comes to the private enforcement of competition laws through Courts (individual and collective actions), the Brazilian system allows both for the so called follow on damage claims (filed after a decision from competition authorities) and for independent lawsuits seeking injunctions and/or claiming damages caused by anticompetitive practices. Last, but not least, criminal sanctions are also enforced in Courts.

¹ A new Competition Law is expected to be approved by the Brazilian Congress in a very short term. Among other important changes, the new legislation will transfer the Antitrust Division of SDE to CADE, consolidating most of the competition issues into one single agency, the new CADE. In competition matters, SEAE will be limited to competition advocacy.

For clarification, an important distinction must be drawn between implementation and review of CADE's decisions. In the first case, CADE's decisions may be judicially enforced. That means that a judicial measure may be taken directly at the enforcement stage, that is a judicial measure to enforce CADE's decision (i.e. again, to compel a company to pay an administrative fine). In the second case, however, the judicial proceeding will begin at the first instance level and often rises to second instances and higher courts.

3. Interaction between SDE and the judiciary

The interaction between SDE and Brazilian courts is carried out mainly through the Federal Attorney General, which is generally in charge of defending the federal government against lawsuits and provides legal counsel to the executive branch.

3.1 A few numbers

SDE currently faces approximately 150 lawsuits relating to its antitrust investigations. These cases represent around 15% of the investigation being carried on by SDE at the present. Investigations involving dawn raids are the ones that usually bring more matters to courts. These investigations account for almost half the cases currently being discussed in the Judiciary. Indeed, not only is the authorization for dawn raids questioned (approximately 29% of the cases) but also the use of the material seized (approximately 17% of the cases) is subject to disputes.

Other frequent topics of discussions are the precautionary measures which SDE is entitled to issue during its investigations (approximately 7%) and the notices of infraction issued against investigated companies/individuals (approximately 7%) .

3.2 Main challenges

One of the main goals of SDE when it comes to its relationship with the Judiciary is to avoid that courts issue precautionary decisions still early in the course of investigations. This is so because such decisions can end up halting the investigations for very long periods, thus reducing the effectiveness of antitrust enforcement.

Indeed, the average time in which investigations are halted due to precautionary measures adopted by the Judiciary is one year, whilst SDE investigations normally last on average two years and a half. There have also been cases in which investigations were halted for almost four years with great loss to society and consumers, although lately some judges have become more aware of the negative effects of precautionary decisions (see, for instance Precautionary Measure n°. 13.103 – SP and Appeal n°. 1182-DF). Since the negative impact of delays in the investigations is hard to overcome when investigation are halted for a significant period of time, SDE is increasing its actions of advocacy with the judiciary to increase this awareness.

In the end, the vast majority of the precautionary measures are lifted and 85% of judicial decisions end up upholding the investigative powers of SDE, which indicates that investigations in the administrative arena do abide by the relevant due process rules.

4. Interaction between CADE and the judiciary

The interaction between CADE and Brazilian courts is assured by the *Procuradoria Federal Especializada do CADE* (ProCADE), which corresponds to the General-Attorney's Office in CADE. Since CADE is the agency in charge of issuing final decisions on both merger cases and antitrust investigations,

it is the ProCADE who ends up handling most of the discussions relating to competition matters involving the BCPS in the Judiciary.

4.1 Structure of ProCADE

ProCADE is composed by nine public attorneys, including the General-Attorney, who is appointed by the Ministry of Justice and commissioned by the President of the Republic after Senate's approval. Among its main functions, ProCADE provides legal opinions in all cases submitted to CADE, prepares and follows CADE's defense before Brazilian Courts, and enforces CADE's decisions. The Office is considered one of the best of Brazil, in particular due to its very qualified staff. In its last Peer Review from 2010, OECD stated that the public attorneys from ProCADE are, besides professional and hardworking, respected by courts and private bar.

4.2 Increasing central role of ProCADE

CADE's standing before the Judiciary Branch has been strengthened in the past years, which contributed significantly to the effectiveness of the coercive measures established by CADE. In addition, ProCADE has become more proactive by proposing an increasing number of lawsuits either to require the payment of fines imposed by CADE or to obtain a judicial order to compel with the remedies imposed by CADE. Furthermore, the follow-up of judicial procedures involving CADE has become a priority, and frequently CADE's attorneys (sometimes accompanied by the Commissioners) appear personally before courts to explain the merits of the decisions. Such initiatives contribute to strengthen the relationship between judges, the legal community and CADE, as well as to promote an increasing recognition of the work done by CADE.

One of the most important positive outcomes of this proactive role of ProCADE is the change in the case law regarding judicial deposits as a condition to the suspension of CADE's decisions.

Indeed, in the last few years, there has been a substantial change in the case law of the Regional Federal Court of the 1st Region in regards to the judicial deposit of fines or the offer of a suitable guarantee to suspend CADE's decision until the issuance of a decision by courts. Previously, the Judiciary Branch suspended CADE's decisions through the concession of injunctions, without requesting any judicial deposit from the interested companies.

Nowadays, as a result of competition advocacy made by ProCADE before judges, injunctions which suspend the liability of the penalties and decisions adopted by CADE are conditioned to the judicial deposit, by the interested party, of an appropriate amount before courts. This decreases the company's incentive to delay a final decision, therefore favoring the effectiveness of Competition Policy.

4.3 Recent successful judicial cases

The central role of ProCADE may be confirmed by three recent cases with successful outcomes: the "Owens Corning" case, in the field of merger control, and the "TV Jacarandá" and "ABAV" cases, in the field anticompetitive conducts.

In 2006, the companies *Owens Corning* and *Saint-Gobain* announced the intention to enter into a merger agreement that would create a new company named *Cetrotex*. In Brazil, the merger would mean the acquisition by *Owens Corning* of the *Saint-Gobain*'s plant named *Capivari*. This acquisition would raise, however, strong competition concerns. CADE's Chairman Fernando Furlan (Commissioner at that time) voted for the prohibition of the merger, backed by favorable opinions from SDE and SEAE, and CADE decided to block the merger. The new company *Cetrotex* challenged this decision before the Judiciary, but

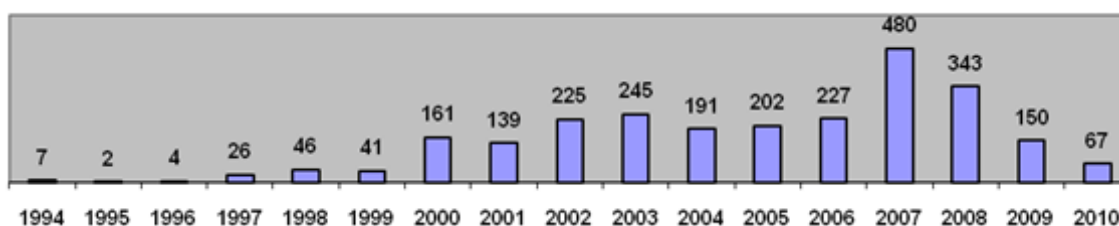
first instance courts confirmed CADE's decision. In 2011, *Owens Corning* finally sold the *Capivari* plant for a third company from a Chinese group, and the merger was then cleared by CADE.

In regards to anticompetitive conducts, the examples are set by two cases from 2011. In the first case, the 14th Federal Court from the Brazilian Federal District confirmed CADE's ruling in the Administrative Proceeding N° 53500.002956/2004. In this file, CADE had condemned the company *TV Jacarandá Ltda* for untimely notification of a merger to BCPS. While the company attempted to judicially invalidate the condemnation and CADE's Resolution N° 36/04, the federal judge understood that the CADE's decision was rendered in solid grounds and ruled to the maintain the condemnation. In the "ABAV" case, the 8th Federal Court from the Brazilian Federal District also confirmed CADE's ruling in the Administrative Proceeding N° 08000.007754/1995-28. CADE had condemned the Brazilian Association of Travel Agents of the Federal District ("ABAV") for anticompetitive practices, when establishing a "Code of Ethics" that restricted its members' rights to offer "predatory" discounts in biddings. The federal judge considered invalid the plaintiff's requests and maintained CADE's decision.

4.4. Statistics of judicial cases involving CADE

The statistics below demonstrate some aspects of the judicial cases involving CADE. Table 1 indicates the evolution of the number of judicial cases involving CADE from 1994 to 2010:

Table 1 - Distribution of lawsuits, appeals and judicial procedures involving CADE



Source: CADE

The increase in judicial cases as from 2000 is explained by the similar increase in the number of CADE's decisions that imposed sanctions or restrictions. Besides, the dynamic of the Brazilian economy at this period also contributed to more merger notifications and anticompetitive cases to be analyzed by SBDC.

However, a considerable – and constant – decrease in lawsuits, appeals and judicial procedures is noted in the past few years. Three reasons may explain, at least partially, this important reduction of judicial cases.

First, the level of successful outcomes in judicial litigation has significantly increased. A recent study commissioned by the Brazilian National Council of Justice (CNJ), a Judiciary body itself, demonstrates that over 80% of administrative decisions challenged in the Judiciary have a successful outcome, considering the judicial cases decided on the merits involving CADE and twelve other Brazilian regulatory agencies.² The study makes clear and specific compliments for CADE's strategic planning and

² FERRAZ JR., Tércio Sampaio; AZEVEDO, Paulo Furquim; *et al.* "Inter-relações entre o processo administrativo e o judicial sob a perspectiva da segurança jurídica no plano da concorrência econômica e da eficácia da regulação pública". *Research Report*. Research developed by the Law School of the University of São Paulo (USP) and commissioned by the Brazilian National Council of Justice (CNJ). São

organization concerning judicial proceedings. It also indicates CADE as the only Brazilian regulatory agency that enabled a complete empirical research on this issue, which confirms OECD's stand point in regards to CADE's public attorneys.

Second, CADE's policy to promote negotiated solutions, which is widely known by specialists, has definitely contributed to a decrease in judicial discussions. The Performance Agreements (*Termos de Compromisso de Desempenho*), in the field of mergers, and the Control of Behaviors Agreements (*Termos de Cessaçao de Conduta*), in matters related to Administrative Proceedings against anticompetitive conducts, are the two best examples of this policy. Their success has been spurred by the creation of the CADE's Negotiation Commission in 2008.

Third, some important judicial decisions may have influenced companies' behaviors, providing a disincentive for judicial litigation of certain matters. One of these key-decisions concerns the merger *Nestlé/Garoto*, in which the risk of denying a merger request and consequently reverting mergers that were already implemented does exist.³ Another decision concerns courts confirmation of CADE's jurisprudence over untimely notification fines. The number of judicial cases on this particular subject sharply decreased since 2003. For instance, while almost all administrative decisions concerning untimely notification fines were brought to judicial review before 2003, only 30% of them were discussed in courts after 2006.⁴

The average period to complete CADE's judicial review has not changed since last OECD's studies (OECD Peer Reviews from 2005 and 2010). The studied commissioned by CNJ indicates that a judicial proceeding against CADE takes in general 54 months (4 years and a half) to reach a final ruling. If one considers the cases that are still pending of judgment, this average increases to a minimum of 75 months (7 years). Many reasons may explain this unreasonable time length for dispute settlement. First, the enormous amount of legal proceedings as well as the possibility of appeals. The lack of human and material resources in the Brazilian Judiciary also contributes to these statistics. In addition, there is a general perception that most judicial decisions from lower courts rule in favor of the plaintiff, and CADE's decisions will only be confirmed in the higher courts when there is a better opportunity to present and understand the material complexity of most competition legal proceedings.

5. Recent measures for procedural effectiveness

In 2010, CADE undertook several initiatives to become more efficient and increase the quality of its activities. In September 2010, Resolutions N° 54/2010 and N° 55/2010 were approved by CADE. These resolutions changed CADE's book of internal regulations: administrative and judicial instruments of execution were made faster, and procedures after the issuance of CADE's decision were brought up to date through the elimination of redundant and bureaucratic stages.

Furthermore, CADE issued Resolution N° 57/2010, which improved methods for enforcing CADE's decisions. This resolution regulated procedures against companies that did not co-operate with BCPS'

Paulo, 2011. Page 13. In 2005, the OECD Peer Review for Brazil ("Competition Law and Policy in Brazil", 2010) indicated a 57% output for judicial decisions concerning CADE.

³ As a reminder, Brazil still adopts an *ex post* merger control system. The merger *Nestlé/Garoto* took place in 2002, CADE's decision in 2004, and the case is still, nowadays, objet of judicial discussions.

⁴ FERRAZ JR., Tércio Sampaio; AZEVEDO, Paulo Furquim; *et al.* "Inter-relações entre o processo administrativo e o judicial sob a perspectiva da segurança jurídica no plano da concorrência econômica e da eficácia da regulação pública". *Research Report*. Research developed by the Law School of the University of São Paulo (USP) and commissioned by the Brazilian National Council of Justice (CNJ). São Paulo, 2011. Pages 170-172.

determinations. That strategy has increased efficiency in cases when companies failed to respond fully and honestly to CADE's demands for information.

In September 2010, CADE took another step towards improving its enforcement by issuing Resolution N° 58/2010. It created a formal program for auditing information provided by parties to CADE. This program will be executed by the Decision Enforcement Sector, a division of the ProCADE, and will be supported in this task by CADE's Economic Study Department. The Decision Enforcement Sector selects cases according to necessity or convenience and additional cases may also be referred by CADE.

SDE, on its turn, has been fostering its close relationship with the Federal Attorney General's office in order to provide public attorneys with full support during judicial procedures.

6. Conclusion

This written contribution described the institutional and procedural aspects of the relationship between Competition Authorities and Courts in Brazil. It also presented an update on the development in procedural issues that enhance overall efficiency. The interaction between CADE and the Brazilian Judiciary is assured by the General-Attorney's Office in CADE, the ProCADE. The role of ProCADE has increased considerably in the past years, since it plays an essential role in the confirmation of CADE's technical decisions before the Brazilian Courts.

In addition, some relevant numbers related to the Judicial Review of CADE's decisions were analyzed. These data were largely produced by a recent study carried out by the University of São Paulo, commissioned by the Brazilian National Council of Justice (CNJ), which analyzed the complete judicial proceedings involving CADE. On the one hand, they demonstrate a considerable and constant decrease of new judicial filings involving CADE. On the other hand, they show evidence that Brazilian Courts take in average 4 years and a half to reach a final ruling over disputes concerning a decision from CADE that imposes sanctions or conditions to companies.

BULGARIA

1. Public enforcement of competition rules and judicial review of the decisions of the Commission on Protection of Competition

In the Bulgarian legal system the Constitution provides for a general clause on the appeal before the court of all action and legal acts issued by state authorities. Pursuant to Art. 120 of Bulgarian Constitution, the courts exercise control over the legality of the acts and actions of the administrative bodies. All citizens and legal entities are free to challenge any administrative act which affects them, except those listed expressly by the laws.

2. First instance appeals before the Supreme Administrative Court

When issuing administrative acts, the state bodies must respect the fundamental rights and principles provided for in the Administrative Procedural Code (APC), namely legality, proportionality, truthfulness, equality, ex officio initiation, independence and impartiality, procedural economy, accessibility and transparency, consistency and predictability, as well as 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, they are subject to further appeal before the Supreme Administrative Court in respect of the legal conformity of the act.

Art. 64 of the Law on Protection of Competition (LPC) stipulates that the CPC decisions and rulings 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. Under the Administrative Procedural Code (Art. 146), the CPC's acts may be appealed on the following grounds: lack of competence or non-compliance with the established form, or breach of procedural rules, or conflict with provisions of substantive law, or non-conformity with the purpose of the law. When hearing the case, the court does not limit itself to consideration of the grounds stated in the appeal but is obliged, starting from the evidence presented by the parties, to verify the legal conformity of the contested administrative act on all grounds.

CPC decisions may be appealed in whole or partially. There are however some decisions of the Commission, explicitly stated in the LPC, which cannot be appealed before the court, namely: decisions for adopting a sector inquiry report; decisions for adopting opinions in competition advocacy cases; and decisions for rendering assistance by the CPC to the European Commission and ECN national competition authorities under 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 and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. All other decisions of the Commission on Protection of Competition are subject to appeal before the court.

Under the LPC, the rulings of the Commission are subject to appeal by the parties as regards their conformity with the law. The rulings which cannot be appealed before the Court are explicitly stated in the LPC. These are: rulings for suspending the proceeding, rulings for revealing confidential information; and rulings for imposing interim measures.

The deadline for submitting an appeal against decisions is 14 days as of the date of their notification to the relevant party. The rulings are subject to appeal within 7 days of their notification. The appeal stops the enforcement of the administrative act.

An appeal and a prosecution protest are lodged in writing and must state: the identification of the parties, indication of the administrative act which is appealed, specification of the legal non-conformity of the act, the essence of the request, as well as the evidence which the contestant wants to be collected and presented as written evidence. The appeals are submitted through the authority which issued the act and the authority transmits the appeal within three days after the expiry of the time limits for contestation by the rest of the interested parties together with a copy of the entire case file to the court.

Parties in the Court are the contestant, the authority as well as all persons who have taken part in the case before the CPC. A prosecutor from the Supreme Administrative Prosecutor's Office also takes part in antitrust cases before the court. The contestant may withdraw the contestation in written at any stage of the proceeding. The Administrative Code gives the authority the right to withdraw the decision in written with the consent of the rest of the parties. In these cases the withdrawn act may be re-issued only under new circumstances. In practice this has never happened.

The case must be scheduled for open court hearing within a two-month period after its initiation. A rapporteur judge is designated through an electronic distribution system or in another manner of random case distribution. At first instance the CPC cases are examined by a three-judge panel of the Supreme Administrative Court.

The appeal or prosecution protest is terminated if the act is incontestable, or the contestant lacks legal personality, or the contested administrative act has been withdrawn, or the contestant has no legal interest, or the contestation is overdue, or the contestation is withdrawn or abandoned.

If the appeal or protest is admissible, the rapporteur judge orders the transmittal of transcripts thereof to the parties. Within fourteen days after receipt of the transcript, each of the parties may present a written response and adduce evidence. The written evidence in possession of the parties is attached to the response.

Where collection of further evidence, other than this contained in the case file collected by the authority, is necessary for clarification of the legal dispute, the rapporteur judge instructs the relevant party on the need to collect such evidence. Burden of proof lies with the authority and the persons to whom the contested administrative act is favourable. These parties must prove the existence of grounds in the decision.

The evidence duly collected during the proceeding before the authority in the case file is used before the court as well. The court may question as witnesses the persons who have provided information to the authority and may appoint experts to provide opinion if the court finds it necessary. On a motion by the parties or on its own initiative the court may collect new evidence and/or appoint experts. The court pronounces on the motions for evidence in camera or at the first hearing of the case, if the court finds necessary to hear the oral explanations of the parties on the collection of new evidence.

The court renders judgment within one month after the last hearing of the case. With the judgment the court may revoke the act in whole or in part, or may modify the act, or may reject the contestation.

The CPC's experience shows that in most cases, when the court partially revokes the Commission's decision, it usually reduces the sanction imposed by CPC on the grounds of excessiveness of the sanction and non-compliance of the specific amount of the sanction with the principle of proportionality to the established infringement.

The first instance may revoke a decision, where CPC states no infringement, when in the court proceeding new evidence has been collected. In these cases the court returns the case file to the CPC with mandatory instructions on the interpretation and application of the law.

The judgment is effective *inter partes*. If the contested act is revoked or modified, the judgment is effective *erga omnes*.

3. Cassation appeal (second instance appeal) before the Supreme Administrative Court

The first-instance judgment adopted by the three-judge panel of the Supreme Administrative Court is subject to cassation contestation in whole or partially. A cassation appeal or a cassation protest is lodged where the judgment is: null and void or inadmissible, or incorrect by reason of violation of the substantive law, substantial breach of the rules of court procedure, or lack of justification.

The party, to which the judgment is adverse, has the right to appeal the judgment within fourteen days after the day of notification. The Public prosecutor may also lodge a cassation protest within one month.

The appeal and the protest is lodged in writing and must state: the court, the name and exact address of the appellant, the authorized representative (if any), indication of the judgment which is contested, exact and reasoned indication of the specific defects of the judgment which constitute the grounds for cassation, essence of the petition, all evidence which the contestant seeks to be collected and to be presented as written evidence in possession thereof. A cassation proceeding may be dismissed if the appeal or protest has been lodged by an individual or an organization which has not participated in the court proceeding, or the said appeal or protest has been lodged after expiry of the time limit, or the said appeal or protest has been lodged against a judgment which is not subject to cassation contestation, or it has been withdrawn or abandoned by a written application.

The case is examined by a five-judge panel of the Supreme Administrative Court at public hearing with the participation of a prosecutor from the Supreme Administrative Prosecutor's Office. The Supreme Administrative Court in the cassation instance limits itself to considering the defects of the judgment as only indicated in the cassation appeal or protest. Only written evidence is admissible for establishment of the grounds for cassation. No evidence is admissible for establishment of any circumstances irrelevant to the grounds for cassation. The Supreme Administrative Court as cassation instance assesses the application of the substantive law on the basis of the facts established by the court of first instance in the contested judgment.

The CPC experience shows that the evidence called at by the parties at the cassation instance most often is based on events or documents that took place or were obtained after the completion of the administrative procedure before CPC – licenses, permissions, or evidence which prove the termination of the breach (contracts, etc.). This kind of evidence most often is not relevant to the CPC act and the court does not take it into account.

The judgment is rendered within one month after the last hearing of the case. The Supreme Administrative Court may leave in effect the judgment of the first instance court or it may reverse the judgment in the contested part if the said judgment is incorrect. When reversing the judgment, the Supreme Administrative Court issues judgment on the merits of the case. The Supreme Administrative Court as cassation instance may refer the case for re-examination by another chamber of the court of first instance where the Supreme Administrative Court finds substantial breach of the procedural rules, or some additional facts must be established but the collection of only written evidence is not sufficient for their establishment.

The court of first instance re-examines the case according to the standard procedure, starting the procedure from the first legally non-conforming procedural action. Only written evidence which could not have been known to the party, as well as evidence of newly discovered or intervening circumstances after the initial examination of the case by the court of first instance, is admissible during the re-examination of the case. The orders of the Supreme Administrative Court on the interpretation and application of the law are binding upon a further examination of the case.

The cassation judgment is final. The average duration of the whole judicial process before the Supreme Administrative Court is about 12 to 18 months.

4. Court authorization of inspections

The Administrative court of Sofia city is the competent court when authorization of inspections is sought. The inspections are conducted after an authorisation by a judge from the Administrative Court of Sofia city and the authorization is issued upon a motivated request of the Chairman of the CPC.

As regards cases under Art. 93 LPC – obligation for assistance under 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 and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, the request for authorization of inspection is accompanied by the CPC decision for rendering assistance, as well as by the original request for assistance from the European Commission or from an ECN national competition authority.

The Administrative Court of Sofia, on the same day when the request has been submitted, must issue a ruling, which contains the exact name of the undertaking or association which will be inspected. The court warrant applies to the premises, means of transport and other locations used by the inspected undertaking or association. Where it is necessary to conduct simultaneous inspections of several undertakings or associations, the Chairman of the Commission may submit one request for all undertakings, and the court will pass separate rulings for each of the undertakings or associations.

The rulings as well as any refusal to pass such rulings are subject to appeal before a three-member panel of the Supreme Administrative Court. The appeal does not suspend the execution.

Until now, all the inspection requests by the CPC have been authorised by the court with one exception – a case for alleged price fixing cartel of taxis set up by a taxi association. The ruling for authorisation for the inspection by the first instance court was revoked by the second instance court, which stated that there was “not enough proof for breach of Art. 9 of the LPC (repealed)¹”. Even though the CPC was able to collect enough evidence for proving a prohibited agreement of the taxi association during the inspection, the CPC could not use it in its final decision on the merits of the case, as the evidence gathered during the inspection had been collected under a revoked court authorisation.

5. Private enforcement of competition rules in Bulgaria

The procedure which regulates the private enforcement is provided for in Art. 104 of the LPC where it is stipulated that the person at fault for committed infringement(s) of the LPC owes an indemnity for damages caused. Entitled to an indemnity are all natural persons and legal entities who have suffered damages even where the infringement has not been directed against them.

¹ Similarly to Art. 101 (1) TFEU the Art. 9 LPC (repealed) provides for a general prohibition of agreements, decisions or concerted practices among undertakings.

The judgement of the Supreme Administrative Court which has entered into force, and which upholds a CPC decision finding a committed infringement of the LPC, is legally binding upon the civil court as regards the fact whether the decision of the CPC is valid and compliant with the law. A CPC decision, which has not been appealed against or the appeal application against it has been withdrawn, has binding force upon the civil court as well.

In these cases the right to claim indemnity lapses by limitation within 5 years as of the coming into force of the judgement of the Supreme Administrative Court or of the CPC decision. The claims for indemnity may be pretended individually or collectively under the procedure set forth in the Civil Procedure Code.

6. Collective claims for damages

The Code of Civil Procedure (in force as of 01.03. 2008) introduces a procedure on collective claims, which may be used in competition infringement cases.

A collective claim may be submitted on behalf of persons damaged by the infringement. The claim can be submitted by persons who pretend to be harmed on behalf of all damaged persons. In the claim motion the circumstances which determine the circle of the damaged persons and the way in which the claim shall be announced are stated.

The court determines the appropriate way to notify to the public and interested persons that a claim has been submitted – the number of the notifications, in which media the announcements shall be published and the duration of the announcement, as well as the appropriate deadline after the announcement, by which the damaged persons may declare that they will participate in the procedure or that they will carry out their defence on their own.

The judgement of the court has effect for the violator or for the persons who submitted the claim, as well as for those who pretend to be damaged. The court may pronounce compensation to be deposited into the account of one of the persons who submitted the claim, into a special account for common disposal of the persons who submitted the claim, or into a special account for common disposal of all the damaged persons.

7. Co-operation between the courts and the Commission on Protection of Competition

A special mechanism came into force in 2010 in order for Bulgaria to comply with its obligation under art. 15 (2) of Council Regulation (EC) No 1/2003 to submit to the European Commission all national courts judgments on the application of Art. 101 and 102 of TFEU. In its Action Plan for 2010, the Commission on Protection of Competition put as one of its priorities building a mechanism for co-operation between the institutions – the national courts, the CPC and the European Commission, for exchange of information under Art. 15 (2) of Council Regulation (EC) No 1/2003. The CPC proposed to the Ministry of Justice and to the Supreme Judicial Council to adopt an appropriate act for the above-stated purpose.

The Supreme Judicial Council of the Republic of Bulgaria, with its Protocol No 14/08.04.2010, obliged the presidents of all courts in the Republic of Bulgaria, including the Supreme Court of Cassation, the Supreme Administrative Court, all courts of appeal, all district and regional courts in the country to forward to the CPC without delay any written judgment regarding claims for damages resulting from infringements of Art. 101 and 102 of TFEU. After receiving these judgments, the CPC will send them to the European Commission.

INDONESIA

1. Introduction¹

Every nation has its own legal system and procedure, meaning that relationships among law enforcers might be different from one country to another. Indonesian competition law (the Law No. 5/1999) is a relatively new issue in Indonesia. The Law was issued as part of a reform package at a time when society's trust in government was very low. This state of affairs has led to the distribution of parts of government functions to a new type of institution, namely state commissions. To date, there are fifty state commissions (independent and executive) in Indonesia with specific functions that sometime overlap with government supervision. The competition law enforcer, KPPU, is one of the independent state commissions. Competition law enforcement involves three main law enforcers, namely the commission (KPPU), the court, and the national police. The legal procedure is also newly established and is yet to be part of specific legal procedures, unlike corruption, commercial, administrative, and human rights which have their own national court.

As the supervisor of competition law implementation, KPPU is given authority based on the Law to organise its own legal proceedings, along with its internal rules and systems. The KPPU has also been given authority to impose sanctions to reported parties, to provide policy advice and recommendation to the government, and to provide statement on mergers.

2. The role of courts in competition law enforcement

Courts are part of competition law enforcement in Indonesia, in addition to the competition agency (KPPU) and the national police. Their participation in competition cases differs widely, given the specific roles attributed to them by competition law. By law, the court's authority is limited to three legal proceedings: namely objection, cassation, and execution.

2.1 Rules in objection

As other international practices, there are three possible reactions to the decisions of the competition agency, namely (i) to voluntarily accept and implement such decisions; (ii) to file an "objection" to the decision; and (iii) to refuse to implement the decision. The involvement of the court in competition law enforcement is in the form of processing objections by the parties in the case. The law stipulates that objections to a KPPU's decision can be filed only in the district court. These objections cannot be handled by the State Administrative Court given that the competition agency is not a regulator, as stipulated by law. The objection also cannot be settled by mediation. The procedures conducted by the court are regulated by the Supreme Court Regulation No. 3/2005 on Procedures for an Objection on KPPU's decision.

The role of the court in deciding upon an objection is to decide whether KPPU's analysis is acceptable or in-appropriate, if it is supported or not by comprehensive and accurate facts, thus if it may be accepted

¹ For further information, please kindly visit our website (<http://eng.kppu.go.id>) or email us at international@kppu.go.id. English news can be obtained through personal blog at <http://indocomnews.wordpress.com>.

under the accepted standard of proof. The court will therefore conduct several follow-up procedures in analysing KPPU's decision.

- To review all examination processes having taken place at the Commission in the decision-making process; courts cannot take into consideration the existence of new evidence (*novum*) or create new claims in the review process;
- To assess whether the background of the conclusion reached by the Commission based on available facts is fair and rational;
- To review judgements on a Commission's decision on the legal aspects with respect to the conclusion made.
- To affirm the Commission's decision when the court agreed with KPPU's decision.

An objection to a KPPU's decision can be submitted within 14 (fourteen) working days from the moment the business parties have received notice of the KPPU decision. The objection shall be made through clerks at the competent district courts in accordance with the civil case's notification procedure and by providing a copy of the objection to the Commission. In the event that an objection is filed by more than one business actors on the same KPPU decision, and with the same legal domicile, the objection case should be registered under the same registration code. Moreover, in the event that the objection is filed by more than one business actors on the same KPPU decision, but with different legal domicile, the Commission may file a written request to the Supreme Court to appoint as competent one of the district courts involved and suggest to which district court the objection should be made.

All heads of district courts accepting an objection proposal must be notified by the Commission when the written request by the KPPU is made to the Supreme Court, thus it can be used as legal background by each district court to stop the hearing and wait for further appointment by the Supreme Court. Upon receiving the declaration from the Supreme Court, the un-appointed district court must send the case files (documents) along with the remaining case fee to the appointed district court.

On each objection, the Commission shall act as a Party and must submit the decision along with the supporting documents to the district court examining the objection on the first day of the hearing. The timeframe for an assessment by court is quite short: i.e. 30 (thirty) working days from the moment the objection is filed. The type of review conducted by the court commonly includes standardizing and narrowing the examination of substantial evidence, which focuses more on the examination procedure made by the Commission rather than on finding new evidence or facts on the respective cases. The assessment is made on overall documents which are relevant to the Commission's findings. It reviews the rationality of the reasoning or consideration in the Commission's decision and whether such a decision is based on the provided evidence. Economic approach should be considered in the objection analysis by the court.

If the court who assessed the objection finds the existence of insufficient or under-utilized evidence by the Commission, or it finds irregularities on the legal application, then the case can be returned to the Commission to be revised or re-examine. Additional examination of witnesses in the objection process cannot be performed by the court. Therefore, based on Supreme Court regulation, the court can define the name of witnesses along with the necessary substance that need to be re-examined. The court submits this information to the Commission to implement additional examination, which is limited to the court's instructions (on witnesses and substances). In this regard, the calculation of examination days is sustained until the result of additional examination and its documents are submitted by the Commission to the court.

2.2 *Cassations*

Cassation shall be made to the Supreme Court when one of the parties (KPPU or the business actors) loses at the district court and cannot accept the decision made. The examination at the Supreme Court is limited to 30 (thirty) working days after the application for cassation is accepted. However, there is no penalty to the Supreme Court if the decision is delayed. Based on the implementation, only a few cassation processes are concluded within the applicable time frame.

2.3 *Executions*

Competition law stipulates that criminal sanctions in competition cases can only be imposed by the court. Such sanctions involve principal sanctions, such as fines or imprisonment replacing the fines, and additional sanctions, such as revocation of a license, a position and an activity. When a decision is affirmed (*inkrach*), and if no objection is made at the highest court, then an execution on the decision can be made.

The execution of a decision can only be made based on an execution order from the district court. Therefore, the Commission must apply for such an order to the court. The execution is made through the district court which decided on the case. For decisions which have not been subject to an objection, the execution order can be proposed to the district court where the business actor is domiciled. As a preliminary procedure, the district court will issue a warning (up to two warnings) to the business actor to meet the decision within a certain time limit. After the time limit has passed, and if the decision has not been implemented, the district court can order a forced execution of the decision.

Until the end of 2010, the value of fines of affirmed KPPU decisions was Rp.182,349,030,287. However, only 5.8% of this amount (Rp 10,587,146,667) was paid by the businesses to the State Treasury. Nevertheless, the Commission through the litigation section will be more proactive in facilitating its competence to a district court (PN) to undertake execution as soon as possible if any business actor does not carry out its obligations.

3. **Private actions on competition cases**

Competition law can only be enforced by the competition agency. Private action on competition law cannot be made through courts, as this is not allowed by the Supreme Court Regulation No. 3/2005. However, theoretically, competition law disputes may proceed through to courts, especially by using Article 1365 of Indonesian civil code (law) on activities against the law (which is adapted from the Code Napoleon/French Civil Code). The article stipulates that the perpetrator of any unlawful activity causing damage to other people should compensate the loss caused by such damages. So, in this context, a given party may report another's breaching of competition law and request that it compensates it for the losses occurred. We acknowledged a case where a certain business actor utilized KPPU's decision to request compensation to the court by using such provision.

Private action was once conducted by a person to the district court. The case was a bid rigging case in local government. In the development, the court refused to handle such a report and returned it to the reported party and asked him to submit it to KPPU. The court highlighted that only KPPU has the authority to conduct an investigation on the violation of competition law.

4. **Challenges**

Competition law procedure has yet to gain an appropriate position in the structure of legal proceedings in Indonesia. In some cases, the legal approach used by competition law is difficult to be accepted by judges due to several inconsistencies in understanding the terms or approaches in competition

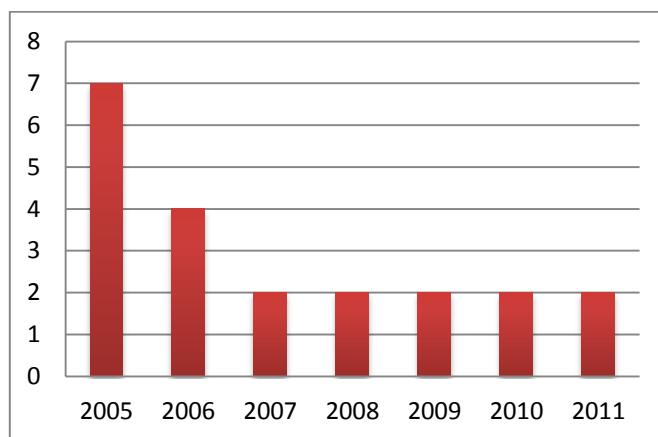
law. For example, additional examination is rarely used by the district court, but rather by a higher court which lead to different perception at the implementation level.

This also applies to the term “appellate”. The law mentions that an objection can be filed by a person who is unsatisfied with the KPPU’s decision. Bearing this definition in mind, if a party to an investigation is not satisfied with KPPU’s decision, it can object to the court. This is yet to be regulated in the applicable legal system, even though this situation is already well-documented. The result is that there is a variety of interpretations amongst judges which lead to different jurisprudences.

Short timeframes in handling objections also provide additional challenges at the implementation level: examining objections may also lead to the discussion of substantial aspects of competition law enforcement – debates which are prone to being particularly resource-intensive.

This challenge is overcome by conducting competition law workshops, fully facilitated by KPPU and aimed at district judges. Each year, KPPU conducts at least one workshop for judges, under the support and supervision of the Supreme Court. The topics examined range from the basic knowledge of competition law to its associated economic aspects and specific competition violations.

Table 1: Number of workshop for judges



However, this effort is also being challenged as specific judges for competition law have yet to be established. The situation is worsened by the high turn-over among all Indonesian district courts. Sustainability and regeneration might be a disrupting factor. Fortunately, the Supreme Court supported the KPPU by informally stipulating that district judges which handle an objection case on competition law shall be the ones to participate in KPPU workshop (these judges receive a certificate by the Supreme Court and the KPPU at the end of the workshop to attest their participation). To date, more than 300 judges have participated in the workshop.

INDIA

1. Introduction

The judiciary reviews the legality of the acts of the economic authority in enforcing its policy. It checks that the regulator has observed the rules of procedure and evidence. In other words, it determines whether the regulator has observed procedural due process. The judiciary also reviews the way in which the substantive law has been applied, *i.e.*, it determines whether the regulator's understanding of the law is correct. The judges construe the law- the objective of which is to enforce economic policy- in the light of a given factual and economic context. The judiciary therefore determines both issues of substantive law and the procedural legality of its implementation by the regulatory authority.

The courts play a key role in interpreting competition laws, creating judicial precedents and bringing in the flexibility to the implementation of the laws thereby enhancing the development of the law and the application of current economic thinking to the decision-making process. The courts also ensure protection of fundamental procedural rights, the right to a fair and impartial hearing and confidentiality of business information. This brings about a relationship between the national competition authorities and the courts.

The judicial oversight by the courts over the orders passed and the decisions made by the expert regulatory body is quite significant in the effective and efficient enforcement of the provisions of the law which such body is enjoined upon to administer. This, in turn, in a significant measure, depends upon the procedural fairness and transparency followed by the expert body while discharging its functions under the law. Based on this inter-relation between these two aspects, the same shall be dealt with separately in two different sections of this paper.

2. Relationship between National Competition Authorities (NCAs) & courts

The relationship between national competition authorities and courts is very critical for the effective enforcement of the provisions of the competition law. There are myriad ways in which such relationship comes into play between the competition authority and the courts. In particular, it may arise in the context of the appellate powers of the tribunal in appealable matters or in the context of the judicial review functions exercised by the constitutional courts.

In India, the new competition law, *i.e.*, the Competition Act, 2002 ('the Act') was passed by the Parliament in the year 2002 and received the assent of the President of India on January 13, 2003. However, the national competition authority set up thereunder, *viz.*, the Competition Commission of India (CCI) started discharging its enforcement functions relating to anti-competitive agreements and abuse of dominant position from May 20, 2009 and regulation of combinations from June 01, 2011 only.

This delay has its genesis in the order of the Supreme Court of India in the case of *BrahmDuttv. Union of India*, (2005) 2 SCC 431 where validity of certain rules framed under the Act was challenged. The Supreme Court while disposing of the petition in this case observed that if an expert body has to be created consistent with the international practice, it might be appropriate if two separate bodies are created, one with expertise, *i.e.*, advisory and regulatory and the other adjudicatory based on the doctrine of separation of powers recognised by the Constitution. Keeping in view the judgment of the Supreme Court, the Competition (Amendment) Bill, 2006 was introduced in the Lok Sabha on the 9th March, 2006 and the

same was referred for examination and report to the Parliamentary Standing Committee. Taking into account the recommendations of the Committee, the Competition (Amendment) Bill, 2007 was introduced. The Competition (Amendment) Bill, 2007 *inter alia* provided for the following:

1. CCI shall be an expert body which would function as a market regulator for preventing and regulating anti-competitive practices in the country in accordance with the Act and it would also have advisory and advocacy functions in its role as a regulator;
2. for establishment of the Competition Appellate Tribunal (COMPAT), which shall be a three member *quasi*-judicial body headed by a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court to hear and dispose of appeals against any direction issued or decision made or order passed by CCI.

Thus, the scheme of the original Act which provided for an appeal to the Supreme Court of India from the orders made by CCI had undergone a sea change in as much as the amendments effected in the year 2007 to the Competition Act, 2002 were quite far reaching in as much as an appellate tribunal, *viz.*, COMPAT was established to hear and dispose of appeals against specified directions issued or orders passed by CCI. A further appeal was also provided to the Supreme Court against the decisions or orders passed by the appellate tribunal.

2.1 CCI & COMPAT

Under the scheme of the extant competition law in India, a three-tiered mechanism has been set up to hear the competition matters. To begin with, a statutory appeal has been provided against the specified decisions made or orders passed by CCI to COMPAT and a further appeal has been provided to the Supreme Court of India against the decisions/orders made by COMPAT.

From the above, it is evident that under the scheme of the Act, two appeals have been provided against the decisions/orders of CCI. Thus, under the Act, intervention by COMPAT and Supreme Court has been envisaged through appellate proceedings. These interventions would raise and involve *inter alia* issues of procedural fairness and transparency followed by CCI in its enforcement jurisdiction.

2.2 CCI & civil courts

So far as the role of civil courts is concerned, section 61 of the Act, in explicit terms, excludes the jurisdiction of civil courts in respect of the matters covered under the Act. It provides that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which CCI or COMPAT is empowered by or under the Act to determine and no injunction shall be granted by any court or authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act. Thus, with reference to the matters covered under the Act, the role of the civil courts has been eliminated through this ouster clause and hence there may hardly be any instance of any overlapping in the functioning of CCI with the civil courts. However, such clause in the Act cannot take away the judicial review functions exercisable by the High Courts and the Supreme Court under the Constitution as noted in the following paras and hence the issues of procedural fairness and transparency may engage the attention of the constitutional courts as well.

2.3 Judicial review by high courts & Supreme Court

The rule of law requires that the enterprises concerned have access to judicial review. Judicial review ensures that independent competition authorities comply with the law and makes them accountable for their decisions. It also contributes to improving the decision of competition authorities. There may be different levels of review intensity in different cases. At the lowest level, the court only assesses manifest

errors in the application of the law and quashes obvious unreasonable decisions. In this exercise, the court controls, for instance, whether the authority has acted within its jurisdiction and whether it has respected the basic principles of procedural fairness. In the next level, the court review consists of an assessment of the legality of the decision at stake, including compliance with procedural requirements. This would include the assessment by the court as to whether the competition authority has correctly interpreted the law. In the third level, the court can fully review the merits of the case by assessing all relevant facts in addition to the correct application of the law to the facts. This standard goes beyond the control of legality, since the court also needs to assess the factual evidence at the basis of the competition decision. Finally, the most intensive standard of review allows the court to review the case fully and substitute its own analysis for the assessment of the competition authority. However, in India, the scope of judicial review by the constitutional courts remains circumscribed by the self-imposed limitations drawn by such courts.

In India, the power of judicial review of the decisions/orders/directions *etc.* of CCI by the High Courts and the Supreme Court under the constitutional scheme remains unaffected by statutory exclusion of jurisdiction of civil courts. Such a power having been conferred by and under the Constitution cannot be ousted by the exclusionary provisions of jurisdiction of civil courts under the Act, as noted above.

The power to judicially review any decision is an extraordinary power vested in a superior court for checking the exercise of power by public authorities, whether they are statutory, *quasi-judicial* or administrative.

In India, by virtue of Article 32 of the Constitution, the Supreme Court can exercise the power of judicial review. Similarly, under Articles 226 and 227 of the Constitution, the High Courts have the power of judicial review. No other court has been conferred with such a power. The power is not intended either to review governance under the rule of law nor do courts step into areas exclusively reserved by the Constitution to the other organs of the State, *viz.*, the legislature and the executive.

2.4 *Judicial review and appeal-the distinguishing feature*

It may be noted that the object and scope of judicial review of administrative action is different from that of appeal. The object of judicial review by the courts is to keep the authorities within the bounds of their powers under the law. In appeal, however, the courts have the power to reconsider the decision of the authority on the merits. Appeal, however, is a creature of statute and there is no right of appeal unless there is a specific statutory provision creating that right.

In judicial review, the court is not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or order is made. A court of law is not exercising appellate power and it cannot substitute its opinion for the opinion of the authority deciding the matter. The areas where judicial power can operate are limited to keep the authority within the bounds of law.

2.5 *Emerging trends of judicial review*

Judicial review has certain inherent limitations. It is for the executive to administer the law and the function of the judiciary is to ensure that the authorities carry out their duties in accordance with law.

The duty of the court in judicial review is essentially to confine itself to the questions of legality. It has to consider whether a decision making authority exceeded its power, committed an error of law, violated rules of natural justice, and reached a decision which no reasonable man would have reached or otherwise abused its powers. Though the court is not expected to act as a court of appeal, nevertheless, it can examine whether the decision making process was reasonable, rational, not arbitrary or not violative of Article 14 of the Constitution.

Unless the order passed by an administrative authority is unlawful or unconstitutional, power of judicial review cannot be exercised. An order of authority may be right or wrong. It is the administrator's right to trial and error and so long as it is *bonafide* and within the limits of the authority, no interference is called for. In short, power of judicial review is supervisory in nature. Unless this restriction is observed, the court, under the guise of preventing abuse of power by the administrative authority, will itself be transgressing its powers.

At the same time, however, the power of judicial review is not unqualified or unlimited. If the courts were to assume jurisdiction to review administrative acts which are unfair in their opinion on merits, the courts would assume jurisdiction to do the very thing which is to be done by administration.

In recent times, judicial review of administrative action has become extensive and expansive. The traditional limitations have vanished and the sphere of judicial scrutiny is being expanded. Earlier, the courts used to exercise power only in cases of absence or excess or abuse of power. As the State activities have become pervasive and various regulatory bodies have come into existence, the stake of public exchequer justifies larger public audit and judicial control.

2.6 Scope of intervention by CCI in appellate & judicial review proceedings

Since the appellate and judicial review of the proceedings of the decisions of CCI will increase in the coming times, the scope of intervention by CCI in these proceedings assumes importance.

In this connection, the judgment of the Hon'ble Supreme Court of India in the case of *Competition Commission of India v. Steel Authority of India Ltd.*, Civil Appeal No. 7779 of 2010 on 09.09.2010 is very crucial in the field of competition law in India, wherein, the Hon'ble Supreme Court has put forth in great detail the rationale behind the enforcement of the new competition law. Through this judgment, the Hon'ble Supreme Court has put to rest various controversies regarding the interpretation of the provisions of the Act and, in particular, the demarcation of the powers of COMPAT and CCI. In particular, the Supreme Court held that CCI, in cases where the inquiry has been initiated *suomoto*, shall be a *necessary party* and in all other cases CCI shall be a *proper party* in the proceedings before COMPAT.

Thus, in view of the aforesaid ruling, CCI can effectively intervene in the appellate proceedings before COMPAT and on the parity of logic and reasoning, CCI can similarly intervene in the proceedings before the High Courts and the Supreme Court in judicial review proceedings. The standing of CCI before appellate tribunal and constitutional courts would help achieve the putting forth of the perspectives of CCI before such fora in an effective manner.

3. Development in procedural fairness and transparency

The issues of procedural fairness and transparency under the Indian competition law need to be noted in the light of the provisions contained in section 36(1) of the Act which enjoins upon CCI to follow the principles of natural justice. Thus, the Act without delineating any detailed rigorous procedure leaves it to CCI to devise its own procedure to regulate the proceedings subject to the requirements of principles of natural justice. In fact, CCI has framed the Competition Commission of India (General) Regulations, 2009 ('the General Regulations') which provide for a detailed procedure in the matters *inter alia* relating to enquiries conducted by it. The General Regulations provide sufficient opportunities to the parties to represent their cases in the enquiries before CCI.

Much effort has and continues to be spent on the development of best practices that guide competition authorities in their enforcement decisions and minimize the differences over substantive views governing competition enforcement. Similarly, efforts need to be directed at to ensure that the investigation and appeals processes also are governed by adherence to a set of internationally recognized best practices.

The adoption of such best practices not only ensures procedural fairness for those involved, but more importantly supports vigorous and efficient enforcement and serves as a means of ensuring quality control, better findings, and confidence in the decision making process, all of which are necessary for a credible authority.

There are challenges and limitations to the development of procedural fairness best practices and different levels of procedural fairness may be justified in an investigation versus an appeals phase of a case. Thus, an international conversation should take place about the procedural fairness protections that should be afforded in all competition related cases, even though the development of a comprehensive and universal list of best practices might prove to be difficult.

3.1 *Transparent and open process*

To begin with, it is necessary to ensure that procedures and agency practices are transparent and open. Competition authorities make their rules and procedures publicly available, and they should allow parties to consult with the agency at key stages of the investigation. By having high standards of transparency and openness, the competition agency can make certain that its decisions are respected by all parties. Transparency increases confidence in the agency's decision-making process by instilling in regulated parties and the public a sense of confidence that decisions are reached fairly and consistently.

Further, a competition authority should not publicly issue a notice that it has begun an inquiry unless the agency has gathered adequate evidence and is proceeding with a full investigation. If it issues such a notice, it should qualify any statement by specifying that an investigation does not mean that there has been a violation of the law. A competition agency should have in place internal controls that prevent the development of a bias that leads the agency towards needing to reach a certain conclusion as a result of launching an investigation.

3.2 *Confidentiality treatment to the information/documents*

Every effort should be made by the competition authorities to protect the confidentiality of the identity of an informant on a request as also to keep the requested information as confidential. This is a very balancing and delicate task. As, on the one hand, disclosure of commercially sensitive information may shake the confidence of the parties to the proceedings, on the other hand, too much of confidentiality and secrecy may run afoul of the principles of natural justice. In this regard, CCI has framed the regulations which deal with the issues of confidentiality of the information in a balanced manner as only that information is granted confidential treatment which, if made public, would result in disclosure of trade secrets or destruction or appreciable diminution of the commercial value of any information or would otherwise be reasonably expected to cause serious injury to the enterprise concerned.

3.3 *Principles of natural justice*

Allowing the opposite parties a meaningful opportunity and adequate time to review and respond to the evidence gathered against them is decidedly the most important procedural fairness best practice that a competition agency can adopt. Allowing the respondent to see the evidence in an agency's possession and an ability to explain or challenge that evidence ensures that an agency's enforcement decisions are based on sound and strong evidence. In addition, the agency should not be selective in the evidence it chooses to obtain, but, instead, should pledge to evaluate all relevant evidence, including that which is presented by the respondent in its own defence.

3.4 *Recusal in cases of conflicts of interests*

In the matters which may involve conflicts of interests, the investigating officer or the deciding authority, as the case may be, must recuse from the proceedings to inspire the confidence of the parties in the decision making process. The conflict may be personal, pecuniary or subject matter related. It is of the essence of the decision making process that parties to the proceedings have full faith and confidence in the impartiality and independence of the agency.

An agency also has a vested interest in ensuring that the rules of evidence and procedure are closely followed and that all legal privileges, such as the right to counsel, and confidentiality doctrines, where recognized, are respected. This would ensure the respondent a fair opportunity to prepare an adequate defence.

An administrative agency should allow respondents to present evidence and offer an argument at a hearing in which the burden of proof is on the party alleging the violation. Though, wherever necessary, the law may provide for presumption of violation in cartel cases which must be made rebuttable. Examining witness testimony and documentary evidence in a live setting, preferably with a hearing officer with independent decision making authority, guarantees that the evidence is reliable and trustworthy, and it strengthens the basis for the ultimate decision of the competition agency.

3.5 *Reasoned/speaking orders*

Reasoned order is another facet of the requirements of the principles of natural justice. A reasoned order eliminates subjectivity and infuses objectivity in the decision making process. Further, a speaking order enables the superior courts and tribunals to review the order in an effective manner. Hence, when an agency reaches its decision, it should make the decision public, explain the reasons for the decision, and make sure that it has a strong economic basis based on objective, not subjective, factors. The goal of a competition system is to ensure that all actors follow the law and do not engage in anti-competitive conduct. Most businesses and individuals, in fact, want to follow the law. By explaining in detail an agency's decision to challenge (or not to challenge) certain conduct, the agency can help its mission – compliance with the law – by notifying businesses what conduct is acceptable or unacceptable.

3.6 *Role of experts of economics*

Competition law being an economic law, it is imperative that experts in economics are engaged in the analysis of cases. The Indian competition law enables CCI to call upon experts from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist it in the conduct of any enquiry by it. Further, CCI may also engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and outstanding ability, who have special knowledge, and experience in, economics, law, business or such other disciplines related to competition, as it deems necessary to assist CCI in the discharge of its functions. An agency also should ensure that it uses economic experts to make its decisions and base them on objective factors. Today, there is strong consensus that economic analysis must be undertaken to determine whether anti-competitive conduct occurs. An agency that uses economics as the basis for its objective decisions will legitimize its decisions in the eyes of those it regulates and in the eyes of fellow global enforcers. By having a clear, objective, and economics-based method of deciding cases, an agency's decisions will be strengthened and its reputation will rise among all stakeholders and peers.

3.7 *Appeals and judicial review*

An appeal before an independent and impartial tribunal is *sine qua non* for a regulatory process to instil confidence in the decision making process. As noted earlier, under the Indian competition law,

appeals are provided against the directions issued or decisions made or orders passed by CCI to COMPAT in respect of final or substantive determinations. Besides, the High Courts and the Supreme Court exercise supervision by way of judicial review over the determinations made by CCI and COMPAT. A system of checks and balances consisting of an independent judiciary provides an important benefit by ensuring that an impartial entity reviews all enforcement decisions to guarantee that they are soundly based both in law and in fact. An agency wants to get the right result – not just the result for which it advocates – and a court system makes certain that both the agency and the judiciary each has a role in arriving at that right result. Under the Indian competition law, investigations are conducted by an independent agency set up by the Government of India. Thus, there is a dichotomy between the investigating functions and adjudicatory function and both are conducted by separate agencies.

The agencies highly value open communication with subjects of anti-trust investigations, subject, of course, to appropriate confidentiality constraints. At every stage, parties are encouraged to meet the lawyers and the economists charged with investigating the conduct at issue. Parties are free to submit their arguments, facts and theories they believe relevant during the investigation. This openness enhances ability of the agencies to investigate and prosecute successfully by focusing energies on the real areas of dispute. More importantly, this type of transparency ultimately help the agencies make the right enforcement decision.

In the end, it may be concluded that procedural fairness and transparency in the decision making process go hand in hand in defining the relationship between the national competition authorities and the courts.

LITHUANIA

1. Introduction

The Competition Council of the Republic of Lithuania (hereinafter the Competition Council) is not a pre-trial institution, but it is the institution entrusted with the enforcement of competition rules. First of all, public enforcement of competition rules is ensured by investigation by the Competition Council and imposition of sanctions. This involves prohibited agreements (Article 5 Law on Competition of the Republic of Lithuania (hereinafter the Law on Competition)), abuse of a dominant position (Article 9), mergers (Articles 10-15) and actions of unfair competition (Article 16). The Competition Council is also empowered to conduct investigations concerning legal acts or other decisions by entities of public administration (Article 4) and has the right to oblige them to revoke or change legal acts or decisions that restrict or distort competition, and in failure of them to do so, has the right to appeal to the court. Lastly, the Competition Council has the right to appeal to the court in defence of public interest.

Private enforcement of competition rules can be initiated by an undertaking whose legitimate interests are violated by actions of unfair competition (Article 17) or any natural or legal person that incurred damage due to violation of the Law on Competition (Article 46). In cases of private enforcement of competition rules the Competition Council is to give a finding on the issues pertaining to the application of the Law on Competition either under request of the court or under its own initiative.

Proceedings concerning the public enforcement of the competition rules are regulated by the Law on Competition and the Law on Administrative Proceedings of the Republic of Lithuania (hereinafter the Law on Administrative proceedings). Proceedings concerning the private enforcement of competition rules are regulated by the Law on Competition and the Code of Civil Procedure.

The cases in public enforcement of competition rules are adjudicated by the courts of special jurisdiction – the administrative courts. There are two stages of proceedings before the administrative courts – the first instance and the appeal instance. There is also a quasi-judicial institution - the Chief Administrative Disputes Commission, which the undertakings can appeal to against decisions of the Competition Council, in general concerning procedural issues. The cases in private enforcement of competition rules are dealt by the courts of general jurisdiction and the proceedings are divided into three stages of litigation – the court of first Instance, the court of Appeal and the court of Cassation.

2. The relationship between the courts and the Competition Council

The relationship between the Competition Council and the courts differs depending on the factual situation and the status of the Competition Council in the proceedings. The Competition Council may be the plaintiff (applicant) (e.g. when the Competition Council appeals to the court in defence of public interest), the defendant (e.g. when the resolutions of the Competition Council imposing sanctions are appealed against) or its position may be neutral (e.g. when the Competition Council is requested to give a finding (in essence similar to the expert finding) on the application of competition rules).

The Competition Council may apply to the court: a) in defence of public interest; b) for court authorization to conduct inspections in the premises of the undertakings or to apply restrictions for economic activities of the undertakings; c) for interim measures; d) for sanctions against the chief

executive of the undertaking. The Competition Council may also be a defendant when the resolutions of the Competition Council are appealed against by the undertakings.

2.1 *Defence of public interest*

The Competition Council has the right to apply to the court to ensure proper implementation of competition rules in relation to legal acts or other decisions by entities of public administration that restrict or distort competition. The Competition Council has the right to appeal against the legal acts or other decisions adopted by entities of public administration in regulating economic activity, except for the statutory acts issued by the Government of the Republic of Lithuania. After having examined the compliance of certain legal acts (bylaws) with the provisions of the Law on Competition the Competition Council is to address the entity of public administration with a request to amend or repeal legal acts or other decisions restricting competition. In case of failure to comply with the requirement, the Competition Council has the right to appeal to the court with a request that the entity of public administration revokes or changes the legal acts or decisions that restrict or distort competition. In this case the Competition Council acts as an applicant.

The Competition Council has the right to bring an action in order to protect state and individual interests safeguarded by the Law on Competition. The right to appeal to the court in defence of public interest is dependent on the provisions of law, which means that the Competition Council has the right to bring such action only if the legal provisions directly envisage such a possibility. The public interest in such cases basically may concern any of the actions or decisions of private or public entities and the Competition Council is obliged to prove the existence of public interest. As the proceedings are regulated by the Code of Civil Procedure, the proceedings are adversarial. The Competition Council acts as a plaintiff and has the rights and obligations of the plaintiff. However, in practice the Competition Council has never used this right because usually it uses its powers to enforce Law on Competition by investigating alleged infringements of the Law on Competition and imposing certain sanctions or obligations directly to the undertakings or entities of public administration.

2.2 *Findings in private cases*

The Competition Council may be required to give a finding in private cases involving a question of applicability of competition rules. The Competition Council may also give such a finding under its own initiative. The position of the Competition Council must be neutral, so that the finding is objective and impartial and it is the court that makes the final evaluation of the situation concerned, thus, settling the dispute between private parties. The Competition Council has the right to access to the file, give oral or written explanations, produce evidence, participate in the examination of the evidence and lodge petitions.

2.3 *Authorisation of actions by the Competition Council*

The Competition Council for the purpose of investigation of the alleged infringements of the competition rules is to conduct inspections in the premises, land and means of transport used by the undertaking and other premises, land and means of transport, including residential and other premises of heads and employees of the undertaking only with the court authorization. In this case the authorized officer of the Competition Council applies to the court with the request for the authorization of the abovementioned actions. If the authorised officer of the Competition Council disagrees with the decision to reject the application for court authorization, he has the right to appeal against the decision within seven days.

The Competition Council has the right to apply for interim measures in order to prevent a substantial or irreparable damage to the interests of undertakings or public interests. One of the interim measures, in

particular to obligate the undertakings to perform certain actions is to be imposed only upon receiving court authorization. The decision of the Competition Council on the application of interim measures may be appealed against.

Upon receiving a court authorisation the Competition Council may, by its resolution, establish the following restrictions of economic activity of undertakings which fail to comply with the imposed sanctions: to temporarily suspend export and import operations, bank operations, the validity of the permit (licence) to engage in certain economic activity. The resolutions of the Competition Council are binding on the institutions which may apply such restrictions and must be implemented without delay. The restrictions are lifted after the implementation of the sanctions imposed by the Competition Council.

2.4 Application in request for personal sanctions for the chief executive of the undertaking

If the Competition Council, after having examined all the relevant facts, decides that the chief executive of the undertaking contributed to the infringement of the Law on Competition and the conditions entrenched in the Law on Competition are satisfied, the Competition Council is to submit an application to the court for sanctions against the head of the undertaking. The request is to be submitted when the infringement decision against an undertaking becomes final.

2.5 Appeals against the actions and decisions of the Competition Council

Undertakings suspected of having violated the Law on Competition have the right to appeal to the Competition Council against the illegal actions of the authorized investigating officers. After the Competition Council adopts a decision on the issue, such a decision may be appealed to the court.

The resolutions of the Competition Council imposing sanctions upon undertakings or imposing an obligation upon the entities of public administration to revoke or change legal acts or other actions that restrict competition can be appealed against to the court.

In these cases the Competition Council acts as a defendant before the court.

3. The procedure applicable to public enforcement of competition rules

Public enforcement of competition rules can be conducted in various ways: a) the Competition Council conducts investigations and imposes sanctions upon the undertakings; b) the Competition Council has the right, after an investigation, to oblige the entities of public administration to revoke or change legal acts and other decisions that restrict or distort competition. If the entity of public administration fails to fulfil its obligation, the Competition Council has the right to apply to the court with a request to oblige the entity of public administration to implement the resolution of the Competition Council; c) the Competition Council has the right to apply to the court in defence of public interests.

As mentioned in point 8, the Competition Council has the right to bring an action in defence of public interest subject to the rules of the Code of Civil Procedure. The Competition Council can bring an action only when the legal provisions envisage such a possibility, it acts as a plaintiff on behalf of the state and has all the rights and obligations pertaining to the legal procedural status of the plaintiff. The Competition Council has also the right to appeal to the court of Appeal or court of Cassation against the decisions of the lower courts.

However, the most common procedure is when the Competition Council after an investigation adopts a resolution and imposes sanctions upon the undertakings. The undertakings as well as other persons who believe that their rights, protected by the Law on Competition, have been violated have the right to appeal to the court against the resolutions of the Competition Council. The parties to the proceedings have the

right to appeal against the resolutions of the Competition Council to impose sanctions provided for by the Law on Competition, to refuse to impose sanctions where there is no legally established basis for action, to terminate the case in the absence of proof of infringement and to remand the case to the Competition Council for a supplementary investigation. In practice the parties to the proceedings are suspected undertakings, undertakings whose interests have been violated due to restrictive practices, entities of public administration, associations or unions representing the interests of undertakings and consumers.

As it is mentioned in point 7 the Competition Council also investigates legal acts or other decisions by entities of public administration when they regulate economic activity and when the legal acts or other decisions restrict or distort competition. After the investigation, the Competition Council may pass the resolution imposing an obligation upon the entity of public administration to revoke or change the acts or decisions concerned. The entities of public administration have the right to appeal against the resolutions of the Competition Council. The proceedings are the same as in case of appeals by undertakings. However, in such proceedings the Competition Council has the right to appeal to the court with a request to oblige the entity of public administration to implement the resolutions of the Competition Council if the entity of public administration fails to comply with the obligations by the Competition Council.

Under the case law of the Supreme Administrative Court of Lithuania (the court of Appeal in competition cases), only the resolutions of the Competition Council to cease investigations, the infringement decisions and the decisions to refuse to open an investigation can be appealed against to the court. Whereas resolutions to open, to prolong or to complement an investigation cannot be appealed against. The Supreme Administrative Court concluded that these resolutions are procedural documents necessary for investigation of relevant facts. Although these decisions influence legal status of the undertakings (e.g. they are obliged to provide the Competition Council with information necessary for the investigation), they are of procedural rather than of material nature.

A written complaint is to be lodged within 20 days after the delivery of the resolution or publication of its operative part in the official gazette. The period of 20 days may be renewed if the court of first instance decides that the period was overdue due to serious reasons. The complaint is to be lodged by the undertaking itself or by its legal representatives.

If the appeal is admitted by the court, the Competition Council is the defendant. The parties to the proceedings have the right to access to the file and to make copies, except for the confidential information. They also have the right to participate in the investigation of the evidence, give questions to other parties to the proceedings as well as witnesses, specialists and experts, give written and oral explanations, remove any of the judges from the panel before the beginning of the hearing. The parties also have the right to ask the court not to make the case file public and to get the copies of all court decisions.

The case is held in an open session only after all the interested parties are properly informed about the date and time of the court session. However, the absence of one of the parties does not impede the hearing on condition that the parties have been properly informed. In evaluating the validity of the Competition Council resolution, the court in competition cases undertakes a comprehensive review of the question whether or not the conditions for the application of the relevant competition rules are met. However, its review of complex economic appraisals made by the Competition Council is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has not been any manifest error of appraisal or a misuse of powers.

Upon investigation of the complaint against the resolution of the Competition Council, the court is to take one of the following decisions: a) to leave the resolution as it stands and to reject the complaint; b) to revoke the resolution or its individual sections and to remand the case to the Competition Council for a

supplementary investigation; c) to revoke the resolution or its individual sections; d) to amend the resolution on concentrations, application of sanctions or interim measures.

The parties have the right to appeal to the court of appeal within 14 days after the delivery of the decision of the court of first instance. The decision of the court of appeal is final and cannot be further appealed. However, the parties to the proceedings have the right to apply for the renewal of the process under the Law on Administrative Proceedings (e.g. when new fact emerge which the parties where not familiar with earlier).

Unless the court of first instance decides otherwise, the lodgement of a complaint does not suspend the implementation of the resolutions of the Competition Council. The parties to the proceedings have the right to apply for interim measures. In practice the most common interim measure applied for is to stay temporally the enforcement of the Competition Council resolution, in particular the enforcement of fines.

4. The procedure applicable to private enforcement of competition rules

Private enforcement of competition rules is regulated by the Code of Civil Procedure. Usually private enforcement is exercised in cases of unfair competition, e.g. cases of unauthorised use of a mark identical or similar to the name, registered trade mark or unregistered well known trade mark; imitating the product or product packaging of another undertaking; using, transferring, disclosing the information representing a commercial secret. The Competition Council is entitled to investigate only those actions of unfair competition that violate the interests of the multitude of undertakings or consumers. If that is not the case, an undertaking whose legitimate interests are violated by actions of unfair competition is entitled to bring an action before the court seeking: a) termination of the illegal actions; b) recovery of the damages; c) imposition of an obligation to make one or several statements of specific content and form, denying the previously submitted incorrect information or providing explanations as to the identity of the undertaking or its goods; d) seizure or destruction of the goods, their packaging or other means, directly related to unfair competition, unless the infringements can be eliminated otherwise.

During the proceedings in court the parties to the proceedings have similar rights as in cases of public enforcement (see point 23 above). However, the proceedings in cases of private enforcement are adversarial as the dispute is between two private parties. Thus, the parties to the proceedings have the obligation to provide evidence, to change, decrease or increase their claims or make a settlement.

Undertakings which violate the Law on Competition must compensate for damage caused to other undertakings or natural and legal persons. An undertaking or other persons whose legitimate interests have been violated by actions performed in contravention of Articles 101 or 102 of the Treaty on Functioning of the European Union or other restrictive practices prohibited by the Law on Competition (abuse of dominant position, anti-competitive agreements) are entitled to bring an action before the court seeking termination of the illegal actions or recovery of the damages. Upon request by the court or under its own initiative the Competition Council is to give a finding on the application of competition rules in cases of private enforcement of competition rules. The finding is not decisive or is not considered to be evidentiary, the final decision in such cases lies within the discretion of the relevant court. However, this kind of private enforcement is not usual in Lithuania as it requires considerable efforts by the undertakings or other persons concerned to prove before the court that certain actions infringed competition rules. Therefore, usually undertakings prefer to lodge a complaint to the Competition Council to investigate suspected anti-competitive practices, rather than bring an action against other undertaking directly to the court.

5. Recent developments relating to procedural fairness and transparency

The most significant development in the enforcement of competition law is the institute of individual responsibility for competition law infringements. When the conditions for responsibility of the chief executive of the undertaking set in the Law on Competition are met, the Competition Council is to submit an application to the court for individual sanctions against the head. The Competition Council is obliged to motivate the application. However, the court is not bound by the application of the Competition Council: the court may reject the application or it may impose other sanctions than the Competition Council has applied for. Therefore, the sanction upon the chief executive of the undertaking is to be imposed only by the court. The head of the undertaking has the rights established in the Law on Administrative Proceedings, including the right of defence.

The recent developments relating to procedural fairness are also due to new jurisprudence of Lithuanian courts. As mentioned above, the resolutions of the Competition Council to open, prolong or to complement an investigation cannot be appealed against as the influence of such decisions are of procedural rather than material nature. This gave more clearance to the undertakings concerned on the scope of the decisions the Competition Council that may be appealed against to the court, however, final decisions of the Competition Council (prohibition decisions, other decisions that reflects final conclusions of the investigation) are subject to the appeal and the undertakings' right to defence is not eliminated or limited.

There are no substantial changes or recent developments regarding procedures held in the Competition Council during the investigation of the alleged infringement of the competition rules.

ROMANIA

1. Relationship between the courts and the competition authority

Since the adoption of the Romanian Competition Law, in 1997, the Competition Council has had the power to issue non-binding opinion to courts related to any aspect of the competition policy. On the grounds of this provision, the role of the Competition Council's opinion is to provide courts with a better understanding of the general principles of competition policy and therefore it is not aimed at protecting the interests of any of the parties.

However, during 2010 and 2011, the Competition law was substantially modified. One of the most important modifications consists in the introduction of the Competition Council's role as *amicus curiae*, giving it the power to issue observations to courts in particular cases when the national and European competition rules are applied. These observations may be issued ex officio or at the request of the courts.

This role of Competition Council may be exercised in private enforcement cases as well, since the competition authority is not part of the trial as plaintiff or defendant.

It must be emphasized that the *amicus curiae* role of public institutions in Romania is also provided by the new Civil Procedure Code that will come into force in the following period, these institutions being empowered to intervene in cases for the protection of public interest.

Starting with 2000 the judges with competencies in competition field from Bucharest Court of Appeal and High Court of Cassation and Justice were involved in different activities within Twinning Projects where Competition Council was beneficiary. These activities consisted in seminars, roundtables and study visits at the European Commission, the competition authorities of Germany and Italy, and also at the European Court of Justice.

In the context of the relationship with the Romanian Courts with competences in competition field, Competition Council has been organizing roundtables with judges since 2005 in order to present and debate the most relevant practical competition aspects of the European jurisprudence. It can be said that these informal meetings with judges have contributed to a better understanding of the specific concepts and principles and the improvement of decisions' motivation in competition cases. One of the important aspects discussed during these meetings has been the standard of proof as it was acknowledged by the European courts.

Whereas the roundtables organized before 2007 were addressed only to the judges with competences in public enforcement of the competition rules, after Romania's accession to the EU the scope of the roundtables has been widened also to judges with competences in private enforcement of competition rules.

With regard to the judges that have power to apply the European competition rules, the Competition law, after its amendment, provides that national courts have the rights and obligations provided by the Council Regulation no 1/2003. At the same time, the Competition law imposed on courts the obligation to send to the European Commission, through the Competition Council, a copy of all decisions through which they apply, in the first degree of jurisdiction, art.101 or 102 of TFEU. Prior to the amendment of

Competition law, the above mentioned obligation provided by Regulation no. 1/2003 was made known to all courts of appeal through a letter sent by Competition Council. Even if not set by law, the transmission procedure was established in agreement with the courts of appeal, as proposed by the Competition Council.

2. Procedures applicable to public and private competition cases before the courts in Romanian jurisdiction

2.1 Public enforcement of the competition rules

According to the Competition law, the involved or interested parties may bring an action for annulment against the decision issued by the Competition Council to Bucharest Court of Appeal, Administrative and Fiscal Section. The time-limit for bringing such an action before the first court is 30 days starting from the day the decision (including the merits on which is based) was communicated to the parties or published either on Competition Council's web site or in the Official Journal of Romania. As a matter of practice the decisions are always communicated to the parties.

The Bucharest Court of Appeal is the only competent court to review, at the first level of jurisdiction, the legality of the decisions adopted by Competition Council relating to an infringement of art.5 and art. 6 of the Competition Law, and art.101 and 102 of TFEU. Before the Bucharest Court of Appeal, the competition cases are heard by one judge.

The actions brought before the Bucharest Court of Appeal do not have a suspensory effect, since all deeds issued by Romanian institutions benefit of the presumption of legality unless cancelled by a court binding decision.. According to the Administrative Contentious Law, the Court may order an administrative act to be suspended if two cumulative conditions are fulfilled:

- the suspension is justified, *prima facie*, *de jure* and *de facto* and
- the suspension is urgent insofar as to avoid serious and irreparable harm to the applicant's interests.

The amended Competition law provides an additional condition, requiring the applicant to pay a guarantee of up to 20% of the fine – the general rule applicable to debts to the State budget-before the suspension. The judge hearing the application for interim measures may order the suspension of the applicability of the contested decision until the court adjudicates on the substance rules in the main action for annulment of that decision. The judge will also set the amount of the guarantee.

The first court's decision may be appealed in front of the High Court of Cassation and Justice, Administrative and Fiscal Section. The time limit for bringing an appeal before the High Court of Cassation and Justice is 15 days after the decision was communicated by the first Court. In the review procedure, competition cases are heard by three judges.

With regard to the judicial review of the acts issued by Competition Council relating to procedural infringements, the only competent court is the Local Court of the District 1 in Bucharest ("District 1 Court"). The actions for annulment against such fines may be brought before this first court in 15 days from the day of communication. The appeal Court is the Bucharest Tribunal; the time limit is 15 days starting from the communication day. According to the Law on minor offences, the actions brought before District 1 Court have a suspensory effect.

The procedural rules applicable in judicial control of the decisions issued by the competition authority with regard to infringements of the substantive competition rules are those provided by Administrative

Contentious Law and Civil Procedure Code. As regards the competition authority's deeds sanctioning the procedural infringements, the applicable procedure is that provided by Law on minor offences, which is the general legislation in the field, and is supplemented by the Civil Procedure Code, wherever applicable. It should be mentioned that the Competition law provides for derogatory rules, as a special law, from the Law on minor offences, such as the competent court, form and name of the deeds, the administrative procedure, the kind and amount of the sanctions etc.

In the Romanian legal system, in the civil judicial procedure, *lato sensu*, the burden of proof is on the plaintiff. If claiming the unlawfulness of an administrative deed the plaintiff must prove that that deed had infringed the substantive and procedural applicable legal rules. It must be emphasized that in the phase of the administrative procedure for the application of art.5 and 6 of Competition law and art.101 and 102 of TFUE (the investigation phase) the burden of proving an infringement is on the Competition Council.

In evaluating the lawfulness of the administrative act, judges have the power to use all necessary evidence, at the request of the parties or *ex officio*. In the administrative litigation the most important evidence are the written documents.

The national legislation does not provide an express and rigorous standard of proof for civil trials. However it states the principles that must be observed by the judges during the administration of evidence phase of the judicial procedure. For that purpose, the Civil Procedure Code provides that the evidence used must be conclusive, pertinent and useful for that case. Also, the documents used as evidence must be legally obtained.

In the Romanian legal system, the judicial procedure has two mandatory phases: written phase and oral phase. After the application for annulment was sent by the court, the Competition Council must lodge a written defence relating to all factual and legal aspects of that application no later than 5 days before the first meeting in court. For the competition authority it is also mandatory to submit the case file to the court no later than 5 days before the first meeting, during the first meeting or in the evidence discussion meeting as the judge will decide.

The oral phase is mandatory and held in public hearings. In the public hearings each party is limited in its pleading to arguments that were presented to the court during the written phase. The court may postpone the deliberation of the case giving to the parties the opportunity to submit final written conclusions.

The Bucharest Court of Appeal, ruling on the substance of the dispute in case, has the power to set aside or to uphold the decision adopted by Competition Council. The said Court may also decide to reduce the fine imposed by the competition authority.

If the review is well founded, the High Court sets aside the judgment of the Bucharest Court of Appeal, having the power to refer the case back to this court or it may decide on the case. The decisions of the High Court of Cassation and Justice are taken by majority. Decisions are signed by all the judges who took part in the deliberation. In the Romanian legal system, the operative part of all judgments is pronounced in open court.

2.2. *Private application of the competition rules*

In Romanian legal system, the actions for damages have as legal basis the Civil Code, which is the general legislation for this matter. Hence, as a general rule, the Civil Code¹ provides that any person that

¹ The new Civil Code will be in force as of 1 October 2011; it contains modern and efficient provisions in respect of the liability for torts.

caused harm to another is obligated to compensate the damages suffered, whether it was committed intentionally or with negligence. Correlatively, any person that suffered harm must be able to claim reparation from the person who caused that harm. These provisions are acknowledging the principle of the civil liability based on an illegal conduct.

Due to lack of special provisions, these rules are also applicable to actions for damages as a result of breach of European or national antitrust rules.

According to the applicable rules, the general conditions of the civil liability that the court must assess, once an application for seeking damages was brought before it, are: the existence of harm, the existence of illegal conduct, the causal link between the illegal conduct and the harm suffered and the fault of the person whose conduct caused that harm, intentionally or with negligence. In competition private enforcement cases, the court must ascertain the causal link between the breach of the antitrust rules by the offender and the losses suffered by the claimant.

According to the Competition Law, damages actions may be brought before courts either before or after a decision sanctioning an antitrust infringement was adopted by the Competition Council. The damages actions can be brought before the courts by harmed persons, by an attorney on behalf of a number of harmed persons, based on individual will expressed by each of them, or by the associations for the protection of the consumer's interests or trade associations.

The applicable procedural rules are those provided by general legislation, respectively the Civil Procedure Code.

The competent courts, in a first instance, are the local courts and county courts, civil or commercial sections, depending on the level of the damages claimed.

The burden of proof is on the plaintiff, as in public enforcement. The court may use, at the request of the parties or ex officio, any type of evidence, including witnesses and expertise. The applicable principles related to using the evidence are those mentioned for public enforcement.

The Romanian Competition Law, as amended and supplemented in 2010 and 2011 took over most of the recommendations made by the European Commission in its White Paper on Damages actions for breach of the European antitrust rules. As such, with regard to the follow-on private actions, the Competition Law grants the courts the power to ask for documents from the case file of the administrative procedure before Competition Council, provided that the legitimate interest of the undertakings in protecting their business secrets is observed.

In private judicial procedures, a decision issued by the competition authority, prior to a final judgment, may represent a strong presumption in relation to the illegal conduct and the responsible persons. If the appellate court has given a final judgment upholding the competition authority's decision, this decision is mandatory for the civil or commercial courts with regard to decided aspects, on the *res judicata* principle

Also, the full compensation principle is applicable, meaning that the damaged persons are able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest. It should be emphasized that in Romanian legal system the civil liability has a reparatory role and not a punitive role as the damages do not represent a punishment.

Competition Law provides also that the passing-on overcharges defence is not a legal basis for considering that the harm does not exist. The unjust enrichment principle is also applicable to all private

litigations. It means that damages shall be granted for both direct and indirect buyers, for covering the harm they prove to have suffered.

In order to ensure that the leniency program is attractive, the Competition Law provides that civil liability of successful immunity applicants is limited to the damages attributable to its conduct, in this case the general civil principle of the joint and several liability not being applicable.

With regard to time limits for seeking compensation, Competition Law provides for a special limitation period of two years that will start once the infringement decision of the competition authority, on which a follow-on claimant relies, has been confirmed by a final court decision.

The quantification of harm suffered by victims in actions for damages based on infringements of European and national antitrust rules rests entirely with the judge. In practice it is very likely that the judge will ask for an expert opinion, on the expense of the plaintiff.

The mentioned procedural rules related to written and oral phases in administrative contentious procedure are also applicable in private enforcement.

It has to be underlined that the number and impact of private litigation is still relatively low (and referring mostly to unfair trade disputes rather than antitrust matters) but it is expected to grow due to the recent decisions issued by the Competition Council and to the impact of the new legislation – especially the special provisions in the Competition Law.

RUSSIAN FEDERATION

There are two ways of interaction between the FAS Russia and the Russian courts: official (during consideration of cases with participation of competition authority) and informal (seminars, lectures, conferences, joint meetings and round tables).

Within the framework of formal interaction the following issues should be clarified.

In accordance with its jurisdiction, the FAS Russia initiates and examines cases on antimonopoly law infringement. Upon consideration of a case on antimonopoly law infringement, the FAS Russia takes a decision and issues a prescription on termination of antimonopoly law infringement.

As opposed to the American legal system, in which decisions of the antimonopoly authority are final and may not be appealed, in the Russian Federation decisions and/or prescriptions of the antimonopoly authority can be appealed in court (Article 52 of the Federal Law “On Protection of Competition”). Additionally, there may also be appealed the following acts: orders of the FAS Russia on imposing administrative liability, decisions of the FAS Russia on inclusion in the Register the companies occupying dominant position, decisions and prescriptions of the FAS Russia within the frameworks of control over economic concentration, as well as decisions on activity/inactivity of an antimonopoly authority. In addition, in accordance with Article 23 of the Federal Law “On Protection of Competition”, the FAS Russia can submit a claim (petition) on antimonopoly law infringement to the Court or the Arbitration Court, as well as participate in the proceedings as a third party.

In accordance with the Article 10 of the Constitution of the Russian Federation, the state power in the Russian Federation shall be exercised on the basis of its division into legislative, executive and judicial power. The bodies of legislative, executive and judicial power shall be independent.

Justice in the Russian Federation shall be administered by the courts, instituted by the Constitution of the Russian Federation. Within the frameworks of its activity the FAS Russia interacts with the following courts:

- the Constitutional Court, which considers cases on the compliance of legal acts to the Constitution of the Russian Federation. The Constitutional Court (as opposed to all the other courts) can repeal laws or other legal acts in case if they are declared unconstitutional;
- the Courts of General Jurisdiction that engaged in considering civil and criminal cases and cases arising out of administrative violations, as well as other cases that are under jurisdiction of the Courts of General Jurisdiction;
- the Arbitration Courts that execute justice in the field of business and other economic activity by means of solving economic disputes and considering other cases assigned to their jurisdiction.

Appeal of decisions or prescriptions of the antimonopoly authority, as a rule, takes place in the Arbitration Courts. In case of appeal of the decision of FAS Russia by a person found guilty in violating antimonopoly law, the FAS Russia obtains the status of an interested party (respondent) and becomes

subject to the requirements of procedural law. Thus, the courts are arbiters that take a final decision on legality or illegality of the decision of the antimonopoly authority.

The Higher Arbitration Court of the Russian Federation is a higher judicial authority solving commercial disputes and other cases. The Court has the following powers: consideration of cases at the first instance, review by way of judicial supervision of judicial acts of arbitration courts of all levels which came into force, study and briefing of practice of laws and other legal acts, and solving, within its jurisdiction, issues emanating from international treaties of the Russian Federation.

In 2010, the Higher Arbitration Court of the Russian Federation with the participation of the FAS of Russia considered about 10% of cases on antimonopoly law infringement. The FAS of Russia won 80% of those cases.

Furthermore, in October 2010, having the powers in the briefing of practice of laws and other legal acts, the Plenary Session of the Higher Arbitration Court of the Russian Federation (the VAS of Russia) made amendments and additions to the Decision of the VAS of Russia No.30 dated June 30, 2008 "On Some Issues of Application by Arbitration Courts of the Antimonopoly Legislation."

In total 2,656 decisions on violations of antimonopoly law taken by the FAS of Russia (including regional authorities) were appealed in court in 2010. The court found 951 decisions fully legitimate and 413 decisions fully void. The rest of 1366 cases are at the stage of judicial consideration.

The Russian antimonopoly authority also has experience in making settlement agreements. The following case is one of the examples of making a settlement agreement.

Russian competition authority has experience concluding settlement agreements. One of the earliest examples of a settlement agreement is the next case.

FAS Russia in the middle of October, 2005 in connection with the establishment of monopolistically high prices for cement recognized OJSC "Eurocement group" violated the Federal Law "On competition and restriction of monopolistic activity on commodity markets" (previous law on competition) and ordered the company to transfer the income received in the result of violation of competition law (1,914 bln rub (67 mln US dollars)) to the Federal budget till February 1, 2006.

In its decision, the FAS Russia provided "Eurocement Group" with the instruction not to increase cement prices within 5 years without prior notification of the competition authority that would contain an explanation of reasons for prices change. At that, if the competition authority comes to a conclusion that the price increase is unreasonable, "Eurocement" cannot change them.

As a result, upon completion of the proceedings in the courts, FAS Russia reduced the fine to 267 mln rub (9 mln. US dollars) in exchange for the fulfillment of the requirements listed above, as well as for the company promise to invest 10 bln rub (3 mln. US dollars) in modernization of the sector.

This case became the precedent in forming the practice of concluding settlement agreements - the courts accepted the possibility of such agreements and possibility of reducing sanctions.

Another example of the so-called "settlement agreement" or an agreement on the actual circumstances, was the next case.

In autumn 2008 the FAS Russia admitted four largest Russian oil companies (Rosneft, LUKOIL, Gazpromneft and TNK-BP) violating antimonopoly legislation. The companies established excessive prices for petrol, diesel, jet fuel and mazut. The companies were totally fined over 4 bln rubles for abuse of

their dominant position. In 2010 after long judicial proceedings Presidium of the Supreme Arbitration Court of the Russian Federation took a precedent decision in FAS Russia vs TNK-BP case that supported the FAS Russia decision. This stimulated faster completion of judicial proceedings with regard to rest three companies. As a result, all four mentioned companies fully paid imposed fines to the federal budget.

In 2009 the FAS Russia initiated a so-called “second series of cases” against the same oil companies due to unjustified growth of prices on oil products from October 2008 till February 2009. Main violation was in withdrawal of a product from circulation which resulted in increase of the price of products (artificial creation of deficit) and in creation of discriminatory conditions on the market of automobile fuel and jet fuel.

Taking into consideration the repeated violation the fines on these cases were increased and the FAS Russia fined Rosneft on 5,28 bln rubles (176 mln US dollars), Gazpromneft on 4,7 bln rubles (157 mln US dollars), LUKOIL – 6,5 bln rubles (217 mln US dollars), TNK-BP - 4,2 bln rubles (140 mln US dollars).

Initially the total sum of fine imposed on oil companies with two series of cases made up about 26 bln rubles (about 1 bln US dollars).

However later, all companies, except for Gazpromneft applied for a voluntary settlement with the FAS Russia. The companies admitted their violations, stopped participation in judicial prolonging, took obligations not to violate the Law. This step led to significant reduction of total sum of fines till 15 bln rubles (500 mln US dollars). Gazpromneft defended its position till the end and according to the decision of the High Arbitration Court, which upheld the FAS Russia decision, was obliged to pay the fine entirely.

Thus, the interaction between the courts and FAS Russia on the legal sense are based exclusively on arbitration - procedural legislation.

As for informal methods of interaction between the FAS Russia and the Courts, FAS Russia regularly hold meetings with the judges of arbitration courts and the courts of general jurisdiction on the matters of application of the competition legislation by the courts.

Thus, during the period of July 8-9, 2010 in Moscow the FAS Russia with the support of the U.S. Embassy held the Russian-American Seminar on implementation of antitrust legislation with the participation of Russian and American judges.

During the period of July 7-8, 2011 the Conference “Recent Trends in Resolving Antitrust Cases. Russian and International Experience” was held in Moscow organized by the FAS Russia and the U.S. Department of Justice, and the Supreme Arbitration Court of the Russian Federation was a co-organizer of the Conference. More than 200 people took part in that event.

Besides, the FAS Russia holds annual regional conferences in each Federal region of the Russian Federation (at least 8 events per year), where judges of various courts participate.

SOUTH AFRICA

1. Introduction

Competition authorities in South Africa, by virtue of the fact that they exercise public power, are subject to the overarching discipline of the South African Constitution (“the SA Constitution”). A constant refrain in South African constitutional cases¹ is that “the exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law.”²

As discussed in our previous submission,³ the SA Constitution expressly entrenches the right to administrative action that is “lawful, reasonable and procedurally fair”.⁴ The right to just administrative action is entrenched as a “constitutional control over the exercise of power”.⁵ The exercise of public power is subject to the principle of legality and accountability.⁶ These constitutional principles apply with equal force to the exercise of public power by competition authorities in South Africa.⁷

¹ See *Pharmaceutical Manufacturers of South Africa and Another In re: The Ex parte Application of: The President of the Republic of South Africa* 2000(2)SA 674 (CC). Also available on the website of the Constitutional Court of South Africa – www.constitutionalcourt.org.za/site/judgments/judgments.htm, last visited on 15 September 2011.

² *Ib* at paragraph 20. See also *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999(1)SA 374 (CC) at paragraph 58 where the Court stated “It seems central to the conception of our constitutional order that the Legislature and the Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.” Also available on the website of the Constitutional Court of South Africa – www.constitutionalcourt.org.za/site/judgments/judgments.htm, last visited on 15 September 2011.

³ OECD’s Competition meetings, 15 -17 February 2010 at paragraph 1.

⁴ Section 33 of the South African Constitution.

⁵ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000(1) SA 1 (CC) at paragraph 135. Also available on the website of the Constitutional Court of South Africa – www.constitutionalcourt.org.za/site/judgments/judgments.htm, last visited on 15 September 2011.

⁶ *Jacoba Hendrina Wessels v Minister for Justice and Constitutional Development, Case No; 594/09* (High Court of South Africa (North Gauteng High Court) available at www.saflii.org/za/cases/ZAGPHC/, last visited on 15 September 2011.

⁷ See *Woodlands Dairy v Milkwood Dairy, Supreme Court of Appeal case No.105/2010* at paragraph 10 where that Court asserted “the Act (the Competition Act), unnecessarily, reminds us that it must be interpreted in a manner that is consistent with the Constitution and which gives effect to the purposes set out in s 2 of the Constitution. Importantly, in the context of this case is that the Constitution is based on the rule of law, affirms the democratic values of dignity and freedom, and guarantees the right to privacy, a fair trial and just administrative action. Also important is the fact that the actions of the commission in relation to chapter 2 complaints, which are administrative, may lead to punitive measures. The so-called ‘administrative penalties’ (more appropriately referred to as ‘fines’ in s 59(2)) bear a close resemblance to criminal penalties. This means that its procedural powers must be interpreted in a manner that least impinges on these values and rights”, and, *Senwes Limited v The Competition Commission of South Africa, SCA case no. 118/2010* at paragraph 51 where the SCA said “...the starting point of an enquiry into the

As is the case in most jurisdictions, South African competition authorities are subject to judicial review. The Competition Commission's ("the Commission") investigative powers are subject to review and oversight by the Competition Tribunal ("the Tribunal"). In turn, decisions of the Tribunal are appealable and reviewable by the Competition Appeal Court ("the CAC"). If there are special circumstances, an appeal against the CAC lies with the Supreme Court of Appeal ("the SCA"). The last appellate forum is the Constitutional Court, which may hear appeals from the SCA if a case raises constitutional issues or a matter connected with constitutional issues.⁸

2. Overview of recent development in competition law enforcement in South Africa

The appellate courts in South Africa have, in a series of recent prominent decisions, strongly re-asserted the principles of legality and rationality in examining the requirements and the limits applicable to the exercise by the Commission of its investigative powers and the requirements for the Tribunal jurisdiction to adjudicate complaints.

A significant body of jurisprudence, which has given rise to considerable debate, has been developed by the appellate courts on the complaint investigation and adjudication system in terms of South African competition legislation, the Competition Act No. 89 of 1998 as amended ("the Competition Act"). A central concept of this jurisprudence, although expressed in varying formulations, is that the content of a complaint, as submitted to the Commission by a complainant or formulated by the Commission, circumscribes and delineates the ambit of the ensuing investigation, the referral to the Tribunal and the ultimate adjudication of the complaint.

3. The principle of legality and rationality

Some of the key legal principles underlying this jurisprudence are the principles of legality and rationality and it may be apposite to very briefly set out how they are understood in South Africa since the advent of a new constitutional dispensation. The principle of legality was aptly described as follows by the High Court of South Africa in *Vorster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province, and Others*:⁹

*"Lawfulness is relevant to the exercise of all public power, whether or not the exercise of such power constitutes administrative action. Lawfulness depends on the terms of the empowering statute. If the exercise of public power is not sanctioned by the relevant empowering statute, it will be unlawful and invalid. (citations omitted)...Lawfulness lies at the heart of administrative justice and underpins the whole Constitution. It is a fundamental principle of the rule of law. The exercise of public power in whatever form can only be legitimate where it is lawful, and the rule of law, at least to the extent that it expresses the principle of legality, is accepted to be a fundamental principle of constitutional law. This has been understood internationally (not necessarily in South Africa) before the advent of the new constitutional dispensation, and certainly thereafter."*¹⁰

scope of the Tribunal's authority, is that we are dealing with a creature of the Act. It has no inherent powers. In accordance with the principle of legality, it has to act within the powers conferred upon it by the Act."

⁸ It is also possible to apply for direct access to the Constitutional Court in certain appropriate circumstances.

⁹ 2006(5) SA 291 (T). Also available at www.saflii.org/za/cases/ZAGPHC/, last visited on 15 September 2011.

¹⁰ *Ib* at paragraph 18.

In *The Pharmaceutical Manufacturers Association of South Africa and Another In re: Ex Parte Application of the President of The Republic of South Africa*,¹¹ the Constitutional Court of South Africa said:

*“It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”*¹²

The SCA has also re-iterated the fact that “both the Commission and the Tribunal are creatures of statute, the statute being the Act. Both bodies must exercise their functions in accordance with the Act.”¹³

4. The complaint investigation system in South Africa

The complaint investigation system embodied in the Competition Act is predicated on two categories of complaints – complaints initiated by the Commissioner (“self-initiated complaints”) and complaints lodged with the Commission by a complainant (“third party complaints”).¹⁴ A complaint triggers an investigation by the Commission. At the conclusion of an investigation, the Commission can decide to refer the complaint to the Tribunal for adjudication (referral) or not to refer the complaint (non-referral). In the case of third party complaints, if the Commission decides not to refer the complaint to the Tribunal for adjudication, the complainant may refer the complaint to the Tribunal for adjudication.¹⁵ The same litigation procedures apply to a referral by the Commission or a third party.

5. Legal requirements imposed by the appellate courts on complaints

There are certain legal requirements which have been laid down by the appellate courts on both self-initiated and third party complaints. The underlying rationale for these requirements is that the administrative penalties that can be imposed under the Competition Act are akin to criminal penalties and this therefore requires that the Commission’s powers of investigation be interpreted in a manner that least impinges on the respondent’s right to privacy, fair trial and just administrative action.¹⁶

¹¹ 2000(2) SA 674 (CC). Also available on the website of the Constitutional Court of South Africa – www.constitutionalcourt.org.za/site/judgments/judgments.htm, last visited on 15 September 2011.

¹² *Ib* at paragraph 85.

¹³ *Menzi Simelane NO and Others v Seven-Eleven, Case No.480/2001* at paragraph 12, available at www.saflii.org/za/cases/ZASCA/, last visited on 15 September 2011.

¹⁴ There are certain legal consequences attached to each of the two types of complaints in terms of the Act. For instance The right to self referral by a complainant only arises in a complainant complaint in the event of a non-referral by the Commission (s51(1)). A complainant complainant has a right to apply for an interim relief in the Tribunal (s49C (1)). In the event the Tribunal does not make a finding against the respondent a cost order may also be awarded against a complainant complainant in self-referral (s57 (1) of the Act). Whereas a cost order cannot be granted against the Commission (see *Omnia Fertilizer Ltd v The Competition Commission, case no:77/CAC/Jul08* paragraph 20, available at www.comptrib.co.za last visited on 15 September 2011.

¹⁵ See *Loungefoam (Pty) Limited and Others v The Competition Commission of South Africa, Case No. 102/CAC/Jun10*, available at www.comptrib.co.za last visited on 15 September 2011.

¹⁶ See *Woodlands supra*, at paragraph 10; *Loungefoam supra* at paragraph 45.

5.1 A complainant must set out the conduct

According to an earlier decision of the CAC,¹⁷ a complainant is not required to “pigeonhole” the conduct with reference to particular sections of the Competition Act.¹⁸ A complainant is only required to identify conduct of which it complained.¹⁹

The allegations or the conduct in the complaint must be cognisably linked to particular prohibited conduct or practices. There must be a rational or recognisable link between the conduct referred to in a complaint and the prohibitions in the Competition Act.²⁰

5.2 A complaint must be set out with sufficient clarity

The conduct said to contravene the Competition Act must be expressed with sufficient clarity for the party against whom the allegation is made to know what the charge is and be able to prepare to meet and rebut it.²¹

5.3 There must be a reasonable suspicion for self-initiated complaints

The SCA has laid down certain requirements for self-initiated complaints.²² In the exercise of his/her powers to initiate a complaint, “the commissioner must at the very least have been in possession of information ‘concerning an alleged practice’ which, objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice. Without such information there could not be a *rational exercise of the power*.”²³ An initiation “must survive the test of legality and intelligibility.”²⁴

5.4 A complaint must specify all the firms against whom a complaint is made

A suspicion against a specific firm(s) cannot be used as a springboard to investigate “all and sundry.” If the Commission receives information about other firms in the course of the investigation, it may amend a complaint or initiate another complaint.²⁵ An industry wide investigation is not permissible.²⁶

Information submitted in the complaint could constitute part of a complaint or it could constitute the submission of further information to the Commission.²⁷ According to the CAC, the competition authorities

¹⁷ *Glaxo Wellcome (Pty) Limited and Others v National Association of Pharmaceutical Wholesalers and Others, Case 15/CAC/Feb02* available at www.comptrib.co.za last visited on 15 September 2011.

¹⁸ *Ib* at paragraph 15.

¹⁹ *Ib*.

²⁰ *Ib*.

²¹ *Netstar (Pty) Limited and others v Competition Commission of South Africa* Case No. CAC/99/MAY10. Available at www.comptrib.co.za last visited on 15 September 2011.

²² *Woodlands Dairy (Pty) Ltd and Another v The Competition Commission* Case No. 105/2010. Available at www.saflii.org/za/cases/ZASCA/, last visited on 15 September 2011.

²³ *Ib* at paragraph 13.

²⁴ *Ib* at para 35.

²⁵ *Woodlands*, *supra* at paragraph 36.

²⁶ *Ib*.

²⁷ *Yara South Africa (Pty) Ltd v The Competition Commission and Others, Case No. 93/CAC/Mar10* at aparagraph30. Available at www.comptrib.co.za last visited on 15 September 2011.

must discern, from a reading of the complaint as a whole, whether or not the complainant intended to complain about a specific prohibited conduct or to submit information to the Commission. To this end, the CAC said:

*“The argument that a submission of information to the Commission, on its own, signals an indication of an intention to submit a complaint (in the same manner envisaged in section 49B(2)(b) detracts from a distinction drawn in the Act between submitting a complaint and submitting information in sub-sections 49B(2)(a) and (b).”*²⁸

5.5 The complaint as submitted or initiated must be referred to the Tribunal

When a complaint is referred to the Tribunal for adjudication what must be referred are particulars of the complaint *“as submitted by the complainant.”*²⁹ The words *“as submitted by the complainant”* signal a clear reference to the conduct referred to by the complainant and which amount to the *facta probanda* (main facts) necessary to establish a prohibited practice.³⁰

The complaint (subject to possible amendment and fleshing out) *as initiated* will be referred to the Tribunal.³¹

5.6 The Tribunal’s jurisdiction is confined to a complaint as initiated or submitted

The Tribunal’s jurisdiction is confined to the consideration of the complaint so referred and the terms of the complaint referral are constrained by the terms of the complaint as initiated by the Commissioner or submitted to the Commission by a complainant.³² The submission of a complaint to the Commission is the jurisdictional fact or precondition which must be satisfied before the Tribunal can adjudicate a complaint.³³ The Tribunal has no power to enquire into and decide any matter not referred to it.³⁴ The Tribunal’s hearing must be confined to matters set out in the referral.³⁵

6. Pitfalls of the approach fashioned by the appellate courts to complaints

The jurisprudence of the appellate courts on complaints has various pitfalls which are canvassed in a recent decision of the Tribunal.³⁶ The Commission has launched appeals to the Constitutional Court of South Africa against the relevant decisions. As correctly pointed out by the Tribunal, the strict approach requiring that a complaint lodged by a complainant or self-initiated by the Commission to be the same as the referral to the Tribunal ignores the fact that a complaint marks the beginning of an investigation and presupposes that either the Commission or a complainant possesses “full knowledge” of the *facta*

²⁸ Ib at paragraph 34.

²⁹ *Glaxo, supra* at paragraph 19.

³⁰ Ib.

³¹ *Woodlands, supra* at paragraph 35.

³² *Netstar, supra* at paragraph 26.

³³ *Glaxo, supra* at paragraph 29.

³⁴ *Senwes Limited v The Competition Commission of South Africa*, Case No. 118/2010 at paragraph 51. Available at www.saflii.org/za/cases/ZASCA/, last visited on 15 September 2011.

³⁵ Ib at paragraph 52.

³⁶ *South Africa Breweries Limited and Others v The Competition Commission*, CT Case No.134/CR/Dec07 at paragraph 97 - 158, available at www.comptrib.co.za last visited on 19 September 2011.

probanda (main facts) necessary to support the allegation of a prohibited practice at the time of instituting a complaint.³⁷ This approach has serious implications for both cartel and effects-based investigations. The true nature of the conduct complained of and its effects often crystalizes during the investigation process. The approach advocated by the appellate courts may lead to under-enforcement of anti-competitive conduct and thus undermine the economic objectives sought to be achieved by competition law and policy.

³⁷ Ib at paragraph 141.

CHINESE TAIPEI

1. Introduction

Chinese Taipei practices statute law. This is clearly defined in institutional and procedural aspects of the relationship between the competition authority, the Fair Trade Commission (the FTC), and the courts. In the case where an enterprise violates the Fair Trade Act, it is likely to face administrative sanctions, criminal sanctions and compensation responsibility of civil damage. The FTC has administrative enforcement authority, while the courts have the authority to impose both criminal and civil penalties.

Article 16 of the Constitution stipulates, “The people shall have the right of presenting petitions, lodging complaints, or instituting legal proceedings.” In addition, according to Chinese Taipei’s remedy regulations, administrative courts have the power to determine whether the administrative decision is lawful in the final decision.

Meanwhile, although criminal sanctions and civil compensation for breach of the competition law may be under the jurisdiction of the courts, the highly professional aspects involved can go beyond the capacity of the judges or prosecutors handling such competition cases. Under such circumstances, judicial agencies may request professional assistance from the FTC to provide advice as to whether the conduct in question complies with the constituent elements of a violation against the Fair Trade Act. In other words, the FTC and the courts have established a highly interactive relationship regardless of whether it is the procedure, system or practices that are the concern.

2. Administrative courts have the power to determine whether the FTC’s decision is lawful in their final adjudication

The FTC has the authority to impose administrative sanctions on enterprises that violate the Fair Trade Act. The decisions of the FTC are made at Commissioners’ Meetings that are composed of nine full-time commissioners, who are well experienced in law and economics and act independently in performing their duties under the law to investigate, review and assess administrative fines in accordance with the Act. Normally, the administrative courts will defer to the FTC’s decisions unless they consider that the FTC has exceeded its statutory authority or the FTC’s actions reflect an abuse of discretion.

The Administrative Appeal Act and the Administrative Litigation Act offer administrative and judicial remedy procedures to ensure the rights of the people. Paragraph 1, Article 1 of the Administrative Appeal Act and Article 4 of the Administrative Litigation Act provide that “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 entitled to file an administrative appeal according to the Administrative Appeal Act. In the case of a person who 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 within three months after such filing or within 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.” In other words, should the parties be dissatisfied with the decision of the FTC, they have the right to petition to the Appeal and Petition Committee under the Cabinet before bringing the suit to the administrative court.

The adjudications of the administrative courts on administrative remedies for competition cases have binding force on the concerned parties as well as the FTC. Hence, whether the FTC's decisions are upheld or revoked by the administrative courts has a certain degree of effect on the FTC in interpreting the Fair Trade Act and on its position in handling cases. In turn, the FTC's future enforcement in applying the Fair Trade Act is also affected.

During the administrative litigation process, a common problem that the FTC often faces is a conflict that exists between the transparency of the decision-making process and the protection of the confidential business information obtained from the parties. The parties or the interested parties providing business secrets to the FTC often require that their business information be kept confidential. However, the judges require that the defendant be allowed to access relevant materials or files for protecting the rights of defence, and therefore, the FTC should present important evidence necessary to support its views with the need to protect the confidentiality of business information. Nevertheless, the ultimate goal has to be that all relevant materials and files are made public in order to meet the demands for transparency and procedural fairness.

3. The injured filed for civil compensation that involved violation of the competition law with the courts according to civil litigation procedures

As set forth in the Fair Trade Act, compensation for damages is the general approach for offenders to fulfill their civil liability and it falls under the jurisdiction of the ordinary courts. The regulations regarding the right to a civil claim are stipulated in Articles 30 to 34 of the Fair Trade Act.

According to these regulations, if any enterprise violates any of the provisions of the Fair Trade Act and thereby infringes upon the rights and interests of another, the injured may demand the removal of such infringement; if there is a likelihood of infringement, prevention may also be claimed. An enterprise that infringes upon the rights and interests of another shall be liable for the damages arising therefrom. In response to the request of the person being injured, a court may, in taking into consideration the nature of the infringement, award damages that exceed actual damages if the violation is intentional, provided that no award shall exceed three times of the amount of damages that is proven. Where the infringing person gains from its acts of infringement, the injured may request to assess the damages exclusively based on the monetary gain to such an infringing person. No claim for damages shall be allowed unless the right is exercised within two years after the claimant knows the act and the person liable for the damages; nor shall the claim be allowed after a lapse of ten years from the time the infringing conduct took place. In filing a suit with a court in accordance with the Fair Trade Act, the injured may request that the content of the judgment be published in a newspaper at the expense of the infringing party.

When going through the civil litigation procedure to request civil compensation for violations of the competition law, the injured are required to pay the court costs up front on the claim while they will most probably bear the risk of losing the case. In addition, the courts may request professional assistance from the FTC to provide advice on the cases, such as counterfeiting, false and misleading advertising, and obviously unfair conduct. In civil litigation, the complainant coupled with the administrative resources of the FTC and the high rate of its utilization may request that the courts provide compensation after the FTC has made its decision on the disposition against the violators.

4. Certain cases violating the Fair Trade Act also call for criminal sanctions and such offenders have to go through the criminal procedures and stand trial

Pursuant to Paragraph 2 of Article 35 and Article 36 of the Fair Trade Act, if any enterprise violating the provisions of Articles 10 (monopoly), 14 (concerted actions), 19 (competition restriction or impediment to fair competition) or paragraph 1 of Article 20 (counterfeiting) fails to cease, rectify its conduct, or take

necessary corrective action within the time prescribed in the order, or after its ceasing therefrom, shall such enterprise have the same or similar violation again, the actors, in addition to the administrative sanctions from the FTC, shall be subject to criminal sanctions. Furthermore, according to Paragraph 1 of Article 35 and Article 37, any enterprise violating the provisions of Articles 22 (damaging the business reputation of another) and 23 (illegal multilevel sales) are subject to criminal sanctions that are within the jurisdiction of the ordinary courts.

The status of the Fair Trade Act is that it is Chinese Taipei's fundamental economic law. As mentioned earlier, the highly professional aspects involved may be beyond the capacity of the judges or prosecutors handling such competition cases. Under such circumstances, judicial agencies may request professional assistance from the FTC to provide advice as to whether the conduct in question complies with the constituent elements of a violation against the Fair Trade Act; however, the FTC does not provide a decision as to whether the conduct in question violates the Act.

5. Recent developments in procedural fairness and transparency in Chinese Taipei

There is no update on recent developments relating to procedural fairness and transparency in regulations or practices that have taken place.

In addition, based on the FTC's internal statistics, up to the end of August 2011, the extent to which the agency with jurisdiction for administrative appeal or administrative litigation upheld the FTC's dispositions for each stage of the administrative remedies was as follows: 1) the stage of the Appeal and Petition Committee, 96.29%; 2) the stage of the High Administrative Court, 92.20%; and 3) the stage of the Highest Administrative Court, 91.42%.

BIAC

1. Introduction

BIAC welcomes the opportunity to contribute to WP3's follow up on the two discussions held in 2010 on procedural fairness and in particular to submit these written comments which focus specifically on judicial review of decisions by competition authorities. BIAC also looks forward to participating in the roundtable discussion of developments in procedural fairness and transparency.

In previous contributions¹ BIAC has commented on the inherent difficulties of constructing a fair and just process under a regime where the authority not only investigates and prosecutes cases but itself decides the outcome of those cases and BIAC has a clear preference for decisions in competition cases to be taken by an independent judicial body. The discussions within WP3 in 2010 included suggestions to improve authority procedures, including where the authority is also the decision-maker. This paper looks specifically at how judicial review of authority decisions finding infringements of competition law or applying merger control powers can contribute to ensuring that, taken as a whole, a country's competition enforcement system satisfies requirements of fairness and justice.

The architecture and detail of the relationship between competition authorities and courts in each country depends on multiple factors including the overall institutional framework and judicial traditions, as well as the structure of the competition authority and its enforcement and decision-making powers and processes. Thus, there is no one ideal set of procedural rules for judicial review. BIAC's comments will focus on those features of judicial review of decisions taken by competition authorities² which, in BIAC's submission, should be regarded as basic standards which any such procedure should deliver and by which any efforts to seek best practices should be guided. BIAC will also comment briefly on the role of the courts in approving consent agreements.

2. The role of judicial review of competition authority decisions

Judicial review plays a crucial role in respect of decisions taken by competition authorities. Basically, its objective is to eliminate erroneous decisions³ in the specific cases under appeal, thereby not only protecting the parties' individual rights but promoting economic welfare for society as a whole. More generally, it ensures that the rule of law applies and is seen to apply. It safeguards due process and provides or enhances appropriate checks and balances, which is vitally important where the agency is an administrative body which both prosecutes and decides its own cases⁴ and may also play a significant role in setting enforcement priorities and shaping competition policy.

Judgments in decided cases provide guidance on the meaning and scope of substantive competition law, which is frequently not self-evident from the texts of the legislation (and may differ from the stated

¹ See DAF/COMP/WP3/WD(2010) 22 and DAF/COMP/WP3/WD(2010) 52.

² This paper does not deal with appeals from competition decisions made by an independent judicial body.

³ Unsupported by the evidence, poorly reasoned or legally incorrect.

⁴ As well as in other cases where there may be shortcomings in respect of due process and fairness.

view of the authority itself), enhancing legal certainty both for citizens striving to understand and comply with the law as well as for the authorities in their subsequent work.

An accessible, effective and credible judicial review process which leads to the correction of legal and factual errors in authority decisions and to the adjustment of any unjust penalties imposed provides accountability for the authority and encourages rigour within the authority's proceedings. A review procedure under which the authority never loses an appeal does not promote the reputation of the authority or the credibility of the law, any more than one under which the authority always loses. A well-balanced review underlines the legitimacy of authority decisions and, as a public process, enhances the overall standing and respect for enforcement efforts.

3. Particular challenges in these cases

There are particular challenges for courts charged with reviewing decisions by authorities in competition cases. In particular, traditional canons of construction such as looking to the ordinary meaning of the words or applying a strict construction to the legislative language are ill-suited to the application of competition law since competition law incorporates economic concepts such as "restriction of competition", "foreclosure", "abuse of market power" and many others which may be unfamiliar to judges with traditional legal backgrounds and which cannot be defined in the abstract. Instead these concepts develop constantly as economic research improves the understanding of competition's role in helping markets work optimally.

Decisions in competition cases are important and challenging because they can interfere with the fundamental rights of the parties concerned, not only in cases where fines and imprisonment are imposed but also when decisions lead to mandatory changes to business practices, such as defining the customers with whom a party must deal or compelling the grant of licences to intellectual property.

In addition to these profound effects on the individual interests of the parties, competition decisions can impact, in some cases quite directly, on economic incentives for business and hence the well-being of society more generally.

4. When judicial review should be available

The defendant should be able to appeal against any authority decision which is adverse to its interests, including not only decisions finding that competition law has been infringed (whether or not sanctions are imposed), or ruling on proposed merger transactions, but also against decisions which include any other material findings, such as those regarding market definition or the existence of market power.

The position of third parties in respect of decisions by competition authorities is fundamentally different from that of the parties in respect of whom the decision was made. In some systems, third parties who can demonstrate a sufficient interest are able to take a formal role in the proceedings and it may be appropriate for such third parties to have standing to appeal where they can demonstrate that their specific individual rights have been infringed by the decision, subject always to safeguards to avoid anti-competitive tactical appeals. In other cases there should be no need and no right for third parties to be able to appeal a decision.

5. An effective right of recourse to the courts

In order to be effective, the right of parties to appeal against an authority decision must be timely. It is trite but true that justice delayed may be justice denied and nowhere is this more true than in the case of appeals against authority decisions in competition cases.

The right to a timely appeal means that appellants who assert their rights diligently and co-operate properly with the court's procedures can obtain judicial review of the authority's decision within a timeframe that will enable them to secure the practical benefit from any judgment on appeal which reverses or revises the authority's decision. In the case of decisions on proposed merger transactions, factors such as competing bids for the target, stock market fluctuations and the sometimes fragile economic position of the target may mean that to be timely an appeal needs to be completed within weeks rather than months. The same timescale may be necessary in other cases such as decisions in unilateral conduct cases which may lead to significant changes to a company's business model, may impact its commercial relations around the world and so create uncertainty as to its value and future viability. In some jurisdictions the scale of financial penalties alone may create similar uncertainty in some cases.

At the same time, the issues at stake in these appeals may involve review of a protracted administrative procedure leading up to the decision, extensive files and complex factual and legal disputes and economic evidence, meaning that a thorough review will require substantial attention. It is essential, in this context, that courts reviewing these cases have sufficient resources to address them promptly and efficiently, without any delays due to non-critical administrative steps⁵ or because of any backlog of the court's case work. Where the courts offer an expedited procedure for urgent matters, this should be available at the parties' option in competition appeals. If normal court procedures are insufficiently expeditious, these cases may need to be expedited systematically.

However speedy the judicial procedures may become, it will remain necessary to safeguard the parties' rights pending the outcome of their appeal. Parties should not be required to take any steps, including the payment of substantial penalties, which are irreversible or which may interfere with or damage the effectiveness and continuity of their business operations pending the outcome of the appeal. This will mean that an appeal should have suspensory effect on measures ordered by the decision, subject to the ability for the court to rule that a decision should have immediate executory effect in exceptional cases where this is shown to be essential whilst the appeal is pending.

6. Appropriate qualifications and expertise

In accordance with basic principles of effective judicial control, the court responsible for judicial review in these cases should consist of impartial judges immune from political influence. The significance of the court being and being seen to be impartial and independent will be particularly obvious in cases where the position of national champions or state-owned entities are at stake or where not all of the interested parties are from the agency's jurisdiction but is not limited to these cases, being equally important whenever the decision of an authority forming part of the public administration of the State is challenged.

The particular requirements for an effective review of findings in competition cases outlined in section II above mean that it is vital for the judicial authority hearing these cases to have appropriate expertise, including an understanding of the economic underpinnings of competition law. This expertise needs to be sufficient to evaluate the competing economic theories and expert opinions which are of ever-increasing importance in competition cases. BIAC is aware of initiatives to provide judicial training in competition law⁶ and would urge that such training be a mandatory requirement for all judges involved in hearing and deciding these appeals. Specialist panels or tribunals have been established in some

⁵ For example, in some jurisdictions translation issues can lead to delays which should be avoided by reducing the burden of translation or ensuring sufficient resources so that translations can be effectively immediate.

⁶ Such as the UK Enterprise Act 2002, Sch 2, para 8, which imposes an obligation on the President of the Competition Appeal Tribunal to arrange training for the Tribunal's members.

jurisdictions which may facilitate the acquisition and maintenance of the necessary knowledge and expertise among the judiciary but is not, in BIAC's view, essential provided there is sufficient investment in judicial training of members of the general court hearing these cases.

Even a well-trained and experienced judiciary will need to be able to call upon effective support, including court-appointed experts in economics and other disciplines as well as industry experts where the issues at stake in the appeal require this. The resources available to the court should include access to such support.

International organizations including the OECD can usefully promote the development of appropriate judicial expertise by sponsoring training programmes and opportunities for judicial exchange. BIAC would suggest that this work should extend not only to OECD member countries but also, crucially, to all candidate countries for OECD membership and other countries with which the OECD co-operates through enhanced engagement and as global partners.

7. A full review

BIAC submits that judicial review in competition cases needs to provide for a full and intense review on the factual and legal merits of the decisions under appeal if it is to fulfill its role⁷ and meet the challenges involved in these cases which involve not only the vital interests of the parties but frequently their fundamental rights.⁸ In particular, since the appeal against an authority's decision will be the first occasion upon which the matter is reviewed by an independent judicial body in the cases we are here examining, it is appropriate that the appeal provide for full, unlimited jurisdiction for the court to review the case.⁹ A full review enables the court to assess the correctness, on the merits, of the authority's decisions, not just its legality. It also enables the court fully to review the penalty. In practical terms this means that the court should

1. independently review the evidence used to support the accusations and weigh this in light of evidence supporting the defence. The court needs the power to confront and test the evidence to the fullest extent provided for by national rules of procedure, for example by calling witnesses to be subject to examination and cross-examination before the court comes to its own conclusions;
2. evaluate the facts in the context of the legal and economic elements making up the infringement including a full review of the economic evidence and analysis;
3. confirm whether the burden of proof is met;
4. verify that due process and transparency have been respected; and
5. check that any penalty is appropriate (just and proportionate to the gravity of the offence and the individual defendant's participation in any violation), consistent with penalties imposed for comparable economic offences and justified by reference to actual harm caused to consumers or a demonstrated need for deterrence.

⁷ As summarised in section II above.

⁸ See section III above.

⁹ Indeed, Art 6 of the European Convention of Human Rights, to which many OECD members states are party, requires that where an administrative authority imposes a sanction which is penal in nature like fines in competition cases there must be a possibility for subsequent judicial control by a court having full jurisdiction to review and revise all elements of fact and law involved. See for example *Affaire A. Menarini Diagnostics* (Req 43509/08, judgment of 27 September 2011 of the ECtHR).

In this context, courts should be wary of excessive deference to the administrative authority and undertake their own full review, rather than, for example, relying on the authority's assessment of matters of fact.

8. Cases resolved on consent

Where a country's competition law provides for separate bodies responsible for enforcement and adjudication, the question arises of the proper role of the judicial body where the enforcement authority has entered into a consent agreement, particularly one entered into with parties to a merger.

With respect to judicial review of these consent agreements, competition law regimes need to strike the right balance between two considerations. First, providing parties to a proposed transaction reasonable certainty that a proposed resolution negotiated between the parties and the enforcement authority will be accepted by the courts; and on the other hand, ensuring that the judicial body has appropriate oversight over the consent order process – including taking into account legitimate concerns raised by affected third parties, for example in relation to errors in law or excess of jurisdiction on the part of the enforcement authority.

A consent agreement should not be subject to a full review on the merits. In contrast to the authority's enforcement decisions discussed above, the rights of the parties to a consent agreement require no such full review. To the contrary, legal certainty requires that there be a strong presumption that consent agreements will be approved by the judicial body. However, care should be taken to ensure that the judicial body plays a meaningful role in ensuring the fairness and thoroughness of the enforcement authority's review and decision-making process.

9. Conclusions

BIAC submits that judicial review respecting the standards outlined in this brief paper is essential to fulfill the crucial role judicial review needs to play in competition cases and would urge the Competition Committee to work towards ensuring that such standards be accepted as a minimum for judicial review of decisions taken by administrative authorities in competition cases and to work towards promoting judicial training in competition law and economics and exchanges among OECD members, candidate countries and other countries with which the OECD co-operates.

SUMMARY OF DISCUSSION

By the Secretariat

The Chair opened the Roundtable discussion by noting that it would be the third and final Roundtable in a series addressing the issues of procedural fairness and transparency in competition enforcement. Specifically, this Roundtable would address:

- The institutional relationship between competition authorities and the courts; *and*
- An update on developments in procedural fairness and transparency in member countries.

After thanking the delegations for their submissions to the Roundtable, the Chair asked the delegate from Mexico to discuss recent changes with respect to judicial review of competition cases within that jurisdiction. The delegate began by outlining these changes, enacted in May 2011 and due to enter into force in November 2011, which balanced a stronger enforcement framework against more intensive judicial review. On the one hand, the competition authority will have the power to conduct dawn raids, and impose higher fines and criminal sanctions. On the other, there will be an enhanced mechanism for judicial review in competition cases, involving specialised competition courts, the possibility for a full substantive review, and an option to go directly to judicial review rather than requiring an intermediate administrative review stage.

The delegate emphasized that three principal objectives should underpin these changes to the judicial process: *first*, efficiency; *second*, equality of access to review mechanisms for both private parties and the public enforcement agency; and *third*, a substantive review process that respects the division of powers, giving due deference to the agency's decision. Currently, competition appeals are heard under the *amparo* system, which will remain available to applicants for review, and there will be a need to ensure consistency between these review systems. The new additional process will involve first instance review before a specialised judge, with the possibility of appeal to a specialised tribunal. The revisions to the judicial review process create the opportunity for efficiency improvements, but also certain risks. Specialisation of the judiciary allows for more nuanced review of competition decisions, yet the system will take time to implement, and there is a risk of capture. Specialised procedural rules provide clarity, yet there is a risk of delay if cases are subject to multiple instances of review. Substantive review will shift the appeals process from legal formalism to a merits-focused approach. At the implementation stage for the new system, the delegate noted that the current danger is that lobbying by vested interests will seek to shift the balance in favour of private parties in the review process.

In response to a question from the Chair, the delegate from Mexico clarified that the new system was due to enter into force on 11 November 2011. However, in the event that the new framework for review was not in place by that time, the existing judicial *amparo* system would continue to govern competition reviews. The delegate from the US asked whether the Mexican competition authority had sought the new reforms and if so, the extent to which the legislative changes reflected its proposals; and whether international experiences had played a role in shaping the Mexican reforms. The delegate from Mexico acknowledged the key role played by the work of the OECD, in particular the 2004 *Competition Law and Policy in Mexico* peer review, in identifying shortcomings in the existing system and providing the impetus for reform. Mexico also consulted with experts from other competition jurisdictions, including the US and

EU, in drafting the reforms. The final package of amendments enacted in May 2011 largely reflects the preferred outcome of the competition authority, insofar as it balances stronger powers of dissuasion with a more in-depth review of decision-making. The delegate noted the particular hostility of the private sector in Mexico towards the competition system, and the risks that this posed for the reform process. Although reliance on international experience may allow Mexico to avoid some of the pitfalls in this area, to a certain extent every institutional set-up is unique to its national or supra-national context. The Chair asked about the selection process for judges at the specialised tribunals. The delegate from Mexico explained that the process of selecting specialist judges will be the sole responsibility of the *Consejo de la Judicatura*, the administrative body of the judiciary, although the Mexican competition authority has liaised with this body in order to assist it with its task. The delegate explained that there is no definite answer in Mexican law to the question of how much deference the new court should give to the technical assessment of the competition authority, but the clear intention of these reforms is to go beyond the usual remit of courts in Mexico. While efforts have been made to ensure that a robust and transparent principle of deference is enshrined within the law, this is one of the most contentious questions in the reform. The delegate from Mexico added that certain private interests in Mexico were keen to ensure that the courts' powers of review are as comprehensive as possible, so that in essence the competition assessment will begin again entirely before the judiciary, which is a major issue.

The Chair asked the delegate from Australia to elaborate on the distinction between “judicial” review and “merits” review that is found in the Australian system. The delegate explained that, as part of the executive government, the Australian Competition & Consumer Commission (ACCC) exercises administrative powers when it makes decisions or takes enforcement action before the courts. In general, decisions regarding enforcement action are not reviewable, but some of the ACCC's powers of investigation can be reviewed. Such cases involve judicial review, which focuses on whether the decision-making process was lawful. Essentially, the court is concerned with whether the decision was made correctly, rather than whether it was the correct decision on the facts. Under a merits review, which generally concerns regulatory-type decisions, the decision of the ACCC can be entirely revised on appeal, where it is found to be incorrect on the facts. Merits reviews typically take place before the Australian Competition Tribunal or other tribunal.

The Chair then turned to the submission from Korea, which discussed the ability of complainants in that jurisdiction to appeal decisions of the competition authority not to investigate a complaint or to close a case. The delegate from Korea explained that such decisions are amenable to judicial review before the Constitutional Court, which assesses cases involving the exercise of public powers with a constitutional dimension. The delegate also clarified that the competition authority issues a written statement when it declines to investigate or closes a case, which provides the basis for the judicial review challenge.

The Chair asked the delegate from the Netherlands to discuss the benefits and disadvantages of reviewing all competition appeal cases in a single court. The Dutch delegation explained that, although there are 19 different district courts in the Netherlands, all appeals against decisions of the competition authority are brought before a single court, the Rotterdam District Court, in order to concentrate competition law knowledge and economic expertise within a single tribunal. The Rotterdam District Court also houses a specialised centre for competition law, which provides training for civil judges throughout the Netherlands. In contrast to administrative cases, civil cases involving competition law issues are not necessarily brought before the Rotterdam court, and so it is necessary for all civil judges to have some understanding of competition issues. In such cases, civil judges can obtain assistance from part-time specialist competition law judges. The Chair remarked on the parallels between the Dutch system and efforts to introduce a specialised competition court system in Mexico, and asked whether specialised judges in the Netherlands receive formal training or merely learn through experience. The delegate from the Netherlands answered that expertise was developed both through practice, insofar as all administrative

competition appeals are heard before the same court, as well as via formal training for judges and their assistants.

The submission from the Slovak Republic detailed the relationship between the courts and the Antimonopoly Office. The Chair asked the Slovak delegate to discuss the efforts of the agency to improve this relationship. The delegate from the Slovak Republic emphasised that the Antimonopoly Office respects the independence of the judiciary, and that both courts and competition authority pursue consumer welfare objectives. In practice, however, the Office has seen the annulment of many of its decisions that involve high fines, without further guidance from the courts regarding improvements for the future. The Office has therefore sought to engage with the judiciary and the Ministry for Justice, with a view towards the development of a specialist competition court, as well as competition training for judges.

The submission of Sweden concerned an issue of increasing relevance for competition authorities: the treatment of confidential information and business secrets presented in court during merger cases. The delegate from Sweden explained that the Swedish Constitution grants an extensive right of access to official documents, a right which is complemented by a specific right of access to file for parties in court proceedings. However, there is a tension here with the need to protect confidential information. This can be a particular problem in merger cases, where the merging parties and sometimes other firms are required to submit sensitive economic data and business secrets to the competition authority. The competition authority itself can, to an extent, keep this information secret during its investigations. In order to prohibit a concentration, however, in Sweden the competition authority is required to bring the case to court, and once in court there is an absolute right of access by the parties to documents that are reasonably relevant to the court's ruling. Historically, the court has granted access to the material where requested, but made its use subject to reservations, so, for example, only legal counsel can view the material and it must be destroyed when the case is settled. Violations of these reservations are subject to fines. It is a controversial question, however, as to whether these restrictions are compatible with Swedish law. In order to deal with the problem of confidential information, the Swedish competition authority is considering the use of a data room for economic evidence, accessible to the parties' legal and economic counsel. The competition authority would then present only its analysis in court, rather than the underlying material, thus protecting confidential information from being released. In cases where the parties challenge the underlying data, however, it is likely that the material will still need to be released to the court.

The Chair asked the delegate from Brazil to discuss the work of ProCADE, the legal department of the competition authority, CADE. ProCADE is staffed by 10 career public attorneys, the delegate explained, and headed by a General Counsel appointed by the Minister for Justice. The main duties of the department are to defend CADE's decisions in court and to monitor the correct implementation of CADE's decisions. ProCADE also negotiates judicial settlements, a key task, although it needs the approval of the board of CADE to conclude any settlement. Further activities of the department include the issuance of legal opinions in competition cases and in internal administrative matters, and the preparation of responses for parliamentary inquiries. The delegate confirmed that opinions issued by CADE are publicly available.

The Chair then gave the floor to the delegate from the European Union, to discuss the impact of the recent *Menarini* decision of the European Court of Human Rights,¹ and its implications for competition proceedings in Europe. The delegate explained that, in that case, the Strasbourg court held that the competition enforcement system in Italy was compatible with the European Convention on Human Rights insofar as it guaranteed the right to a fair trial. In Italy, fines for competition law violations are imposed by the national competition authority, with the possibility of appeal to the administrative court which carries out a full merits review. The case is of interest from an EU competition law perspective because the Italian

¹ Judgment of the ECtHR of 27 September 2011, *A. Menarini Diagnostics S.R.L. v. Italy*, Application No. 43509/08.

system is very similar to the enforcement regime in the EU. It therefore confirms that when the EU accedes to the Convention, the EU system should be compatible with fundamental human rights.

The Chair opened the discussion to questions from the floor. The delegate from the US asked the Netherlands about its administrative appeal procedure, which consists of a reassessment of the case by another case team in the competition authority. The delegate from the Netherlands explained that the possibility is available only in cartel cases, and not in merger decisions, which are reviewed directly by the district court. In cartel cases, the agency rarely reverses its initial decision, but the parties still retain the ability to further appeal the decision before the district court. The delegate from Sweden asked for clarification on the competition law training for judges in the Netherlands. The delegate from the Netherlands explained that civil judges are trained by competition specialists based in the Rotterdam District Court. Furthermore, the competition authority was asked to give a presentation on competition law in a conference for civil judges this year.

Next, the Chair asked the delegate from Bulgaria to discuss the criteria applied by Bulgarian courts when granting authorisation for inspections or dawn raids. The delegate explained that such requests are submitted by the Chairman of the competition authority to the Sofia City Court, and are assessed on the basis of three necessary elements: (i) an indication of the suspected breach of competition law; (ii) the reasons why the raid is necessary; and (iii) the purpose of the inspection, meaning the evidence to be collected. A request can also be made in order to assist the European Commission in its activities. Where these three conditions are satisfied, the court must grant the request. With one exception, the court has always granted authorisation requests submitted by the competition authority. The delegate clarified that court authorisation is required for all inspections and dawn raids, including in urgent cases, but that authorisation can be obtained at short notice where necessary.

The delegate from Chile added that the Chilean competition authority has recently acquired new powers to conduct dawn raids and wire taps, but it has found the process of obtaining judicial authorisation for use of these powers somewhat time-consuming. It is therefore working with the judiciary in an attempt to put in place a more expeditious procedure. The Chair noted that, in the US, a big concern is to ensure that the parties under investigation do not learn of the impending raid beforehand, and she asked whether this is also an issue in Chile. The delegate from Chile responded that maintaining confidentiality had not been a problem, but delay nonetheless remains an issue. The delegate from Australia explained that, in that jurisdiction, it is necessary to obtain a search warrant from a magistrate to conduct a dawn raid. The ACCC has recently acquired a new power to seek “stored communications” held by telecommunications companies, which allows the agency to access electronic communications, and use of this power also requires authorisation from a magistrate. The legal standard for access to “stored communications” is lower than for the granting of a search warrant, but the ACCC is still required to establish a legitimate basis for seeking the material. Moreover, use of the power is subject to annual audits by the Ombudsman.

In Lithuania, the Competition Council has the power to file legal challenges against laws and decisions of public bodies that restrict or distort competition. The delegate from Lithuania explained that national competition law prohibits public entities, apart from the Parliament and the Cabinet Ministries, from creating unequal conditions for competition. The Competition Council has the power to investigate these cases like any other competition cases, although dawn raids cannot be carried out. Where a violation is established it can issue a cease and desist order. Such orders can be appealed to the administrative court, and if upheld, are binding on the public body. Examples of cases that have been taken under this provision include the failure of a municipality to engage in competitive tendering for transport services; government restrictions regarding the storage of energy reserves; the provision of commercial services by a branch of the police department; and a cartel of orthopaedic device manufacturers that was administered by the national health insurance fund. The Chair asked whether public authorities consult with the Competition

Council in advance, and the delegate explained that advocacy is the Competition Council's preferred response, and use of this power is a last resort.

The Chair asked the delegate from Romania to describe the Competition Council's role as *amicus curiae* in public and private competition proceedings. The delegate explained that the formal legislative authority to act as *amicus curiae* will be included in the new Romanian Code of Civil Procedure, but the Competition Council has played such a role informally for many years. The Council provides non-binding opinions on competition matters to courts, and it also provides training for judges, in order to ensure that the judiciary has a fuller understanding of the competition rules. The Council's new formalised role will relate to private damages actions in competition cases. Romania has implemented to a large extent the European Commission's White Paper on damages, and wants to provide pro-active support for the development of private competition enforcement, although the ultimate success or failure of these endeavours remains unknown. The Chair asked about the criteria for choosing cases for intervention, and the delegate confirmed that the Council retains the choice of whether or not to intervene in private actions. In public actions, the Council is automatically a party to the proceedings.

In Turkey, the jurisdiction of the Turkish Competition Authority (TCA) over the regulations of professional associations has been a particularly contentious issue. The delegate from Turkey explained that the TCA had imposed sanctions on certain professional organisations for their anticompetitive by-laws and regulations. Those decisions were subsequently annulled by the Council of State, the highest administrative court, on the basis that determination of the legality of such measures was a question for the court rather than the TCA. When the TCA then filed actions for annulment of the professional regulations in court, the Council of State rejected these cases on the basis that the TCA does not have capacity to sue with respect to such regulations. The TCA takes the view that it has capacity in this regard under the existing competition rules; nonetheless, the TCA is advocating for a formal amendment of the act, to provide it with express powers in this area.

The Chair then invited the delegate from Chinese Taipei to share its experiences with private litigation in competition cases, including the role of the Fair Trade Commission (FTC). The delegate began by explaining that, in Chinese Taipei, private parties can apply for civil compensation, including treble damages, for competition law violations, although in practice treble damages are never awarded. The FTC can play two roles in private litigation. *First*, it acts as an expert witness, advising the court as to the requirements of competition law, although it does not act as final decision-maker in such cases. *Second*, private actions for damages may take the form of follow-on actions, premised on a prior finding of breach by the FTC, an approach which makes the private litigation itself quicker and easier to conclude successfully. In response to a question from the Chair, the delegate explained that, to date, the expert opinions provided by the FTC to the court have been respected in the proceedings.

The Chair then opened the floor to further questions and comments. The delegate from Spain drew parallels between the Lithuanian and Spanish experiences in applying competition law to the acts of public bodies. In Spain, where public bodies operate as economic actors, they are subject to the normal competition rules, including, at least in theory, dawn raids. In the case of anticompetitive regulations below the level of primary legislation, the competition authority now has the power to challenge such measures before the administrative courts. It is currently pursuing two such cases against regional authorities that extended transport concessions without conducting a public tender. The delegate from South Africa noted that, in contrast to Chinese Taipei, where private actions can be brought without any finding of breach by the competition authority, in South Africa, any action for damages requires such a prior determination. Until the recent bread cartel case, no private damages action had been pursued in South Africa. The South African competition authority is concerned that the criteria for certifying class actions specified by the court in that case were set at an unduly high level, which may prevent many such actions going forward.

The delegate from the US asked Turkey about the circumstances in which the burden of proof might be shifted from the claimant to the defendant in private litigation. The delegate from Turkey explained that private plaintiffs are required to establish, generally through economic evidence, that the restrictions to competition are not an inherent feature of the market itself. The burden of proof then shifts to the defendant, which is an unusual but not unduly onerous feature of private competition litigation in Turkey, and which of course facilitates private enforcement. In practice, the TCA does not rely on the reversed burden of proof in its decision-making, but instead endeavours to produce sufficient robust evidence of anticompetitive conduct by the defendant firm. The delegate from Australia noted the significant, and unresolved, tension in Australia between public enforcement and private damages in cartel cases, in particular in relation to material provided in leniency applications. In Australia, the courts have the power to make “findings of fact” in competition enforcement cases, which can then be used by private parties as a basis for follow-on litigation. However, this provision has proven entirely ineffective in practice, and so Australia is looking at alternative mechanisms to support private enforcement.

The Chair then gave the floor to BIAC, whose submission focused on appeals against administrative decisions of competition authorities. BIAC emphasised, first and foremost, the need for judicial training, and in appropriate cases, a specialised court system or judiciary, insofar as competition law falls outside the typical knowledge of generalist judges. Timeliness of process is another key feature of an effective appeals mechanism. Moreover, the parties’ rights must be safeguarded during the appeals process. Finally, courts must have the power to conduct a full and independent review of administrative decisions, in accordance with the *Menarini* judgment.

The focus of the Roundtable then moved on to the consideration of recent developments relating to transparency and procedural fairness in member and non-member countries. The delegate from the European Union introduced the recent changes to the Commission’s internal enforcement practices, involving the adoption of best practices for antitrust proceedings, guidance on the submission of economic evidence and a revised mandate for the hearing officer. Within DG Competition, there are already an extensive system of internal checks and balances in place, involving review and/or supervision of competition cases by, *inter alia*, the case support team and divisional hierarchy, peer review panels, the Chief Economist, the Commissioner for Competition, the legal service, the Member State’s competition experts in the Advisory Committee, other Commission departments responsible for economic policy and the relevant sector at issue and the Commission itself. Moreover, built into the legislative framework are a series of rights of defence and procedural guarantees for defendants, which are safeguarded by the Hearing Officer. These recent changes are, nonetheless, intended to enhance the fact-finding ability of the Commission, to prevent errors, to increase accountability, and to generate greater support for competition enforcement efforts amongst stakeholders and the general public, by enhancing their legitimacy. At the same time, it is important to ensure that greater procedural fairness and transparency not come at the expense of efficiency in enforcement proceedings.

First, a draft set of best practices for antitrust proceedings was adopted and provisionally implemented in January 2010, and at the same time, was subject to a public consultation. The revised best practices introduce enhanced transparency of process for parties, including:

- Provision of a complete overview of the Commission’s antitrust enforcement procedures;
- Enhanced transparency for stakeholders, in particular public announcements at key investigative stages;
- Enhanced interaction, including more frequent state of play meetings and earlier access to key submissions;

- Inclusion in the Statement of Objections of information about the parameters for the possible imposition of fines, including the value of sales affected by the infringement, as well as the period that the EC intends to consider for determining the value of such sales); *and*
- Guidance on when claims of inability to pay fines should be made and how the Commission will assess them.

Second, the submission of economic evidence in enforcement cases has become more frequent and significant, and so the Commission has issued guidance on the requirements for economic, and particularly econometric, evidence submitted by parties. This guidance covers, *inter alia*, acceptable formats for data submitted, as well as the Commission's procedures for dealing with sound but imperfect economic evidence.

Third, the Terms of Reference of the hearing officer has been consolidated and expanded. In particular, the hearing officer now plays a role from the very beginning of the enforcement process, including functioning as legal arbiter in disputes relating to legal professional privilege, the right against self-incrimination and deadlines imposed by the Commission.

The role of the hearing officer has also been extended to include:

- Reporting on the upholding of procedural rights throughout enforcement proceedings;
- An increased role in commitment decision procedures; *and*
- Greater ability for the hearing officer to structure the oral hearing so as to ensure the most effective assessment of all elements of the case.

Within the European Union, the delegate concluded, the procedures for competition enforcement are constantly being improved, in consultation with stakeholders. Transparent and fair procedures benefit not just the parties to an investigation but also the credibility of the enforcement system as a whole, which is a key driver of this constant process of improvement. The EU delegation also noted that the key change in practice with regard to the implementation of the provisionally applicable Best Practices was the state of play meetings. As has been seen in merger cases where state of play meetings were introduced in the Merger Best Practices of 2004, they can lead to an improvement in the quality of evidence. The increased role for the hearing officer emerged from the best practices consultation and has been well-received by stakeholders.

The Chair then recognized the delegate from Canada, where recent efforts have been made to increase the transparency of the Competition Bureau's activities. The delegate explained that transparency is one of the Bureau's five operating principles, and so the Bureau's practices and procedures are actively and continuously self-assessed, in order to identify opportunities for enhanced transparency. The Bureau regularly publishes updated enforcement guidelines outlining its enforcement policy and approach. For example, it recently published final merger enforcement guidelines, following an internal review process and consultations with stakeholders and other national competition authorities. Indeed, transparency is a particularly relevant issue in the mergers context, and so the Bureau also publishes position statements describing its analysis of complex merger cases, and plans to establish a public registry of all concluded merger reviews.

The submission of Germany considered the issue of access to documents provided in a leniency application for plaintiffs in follow-on private litigation, in light of the Court of Justice of the European

Union's decision in the *Pfleiderer* case.² The delegate from Germany began by outlining the background to the *Pfleiderer* judgment. The case had its origins in a cartel decision taken by the Bundeskartellamt in the décor paper sector, which began on the basis of a leniency application. In a follow-on private action for damages, the plaintiffs sought access to the Bundeskartellamt's case file, which was granted except for the material provided in the leniency application. On appeal to the Amtsgericht Bonn, the judge considered it necessary to make a reference to the Court of Justice to clarify the EU law in this area. In the referred proceeding, the Court of Justice held that EU law does not prohibit access to leniency documents by third parties, but that it is for the national court of each Member State to determine, whether to permit access to documents in a particular instance. The delegate highlighted the particular difficulty for second-in-line leniency applicants in Germany, who receive only a 50% reduction in fine imposed by the Bundeskartellamt, yet are required to provide extensive evidence of the violation, rendering them particularly vulnerable to access to information requests. Going forward, it will probably be necessary to amend the existing German law with respect to access to leniency material. Moreover, the delegate concluded, there is also a need for legislation on this issue at an EU level, perhaps in the form of revisions to Regulation 1/2003, which ideally would address the issues of access to file, leniency in general and the setting of fines.

The Chair then opened the discussion to the floor, for questions and comments on the issue of access to leniency documents. The delegate from Australia noted that two cases similar to the *Pfleiderer* decision had arisen within its system, which had resulted in legislative changes in order to strengthen and clarify the law. The new legislation allows the ACCC to deny access to confidential cartel information, although access can subsequently be ordered by the court where, having weighed the competing interests, the balance lies in favour of disclosure. The delegate from the European Union agreed with the view of the delegate from Germany that EU-level legislation on this issue is needed. This lacuna in EU law was implicitly criticised by the Court of Justice in *Pfleiderer*, and the absence of a definite EU legal norm may explain why the Court of Justice, in essence, left the question to be decided by national courts on a case by case basis. The delegate distilled two broad rules of thumb: *first*, that the corporate statement in the leniency submission should always be protected, while pre-existing documents might be released; and *second*, there is a particular need to balance the interests of leniency applications with those of private follow-on plaintiffs, because without the former there will never be the latter.

Regarding the shape that any new legislation on leniency should take, the delegate from Germany stated that the exact components of the proposed legislation have not been determined, but that the aim is to both encourage leniency applications and support private actions to the greatest extent possible. In terms of German law, the *Pfleiderer* approach represents a progressive development, insofar as it establishes that access to leniency material can be restricted in some circumstances, rather than an absolute rule permitting access. The delegate from the European Union agreed that there is a need to find the dividing line between these competing interests, in order to preserve incentives for both leniency applications and private actions. The delegate from the UK asked Germany whether new legislation that impedes the right to access might run into constitutional law difficulties. In response, the delegate from Germany explained that an absolute ban on access would likely violate the Constitution, but that mere limitations on access should be acceptable, given that there is scope within the Constitution itself for the balancing of competing rights and interests.

The Chair then introduced Japan's submission, which described the 2011 amendments to the JFTC's procedural rules, which are designed to improve transparency and fairness in merger control proceedings. The delegate from Japan described the three main components of the reforms. *First*, the prior consultation process has been abolished, so that the JFTC's investigations now only begin at the notification stage. Formerly, firms considering a merger would consult with the JFTC beforehand on an informal basis, to

² C-360/09 *Pfleiderer AG v Bundeskartellamt*, judgment of the Court of Justice of 14 June 2011.

determine whether the planned transaction would raise competition concerns. The delegate from Japan stated that the previous informal procedure has been abandoned in the reform to enhance transparency. *Second*, the JFTC has improved its communication with the notifying companies, for example, concerning the issues in on-going merger investigations. Although such information was previously available, the communication processes between the JFTC and notifying companies have now been codified in the JFTC's new merger procedural guidelines. *Third*, at the end of the merger review procedure, written findings will be issued, including circumstances where the transaction is cleared unequivocally, in an effort to improve both the transparency and the predictability of the JFTC's decision-making processes. The Chair asked whether the reform has proven successful to date, and the delegate explained that some of the on-going merger investigations, which started before the amended merger regulation had been put into effect, are conducted without the informal prior consultation under the previous system in order to preempt the reform. While informal consultations with the JFTC regarding how to make entries on the notification form, etc. remains a possibility even after the recent reform, no definitive decisions will be taken during the informal consultation stage in the future. The Japanese delegate also noted that the mechanisms employed by the JFTC for communicating with parties are similar to the state of play meetings held by the European Commission in competition cases.

The Chair invited the delegate from Greece to speak about revisions to the country's competition system following enactment of Law 3959/2011, which makes significant substantive and procedural changes while keeping intact the core of the existing competition prohibitions. In particular, the enforcement powers of the Hellenic Competition Commission (HCC) have been strengthened or reformed, including:

- Discretion to select its own case-load, in accordance with HCC enforcement priorities as set out in recently-issued guidelines;
- The power to impose fines on natural persons;
- Strengthening of the leniency programme;
- A five-year statute of limitations for imposition of sanctions for competition law breaches;
- The right to submit comments on draft legislative and regulatory acts with potentially anticompetitive effects;
- The ability to restrict access to confidential information in the competition case file;
- Abolition of post-merger notification and abolition of the power of ministers to approve anticompetitive mergers otherwise prohibited by the HCC; *and*
- Clarification of procedural rights for defendants.

Procedures for appeal against decisions taken by the HCC have not been changed under the new legislation: such decisions are administrative acts, which can be appealed on a full merits review basis before the Administrative Court of Appeals, and decisions of the latter can be challenged subsequently on a judicial review basis before the Council of State. However, the new law makes provision for the establishment of a specialised competition chamber in the Athens Administrative Court of Appeals. Within the Greek competition system, historically procedural fairness and transparency have been prioritised over the efficiency of the procedure. Now that the HCC has the power to prioritise and select its own case-load, however, it is expected that the speed and efficiency of proceedings will improve significantly.

The Chair asked the delegate from Greece to explain the motivation for the reforms, in particular with respect to access to leniency and other confidential material. The delegate acknowledged the need to balance fairness and efficiency, and argued that a formalised framework for disclosure is necessary, in order to protect the HCC from accusations that it has violated rights of defence by denying access. In Greece, the judge gets access to the entire case file, whereas the parties may only be granted access to certain documents. The delegate from Romania asked whether the Greek system is compatible with the principle that all evidence must be made available to all the parties and reviewed in court. The delegate from Greece cautioned that these changes are very recent, and so there is little experience with how the revised system will work in practice. There is a strong respect for the rights of defence within the Greek administrative system, however, and so defendants will continue to have access to sufficient evidence to defend their case. The decision as to what material is to be kept confidential is made by the President of the HCC, and in theory, if the judge disagrees, he or she can order further access.

In Slovenia, plans are underway to transform the Competition Protection Office (CPO), which at present is a part of the Ministry of Economy, into an independent administrative agency. The delegate from Slovenia explained that when the country acceded to the OECD, a key issue identified in its accession review was the absence of an independent competition enforcement agency. Legislative efforts were made during 2010 to reorganise the CPO into an independent body, with the intention that the new agency would operate from 1 January, 2012. However, domestic political difficulties have led to the postponement of these plans. Once in place, key changes to the decision-making processes of the CPO will result in enhanced transparency and due process protection. Currently, decisions are adopted by a panel composed of the Director of the CPO and two employees appointed by the Director for that purpose. Under the new framework, a Competition Protection Commission will be established, which will comprise two outside expert members and three CPO employee members, who will be appointed by the National Assembly. Decisions will instead be taken by a three-person panel of members of this Commission. The reconstituted CPO will also have greater control over its budget, subject to approval by the National Assembly, which will further strengthen agency independence.

The Chair then invited the delegate from Chile to discuss the relationship between the competition authority, the FNE, and the recently-established Transparency Council. The delegate explained that the Transparency Council implements the provisions of the Transparency Act, which is a freedom of information statute, with respect to the FNE but not the Competition Tribunal. The Transparency Council resolves disputes between individuals and government or public bodies, where access to information has been denied. There are two potential issues with respect to the work of the FNE: *first*, only private parties can appeal against a decision of the Transparency Council, whereas public bodies have no right of appeal; and *second*, while the provisions of the Transparency Act do not apply to criminal prosecutions, they are applicable to civil enforcement actions taken by the FNE. Nonetheless, the provisions of the Transparency Act have been applied numerous times against the FNE since it came into force in 2008, without difficulty, and in particular, the Council has never ordered the disclosure of leniency applications or other confidential material. While some defendants have attempted to use the transparency provisions as a quasi-discovery mechanism, in practice the Transparency Council has protected the work of the FNE in its determinations. In response to a question from the Chair regarding the type of information that had been sought from the FNE, the delegate gave as an example two expert reports that had been prepared for litigation proceedings, concerning legal and economic issues, as well as internal notes and deliberations. In each case, the FNE was entitled to deny access to the information.

The Chair turned to the submission of Spain, which has recently conducted a public consultation on draft guidelines for accepting commitments in infringement proceedings. The delegate from Spain emphasised the essential role of public consultations, insofar as they allow stakeholders to comment and identify gaps and ambiguities in the draft provisions, and therefore increase the certainty and transparency of final guidelines. Under Spanish competition law, express provision is made for termination of

competition investigations on the basis of commitment decisions, which do not involve a finding of breach but instead require binding commitments from the defendant(s) to resolve the competition problem. During the public consultation, several respondents requested that the guidelines be extended to cover settlements as well as commitment decisions. However, no provision is made under Spanish competition law for settlements, which involve a guilty plea coupled with a reduced fine. Following the consultation, the competition authority decided to state explicitly within the commitment decision guidelines that settlements are not permitted. Additionally, the consultation process served to clarify the criteria to be used when deciding whether to accept commitments to close a case. Moreover, guidelines, in themselves, are a useful mechanism by which to increase transparency and legal certainty in the work of the competition authority. The delegate also confirmed that, in the view of the Spanish competition authority, legislative change is necessary in order for settlements to be accepted under Spanish law.

In the United Kingdom, the Chair noted, the Office of Fair Trading (OFT) has commenced in March 2011 a one-year trial of a Procedural Adjudicator to resolve procedural disputes that arise during the course of its competition enforcement work. The delegate from the United Kingdom explained that the Procedural Adjudicator position emerged from the need to provide a swift, efficient and cost-effective mechanism to resolve such disputes, where the only existing option was to pursue a time- and resource-consuming judicial review action in the Administrative Court. There is no formal legal basis for the role, and for the purposes of the one-year trial the position has been filled by an OFT official, the Director of Competition Policy, although measures are in place to ensure that she has no conflicts in the role. While the existence of the Procedural Adjudicator does not preclude a judicial review action to resolve procedural disputes, the aim is to remove the need for such review, which will depend in large part on the credibility of the process. Currently, the Procedural Adjudicator can address three main categories of disputes, involving (i) deadlines for submission of information or written responses to a statement of objections, (ii) requests for confidentiality redactions, and (iii) requests for disclosure or non-disclosure of certain material in a case file. The Procedural Adjudicator can also address issues relating to oral representations meetings, such as the date of the meeting, and other significant procedural issues that may arise during the course of an investigation.

Thus far, there have been two applications to the Procedural Adjudicator for review, one concerning an application for early disclosure of documents, the other a request to prevent disclosure of confidential information. Both issues were resolved within six working days, before the ten working days deadline, and neither case has been judicially reviewed subsequently, which the OFT views very positively. In developing the Procedural Adjudicator role, the questions are, *first*, whether the scope of the role should be extended; *second*, whether the role should be made permanent or subject to a further trial period, and *third*, whether the role should be held by an OFT staff member or an external individual. The Chair asked whether the Procedural Adjudicator tends to mediate disputes, or actually decides on the complaint. The UK delegate replied that the Procedural Adjudicator has the power to determine disputes, but might also choose to mediate where more appropriate, the aim being to find the best way to allow the case to go forward. Over time, it is hoped that both the parties and the case team will modify their behaviour, taking into account the past decisions of the Procedural Adjudicator. Subsequent to the roundtable, the OFT announced in March 2012 that it would extend the Procedural Adjudicator trial for a further year until 21 March 2013. From 21 March 2012, the Procedural Adjudicator's role has been expanded to include the chairing of oral hearings in non-criminal cases and the reporting to the relevant decision-maker(s) following the oral hearing, on any procedural issues that have been brought to her attention during the investigation as well as on whether the oral hearing was properly conducted.

The Chair then asked the delegate from Poland to discuss recent legislative amendments that impacted on competition enforcement. The delegate began by clarifying that proceedings before the Office of Competition and Consumer Protection (UOKIK) are administrative in nature, where judicial review of UOKIK's decisions is carried out under the Code of Civil Procedure. The Code was amended in September

2011, and in particular, the rules regarding evidence have been significantly relaxed. Substantial discretion to allow new evidence has been given to the judge, which the UOKIK fears might result in more lengthy judicial review proceeding against its judgments. This, in turn, will have a negative impact on enforcement, insofar as it will take longer for the UOKIK to remedy the harm on competition involved. Moreover, the UOKIK takes the view that it was unnecessary to relax the rules on evidence in the context of review of its decisions. Parties already have broad rights of access to documents during the course of the administrative proceeding itself, and the broad evidence-gathering powers available to the UOKIK mean that all relevant evidence is in the case file. In any event, if new evidence nevertheless emerges during the course of a judicial review action, it would have been possible to admit it under the previous rules of evidence.

The Chair opened the floor again to questions and comments on the interventions made by the delegates so far. The delegate from South Africa noted that the South African competition enforcement system strongly favours the defendant. The Competition Commission investigates complaints and must then prosecute them before an independent tribunal, with the possibility of appeal to the Competition Appeal Court. Although the statute was designed to end the appeals process at that stage, it has been interpreted to mean that further appeals to the Supreme Court of Appeal and ultimately the Constitutional Court are possible. Recently, the higher courts have handed down several extremely restrictive judgments, which make it increasingly difficult for the Competition Commission to investigate complaints. For example, the Supreme Court of Appeal has held that the initiating document prepared when opening an investigation must closely reflect the complaint that is ultimately referred to the Tribunal, and there are conflicting decisions as to whether the initiating document can be amended to reflect the evolving case. The key difficulty here is that the Competition Commission rarely knows at the beginning of an investigation what its outcome will be or what the case eventually referred will cover. Furthermore, the Tribunal can decide the case only on the basis of the material actually referred. To address these problematic interpretations of the law, the Competition Commission has made three applications for direct access to the Constitutional Court, asking the Court to review the current situation, in an effort to secure a more even balance between the rights of defendants and complainants in competition cases, and the need to enforce the law. Two of these cases will be heard in November 2011, and it is hoped that the third will be heard in early 2012.

To conclude, the Chair gave the floor to BIAC, which welcomed the OECD's recognition of the importance of transparency and procedural fairness, and observed that the discussion of developments in furtherance of these objectives had been rather inspiring. What was particularly encouraging was the commitment to continual improvement, whether such developments were dramatic, like Slovenia's plan to transform its competition authority, or more incremental, like the increased powers of the European Commission's hearing officer. The question of leniency applications in the context of disclosure of documents and follow-on actions remained a difficult and unresolved issue, and there was a need to balance competing legitimate interests in this area. On the issue of transparency, the OECD's work to date on this issue has been both thorough and useful, and the delegate suggested that there might be scope for some further synthesis of the materials collected thus far. The Chair then brought the Roundtable to a conclusion.

COMPTE RENDU DE LA DISCUSSION

par le Secrétariat

La Présidente ouvre les discussions de la table ronde en notant qu'il s'agit de la troisième et dernière table ronde d'une série traitant des questions d'équité et de transparence procédurales en matière d'application du droit de la concurrence. Cette table ronde est plus précisément consacrée :

- aux relations institutionnelles entre les autorités de la concurrence et les tribunaux, *et*
- à un point des évolutions en cours en matière d'équité et de transparence procédurales dans les pays de l'OCDE.

Après avoir remercié les délégations pour leurs contributions à la table ronde, la Présidente demande au délégué du Mexique d'évoquer les récentes évolutions survenues dans son pays dans le domaine du contrôle juridictionnel des affaires de concurrence. Le délégué commence par présenter dans les grandes lignes les modifications apportées, promulguées en mai 2011 et qui devraient entrer en vigueur en novembre 2011. Ces modifications permettent de contrebalancer le renforcement du dispositif de mise en application de la loi par une intensification du contrôle juridictionnel. D'un côté, l'autorité de la concurrence aura ainsi le pouvoir de procéder à des perquisitions et d'imposer des sanctions pécuniaires et pénales plus lourdes. De l'autre sera mis en place un mécanisme renforcé de contrôle juridictionnel dans les affaires de concurrence faisant intervenir des tribunaux de la concurrence spécialisés et donnant la possibilité de procéder à un contrôle complet des décisions sur le fond et aux parties d'accéder directement au contrôle juridictionnel sans passer par une étape intermédiaire de contrôle administratif.

Le délégué souligne que trois principaux objectifs doivent être au cœur des modifications apportées à la procédure judiciaire : *premièrement*, l'efficacité ; *deuxièmement*, l'égalité d'accès des parties privées comme de l'autorité administrative publique aux mécanismes de contrôle juridictionnel et *troisièmement*, l'instauration d'un processus de contrôle sur le fond respectueux de la répartition des pouvoirs et prenant en considération comme il se doit les décisions rendues par l'autorité de la concurrence. À l'heure actuelle, les appels dans les affaires de concurrence sont entendus dans le cadre du système d'*amparo* qui restera accessible aux parties introduisant une demande de contrôle juridictionnel et il faudra donc s'assurer de la cohérence entre les deux systèmes. Cette nouvelle procédure, qui viendra s'ajouter au dispositif existant, donnera lieu à un contrôle des décisions en première instance devant un juge spécialisé, avec une possibilité d'appel devant un tribunal spécialisé. Ces évolutions de la procédure de contrôle juridictionnel sont autant d'occasions d'améliorer son efficacité mais comportent aussi une part de risque. La spécialisation de l'appareil judiciaire permet un contrôle plus nuancé des décisions rendues dans le domaine du droit de la concurrence, mais la mise en place de ce dispositif prendra du temps et il existe un risque de capture. La spécialisation des règles de procédure apporte de la clarté, mais risque aussi d'induire des retards si les affaires sont soumises à une multiplicité d'instances exerçant le contrôle. Avec les contrôles sur le fond, la procédure d'appel ne sera plus axée sur le formalisme juridique mais sur le bien-fondé des décisions. Le délégué fait observer qu'au cours de la présente phase de mise en œuvre de ce nouveau régime, il existe un risque de voir des groupes d'intérêts exercer des pressions pour faire pencher la balance en faveur des parties privées dans le cadre des procédures de contrôle.

Répondant à une question de la Présidente, le délégué du Mexique précise que le nouveau régime de contrôle juridictionnel doit entrer en vigueur en novembre. Cela étant, dans l'éventualité où il n'aurait pas encore été instauré à ce moment-là, le contrôle juridictionnel des décisions rendues dans les affaires de concurrence continuerait d'être régi par le système judiciaire d'*amparo*. Le délégué des États-Unis demande si l'autorité de la concurrence mexicaine avait sollicité cette récente réforme et dans quelle mesure, le cas échéant, les modifications législatives apportées sont représentatives des propositions qu'elle avait faites et si la pratique internationale à cet égard a joué un rôle dans la formulation des réformes intervenues au Mexique. Le délégué du Mexique ne conteste pas le rôle essentiel des travaux de l'OCDE, en particulier dans le cadre de l'examen par les pairs mené en 2004 *du Droit et de la politique de la concurrence au Mexique*, qui a contribué à mettre en évidence les lacunes du système en vigueur et a donné l'impulsion nécessaire aux réformes. Pour préparer les réformes, le Mexique a en outre consulté les experts d'autres juridictions de la concurrence, notamment américaines et européennes. La dernière série de modifications législatives promulguées en mai 2011 reflète en grande partie la solution privilégiée par l'autorité de la concurrence dans la mesure où elle contrebalance le renforcement des pouvoirs de dissuasion par un contrôle plus approfondi des décisions rendues. Le délégué relève l'hostilité particulière du secteur privé mexicain vis-à-vis du dispositif d'application du droit de la concurrence et souligne le risque que représente cette attitude pour le processus de réforme. Même si le Mexique peut éviter certains écueils en s'inspirant de la pratique internationale en la matière, il n'en demeure pas moins que chaque dispositif institutionnel, étant rattaché à un contexte national ou supranational qui lui est propre, est unique en son genre. La Présidente s'enquiert du processus de sélection des juges siégeant dans les tribunaux spécialisés. Le délégué du Mexique explique que le processus de sélection des juges spécialisés est du seul ressort du *Consejo de la Judicatura*, l'autorité administrative de l'appareil judiciaire, même si l'autorité de la concurrence travaille en liaison avec cette instance pour l'aider dans ses missions. Le délégué explique que le droit mexicain ne précise pas dans quelle mesure le nouveau tribunal doit faire primer l'évaluation technique de l'autorité de la concurrence mais que l'intention des réformes était assurément d'élargir le domaine de compétence habituel des tribunaux mexicains. Des efforts ont été déployés pour assurer qu'un principe de primauté, irrévocable et transparent, soit inscrit dans la loi, mais il s'agit là de l'un des points les plus controversés de la réforme. Le délégué du Mexique ajoute que certains intérêts privés de son pays ont fait du zèle pour s'assurer que les pouvoirs de contrôle des tribunaux soient aussi étendus que possible, de sorte qu'en substance les juges puissent entièrement reprendre du début les évaluations d'impact sur la concurrence, ce qui constitue un enjeu majeur.

La Présidente demande au délégué d'Australie d'expliquer la distinction entre contrôle « juridictionnel » et contrôle « sur le fond » présente dans le régime australien. Le délégué explique que l'*Australian Competition & Consumer Commission (ACCC)*, qui fait partie intégrante de l'appareil exécutif, exerce des pouvoirs administratifs lorsqu'elle rend des décisions ou porte une affaire devant les tribunaux. En général, les décisions rendues par de l'ACCC ne peuvent faire l'objet d'un contrôle contrairement à certains de ses pouvoirs d'enquête. Il s'agit alors, le cas échéant d'un contrôle juridictionnel consacré à l'examen de la légalité des décisions rendues. Pour l'essentiel, le tribunal se préoccupe donc de savoir si la décision a été correctement rendue et non si la décision est justifiée d'après les éléments factuels disponibles. Dans le cadre d'un contrôle sur le fond, qui concerne généralement des décisions de type réglementaire, les décisions rendues par l'ACCC peuvent être entièrement révisées en appel lorsqu'elles sont jugées infondées d'après les éléments factuels disponibles. Le Tribunal australien de la concurrence ou une autre juridiction procède généralement à ce type de contrôle.

La Présidente passe ensuite à l'exposé de la Corée, qui analyse la possibilité dont disposent les plaignants, dans ce pays, de faire appel des décisions rendues par l'autorité de la concurrence de ne pas ouvrir d'enquête en cas de plainte ou de clore une enquête. Le délégué de la Corée explique que ces décisions peuvent faire l'objet d'un contrôle juridictionnel devant la Cour constitutionnelle qui évalue les affaires donnant lieu à l'exercice de pouvoirs publics ayant une composante constitutionnelle. Le délégué précise en outre que l'autorité de la concurrence publie, lorsqu'elle décide de ne pas ouvrir d'enquête ou de

classer une affaire, une déclaration écrite, sur la base de laquelle sa décision pourra être contestée dans le cadre du contrôle juridictionnel.

La Présidente demande au délégué des Pays-Bas d'exposer les avantages et les inconvénients liés au réexamen, en appel, par un unique tribunal de toutes les affaires relevant du droit de la concurrence. La délégation néerlandaise explique que bien que les Pays-Bas comptent 19 tribunaux d'instance, tous les appels des décisions de l'autorité de la concurrence sont portés devant un unique tribunal, le tribunal d'instance de Rotterdam, qui concentre ainsi les connaissances en matière de droit de la concurrence et les compétences économiques requises. Ce tribunal abrite par ailleurs un centre spécialisé en droit de la concurrence qui dispense des formations aux juges civils de tout le pays. Au contraire des affaires administratives, les affaires civiles liées à des problèmes relevant du droit de la concurrence ne sont pas nécessairement portées devant le tribunal de Rotterdam, et il est donc indispensable que tous les juges civils aient une connaissance des questions de concurrence. Le cas échéant, ces juges peuvent obtenir l'aide de juges spécialistes du droit de la concurrence intervenant à temps partiel. La Présidente fait remarquer le parallèle existant entre le régime néerlandais et les mesures prises par le Mexique pour mettre en place un système de tribunal spécialisé en droit de la concurrence et demande si les juges spécialisés néerlandais bénéficient d'une formation formelle ou se forment simplement dans l'exercice de leurs fonctions. Le délégué des Pays-Bas répond que les juges accumulent des compétences à la fois dans le cadre leur pratique professionnelle, dans la mesure où tous les appels administratifs relevant du droit de la concurrence sont traités par un seul et même tribunal, et grâce aux formations formelles dispensées aux juges et à leurs assistants.

L'exposé de la République slovaque décrit en détail la relation entre les tribunaux et l'Office anti-monopole. La Présidente invite le délégué slovaque à présenter les mesures déployées par cette autorité pour améliorer cette relation. Le délégué de la République slovaque souligne que l'Office anti-monopole respecte l'indépendance des juges et que les tribunaux, tout comme l'autorité de la concurrence, ont pour objectif le bien-être des consommateurs. Dans la pratique toutefois, l'Office anti-monopole a constaté que les tribunaux ont annulé nombre de ses décisions d'imposer de lourdes amendes sans donner de gages d'amélioration à cet égard pour l'avenir. L'Office a donc cherché à collaborer avec l'appareil judiciaire et le ministère de la Justice pour que soit mis en place un tribunal de la concurrence spécialisé et que des formations au droit de la concurrence soient dispensées aux juges.

L'exposé de la Suède concerne un problème de plus en plus important pour les autorités de la concurrence : le traitement des informations confidentielles et des secrets commerciaux présentés devant les tribunaux dans le cadre des affaires de concentration. Le délégué de la Suède explique que la Constitution suédoise accorde un droit d'accès étendu aux documents officiels, complété par un droit spécifique d'accès au dossier des parties à une procédure judiciaire. Cela étant, ce droit est en conflit avec la nécessité de protéger les informations confidentielles. Cela pose un problème particulier dans les affaires de concentration lorsque les parties candidates à la fusion, et parfois d'autres entreprises, sont tenues de communiquer à l'autorité de la concurrence des données économiques sensibles et des secrets commerciaux. De son côté, l'autorité de la concurrence peut, jusqu'à un certain point, ne pas divulguer ces informations durant son enquête. Pour interdire une opération de concentration, l'autorité de la concurrence est toutefois tenue, en Suède, de porter l'affaire devant le tribunal et les parties ont alors, à ce stade, un droit absolu d'accès aux pièces dont le tribunal peut raisonnablement avoir besoin pour rendre sa décision. Les tribunaux accordent l'accès aux pièces lorsque la demande leur en est faite tout en soumettant leur utilisation à certaines conditions. Par exemple, seul le conseiller juridique peut en prendre connaissance et ces documents doivent être détruits une fois l'affaire réglée. La violation de ces conditions est passible de sanctions. La compatibilité de ces restrictions avec le droit suédois prête toutefois à controverse. Pour traiter le problème des informations confidentielles, l'autorité suédoise de la concurrence envisage de recourir à un local de stockage de données où seraient conservées les données économiques consultables par les conseillers juridiques et économiques des parties. L'autorité de la concurrence ne présenterait dès

lors que son analyse de l'affaire au tribunal sans lui communiquer les documents utilisés, la protection des informations confidentielles étant ainsi assurée. Dans les affaires où les parties contestent les données utilisées, les documents devront toutefois être communiqués au tribunal.

La Présidente demande au délégué du Brésil de parler du travail du ProCADE, le service des affaires juridiques du CADE, l'autorité de la concurrence. Selon le délégué, ce service emploie 10 procureurs et il est dirigé par un conseiller général nommé par le ministre de la Justice. Il a pour principale mission de défendre les décisions du CADE devant les tribunaux et de vérifier qu'elles sont mises en œuvre comme il se doit. Le ProCADE négocie en outre les transactions judiciaires, ce qui est l'une de ses missions essentielles, mais ne peut conclure aucune transaction sans l'accord du conseil d'administration du CADE. Ce service a pour autres activités de donner des avis juridiques dans les affaires de concurrence ainsi que dans les affaires administratives internes et de préparer de réponses aux demandes d'information de parlementaires. Le délégué confirme que les avis émis par le CADE peuvent être consultés par tous.

La Présidente laisse ensuite la parole au délégué de l'Union européenne, qui décrit l'impact du récent arrêt *Menarini* rendu par la Cour européenne des droits de l'homme¹ et ses répercussions sur les actions en justice relevant du droit de la concurrence intentées en Europe. Le délégué explique que dans cette affaire, les juges strasbourgeois ont reconnu que le système italien d'application du droit de la concurrence était compatible avec la Convention européenne des droits de l'homme dans la mesure où il garantit le droit à un procès équitable. En Italie, c'est l'autorité de la concurrence qui impose des amendes en cas d'infractions au droit de la concurrence, avec une possibilité d'appel devant le tribunal administratif qui procède alors à un contrôle de la décision sur le fond. Cette affaire présente un intérêt du point de vue du droit de la concurrence de l'Union européenne car le système italien est très analogue au régime applicable dans toute l'Union. Elle confirme donc que dès lors que l'UE adhère à cette Convention, le régime européen d'application du droit de la concurrence doit être compatible avec le respect des droits humains fondamentaux.

La Présidente ouvre la partie des débats portant sur les questions des délégués. Le délégué des États-Unis interroge le délégué néerlandais au sujet de la procédure d'appel administrative dans son pays, qui consiste en un réexamen des affaires par les enquêteurs de l'autorité de la concurrence. Le délégué des Pays-Bas explique que cette possibilité n'existe que pour les affaires d'entente et non pour les décisions relatives aux fusions qui sont directement contrôlées par le tribunal d'instance. Dans les affaires d'entente, l'autorité ne revient que rarement sur ses premières décisions que les parties peuvent quoi qu'il en soit toujours contester en appel devant les tribunaux. Le délégué de Suède demande des précisions sur la formation dispensée aux juges néerlandais en matière de droit de la concurrence. Le délégué des Pays-Bas explique que les juges civils sont formés par des spécialistes de ce domaine basés au tribunal d'instance de Rotterdam. En outre, cette année, l'autorité de la concurrence a été invitée à présenter un exposé sur le droit de la concurrence lors d'une conférence organisée à l'intention des juges civils.

La Présidente demande ensuite au délégué de la Bulgarie d'expliquer les critères appliqués par les tribunaux bulgares pour autoriser les visites de site et les perquisitions. Le délégué explique que ces demandes sont soumises par le Président de l'autorité de la concurrence au tribunal de la ville de Sofia et qu'elles sont évaluées au regard de trois éléments indispensables : (i) une indication de l'infraction suspectée au droit de la concurrence, (ii) les raisons motivant la perquisition, (iii) l'objet de la visite, autrement dit les éléments de preuve à recueillir. Des demandes visant à aider la Commission européenne dans ses activités peuvent également être présentées. Lorsque ces trois conditions sont réunies, le tribunal doit accéder à la demande. À une exception près, il a toujours accordé à l'autorité de la concurrence les autorisations demandées. Le délégué précise que l'autorisation du tribunal est indispensable pour toutes les

¹ Arrêt de la Cour européenne des Droits de l'Homme du 27 septembre 2011, *A. Menarini Diagnostics S.R.L. c. Italie*, Requête n° 43509/08.

visites et perquisitions, même en cas d'urgence, mais que lorsque la situation l'impose, cette autorisation peut être délivrée dans un très bref délai.

Le délégué du Chili ajoute que l'autorité chilienne de la concurrence s'est vu récemment conférer la prérogative supplémentaire de procéder à des perquisitions et à des interceptions de communications mais trouve que le processus de délivrance de l'autorisation judiciaire lui permettant d'exercer cette prérogative est un peu trop long. L'autorité de la concurrence coopère donc avec les juges pour tenter de mettre en place une procédure plus rapide. La Présidente fait observer qu'aux États-Unis, l'une des préoccupations majeures des autorités est de veiller à ce que les parties qui font l'objet d'une enquête ne soient pas informées à l'avance d'une perquisition imminente et elle demande si cela est également un problème au Chili. Le délégué du Chili répond que le maintien du secret n'est pas un problème mais qu'en revanche les délais excessifs en sont encore un. Le délégué de l'Australie explique que dans son pays l'autorité doit obtenir un mandat auprès d'un juge pour pouvoir procéder à une perquisition. L'ACCC a depuis peu le pouvoir de demander à se voir remettre les « communications stockées » conservées par les opérateurs de télécommunications qui lui permettent d'accéder aux communications électroniques et qu'elle doit également obtenir l'autorisation d'un juge pour exercer ce pouvoir. La norme juridique régissant l'accès aux « communications stockées » est moins rigoureuse que pour la délivrance d'un mandat de perquisition, mais l'ACCC n'en est pas moins tenue d'invoquer une cause juridiquement raisonnable pour avoir accès à ces données. En outre, l'exercice de ce pouvoir donne lieu à un audit annuel par une instance de médiation.

En Lituanie, le Conseil de la concurrence a le pouvoir de contester juridiquement les textes de loi et les décisions rendues par des organismes publics et qui ont pour effet de restreindre ou de fausser la concurrence. Le délégué de la Lituanie explique que le droit national de la concurrence interdit aux entités publiques, à l'exception du parlement et des ministères, d'instaurer des conditions de concurrence inéquitable. Le Conseil de la concurrence dispose le cas échéant du pouvoir d'enquêter sur ces affaires comme sur toute autre affaire de concurrence, sans pouvoir cependant procéder à des perquisitions. Lorsque l'infraction est établie, il peut prononcer une ordonnance de cesser et de s'abstenir. Il est possible de faire appel de ces ordonnances devant le tribunal administratif. En cas de confirmation, ces ordonnances sont contraignantes pour l'entité publique concernée. Au nombre des décisions rendues en vertu de cette disposition, on peut citer le cas d'une municipalité qui a adjugé le marché de ses services de transport sans lancer d'appel d'offres, des limitations instaurées par les pouvoirs publics concernant le stockage de réserves énergétiques, la prestation de services commerciaux par un service des forces de police et une entente entre fabricants d'appareils orthopédiques administrée par la caisse nationale d'assurance santé. La Présidente demande si les pouvoirs publics consultent en amont le Conseil de la concurrence et le délégué de Lituanie explique que celui-ci préfère recourir à des campagnes de promotion de la concurrence et n'exercer ces pouvoirs qu'en dernier ressort.

La Présidente demande au délégué de la Roumanie de décrire le rôle d'*amicus curiae* du Conseil de la concurrence dans le cadre des procédures publiques et privées relevant du droit de la concurrence. Le délégué explique que le pouvoir législatif officiel d'agir en tant qu'*amicus curiae* sera inscrit dans le nouveau Code de procédure pénal roumain, mais que le Conseil de la concurrence joue déjà officieusement ce rôle depuis de nombreuses années. Il fournit aux tribunaux des avis non contraignants sur les questions de concurrence et dispense en outre des formations aux juges pour leur donner une meilleure connaissance des règles de concurrence. Le Conseil exercera son nouveau rôle officiel dans le cadre des actions privées en dommages et intérêts dans les affaires de concurrence. La Roumanie a mis en œuvre dans une large mesure le Livre blanc de la Commission européenne sur les actions en dommages et intérêts et souhaite apporter un soutien actif au développement de l'application privée du droit de la concurrence, même si au bout du compte il est impossible de prédire le succès ou l'échec que connaîtront ses efforts. La Présidente demande selon quels critères sont choisies les affaires dans lesquelles le Conseil intervient et le délégué confirme que le Conseil se réserve lui-même le droit d'intervenir ou non dans le cadre des actions privées. Dans le cadre des actions publiques, il est automatiquement partie à la procédure.

En Turquie, la compétence de l'autorité de la concurrence turque (TCA) concernant les règlements des associations professionnelles est une question particulièrement controversée. Le délégué de la Turquie explique que la TCA a imposé des sanctions à certaines associations professionnelles en raison de leurs statuts et règlements anticoncurrentiels. Ces décisions ont ensuite été annulées par le Conseil d'État, le plus haut tribunal administratif du pays, au motif qu'il appartient aux tribunaux et non à la TCA de déterminer la légalité de ces mesures. Lorsque la TCA a ensuite intenté des actions en annulation des règlements des associations professionnelles, le Conseil d'État l'a déboutée au motif qu'elle ne disposait pas de la prérogative l'habilitant à intenter une telle action. La TCA estime pour sa part qu'en vertu des règles de concurrence en vigueur, elle dispose bien d'une telle prérogative. Elle milite néanmoins en faveur d'une modification officielle de la loi qui la doterait de pouvoirs explicites à cet égard.

La Présidente invite ensuite le délégué du Taipei chinois à faire part de son expérience des actions privées dans les affaires de concurrence et à décrire notamment le rôle de la Fair Trade Commission (FTC) à cet égard. Le délégué commence par expliquer qu'au Taipei chinois, les parties privées peuvent demander des dommages et intérêts, voire le triplement de leur montant, en cas d'infractions au droit de la concurrence, même si en pratique ce triplement ne leur est jamais accordé. La FTC peut jouer deux rôles dans le cadre des actions privées. *Premièrement*, elle peut intervenir en tant que témoin expert, conseillant alors le tribunal sur les dispositions du droit de la concurrence, même si elle ne tranche pas en dernier ressort dans les affaires de ce type. *Deuxièmement*, les actions privées en dommages et intérêts peuvent prendre la forme d'actions consécutives supposant que la FTC a préalablement conclu à l'existence d'une infraction. Grâce à cette approche, ces actions peuvent déboucher plus rapidement et plus facilement sur l'octroi de réparations. En réponse à une question de la Présidente, le délégué explique que jusqu'à présent, les tribunaux ont entériné les avis d'expert fournis par la FTC dans le cadre de la procédure.

La Présidente invite ensuite les délégués à poser des questions ou à faire des commentaires. Le délégué de l'Espagne fait un parallèle entre l'expérience de la Lituanie et celle de l'Espagne concernant l'application du droit de la concurrence aux actes d'instances publiques. En Espagne, les organismes publics exerçant leur activité en tant qu'agents économiques sont soumis aux règles normales de concurrence et peuvent notamment faire l'objet, du moins en théorie, de perquisitions. En cas de règlements anticoncurrentiels de niveau inférieur à la législation principale, l'autorité de la concurrence a désormais le pouvoir de contester ces mesures devant les tribunaux administratifs. Elle a pour l'heure engagé, dans deux affaires, des poursuites à l'encontre d'autorités régionales qui ont étendu des concessions de services de transport sans avoir lancé d'appel d'offres. Le délégué de l'Afrique du Sud fait observer que contrairement au Taipei chinois où des actions privées peuvent être introduites sans que l'autorité de la concurrence ait préalablement conclu à la commission d'une infraction, dans son pays, toute action en dommages et intérêts impose une telle constatation préalable. Jusqu'à la récente affaire de l'entente sur le pain, aucune action en dommages et intérêts n'avait été intentée en Afrique du Sud. L'autorité de la concurrence sud-africaine craint que les critères de validation de l'action de groupe énoncés par le tribunal dans cette affaire n'aient été exagérément rigoureux, ce qui pourrait empêcher l'introduction de telles actions dans l'avenir.

Le délégué des États-Unis interroge la Turquie sur les cas où la charge de la preuve peut être transférée du demandeur au défendeur dans le cadre des actions privées. Le délégué de la Turquie explique que les plaignants privés sont tenus de démontrer, généralement au moyen de données économiques, que les restrictions de concurrence ne sont pas des caractéristiques inhérentes au marché lui-même. La charge de la preuve est ensuite transférée au défendeur, ce qui est l'une spécificité inhabituelle – qui n'entraîne toutefois pas de coûts excessifs – propre aux actions privées relevant du droit de la concurrence en Turquie, et qui facilite à l'évidence la mise en œuvre du droit de la concurrence par des parties privées. Dans la pratique, la TCA ne recourt pas à l'inversion de la charge de la preuve pour prendre ses décisions mais s'efforce au contraire de produire elle-même des preuves suffisamment solides du comportement anticoncurrentiel de l'entreprise défenderesse. Le délégué de l'Australie fait remarquer qu'il existe une

tension importante et non résolue dans son pays entre le rôle de l'autorité administrative et les actions privées en dommages et intérêts dans les affaires d'entente, en particulier en ce qui concerne les pièces fournies dans le cadre des demandes de clémence. En Australie, les tribunaux ont le pouvoir, dans les affaires ayant trait à la mise en œuvre du droit de la concurrence, d'établir une « constatation des faits » sur laquelle les parties peuvent s'appuyer pour lancer une action consécutive. Cela étant, ce dispositif s'est avéré complètement inefficace dans la pratique et l'Australie réfléchit donc à d'autres mécanismes pour soutenir les actions privées.

La Présidente donne ensuite la parole au BIAC, dont l'exposé concerne principalement les appels introduits à l'encontre des décisions administratives rendues par les autorités de la concurrence. Le BIAC souligne, d'abord et surtout, qu'il est indispensable de former les juges et, s'il y a lieu, de mettre en place un système reposant sur des tribunaux ou des juges spécialisés dans la mesure où le droit de la concurrence ne fait généralement pas partie du domaine de connaissance des juges généralistes. La rapidité de la procédure est une autre caractéristique essentielle d'un mécanisme d'appel efficace. En outre, les droits des parties doivent être garantis tout au long de la procédure d'appel. Enfin, conformément à l'arrêt *Menarini*, les tribunaux doivent pouvoir procéder à un contrôle exhaustif et indépendant des décisions administratives.

La table ronde a ensuite porté son attention sur l'examen d'évolutions récentes survenues en matière de transparence et d'équité procédurales dans les pays de l'OCDE et les pays non membres. Le délégué de l'Union européenne présente les récentes modifications apportées aux pratiques internes de la Commission en matière d'application de la loi que constituent notamment l'adoption de bonnes pratiques applicables aux procédures relevant du droit de la concurrence, les orientations définies en matière de communication des données économiques et la révision du mandat du conseiller auditeur. Il existe déjà, au sein de la Direction générale de la concurrence, un système complet de poids et contrepois en place prenant la forme d'un contrôle et/ou d'un encadrement des affaires de concurrence par l'équipe de soutien et la hiérarchie de la division, des groupes d'experts, l'Économiste principal, le Commissaire à la concurrence, le service juridique, les spécialistes du droit de la concurrence de l'État membre concerné, les autres services de la Commission chargés de la politique économique et du secteur concerné et la Commission elle-même. Sont en outre inscrits dans le cadre législatif une série de droits de la défense et de garanties procédurales des défendeurs qui sont protégés par le Conseiller auditeur. Ces évolutions récentes sont néanmoins destinées à consolider la capacité de la Commission à constater les faits, à éviter les erreurs, à renforcer la reddition de comptes et à susciter une mobilisation plus importante des parties prenantes et du grand public – en confortant leur légitimité – en faveur des efforts de mise en œuvre du droit de la concurrence. Parallèlement, il importe de veiller à ce qu'une plus grande équité et transparence procédurales n'ait pas pour effet une dégradation de l'efficacité des procédures.

Premièrement, un projet de bonnes pratiques applicables aux procédures relevant du droit de la concurrence a été adopté et mis en œuvre de façon provisoire en janvier 2010, tout en faisant parallèlement l'objet d'une consultation publique. Ces bonnes pratiques révisées introduisent des mécanismes renforcés de transparence de la procédure pour les parties et notamment :

- la mise à disposition d'un récapitulatif complet des procédures de la Commission en matière d'application du droit de la concurrence,
- une plus grande transparence pour les parties prenantes, prenant en particulier la forme de déclarations publiques aux stades essentiels des enquêtes,
- une interaction accrue, prenant notamment la forme de réunions-bilans plus fréquentes et d'un accès plus rapide aux principales déclarations,

- l'inclusion, dans la notification des griefs, d'informations sur les paramètres justifiant l'imposition éventuelle d'amendes, notamment la valeur du chiffre d'affaires affecté par l'infraction et la période que la CE entend prendre en compte pour le calcul de la valeur du chiffre d'affaires), *et*
- des indications sur le moment où les parties doivent faire savoir qu'elles seront incapables de payer l'amende et sur la manière dont la Commission évaluera ces demandes.

Deuxièmement, la communication de données économiques dans les affaires ayant trait à la mise en œuvre du droit de la concurrence est devenue plus fréquente et plus importante et la Commission a donc diffusé des informations sur les données économiques, en particulier économétriques, que les parties sont tenues de communiquer. Ces informations indiquent notamment sous quels formats acceptables les données doivent être présentées ainsi que les procédures appliquées par la Commission pour traiter les données économiques solides mais incomplètes.

Troisièmement, le mandat du conseiller auditeur a été renforcé et étendu. Le Conseiller auditeur joue désormais un rôle dès le début du processus d'application, intervenant notamment en tant qu'arbitre légal pour régler les litiges relatifs au respect du secret professionnel par les membres des professions juridiques, au droit de ne pas contribuer à sa propre incrimination et aux délais imposés par la Commission.

Le rôle du conseiller auditeur a en outre été étendu. Il doit désormais notamment :

- faire rapport sur le respect des droits procéduraux tout au long de la procédure,
- intervenir davantage dans le cadre des procédures de décision d'engagements, *et*
- s'impliquer davantage dans le déroulement des auditions de manière à assurer l'évaluation la plus précise de tous les éléments de l'affaire.

Le délégué conclut en précisant qu'au sein de l'Union européenne, les procédures de mise en œuvre du droit de la concurrence sont en permanence améliorées en concertation avec les parties prenantes. La transparence et l'équité procédurales ne bénéficient pas seulement aux parties à une enquête mais aussi à la crédibilité du régime d'application du droit dans son ensemble, ce qui est l'un des aspects essentiels de ce processus constant d'amélioration. La délégation de l'Union européenne fait aussi observer que les réunions-bilans ont constitué, dans la pratique, l'évolution majeure concernant les bonnes pratiques que la Commission a décidé d'appliquer à titre provisoire. Comme on l'a vu dans les affaires de concentration pour lesquelles ces réunions-bilans ont été introduites en application du Code des bonnes pratiques de 2004 relatives aux fusions, elles peuvent donner lieu à une amélioration de la qualité des éléments de preuve. Le renforcement du rôle du conseiller auditeur est le résultat des consultations consacrées aux bonnes pratiques et a été bien accueilli par les parties prenantes.

La Présidente donne ensuite la parole au délégué du Canada, où des efforts ont été récemment déployés pour renforcer la transparence des activités du Bureau de la concurrence. Le délégué explique que la transparence fait partie des cinq principes opérationnels du Bureau et que de ce fait, les pratiques et procédures de celui-ci donnent lieu à une auto-évaluation active et permanente qui a pour but de mettre en évidence les moyens par lesquels il est possible de renforcer encore la transparence. Le Bureau publie régulièrement des lignes directrices mises à jour pour l'application de la loi qui donnent un aperçu de sa politique et de l'approche qu'il a adoptée en la matière. Il a ainsi récemment publié la version définitive des lignes directrices pour l'application de la loi consacrées aux fusions, à la suite d'un processus d'évaluation interne et de consultation avec les parties prenantes et d'autres autorités nationales de la concurrence. De fait, la transparence est une question particulièrement importante dans le contexte des

fusions et le Bureau publie donc également des énoncés de position présentant son analyse au sujet d'affaires complexes survenant dans ce domaine. Il prévoit de créer un registre public de toutes les opérations de fusion dont il a terminé l'examen.

L'exposé de l'Allemagne porte sur la question de l'accès des plaignants ayant intenté une action consécutive privée aux documents communiqués dans le cadre d'une demande de clémence, compte tenu de l'arrêt de la Cour de justice de l'Union européenne dans l'affaire *Pfleiderer*.² Le délégué de l'Allemagne commence par rappeler dans les grandes lignes le contexte de l'arrêt *Pfleiderer*. L'affaire a pour origine une décision rendue par le Bundeskartellamt à la suite d'une entente dans le secteur des papiers décor, qui a débuté dans le cadre d'une demande de clémence. Dans le cadre d'une action consécutive privée en dommages et intérêts, les plaignants ont demandé l'accès à toutes les pièces du dossier du Bundeskartellamt, accès qui leur a été accordé sauf pour les documents relatifs à une procédure de clémence. Dans le cadre du recours introduit devant l'Amtsgericht de Bonn, le juge a estimé que la solution du litige nécessitait un renvoi de l'affaire devant la Cour de justice de l'Union européenne pour préciser l'interprétation du droit de l'Union. Dans l'arrêt cité ici, la Cour de justice fait valoir que les dispositions du droit de l'Union ne s'opposent pas à ce que des tiers obtiennent l'accès aux documents relatifs à une procédure de clémence mais qu'il appartient toutefois aux juridictions des États membres, sur la base de leur droit national, de déterminer les conditions dans lesquelles un tel accès doit être autorisé. Le délégué souligne la difficulté particulière à laquelle sont confrontées les personnes demandant en seconde position à bénéficier d'un programme de clémence et ne bénéficiant de ce fait que d'une réduction de 50 % de l'amende imposée par le Bundeskartellamt, et qui sont pourtant tenues de communiquer une quantité importante d'informations se rapportant à l'infraction et sont donc particulièrement exposées à des demandes d'accès à l'information. Dans l'avenir, il sera probablement nécessaire de modifier les dispositions du droit allemand concernant l'accès aux documents relatifs à une procédure de clémence. Par ailleurs, le délégué conclut qu'il est également nécessaire de légiférer sur cette question au niveau européen, peut-être en apportant des révisions au Règlement n° 1/2003, qui résoudraient dans l'idéal les questions relatives à l'accès au dossier, à la procédure de clémence en général et à la fixation des amendes.

La Présidente invite ensuite les délégués à poser des questions et à faire des commentaires sur la question de l'accès aux documents relatifs à une procédure de clémence. Le délégué de l'**Australie** relève que deux affaires analogues à l'affaire *Pfleiderer* sont survenues dans son pays et ont donné lieu à des modifications législatives visant à renforcer et à préciser les dispositions du droit. La nouvelle législation autorise l'ACCC à refuser l'accès à des informations confidentielles dans les affaires d'entente même si cet accès peut être ultérieurement ordonné par un tribunal si, celui-ci ayant soupesé les intérêts antagonistes des parties, la balance penche en faveur de la communication des informations. Le délégué de l'Union européenne est d'accord avec le délégué de l'Allemagne pour dire qu'une législation sur cette question est nécessaire au niveau de l'UE. Cette lacune du droit de l'UE a été implicitement critiquée par la Cour de justice de l'Union européenne dans l'arrêt *Pfleiderer* et l'absence de norme juridique européenne précise explique pourquoi la Cour de justice laisse en substance les tribunaux des différents pays trancher cette question au cas par cas. Le délégué rappelle deux règles générales : *premièrement*, le principe voulant que la déclaration faite par l'entreprise lors de la demande de clémence doit toujours être protégée même si les documents préexistants peuvent être diffusés et *deuxièmement*, le fait qu'il est particulièrement nécessaire de mettre en balance les intérêts des personnes ayant déposé une demande de clémence avec ceux des plaignants ayant intenté une action consécutive privée sachant que cette dernière n'aurait pu être engagée en l'absence de demande de clémence préalable.

Concernant la forme que devrait prendre toute nouvelle législation relative à la procédure de clémence, le délégué de l'Allemagne précise que les dispositions précises de la proposition de législation

² C-360/09 *Pfleiderer AG c Bundeskartellamt*, arrêt de la Cour de justice de l'Union européenne du 14 juin 2011.

n'ont pas encore été déterminées, mais que l'objectif est d'encourager, dans toute la mesure du possible, aussi bien les demandes de clémence que les actions privées. Aux termes du droit allemand, l'approche retenue dans l'arrêt *Pfleiderer* représente une évolution progressive dans la mesure où cet arrêt établit que l'accès aux documents relatifs à la procédure de clémence peut être limité dans certains cas et n'énonce pas une règle d'accès absolu aux pièces du dossier. Le délégué de l'Union européenne convient qu'il est nécessaire de faire la part entre ces intérêts antagonistes afin de permettre aux parties de continuer à demander, pour les unes, à bénéficier d'une procédure de clémence et, pour les autres, à intenter des actions privées. Le délégué du Royaume-Uni demande à l'Allemagne si une nouvelle législation qui limiterait le droit d'accès au dossier se heurterait à des difficultés constitutionnelles. Le délégué de l'Allemagne répond qu'une interdiction absolue d'accès au dossier constituerait probablement une atteinte à la Constitution, mais que de simples limitations devraient être acceptables du fait que la Constitution elle-même autorise une certaine latitude concernant la mise en balance de droits et intérêts antagonistes.

La Présidente présente ensuite l'exposé du Japon, qui décrit les modifications apportées en 2011 aux règles de procédure de la JFTC en vue de renforcer la transparence et l'équité des procédures de contrôle des fusions. Le délégué du Japon décrit les trois principaux éléments de la réforme. *Premièrement*, le processus de consultation préalable a été aboli de sorte que les enquêtes de la JFTC ne commencent plus désormais qu'au stade de la notification. Auparavant, les entreprises envisageant une fusion consultaient de manière informelle la JFTC avant l'opération, pour déterminer si le projet de fusion suscitait des problèmes du point de vue de la concurrence. Le délégué du Japon précise que la procédure informelle en vigueur dans le passé a été abrogée dans le cadre de la réforme visant à renforcer la transparence. *Deuxièmement*, la JFTC a amélioré sa communication avec les entreprises notifiantes concernant par exemple les questions soulevées dans le cadre des enquêtes en cours relatives aux fusions. Même si les informations en question étaient déjà disponibles dans le passé, les processus de communication entre la JFTC et les entreprises notifiantes ont désormais été codifiés dans les nouvelles lignes directrices procédurales de la JFTC relatives aux fusions. *Troisièmement*, au terme de la procédure de contrôle des fusions, des constatations écrites seront diffusées et préciseront notamment dans quelles circonstances les opérations ont été autorisées sans équivoque, afin de renforcer la transparence et la prévisibilité des décisions rendues par la JFTC. La Présidente demande si la réforme a porté ses fruits à ce jour et le délégué lui répond que certaines enquêtes en cours, qui ont débuté avant l'entrée en vigueur des dispositions modifiées relatives aux fusions, se déroulent selon des modalités qui anticipent la réforme et dérogent au principe de consultation informelle préalable prévue par le régime antérieur. S'il sera encore possible, même après la réforme, de consulter la JFTC de manière informelle pour savoir comment remplir le formulaire de notification, etc., aucune décision importante ne sera prise à ce stade dans l'avenir. Le délégué du Japon fait en outre observer que les mécanismes employés par la JFTC pour communiquer avec les parties sont très assimilables aux réunions-bilans organisées par la Commission européenne dans les affaires de concurrence.

La Présidente invite le délégué de la Grèce à parler de la révision du dispositif d'application du droit de la concurrence de son pays après la promulgation de la Loi 3959/2011 qui apporte des modifications sur le fond et sur le plan de la procédure, tout en conservant intact l'essentiel des interdictions prévues par le droit de la concurrence. Les pouvoirs d'application de la loi de la Commission de la concurrence grecque (CCG) ont notamment été renforcés ou réformés comme suit :

- la CCG peut choisir comme elle l'entend son programme de travail conformément à ses priorités en matière d'application de la loi, définies dans les lignes directrices récemment publiées,
- elle peut imposer des amendes à des personnes physiques,
- son programme de clémence est renforcé,

- le délai de prescription des infractions au droit de la concurrence est fixé à cinq ans,
- la CCG a le droit de faire des observations sur les projets de textes législatifs et réglementaires susceptibles avoir des répercussions défavorables sur la concurrence,
- la CCG a le droit de limiter l'accès aux informations confidentielles contenues dans le dossier de l'affaire,
- la notification post-fusion a été abrogée et la possibilité laissée aux ministres d'approuver des opérations de fusion anticoncurrentielles prosrites par la GGC a été supprimée, *et*
- les droits procéduraux des défendeurs ont été précisés.

La nouvelle législation n'a pas modifié les procédures d'appel des décisions rendues par la CCG : ces décisions constituent des actes administratifs et peuvent, après contrôle exhaustif sur le fond, faire l'objet d'un recours devant la cour d'appel administrative dont les décisions peuvent ensuite être contestées devant le Conseil d'État suite à un contrôle juridictionnel. Cela étant, la nouvelle loi prévoit des dispositions en vue de la création d'une chambre de la concurrence spécialisée rattachée à la cour d'appel administrative d'Athènes. Au sein du système grec d'application du droit de la concurrence, l'équité et la transparence procédurales ont toujours primé sur l'efficacité de la procédure. La CCG ayant désormais le pouvoir de définir ses priorités et de décider de son propre programme de travail, on peut néanmoins s'attendre à une forte accélération des procédures et à une nette amélioration de leur efficacité.

La Présidente demande au délégué de la Grèce d'exposer les raisons ayant motivé cette réforme, en particulier pour ce qui est de l'accès aux documents relatifs à la procédure de clémence et à d'autres éléments confidentiels. Le délégué reconnaît qu'il faut mettre en balance l'équité et l'efficacité et fait valoir qu'un dispositif formalisé de communication des pièces est nécessaire afin d'assurer que la CCG ne puisse être accusée de porter atteinte aux droits de la défense lorsqu'elle refuse l'accès au dossier. En Grèce, le juge a accès à toutes les pièces du dossier alors que les parties ne peuvent être autorisées à consulter que certains documents. Le délégué de la Roumanie demande si le système grec est compatible avec le principe voulant que l'ensemble des pièces soient mises à la disposition de toutes les parties et examinées au tribunal. Le délégué de la Grèce répond que ces modifications sont très récentes et que l'on ne peut guère savoir comment le système révisé fonctionnera dans la pratique. Quoiqu'il en soit, le respect des droits de la défense est un élément essentiel du système administratif grec et les défendeurs continueront donc d'avoir accès à une quantité suffisante d'éléments pour faire valoir leur point de vue. La décision de ne pas divulguer les pièces appartient au Président de la CCG sachant que le juge, s'il est en désaccord avec cette décision, peut en théorie en ordonner la communication.

En Slovénie, des projets de transformation de l'Office de protection de la concurrence (OPC), actuellement rattaché au ministère de l'Économie, en organisme administratif autonome, sont en cours. Le délégué de la Slovénie explique que lors de son processus d'adhésion à l'OCDE, l'examen mené dans ce cadre avait mis en évidence le fait que l'absence d'organisme indépendant d'application du droit de la concurrence était l'un des principaux problèmes qui se posaient. Des efforts législatifs ont été déployés en 2010 pour réorganiser l'OPC et en faire un organisme indépendant, dans l'objectif que cet organisme puisse commencer à exercer son activité à compter du 1^{er} janvier 2012. Toutefois, des difficultés politiques internes ont entraîné un report de ces projets. Une fois la nouvelle structure en place, des modifications essentielles du processus de décision de l'OPC auront pour effet de renforcer la transparence et la protection des droits de la défense. À l'heure actuelle, les décisions sont adoptées par un groupe d'experts composé du directeur de l'OPC et de deux collaborateurs de l'Office nommés par le directeur à cette fin. Au sein du nouveau dispositif, une Commission de protection de la concurrence sera mise en place. Elle sera composée de deux experts extérieurs et de trois collaborateurs internes qui seront nommés par

l'Assemblée nationale. Les décisions seront alors prises par un groupe d'expert composé de trois membres de cette Commission. L'OPC refondé aura une plus grande maîtrise de son budget, qui sera soumis à l'approbation de l'Assemblée nationale, ce qui renforcera encore son indépendance.

La Présidente invite ensuite le délégué du Chili à évoquer la relation entre l'autorité de la concurrence chilienne, la FNE, et le Conseil de la transparence récemment mis en place. Le délégué explique que le Conseil de la transparence, et non le tribunal de la concurrence, veille à l'application des dispositions de la Loi sur la transparence – à savoir le texte législatif relatif à la liberté de l'information – par la FNE. Le Conseil de la transparence règle les litiges survenant entre les particuliers et les pouvoirs publics ou les organismes publics en cas de refus d'accès aux informations. Deux problèmes peuvent se poser en rapport avec les travaux de la FNE : *premièrement*, seules les parties privées sont en droit de faire appel des décisions du Conseil de la transparence alors que les organismes publics ne disposent pas d'un tel droit et *deuxièmement*, les dispositions de la Loi sur la transparence ne s'appliquent pas aux procédures pénales mais sont applicables aux mesures civiles d'application de la loi prises par la FNE. Elles ont été maintes fois appliquées sans difficulté à la FNE depuis leur entrée en vigueur en 2008, et le Conseil de la transparence n'a en particulier jamais ordonné la divulgation des documents relatifs à des demandes de clémence ou d'autres pièces confidentielles. Si certains défenseurs ont tenté d'utiliser les dispositions de la Loi sur la transparence en tant que mécanisme quasi assimilable à une procédure de communication des pièces, le Conseil de la transparence protège dans la pratique les travaux de la FNE lorsqu'il rend ses décisions. Répondant à une question de la Présidente concernant le type d'informations demandées à la FNE, le délégué a cité à titre d'exemple deux rapports d'experts qui avaient été préparés en vue d'une action en justice et ayant trait à des questions juridiques et économiques, ainsi que des notes et des débats internes. Dans un cas comme dans l'autre, la FNE a été habilitée à refuser l'accès à ces documents.

La Présidente porte ensuite son attention sur l'exposé de l'Espagne qui a récemment organisé une consultation publique sur un projet de lignes directrices relatives à l'acceptation des engagements pris dans le cadre de procédures d'infraction. Le délégué de l'Espagne souligne le rôle essentiel des consultations publiques dans la mesure où elles permettent aux parties prenantes de faire part de leurs observations et de mettre en évidence les lacunes et les ambiguïtés des projets de dispositions et permettent ainsi d'accroître la certitude et la transparence de la version définitive des lignes directrices. Le droit de la concurrence espagnol prévoit explicitement l'abandon des enquêtes par suite de décisions d'engagements, lesquelles ne donnent pas lieu à un constat d'infraction mais imposent au(x) défendeur(s) de s'engager irrévocablement à résoudre le problème de concurrence. Plusieurs des personnes ayant participé à la consultation publique ont demandé que les lignes directrices soient étendues de façon à couvrir non seulement les transactions mais aussi les décisions d'engagements. Cependant, le droit de la concurrence espagnol ne contient aucune disposition relative aux transactions qui supposent une reconnaissance de culpabilité donnant lieu à un allègement de l'amende. À l'issue de la consultation, l'autorité de la concurrence a décidé de préciser explicitement dans les lignes directrices relatives aux décisions d'engagement que les transactions ne sont pas autorisées. Le processus de consultation a en outre servi à définir les critères à appliquer pour décider s'il convient d'accepter les engagements afin de classer une affaire. Les lignes directrices constituent en outre un mécanisme utile permettant d'accroître la transparence et la certitude juridique des travaux de l'autorité de la concurrence. Le délégué confirme par ailleurs que selon l'autorité de la concurrence espagnole, des aménagements législatifs sont indispensables pour que les transactions soient acceptées en vertu du droit interne.

La Présidente fait observer qu'au Royaume-Uni, l'Office of Fair Trading (OFT) a commencé en mars 2011 à expérimenter, dans le cadre d'un essai d'un an, la fonction de Procedural Adjudicator (médiateur procédural) chargé de régler les litiges survenant dans le courant des travaux de mise en œuvre du droit de la concurrence. Le délégué du Royaume-Uni explique que la fonction de Procedural Adjudicator est née de la nécessité de mettre en place un mécanisme rapide, efficace et économique pour résoudre ces litiges, alors que jusque-là, la seule possibilité existante était de demander un contrôle juridictionnel par le tribunal

administratif, processus long et qui mobilise beaucoup de ressources. La fonction du Procedural Adjudicator ne repose sur aucun fondement juridique et, pour les besoins de cet essai d'un an, ce poste est occupé par une responsable de l'OFT, la Directrice de la politique de la concurrence, même si des mesures ont été prises pour assurer que les deux fonctions qu'elle doit assumer ne sont pas en conflit. La présence d'un Procedural Adjudicator n'exclut pas de faire appel au contrôle juridictionnel pour résoudre les litiges procéduraux, mais le but est bien de supprimer la nécessité d'y avoir recours, ce qui dépendra en grande partie de la crédibilité du processus. Pour l'heure, le Procedural Adjudicator peut traiter trois catégories de litiges, ceux ayant trait (i) aux délais de communication des informations ou des réponses écrites aux notifications de griefs, (ii) les demandes de confidentialisation de documents et (iii) les demandes de divulgation ou de non divulgation de certaines pièces du dossier. Le Procedural Adjudicator peut en outre régler des problèmes liés aux réunions durant lesquelles les parties exposent les tenants et aboutissant de l'affaire, portant par exemple sur la date de ces réunions ou sur d'autres questions procédurales importantes pouvant se poser dans le cadre d'une enquête.

Jusqu'à présent, le Procedural Adjudicator a été sollicité deux fois, une fois pour une demande de communication anticipée de documents, une autre pour une demande visant à empêcher la divulgation d'informations confidentielles. Ces deux problèmes ont été résolus en six jours ouvrables, donc avant l'échéance du délai imparti de dix jours et aucune des deux décisions n'a fait ensuite l'objet d'un contrôle juridictionnel, ce que l'OFT juge très positif. Pour développer la fonction de Procedural Adjudicator, les questions à se poser sont les suivantes. *Premièrement*, son domaine de compétence doit-il être étendu ? *Deuxièmement*, cette fonction doit-elle être instaurée définitivement ou doit-elle faire l'objet d'une nouvelle période d'essai ? *Troisièmement*, doit-elle être exercée par un collaborateur de l'OFT ou par une personne extérieure ? La Présidente demande si le Procedural Adjudicator intervient généralement en tant que médiateur pour régler les litiges ou s'il statue en fait sur la plainte. Le délégué du Royaume-Uni répond que le Procedural Adjudicator est habilité à trancher les litiges mais peut aussi intervenir en tant que médiateur si cela est plus approprié, le but étant de trouver la meilleure manière de permettre à l'affaire de suivre son cours. Au fil du temps, le comportement des parties et de l'équipe chargée de l'affaire devrait évoluer en fonction des décisions rendues par le Procedural Adjudicator. Après la table ronde, l'OFT a annoncé en mars 2012 qu'il prolongerait d'une année supplémentaire, à savoir jusqu'au 21 mars 2013, la mise à l'essai de la fonction de Procedural Adjudicator. À compter du 21 mars 2012, cette fonction a été étendue à la présidence des auditions orales dans les affaires non pénales et à la présentation aux instances de décision compétentes, après les auditions orales, de comptes rendus sur les questions de procédure concernant toutes les affaires ayant été portées à son attention dans le courant d'enquêtes ainsi que sur le déroulement de l'audition.

La Présidente demande ensuite au délégué de la Pologne de parler des récentes modifications législatives qui ont eu un impact sur l'application du droit de la concurrence. Le délégué commence par préciser que les procédures devant l'Office de la concurrence et de la protection des consommateurs (UOKIK) sont de nature administrative et que le contrôle juridictionnel des décisions rendues par l'UOKIK est exercé conformément aux dispositions du Code de procédure civile. Le Code a été modifié en septembre 2011 et les règles concernant les éléments de preuve ont été en particulier nettement assouplies. Le juge bénéficie désormais d'une latitude non négligeable pour admettre de nouvelles preuves ce qui fait craindre à l'UOKIK un allongement de la procédure de contrôle judiciaire de ses décisions. Cela aura qui plus est un impact négatif sur l'application de la loi, dans la mesure où il faudra à l'UOKIK davantage de temps pour remédier aux atteintes à la concurrence. L'UOKIK estime en outre qu'il n'était pas nécessaire d'assouplir les règles relatives aux preuves dans le contexte du contrôle de ses décisions. Les parties bénéficient déjà d'un important droit d'accès aux documents durant toute la procédure administrative proprement dite et, du fait des vastes pouvoirs de recueil des preuves dévolus à l'UOKIK, le dossier de l'affaire contient déjà tous les éléments utiles. En tout état de cause, de nouveaux éléments apparaissant lors d'une procédure de contrôle juridictionnel auraient également pu être jugés recevables en vertu des règles antérieures.

La Présidente invite l'assistance à poser des questions et à exprimer des commentaires sur les interventions faites jusque-là par les délégués. Le délégué de l'Afrique du Sud note que le régime sud-africain d'application du droit de la concurrence est largement favorable au défendeur. La Commission de la concurrence enquête en cas de plaintes et doit ensuite engager des poursuites devant un tribunal indépendant sachant qu'il existe toujours une possibilité de recours devant la Cour d'appel de la concurrence. La loi a été conçue de façon à mettre un terme à la procédure d'appel à ce stade, mais a été interprétée comme autorisant des recours supplémentaires devant la Cour suprême et en dernier ressort devant la Cour constitutionnelle. Ces derniers temps, ces juridictions de degré supérieur ont rendu plusieurs décisions extrêmement restrictives rendant de plus en plus difficiles les enquêtes menées par la Commission de la concurrence suite à une plainte. La Cour suprême a ainsi fait valoir que le dossier initial préparé au moment de l'ouverture d'une enquête doit fidèlement rendre compte de la plainte, qui est à terme renvoyée devant le tribunal, et les décisions concernant le fait de savoir s'il convient de modifier ou non ce dossier en fonction de l'évolution de l'affaire sont contradictoires. En l'occurrence, la principale difficulté est liée au fait que la Commission de la concurrence sait rarement au départ ce que sera l'issue de l'enquête ou quels éléments l'affaire qui sera ensuite renvoyée devant le tribunal englobera. Par ailleurs, le tribunal ne peut rendre de décisions qu'à partir des pièces qui lui ont été effectivement remises. Pour obtenir une réponse sur ces interprétations problématiques de la loi, la Commission de la concurrence a déposé dans trois affaires une demande d'accès direct à la Cour constitutionnelle, la priant de faire le point sur la situation actuelle afin de parvenir à un meilleur équilibre entre les droits des défendeurs et ceux des demandeurs dans les affaires de concurrence d'une part et la nécessité de faire respecter la loi d'autre part. Deux de ces affaires seront entendues en novembre 2011, la troisième devrait l'être début 2012.

En conclusion, la Présidente donne la parole au BIAC, qui se félicite de l'importance accordée par l'OCDE à la transparence et à l'équité procédurales et observe que la discussion sur les évolutions intervenues pour pouvoir atteindre ces objectifs a été plutôt stimulante. La volonté d'amélioration constante est particulièrement encourageante, qu'il s'agisse d'évolutions radicales, comme le projet engagé par la Slovaquie pour transformer son autorité de la concurrence, ou plus progressives comme l'extension des pouvoirs du conseiller auditeur de la Commission européenne. Le problème des demandes de clémence dans le contexte de la communication des documents et des actions consécutives engagées par des parties privées reste une question difficile qui n'a toujours pas été tranchée et il est nécessaire de trouver un équilibre entre les intérêts légitimes antagonistes des parties à cet égard. Sur le front de la transparence, les travaux de l'OCDE à ce jour ont été à la fois très complets et utiles et le délégué émet l'opinion qu'il peut y avoir intérêt à synthétiser encore les données recueillies jusqu'à présent. La Présidente met ensuite un terme à la table ronde.