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The International Comparative Legal Guide to:

Enforcement of Competition Law 2009

A practical insight to cross-border enforcement regulation

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Preface:

General Chapters:

Country Question and Answer Chapters:

EDITORIAL

Welcome to the first edition of *The International Comparative Legal Guide to: Enforcement of Competition Law*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of enforcement.

It is divided into two main sections:

One general chapter. This chapter reviews the developments of private damages actions in five Member States.

Country question and answer chapters. These provide a broad overview of common issues in enforcement laws and regulations in 24 jurisdictions.

All chapters are written by leading competition lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Lesley Farrell and Melanie Collier of SJ Berwin LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk

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PREFACE

With around one hundred competition authorities around the world, each applying its own competition law, there is a growing need for transparency and discussion about how these competition laws are applied in practice.

We need to encourage global convergence, in both substance and procedure. Of course, by convergence I do not mean a single homogeneous law and enforcement system. I simply mean that we should agree as much as possible on the harm that we are trying to remedy with the competition rules, agree as much as possible what we need to prove to demonstrate that harm and agree as much as possible how we are going to conduct our enforcement activities so as to target that harm. Nor do I see convergence as having everyone else move towards “our” system; every competition regime has something to learn, and everyone should be prepared to make changes to improve.

Convergence is not an end in itself, it is a means to the end of having more effective and efficient enforcement. It is not only good for helping competition authorities do their work better, convergence is good for companies who operate around the world and need to minimise, as much as possible, their compliance costs with the differing competition regimes.

It is therefore in everyone's interest that we disseminate knowledge about how competition enforcement is carried out around the world and follow that by discussion as to what can be improved.

This extremely comprehensive text is an excellent place to start for competition authorities, and for companies and their advisers. It covers the practicalities of the general and sector-specific competition law that is in place, who is entrusted with the enforcement and how they carry it out. It gives a guide to how cases are handled and what options - such as leniency - are available. For anyone with an interest in cross border competition enforcement - and increasingly that is almost anyone involved in competition law at all - this is an invaluable guide to the principles and practices of competition policy around the world.

Philip Lowe
Director-General
DG Competition
European Commission

Private Damages Actions: A Review of the Developments in Five Member States

SJ Berwin LLP

Lesley Farrell

Introduction

In August 2004 a "Study on the conditions of claims for damages in case of infringement of EC competition rules" was prepared for the European Commission. It concluded that:

"*The picture that emerges from the present study on damages actions for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment*".[i]

The findings of that comparative report prompted the European Commission into taking action in order to:

1. Identify the obstacles to the effective private enforcement of competition law existing within EU Member States; and
2. Consider the means by which a more effective system of private antitrust enforcement could be facilitated or encouraged.

After extensive public consultation and internal deliberations on the issue, the Commission published a Green Paper (December 2005) followed by a White Paper (April 2008). The guiding principle of the White Paper is that "*all victims of infringements of EC competition law [should] have access to effective redress mechanisms so that they can be fully compensated for the harm they have suffered*".[ii] The Commission's approach is predicated upon the belief that an effective system of private antitrust enforcement of necessity contributes to the more effective enforcement of competition law generally and thus ensures greater deterrence and greater compliance. The Commission has considered a number of measures at both European and national level that might lead to "*an effective system that complements public enforcement whilst avoiding excessive burdens and abuses*".[iii] Since the White Paper, drafts a directive on the rules governing actions for damages for infringement of EC competition law has been proposed by the Commission covering such issues as group and representative actions, disclosure of evidence, pass through, indirect purchasers and limitation periods. It has not yet been adopted and, despite the best intentions of the Commission, there has been no change to the rules relating to private antitrust claims at European level.

In this context, it is an appropriate time to consider what, if any, developments have taken place in relation to private enforcement actions in certain key member states of the EU. We set out below a review of the current state of play in the UK, Germany, France, Spain and Italy.

The United Kingdom

The UK has two courts competent to hear private enforcement actions; namely the specialist Competition Appeal Tribunal (the "CAT") and the High Court. The CAT only has jurisdiction, however, to determine damages claims brought on the basis of infringement decisions taken by the European Commission, Office of Fair Trading and the UK's other sector specific competition regulators - so called "follow-on" actions. The High Court remains the appropriate forum for stand-alone competition actions as well as retaining its own jurisdiction for follow-on actions.

There is a growing body of case law in the UK relating to both stand-alone and follow-on actions (although primarily in relation to the latter) evidencing the growing number of cases brought for antitrust damages claims. It remains the case that a substantial number of the claims are settled before a final hearing thus avoiding any precedent being created. Notwithstanding the growth in cases a number of important procedural and substantive issues remain unresolved. Nevertheless, over the past two to three years, judgments have been given on a number of issues including the availability of representative actions, jurisdictional rules, case management issues, limitation periods and quantum of damages.

English procedural rules permit claimants to represent a class of persons having the same interest - i.e. a common interest and common grievance.[iv] In *Emerald Supplies*[v] a claim was brought against British Airways for "direct or indirect purchasers or both of air freight services the prices for which were inflated by one or more of the agreements or concerted practices". Emerald therefore wanted to represent other purchasers for whom prices had been inflated as a result of the air freight cartel. The court struck out aspects of the claim on the basis that:

(a) The criteria for inclusion in the group or class of potential claimants depended on the outcome of the action itself - i.e. it was not possible to tell who fell within the class at the stage when proceedings were initiated.

(b) The relief sought was not equally beneficial for all members of the class as the class included direct and indirect purchasers operating at different levels of the distribution chain. Therefore the members of the class did not have a common interest.

As a result, the claimant was denied the right to act as the representative of the entire class of claimants described in the claim. However, the court's decision is currently on appeal to the Court of Appeal.

The extent of the English courts' jurisdiction in a competition damages case was considered in the case of *Provimi*[vi], which arose out of the Commission's vitamins cartel decision.[vii] In the context

of a preliminary hearing on an application to strike out the claim, the court was asked to consider whether it had jurisdiction to determine a claim by a German domiciled purchaser against a German domiciled subsidiary of one of the cartelists on the basis that the latter had implemented the cartel price via an English subsidiary. The claimant argued that it was able to bring a claim against the English subsidiary of that cartel list because the English subsidiary had, albeit perhaps unknowingly, implemented the cartel price. Had the English subsidiary not implemented the cartel price, the German domiciled purchaser would have been able to purchase from it at non-cartel levels. If the German domiciled purchaser was able to establish a claim against the English subsidiary, it would be able to join other parties to the claim on the basis of article 6(1) of Regulation 44/2001. Without determining the substantive claim definitively, the court accepted that the claim was arguable and refused to strike out the proceedings.

There are, however, limits on the jurisdiction of the English courts. In *SanDisk*[viii] the court refused to accept jurisdiction in circumstances where none of the defendants was a UK company, none of the alleged acts of harassment nor negotiations for licences had taken place in the UK, and no immediate damage had been caused to the claimant in the UK as a result of these alleged abuses.

Follow-on actions in the CAT must be issued within a two-year "window". The limitation period starts on the date (known as the "relevant date") on which rights of appeal against an infringement decision have been exhausted or not exercised.[ix] The CAT retains a discretion, however, to give permission for a claim to be brought before the relevant date where circumstances justify it.

The interpretation of the rules relating to limitation periods has led to a number of decisions:

(a) The *Emerson*[x] case determined the question of when time starts to run for limitation purposes against a defendant who has not appealed a European Commission infringement decision in circumstances where the other addressees of the decision have lodged appeals. Unlike its fellow addressees, Morgan Crucible had not appealed the Commission's infringement decision[xi] to the Court of First Instance ("CFI") since it had benefited from 100% immunity in fines under the Commission's leniency policy. The CAT ruled that the limitation period had not started to run due to the pending appeals before the CFI even though Morgan Crucible had not itself lodged an appeal. However, in the circumstances, the CAT exercised its discretion to allow the action by the claimant against Morgan Crucible to proceed citing 'legitimate concerns' about the disclosure and retention of documents by Morgan Crucible. The CAT refused permission to bring claims against the remaining addressees of the infringement decision prior to the resolution of their respective appeals.[xii]

(b) The Court of Appeal recently held, in *BCL Old Co*,[xiii] that there is a distinction between an appeal brought against (i) the Commission's substantive finding of infringement and (ii) the decision to impose a penalty. In that case the defendant had only appealed the level of the fine imposed and not the finding of the existence of a cartel. Accordingly, the two-year period in which to bring an action was deemed to have commenced on the day on which time to appeal against the infringement decision had expired, irrespective of the fact that an appeal had been lodged against the fine that had been imposed by the Commission. On the facts of that case the limitation period had expired.

The issue has arisen as to whether and when follow on actions before national courts should be stayed pending the outcome of an appeal against the infringement decision on which the claim is based. The judgment in *Masterfoods*[xiv] sets out the basic rules providing that national courts should take all steps required to ensure that a trial in a follow on action should not be heard before all appeals to the CFI or, if appropriate, the ECJ have been concluded.

The decision in *Masterfoods* has recently been applied. In *National Grid*[xv] the High Court decided that an immediate stay of a follow-on claim was not appropriate and allowed a claim to proceed, at least partially, notwithstanding ongoing appeals before the Community courts. The court balanced the potential prejudice of delay to the claimants with the potential prejudice to the defendants in terms of wasted time and costs should their appeals to the CFI or ECJ be successful. The court ordered that the claim at least be allowed to proceed to the close of pleadings and that the parties' advisers should meet and attempt to agree the scope and basis for proceeding with disclosure. Moreover, the court would reconsider next steps in the action at a further case management conference. The Judge concluded that "*the need for the follow on action to be processed so as to be as ready for trial as soon after the conclusion of the proceedings before the CFI and ECJ are concluded as is reasonably possible outweighs the need to avoid expenditure which may be wasted if and to the extent that it is not compensated for by an award of costs*".

Another issue that has been addressed by the UK courts is the approach to the damages available to competition law claimants. In *Devenish*[xvi], Lewison J held that restitutionary awards would not be made unless compensatory damages were inadequate to compensate the claimant for its loss. Similarly, the judge held that an account of profits was not an appropriate remedy on the facts of the case.

In addition, the question of whether exemplary damages are available for breach of competition law was considered. As a matter of general principle, exemplary damages may be awarded under English law where "*the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the [Claimant]*".[xviii] This analysis would appear to support claims for exemplary damages against cartel members. However, again in *Devenish*, Lewison J rejected a claim for exemplary damages citing a number of factors that together suggest that there will be limited circumstances in which exemplary damages will be awarded for competition law infringements:

(a) The principle of *non bis in idem*[xix] precluded an award of exemplary damages in circumstances where the defendants had already been fined (or had had fines imposed and then reduced or commuted) by the Commission in respect of the same unlawful conduct.

(b) An award of exemplary damages by a national court against a successful leniency applicant would undermine the public policy behind the leniency programme.

(c) Article 16 of the Modernisation Regulation[xx] precludes a national court from taking a decision running counter to that of the Commission. In this case the Commission had already determined the appropriate level of fines to punish and deter.

(d) It is difficult to assess the appropriate level of exemplary damages where there are multiple claimants and in light of the scale of the fines imposed.

The case was the subject of an appeal to the Court of Appeal on the issue of whether restitutionary awards or an account of profit could be available. The Court of Appeal upheld the judgment finding that the claimant was "*entitled to be compensated for any loss it has suffered as a result of the cartel, no more and no less*".[xxi]

The first award of interim damages in the CAT was made in *Healthcare at Home Ltd v Genzyme*.[xxii] This was a follow-on action arising from the decision of the Director-General of Fair Trading that Genzyme had abused its dominant position by engaging in an

abusive margin squeeze.[xxiii] The CAT awarded £2 million by way of interim relief to Healthcare at Home in respect of loss of revenue, representing approximately 70% of the loss of revenue (one of the several heads of damage claimed) calculated by the CAT to be at the lowest end of estimate of damages. The case has since settled.

Germany

On 1 July 2005 Germany introduced the 7th amendment of the German Act against Restraints of Competition ("ARC"). The ARC was aimed at facilitating the effective private enforcement of antitrust litigation. The ARC tackled much of the uncertainty surrounding private enforcement actions and, in particular, expanded the pool of possible claimants. The amendments made by the ARC are as follows:

(a) Prior to the ARC, the rights of claimants under German law were restricted to those 'protected' under the controversial principle of protective law (the "*Schutzgesetzprinzip*"). Instead of 'protected' parties, the ARC afforded rights to injunctive relief, and, in cases of intentional or negligent acts, provided for damages to 'any affected party' who suffered loss as a result of a competition law infringement.

(b) Cartel members are restricted in relying on the "passing on" defence. Cartel members can no longer argue that purchasers of products who were sold at inflated prices (as a result of the cartel), suffered no damage because they resold the products to customers in downstream markets. The courts are, however, permitted to take into account the fact that claimants may have passed on increased prices to their own customers if they deem it equitable to do so. The effect of this amendment has been to reverse the burden of proof so that the party in breach of competition law is required to establish that the claimant suffered a lower level of loss as a result of passing on any increased prices to customers.

(c) The right to claim pre-judgment interest was introduced.

(d) Follow-on actions were facilitated by providing that a final decision of any Member State's national competition authority or that of the European Commission will bind the German courts as regards the existence of a competition law infringement.

(e) The period for limitation is suspended while the competition authorities undertake their investigations until 6 months after the authority's decision has become final.

(f) Rules have been put in place, which have had the effect of reducing the amount of costs which have to be paid in advance by claimants in competition cases.

Despite the significant changes to the ARC outlined above, German case law on the private enforcement of damages relating to infringements of competition law is still somewhat sparse although a number of cases have been brought and settled before judgment has been given.

What cases there have been focus primarily on actions brought by so-called 'collecting companies' such as Cartel Damage Claims ("CDC") and Talionis. While German law does not generally permit class actions in competition law matters, it is possible for parties to submit damages claims via third parties. These collecting companies buy up the rights of companies or individuals that have been harmed by an infringement of competition law and thus effectively step into their shoes and bring an action against a cartel.

The level of private enforcement activity in Germany is expected to rise significantly once a German court gives its final decision awarding damages to a collecting company. Indeed the current cement cartel case may prove to be the relevant test case.[xxiv] In this case, CDC has purchased the claims of 36 small and medium-sized construction companies for a nominal payment of €100 each plus a percentage of the proceeds obtained through successful court proceedings. Pursuant to an appeal by a cartel member, Dyckerhoff, the Federal Supreme Court recently confirmed in its decision of 7 April 2009[xxv] that CDC had the right to bring the claim and that the claim was sufficiently particularised. It appears, therefore, as though a final decision on the matter will be reached in that the substantive claims made by CDC will be assessed by the regional courts shortly. Such a decision may well provide the impetus for a number of other similar claims to be brought before the German courts.

France

Pure competition law claims are still infrequent in France. In the main, competition law claims have tended to be incidental to the main body of another claim and/or ancillary to contractual disputes.

Following the enactment of Decree 2005-1756 on 30 December 2005, only the specialist courts of Marseille, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris, and Rennes have jurisdiction to hear competition law questions (the "Specialist Courts"). Thereafter appeals can be heard by the Paris Court of Appeal and ultimately by the Court of Cassation. However, it appears that in certain circumstances courts that would normally not have jurisdiction may nonetheless be able to hear private enforcement claims. The key criteria for this determination are not provided for in the Decree but it appears that where a claimant is seeking to use competition law as a sword to obtain damages, injunctive relief, or the nullity of a contract, only the Specialist Courts will have jurisdiction. However, where competition law is used as a shield by the defendant by way of counter-argument, any court may be able to hear the claim.

In two follow-on claims, both of which were based on the vitamins cartel decision[xxvi], the courts have shown a willingness to accept a species of the "passing on" defence. However, rather than considering the "passing on" defence in terms of the defence offsetting any losses suffered and thus damages owed to a claimant, the courts appeared to suggest that, because the claimants had had the "opportunity" to pass on the inflated costs to the downstream market by increasing their own prices, they were not entitled to claim compensation even though they had not in fact passed on the increased prices.

The first decision on this issue, that of *Les Laboratoires Pharmaceutiques Arkopharma* on 11 May 2006,[xxvii] stated that, in freely deciding not to raise its own resale prices in response to the cartel's price increase, the claimant could not thereafter hold the defendant liable for its loss. The second decision, that of *Les Laboratoires Juva* on 26 January 2007,[xxviii] held that the claimant could have passed on the raw material price increase downstream because the raw material involved only constituted a small part of the cost of the final product sold. It should be noted that these decisions do not necessarily indicate that the "passing on" defence will automatically be successfully raised by defendants going forward in all cases before the French courts.

Spain

There have been few decisions relating to the private enforcement of damages for competition law infringements in Spain. Under the old regime a claimant was unable to launch a claim until the Spanish courts had made a final decision on a case. The introduction of the Spanish Competition Act on 1 September 2007 ("SCA") has now given the Spanish Commercial Courts jurisdiction to hear competition law cases even in the absence of such a

decision. Nonetheless, it may still be advisable to bring a private action for competition law damages on the basis of an infringement decision.

In addition, the SCA has, since 28 February 2008, introduced a leniency policy for cartel members based on the EC policy. The leniency policy has so far led to investigations in at least five different industries. This policy, combined with the increasing number of *ex officio* investigations being launched by the Spanish Competition Authority (the "Authority"), is likely to mean a substantial increase in follow-on actions in the near future.

In Spain the general limitation period for private actions arising from an infringement based on non-contractual obligations is fixed at one year from the date that the injured party 'becomes aware' of the damage. There is uncertainty as to the exact date when this limitation period starts to run. On the one hand the period might start when the Authority (or higher court in the case of an appeal) makes its final decision. On the other hand the defendant may contend that the injured party should be aware of the harm once proceedings have been brought before the Authority if not before. Potential claimants can avoid problems in this regard by means of an extrajudicial claim that serves to interrupt the limitation period.

It had traditionally been believed that competition law claims are governed by these limitation rules applicable to non-contractual claims. However, the decision of 26 February 2009 at the Court of First Instance of Valladolid, brought by Nestlé and several other biscuit manufacturers' on the basis of the finding of an infringement in the sugar case involving ACOR, suggests that this may not be the case. In that case, it was held that the claimant had purchased goods or services direct from a cartel member and that therefore a contractual relationship existed between them. This meant the limitation rules relating to contractual claims were applicable thus extending the limitation period for bringing a private action for a competition law infringement from one to 15 years. However, it is unclear whether the judge's decision will be followed going forward by the Spanish courts.

Italy

A number of private damages actions have been brought in the Italian courts, some of which have generated appeals on points of law to the Court of Cassation.

Follow-on actions in Italy have primarily been based on competition infringement decisions of the Italian Competition Authority (the "ICA") despite the fact that there is no provision in Italian law that expressly states that the decisions of the ICA are binding on national judges.

Much of the recent case law from the appeal courts stems from attempts by private individuals to seek damages for competition law infringements from their insurance companies. In 2000, the ICA imposed fines on certain insurers that had, in breach of Italian competition law, systematically exchanged confidential and commercially sensitive information between themselves as well as having fixed prices. While these follow-on damages claims for surcharges paid have largely been successful before the first instance civil courts, some have been the subject of appeals. These appeals have addressed issues in relation to standing, burden of proof and limitation periods for private enforcement actions.

As regards standing, it is now generally recognised by the Italian courts that consumers purchasing goods or services from cartel members are able to bring private actions seeking to annul their agreements and to obtain damages for the loss suffered as a result of the cartel.[xxix] Standing has also been extended to downstream indirect purchasers.[xxx]

In terms of the burden of proof, in follow-on actions, the claimant can submit the ICA's decision and proof of the surcharge paid by the claimant as evidence from which the Court may infer the existence of a causal link between the competition law infringement and the damage suffered. However, the court must still take into account the arguments and evidence in rebuttal submitted by the defendant.

As regards the quantification of the damage suffered, the claimant is subject to the general principles of Italian law.[xxxi] Damages can be recovered for out of pocket losses plus lost profits. As it is usually difficult to quantify such harm, particularly the lost profits, in many cases the courts have awarded damages on 'a fair basis'.[xxxii] Where there is insufficient data to quantify the damages accurately, the judge is afforded the discretion to award a figure he considers to be reasonable in the circumstances. In making an award, the Judge may have regard to expert evidence, for example an economist, to help determine the reasonable level of damages.

The limitation period for bringing an action is currently five years from when the claimant is or, had they been reasonably diligent, would have been aware of both the damage and of the infringement. Thus the limitation period does not start running from the date of the damage (for example the payment of an unlawful surcharge) but rather from the date on which it is possible to assume that the claimant has acquired knowledge of the infringement and of the consequential damage. In follow-on actions, awareness is deemed to exist from the moment when the ICA infringement decision becomes public knowledge.

A final relevant feature of the Italian private enforcement regime concerns the range of remedies available to claimants. The list of remedies contained within the relevant legislation[xxxiii] is exhaustive. The appeal courts and, for Article 81 and 82 infringements, the ordinary first instance courts are competent to issue interim relief in order to avoid serious and irreparable damage to the applicant prior to final judgment.

A recent decision of the Milanese Court of Appeal[xxxiv] confirmed the availability of urgent measures such as injunctive relief, if deemed appropriate to preserve the rights at issue. However, as stressed by the Milanese Court, a final injunction (i.e. one granted after the examination of the merits of the claim) cannot be issued in the context of private competition actions before civil courts since that remedy is reserved for the ICA.

Conclusion

As is clear from the brief review set out above, there are signs of an increase in the private enforcement of competition law damages claims in some EU Member States. At present, developments in both the UK and Germany suggest that these are the jurisdictions in which there is a higher level of such activity. It remains to be seen whether there will be similar developments in other jurisdictions, not least in the wake of the Commission's proposed Directive (if and when adopted) as well as in response to changes in national legislation.

Endnotes

(i) See http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf, p. 1.

(ii) See http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf; White Paper on Damages Actions for breach of the EC antitrust rules dated 2 April 2008, p. 2.

(iii) Commissioner Neelie Kroes - April 2008.

(iv) Civil Procedure Rule 19.6.

(v) [2009] EWHC 741 (Ch).

(vi) *Provimi Ltd v RocheProducts and Others* [2003] EWHC 961 (Comm).

(vii) Case COMP/E-1/37.512.

(viii) *SanDisk Corpn v Koninklijke Philips Electronics NV and Others* [2007] EWHC 332 (Ch).

(ix) Rule 31 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372); Section 47A Competition Act 1998.

(x) *Case No. 1077/5/7/07Emerson Electric Co and others v Morgan Crucible Company Plc and others*, [2007] CAT 28.

(xi) Decision C(2003) 4457 in Case C.38.359. The Commission's decision was addressed to Morgan Crucible Company plc, Hoffman & Co Elektrokohle A, Le Carbone Lorraine SA, Schunk, SGL and C. Conradty Hurnberg GmbH.

(xii) [2008] CAT 8.

(xiii) *BCL Old Co Limited, DFL Old Co Limited, PFF Old Co Limited and Deans Food Limited v BASF SE (formerly BASF AG), BASF PLC and Frank Wright Limited* ([2009] EWCA Civ 434), judgment of 22 May 2009.

(xiv) *Case 344/98, Masterfoods v HB Ice Cream Ltd* [2000] ECR-I - 11369.

(xv) *National Grid Electricity Transmission plc v. ABB Limited and others* [2009] EWCH 1326; The case concerned a follow-on action filed in November 2008 which sought damages arising out of the Gas-insulated switchgear cartel.

(xvi) *Devenish Nutrition Ltd and others v Sanofi-Aventis SA (France) and others* [2007] EWHC 2394 (Ch).

(xvii) Above at Page 281, paragraph 108 at d.

(xviii) *Rookes v Barnard* (1964) AC 1129.

(xix) A fundamental principle of Community law prohibiting a person from being punished twice for the same wrong.

(xx) Council Regulation (EC) No. 1/2003

(xxi) *Devenish Nutrition Ltd and Ors v Sanofi-Aventis SA (France) and Ors [2008] EWCA Civ 1086*, at page 75, para 161.

(xxii) Case 1060/5/7/06 [2006] CAT 29.

(xxiii) CA 98/3/03.

(xxiv) LG Düsseldorf, 34 O (Kart) 147/05. In a second case, Cartel Damage Claims Hydrogen Peroxide currently has a claim in the Regional Court of Dortmund against the members of a Europe-wide hydrogen peroxide cartel including Degussa, Akzo Nobel, Solvay, Kemira, Arkema and FMC Foret. 32 companies from the pulp and paper industry sold and assigned their cartel damage claims to the collecting company, together estimated to be worth more than €430 million (plus interest); Talionis intends to bring a collective damages action against a group of German paper wholesalers on behalf of more than 100 printing firms for a nominal fee and 60 per cent of the damages awarded.

(xxv) As above.

(xxvi) Case COMP/E-1/37.512.

(xxvii) *Les Laboratoires Pharmaceutiques Arkopharma v. Roche and Hoffmann La Roche AG*, Nanterre Commercial Court's decision of 11 May 2006.

(xxviii) *Les Laboratoires Juva - Production, Les Laboratoires Juva Santé - Sed v. Roche, Roche Vitamins Europe Ltd and Hoffmann La Roche AG*, Paris Commercial Court's decision of 26 January 2007.

(xxix) See *Unipol v Mr. Ricciardelli*, decision of the Court of Cassation of 4 February 2005.

(xxx) See International Broker decision of the Rome Court of Appeal of 31 March 2008.

(xxxi) As confirmed by the Milanese Court of Appeal judgment of 25 August 2008 in Quistelli/Zurigo.

(xxxii) According to art. 1226 of the Italian civil code.

(xxxiii) Article 33 (2) of the Italian Competition Law n. 287/90) (as confirmed in the Fly/Sea-Securebag judgment of 4 June 2007)

(xxxiv) *Farmacie Petrone v Pharmacia Italiana s.p.a. & Pfizer Italia s.r.l.* case (dated 16 July 2008).

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sjberwin

SJ Berwin's EU & Competition department has extensive experience of advising on and defending alleged cartel cases before the European competition authorities, including the European Commission and the national competition authorities of the Member States. This includes advising on compliance programmes, fines, leniency applications and strategy, handling on-site inspections and subsequent investigations by the authorities. It also has extensive experience in EU and Member State level competition-related litigation, including judicial review, as well as applications for injunctions and damages and defending such applications. SJ Berwin represents clients in a number of significant cases before the European Court of Justice as well as the national courts of the Member States.

SJ Berwin's EU and competition department has been a core practice area of the firm since its establishment. The department is widely recognised as one of the leading practices in EU regulatory and competition law, operating from Brussels, London, Madrid, Milan, Munich and Paris. Three times voted 'Competition Team of the Year' in the UK Legal Business Awards, the team regularly features in the Global Competition Review's 'GCR 100', a survey of the world's leading competition practices.

Unlike many other European law firms, SJ Berwin's EU and competition practice spans not only competition law but also a broad range of other areas of EU law, which includes an active regulatory practice in pharmaceuticals, telecoms, energy and chemicals, an established trade law practice and a cutting edge EU/competition law litigation practice before both national and EU courts.

Albania

Renata Leka

Jonida Skendaj

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Albania? If more than one, please describe the division of responsibilities between the different authorities.

Law 9121 dated 28.07.2003 "On protection of competition" ("Law on Competition" or the "Law") governs market competition matters in Albania. The enforcement of competition law in Albania is competence of the Albanian Competition Authority (the "Competition Authority" or the "Authority") which operates as an independent public authority. The Authority consists of the 'Competition Commission' which is the 'decision-making body' and the 'Secretariat' with 'technical and investigation' duties. The Authority is entitled to survey the market conditions, apply the competition rules and issue further secondary regulations for purposes of implementation of the Law. The Authority evaluates and authorises or prohibits transactions which give rise to concentrations between undertakings in relation to the possible creation or strengthening of a dominant position in the market. The Authority surveys market operators already having a dominant position in the market in order to avoid any possible abuses by such operators. In addition it grants exemptions for prohibited horizontal and/or vertical agreements. The Authority issues recommendations to public institutions in relation to matters dealing with competition issues as well as opinions, evaluations and proposals on draft laws which would affect any competition issues.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The Albanian Competition Authority is the only body responsible for the enforcement of competition laws in all sectors. There are no concurrent competition enforcement bodies in Albania.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Albania?

The Authority supervises and undertakes economic evaluations of different market structures in order to identify any anticompetitive conducts since in their early stage. The Authority undertakes sector-based studies, by performing periodic collection and assessment of information. This enables the Authority to obtain a general view of the competitive conditions of different market sectors. To this end the Authority may evaluate if there are any reasonable grounds that would lead to the launch of sector-based investigation procedures (*Competition Authority, "The Annual Report 2008 and Main Goals for 2009", III.2.4, pp.11*).

The Authority may initiate general investigations in a specific sector of the economy, *ex officio* and/or upon proposal of the Parliament and/or by initiative of any sector-based regulatory institutions. The investigations may be launched provided that there are indications, likewise inflexibility of the prices that would limit or distort competition in the market (article 41).

The Authority upon its own initiative, or request of interested enterprises or third parties' claims, may undertake a 'preliminary investigation procedure'. Should the Authority believe that there are reasonable grounds that would lead to limitation or distortion of the competition, it may launch the 'in-depth investigation procedure' (articles 42 and 43).

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The Authority may issue secondary rules (regulations and guidelines) for the implementation of the Law. The Law provides for the prohibition of all the agreements between undertakings or association of undertakings which obstruct, limit or distort the free competition in the market (article 4) as well as every abuse of the dominant position of the undertakings in the market (article 9).

The undertakings engaged in concentrations by acquisitions of control or merger transactions, should submit a notification to the Authority provided that they meet the threshold requirements foreseen by the Law. The Authority will check the market share of the undertaking to the concentration in order to assess possible creation or strength of a dominant position in the market.

If the Authority, after performing its own evaluations observes that there are obstacles, limitation or distortion of the free competition in the market (article 4) as well as there is an abuse of the dominant position of the undertakings in the market (article 9), the Authority may open investigation procedures on specific conducts of the market operators.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

There are no provisions that would apply to specific sectors only. The Law sets out the general provisions on competition issues that

may arise in relation to any kind of sector.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

According to the "Regulation on the application of the procedures for concentration of enterprises" ("*The Regulation on Concentrations*") it is possible for every undertaking to formally approach the Authority by informing it on the intention to enter in an agreement or transaction and to ask its formal opinion whether the agreement or transaction may constitute a concentration subject to notification procedures under the Law (article 6 of the Regulation).

Anyhow, in practice it is possible for any interested party to ask the officers of the Authority some guidance or advice aiming to facilitate the self-assessment of the party in relation to possible competition issues which may arise by any transaction, agreement or conduct. This approach is informal and the guidance or advice is not binding.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

The Law provides that interested third parties may submit a complaint to the Authority asking for the opening of a preliminary investigation procedure (article 42).

Further more the "*Regulation on the functioning of the Competition Authority*" as amended, provides for the possibility for any interested party to submit to the Authority oral or written claims either by courier or email. The anonymous claims are registered and evaluated as well. The Authority will evaluate if the issue, object of the claim, is under its competence.

Within 15 days form the receipt of the claim, the Authority notifies the claiming party on the relevant ongoing administrative proceeding. After the conclusion of the procedure, the Authority notifies the claiming party on the results of the administrative proceeding (article 26/1- 3 of the Regulation).

The parties may submit their claims either by their own initiative or upon invitation of the Authority anytime the later announces the filing of a notification procedure (article 52).

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

There are no official statistics on the proportion of the investigations initiated as a result of the third party complaint or by Authority's own initiative.

Pursuant to the "The Annual Report for 2008 and Main Goals for 2009" the most important objectives for the next coming years will be the further awareness of the entrepreneurs, stakeholders and of the consumers on the importance of the competition protection rules as well as they participation in the process of implementation of these rules (*Competition Authority, "The Annual Report for 2008 and Main Goals for 2009", Para. VI, pp.28*).

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

The investigation proceeding consists of a preliminary investigation phase initiated by the Authority or by request of interested enterprises or claim of third parties. After the preliminary investigation phase, if there are indications of infringements, an in-depth investigation proceeding will follow. The decision to open an in-depth proceeding is published in the Official Bulletin of the Authority by giving to third parties the possibility to intervene. In case the Authority observes any infringement of the Law the Authority issues a decision on the immediate ceasing of these infringements by the parties and may impose respective fines. In addition, the Authority may demand to the parties to take the appropriate measures of the case including structural measures. The Law does not provide any time line for the investigation procedures.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Each party under investigation or any other third party who is in possession of information in relation to the specific case is obliged to provide this information each time it is requested by the Authority. If necessary, the Authority may request the information by issuing a decision in this respect. According to the Law, central or local public administration bodies or other public institutions should cooperate and provide the Authority with the useful information (articles 33 and 34).

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

The officers of the Secretariat should be authorised in writing by the Commission in order to perform inspections. They are entitled to enter the undertaking premises, access the transport vehicles and the area of the place of business of the parties under investigation, may consult the hard or soft copies of the books, registers and documents relevant to the activity, may collect or copy books, registers or documents, may seal any business premises, books, registers of the activity, no longer than 72 hours, if required, and may ask representatives or employees of the party under inspection about any explanations on facts and documents (article 36). Extension of the above mentioned period is subject to court decision and may not exceed 6 months.

Inspection of places other than those related to the activity (domicile; other premises similar to the domicile) is done upon authorisation granted by the competent Court (article 37).

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

The Law provides for the possibility of the parties under investigation to intervene in a hearing before the Authority makes a

decision (article 39).

The Authority may invite other third parties or experts engaged for the specific case (article 15 of the "*Regulation on the functioning of the Competition Authority*", as amended).

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

When entering business or domestic premises with a proper authorisation released in accordance with the Law provisions, the officers may collect and confiscate every object considered as a useful evidence for any matter relevant to the investigation. The seizure may not last more than 72 hours. Extension of such period is done upon court decision for a period not exceeding 6 months. The party involved should be promptly notified in any case (article 38).

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

As explained above, the Authority may seize every object considered as a useful evidence for any matter relevant to the investigation.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The Authority has the powers foreseen by articles 36, 37, 38 and 39 of the Law as explained in questions 4.3 - 4.6.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

The Law provides for the possibility of the parties under investigation to intervene in a hearing before the Authority takes a decision (article 39).

4.9 How are the rights of the defence respected throughout the investigation?

The Authority should notify to the party under investigation the opening of the 'in-depth investigation proceeding'. The party has the right to intervene in a hearing before the Authority takes a decision (article 39).

In case of seizure of evidences during inspections, the interested party has the right of appeal in front of the Court.

4.10 What rights do complainants have during an investigation?

The Authority shall within 24 hours from the delivery of the request or claim by the interested parties, assign it to the relevant department with the Authority for processing. The complainants shall be informed on whether the matter is taken forward within 15 days from the day the complaint was submitted to the Authority.

In conclusion of the administrative proceedings of the claim or request, the Authority notifies the claiming or requesting party on the results.

The Authority may invite other third parties or experts engaged for the specific case to participate in the hearings (article 15 of the "*Regulation on the functioning of the Competition Authority*", as amended).

Further, civil actions may be initiated in front of District Court of Tirana by any party affected by anti-competitive conduct of other parties. These actions may be initiated independently to a proceeding commenced by the Authority.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

The Authority may invite other third parties or experts engaged for the specific case to participate in the hearings (article 15 of the "*Regulation on the functioning of the Competition Authority*", as amended).

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The Competition Commission, upon its initiative or further to a request of an interested party, may at any time of the investigation procedure, adopt interim measures. Such measures should be justified by an emergency, risk of serious and irreparable harm to the competition and eventual infringements to article 4 ("Prohibition of restrictive agreements") and article 9 ("Abuse of dominant Position") of the Law.

The interim measures would consist of ordering the concerned undertaking to enter into or terminate specific contractual relationships, give licenses, or to act or omit from acting in a certain way. The decision of adoption of interim measures is taken for a specific time and may be postponed if necessary.

In case of infringement to concentration rules (e.g. realisation of the concentration before clearance), the Commission may adopt interim measures for non restriction of the effective competition.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The Law does not indicate any time limit which would restrict the Competition Authority's ability to commence investigations in case of eventual infringements to article 4 and article 9 of the Law or to commencement of investigations related to the concentrations control (in lack of a notification of the concentration from the parties).

As regards the sanctions, the Law provides for a time limit only for fines imposed to individuals, who by wilful misconduct or negligence conduct or cooperate to actions mentioned in article 74/1 and 75/1 of the Law. Concretely, the fines are subject to a prescription period of 3 years for infringements mentioned in article 74/1 of the Law and 5 years for those indicated in article 75/2 of the Law.

7 Co-operation

7.1 Does the competition authority in Albania belong to a supra-national competition network? If so, please provide details

Albanian Competition Authority is member of the International

Competition Network (ICN) and also has cooperation relationships with the Organization for Economic Cooperation and Development (OECD), Technical Assistance Information Exchange Unit (TAIEX) and homologue competition authorities in Europe, USA, etc.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

Membership of the International Competition Network enables the Albanian Competition Authority to participate in different activities organised from ICN covering competition matters. The purpose of such cooperation and membership relates to the exchange of experiences with the competition authorities of other countries and also to the preparation and integration of competition standards and regulations.

Furthermore, the Competition Authority may, under a bilateral or multilateral agreement, communicate information or documents it holds or receives, to relevant structure of the Commission of European Communities or to authorities of other States exercising similar functions, subject to reciprocity and on the conditions that the competent foreign authority is subject to trade secrecy rules with the same guaranties as in Albania. Also, it may conduct investigation upon request of foreign authorities exercising similar functions and under reciprocity condition.

Where Competition Authority and competition authorities of other States, which have reached a bilateral or multilateral agreement between them, have received a complaint or are acting on their own initiative under the Competition Law against the same infringement, the fact that one authority is dealing with the case may constitute a sufficient ground for the other authorities to suspend the proceedings or reject the complaint.

8 Leniency

8.1 Does the competition authority in Albania operate a leniency programme? If so, please provide details.

Fines and leniency is governed by the Law and Regulation "*On Fines and Leniency*" as approved by the Authority.

According to this Regulation the Competition Commission will grant to an undertaking immunity from any fine, which would otherwise have been imposed if: (a) the undertaking is the first to submit evidence which in the Commission's view may enable it to adopt a decision, in case of infringement of article 4 and article 9 of the Law; or (b) the undertaking is the first to submit evidence which in the Authority's view may enable it to find an infringement of article 4 of the Law (Section A, article 9 of the said Regulation).

Immunity pursuant to the above letter (a) will only be granted on the condition that the Commission did not have, at the time of the submission, sufficient evidence to adopt a decision to carry out an investigation in case of infringements of article 4 and article 9 of the Law. Immunity pursuant to letter (b) will only be granted if the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of article 4 of the competition law **and** that no undertaking has been granted conditional immunity from fines under the above letter (a) in connection with the alleged cartel.

Furthermore, an undertaking will qualify for immunity if (i) cooperates fully, on a continuous basis and expeditiously throughout the Authority's administrative procedure and provides the Authority with all evidence that comes into its possession or is available to it relating to the suspected infringement; (ii) discontinue from its involvement in the suspected infringement no later than the time at which it submits evidence under the abovementioned letter (a) and (b), as appropriate and (iii) did not take steps to persuade other undertakings to participate in the infringement.

Any undertaking may submit a request in writing to the Authority to benefit from immunity to fines.

Undertakings that do not meet the conditions under Section A of the Regulation, may be eligible to benefit from a reduction of any fine that would otherwise have been imposed in case of infringement of article 4 of the Law. In such case, it must provide to the Authority evidence of the suspected infringement which represents significant added value to evidences already in the Authority's possession and must discontinue its involvement in the suspected infringement no later than the time at which it submits the evidence (Section B of the Regulation).

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

Where Commission finds out that an infringement to article 4 and article 9 of the Law exists (prohibited agreements and abuse of dominant position respectively), its final decision may consist of: (i) termination of the infringement (such as cancellation of the prohibited agreement or bring to an end the abusive practise); and (ii) fines. Additionally, the Commission may impose to the concerned undertakings any remedies such as those of a structural nature (which are decided in case measures to act or omit from acting in a specified way are not efficient).

In case of infringements to article 10 and article 14 of the Competition Law (obligation to notify the concentration and realise the concentration if and after cleared), the Commission's decision will be to bring to an end the realisation of the concentration, state the invalidity of the concentration and impose fines.

The Commission decisions taken for the abovementioned infringements shall be published in the Authority's Official Bulletin.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

The Law provides for fines for non serious infringements (e.g. supply of incorrect, incomplete or misleading information; incomplete form of the required books or other business records; refuse to answer to a question or give an incorrect, incomplete or misleading answer, etc.) and fines for serious infringements (e.g. infringement to article 4 - prohibited agreement, article 9 - abuse with dominant position, article 14 - realisation of a concentration without notification, or clearance or before clearance). In the first case, the Commission, by a decision, imposes on undertakings fines up to 1% of the total turnover of the preceding business year, while in case of serious infringements the Commission may impose fines on undertakings from 2% to 10% of the total turnover of the preceding business year of each of the undertakings participating in the infringement. In fixing the amount of the fine, it should be considered both the gravity and the duration of the infringement. In assessing the gravity of the infringement, it must be taken into account nature, actual impact on the market, where this can be measured, of the infringement and the size of the relevant geographic market.

The Authority may also, upon its decision, impose on undertakings periodic penalty payments not exceeding 5% of the average daily turnover of the preceding business year, which is calculated from the date the decision has been taken (e.g. to put an end to an infringement of article 4 and 9; to comply with a decision ordering interim measures; to comply with a commitment made binding; etc.).

The Commission may impose fines to individuals in case of competition infringements, which amount up to ALL 5 million (approx. EUR 38,000).

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

The Commission imposes on undertakings fines amounting up to 1% of the total turnover of the proceeding business year in case such undertakings refuse to answer to a question during an inspection procedure and, also, in case of providing incorrect, incomplete and misleading answers or impede such inspection.

Generally, refusal to cooperate or attempt to obstruct the Competition Authority in carrying out its investigations is considered as aggravating circumstance which implies an increase of the basic amount of the fine imposed for other infringements (e.g. infringement to article 4 and article 9). The Law provides for other aggravating circumstances such as repeated infringement of the same type by the same undertaking(s); role of leader, or instigator of the infringement; retaliatory measures against other undertakings with a view to enforcing practices which constitute an infringement; need to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement when it is objectively possible to estimate that amount, etc.

10 Commitments

10.1 Is the competition authority in Albania empowered to accept commitments from the parties in the event of a suspected competition law infringement?

The Competition Authority is empowered to accept commitments from the undertakings during the preliminary and in-depth procedures in case of concentration of undertakings. The concerned undertakings may propose and present commitments (ex. taking measures in order to eliminate signs of creating or strengthening the dominant position) to the Authority no later than one month from the date of notification receipt in case of preliminary procedures, and two months in case of in-depth procedures.

10.2 In what circumstances can such commitments be accepted by the competition authority?

The Competition Authority is not bound from the proposal of commitments; their acceptance is in the discretion of the Authority.

10.3 What impact do such commitments have on the investigation?

Where the undertakings concerned propose commitments, the Competition Commission may, by a decision, make those commitments binding on the undertakings. The Competition Commission may revoke or amend its decisions, or re-open the investigation procedure when: (i) one or some of the facts that has served as a basis of taking the decision has changed; (ii) the parties contravene to a commitment indicated in the decision; and (iii) the decision is based on incorrect information or was obtained by means of deceit.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

According to the Law, appeals against decisions of the Competition Authority can be made nearby the District Court of Tirana, within 30 days from notification of the decision. In order for the appeal to be accepted, the act of the Competition Authority should have the nature of an administrative act. The subject of the appeals can be either final decisions or decisions taken during an investigation procedure from the Competition Authority. During the investigation procedures, appeals can be made against decisions such as adoption of interim measures or seizure carried out from the officers of the Competition Authority. To be noted that the appeal against the decision of the Competition Authority on clearance of the concentration and interim measures does not suspend, *per se*, the enforcement of these decisions. Nevertheless, Tirana District Court may decide to suspend in whole or part these decisions.

Under a recent decision of Tirana Appeal Court the appeal against the Competition Authority decision to open an investigation procedure was refused based on the argument that such decision is not an administrative act.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

As mentioned in question 11.1 above, appeals against a final decision of the Competition Authority can be made nearby the Court of Tirana District, within 30 days from the notification of the decision, and afterwards nearby Court of Appeal and Supreme Court.

To be noted that the appeal against the decision of the Competition Authority on clearance of the concentration and interim measures does not suspend, *per se*, the enforcement of these decisions. Nevertheless, Tirana District Court may decide to suspend in whole or part these decisions.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

Please refer to question 4.3 above.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

The Law does not indicate any input that the Competition Authority

may have in a judiciary process where a person has filed a lawsuit as a consequence of damages resulting from infringement made by another person to article 4 or article 9 of the Law. Such lawsuit may be filed although a procedure has been initiated from the Competition Authority.

On the other hand, when the defendant begins a procedure with the Competition Authority seeking the exemption of an agreement from the prohibition of article 4 of the Law, the court should decide to suspend the court proceedings until the Authority adopts its decision.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

A person impeded in its activity, by a prohibited agreement or by an abusive dominant position, may initiate an action in court (with Tirana District Court) and request (a) elimination or prevention of the competition restricting practice, which risks to be carried out or is carried out in violation with article 4 or article 9 of the Law and (b) damages relief, in accordance with the relevant provisions of the Albanian Civil Code.

In order to ensure elimination or prevention of competition impediments, Tirana District Court may decide (i) the nullity of contracts (in whole or in part), with a retroactive effect; (ii) order the undertaking which is at the origin of the impediment, to enter into contractual relationship with the impeded undertaking, under the common commercial conditions.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

To the best of our knowledge, there is no final Albanian court decision ruling on claims for damages or other remedies arising out from Competition Law infringements.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Albania covered by the national competition rules?

The Law applies to all undertakings and associations of undertakings, which directly or indirectly may have an influence in the Albanian market and that conduct activities in the territory of the Republic of Albania or abroad when the consequences of these activities are reflected in the domestic market.

14.2 Please set out the approach adopted by the national competition authority and national courts in Albania in relation to legal professional privilege.

To the best of our knowledge, the legal professional privilege matter has not been raised from the Competition Authority so far and is not subject to a consolidated judiciary practice.

Pursuant to the Administrative Procedures Code, the investigated undertakings may refuse to cooperate with the Competition Authority in case such cooperation will cause an infringement to the professional secrecy, such as the legal professional privilege. Additionally, under the Law on Legal Profession in Albania, the lawyers/attorneys are not allowed to disclose information received from the person they represent or defend or from documents received and made available from the latest in the context of its professional assignment/services.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Albania in relation to matters not covered by the above questions.

The targets of the Competition Authority for the year 2009 may be summarised as follows: (i) increment of professionalism and expertise of the technical staff of the Competition Authority; (ii) increase of public acknowledgment on benefits deriving from a healthy competition in the market; (iii) growth of advocacy and culture of competition; and (iv) cooperation with all market players, public institutions and consumer protection bodies. Additionally, the Competition Authority has recently proposed amendments to the current Law aiming to harmonise the Albanian competition legislation with the *acquis communautaire*. The draft amendments have been forwarded to groups of interests for their views and comments.

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Ms. Leka is a senior legal manager at Boga & Associates, which she joined in 1997. She has acquired sound experience in Competition law, Commercial law, Banking and Finance, Intellectual Property law, Mergers and Acquisitions, Privatisations, Litigation etc. She has managed a variety of finance transactions involving corporate governance issues and diligences, secured loan facilities and security packages with respect to commercial property and assignment of contractual interests.
She has advised clients regarding legal and regulatory framework on competition, anti trust issues, trademarks and other issues related to intellectual property rights.
Ms. Leka graduated from University of Tirana, Albania (1996), Faculty of Law and received a Practice Diploma in International Intellectual Property Law from The College of Law of England and Wales (2006). She is also a Lecturer of "Albanian Business and Labor Law" at University of New York in Tirana (2004-present). Ms. Leka is a member of the Tirana Bar. She is an Albanian native and has excellent knowledge of English and Italian.

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Ms. Jonida Skendaj is a manager at Boga & Associates, which she joined in 2004. She has excellent knowledge in competition legislation and valuable experience by following several cases of merger notifications with the Albanian Competition Authority.
Ms. Skendaj was involved in a number of legal advices regarding competition issues in Albania rendered to national and international entities. She has also gathered experience in tax and commercial legislation, while assisting several legal and tax due diligence assignments for international clients who considered investing in Albania in industrial sector.
Ms. Skendaj graduated from Faculty of Law, Maîtrise Droit des Affaires, (Business Law), Paris X Nanterre, France, where she also pursued her post-graduation studies in D.E.A. Droit des Affaires (degree of Master in Business Law). She is an Albanian native and has excellent knowledge of French, English and Italian.

BOGA & ASSOCIATES

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Boga & Associates, established in 1994 has emerged as one of the premiere law firms in Albania, earning a reputation for providing the highest quality legal services to its clients.

The practice maintains its commitment to quality through the skills and determination of a team of attorneys and other professionals with a wide range of skills and experience.

Boga & Associates represents a broad spectrum of high-profile clients, including financial institutions, local and international, banking entities, commercial companies, international and governmental agencies, airlines, industrial complexes, mining and petroleum concerns, non-profit organisations, embassies, public utilities.

Over the years the firm has advised in the areas of privatisation of national resources and enterprises, concessions, real estate transactions, credit facilities, custom issues, tax and accounting issues etc.

During 2007, 2008 and 2009 Boga & Associates was rated as best legal firm in Albania from Chambers and Partners and International Financial Law Review (IFLR) in the fields of Corporate, Finance, Dispute Resolution, Real Estate and Intellectual Property.

Argentina

Allende & Brea

Julián Peña

1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Argentina? If more than one, please describe the division of responsibilities between the different authorities.

The authorities who enforce competition laws in Argentina are the National Commission for Defence of Competition ("CNDC") and the Secretary of Domestic Trade of the Ministry of Economy and Production (the "Secretary").

The CNDC is composed of five members. The President of the CNDC is designated by the President of Argentina who can remove him without cause. The remaining four commissioners are also designated by the President of Argentina but stay in their offices for four-year periods.

Each investigation is carried out by the CNDC who issues a report with recommendations to the Secretary, who takes the final decision on what measures are to be taken. Such decisions may be appealed directly to the federal courts of appeals. No other governmental agency has any enforcement powers in cartel cases.

The antitrust law contemplates the creation of an independent administrative antitrust court, the National Tribunal for Defence of Competition ("TNDC"), which will have seven members. However, the TNDC has not yet been constituted, although, in 2003 there was a call for candidates. The legal uncertainty caused by the failure to create the TNDC was exacerbated by a series of judicial rulings questioning the CNDC's and/or the Secretary's competence as transitory enforcers. This series of cases was known as the "judicialisation" of antitrust law and was solved by a Supreme Court ruling in June 2007, which held that the Secretary was the competition authority responsible for the final decision and the CNDC was responsible for carrying out the investigative procedures and issuing the recommendations to the Secretary.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

There are no other bodies responsible for enforcing competition laws in relation to specific sectors in Argentina.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Argentina?

The competition authorities determine which cases to investigate and which of those to prioritise based on their discretion.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

Section 1 of the Argentine antitrust law (Law 25.156 of 1999) provides that: "*acts and behaviours related to the production or trade of goods and services limiting, restricting or distorting competition or constituting an abuse of a dominant position in a market, in a manner which may result in a damage to the general economic interest, are prohibited and shall be sanctioned pursuant to the rules of this law*".

The antitrust law does not prohibit any anticompetitive conduct *per se*. Rather all anti-competitive practices shall be analysed under the rule of reason. The antitrust law does not consider anti-competitive conducts as illegal if such conducts are proven to be pro-competitive and pro-efficient. An anti-competitive conduct shall further not be considered illegal under the antitrust law if those accused of having engaged in such practice do not have enough market power to cause a potential damage to the general economic interest. The general economic interest has been interpreted in the past decade as comparable to the concept of economic efficiency, although more inclined to consumer surplus rather than to total surplus. The concept is currently under redefinition by the Competition authority, though no new definition has yet been issued or applied.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

There are no provisions which apply only to specific sector in Argentina.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

The only agreements in which the parties may approach the competition authorities to obtain prior approval are those where there is a change of control over a business and the legal thresholds established for merger control are met. Otherwise, although technically there are no impediments to ask for prior approval, in practice it is highly unlikely that this may happen because the Competition authority is understaffed and overloaded with work and would hardly accept to deviate resources for preventive authorisations.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

Pursuant to Section 28 of the antitrust law, a complaint should be filed with the CNDC in a written presentation including the complainant's name and address, a description of the anti-competition behaviour and the facts and legal grounds it considers support the complaint. Once the complaint is filed, the CNDC would request the complainant to attend the CNDC to ratify it.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

Most of the investigations are a result of a third party complaint. However, since third parties do not have the right to give impulse to an investigation, the only investigations that prevail are those that the Competition authority deems necessary.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

Antitrust procedures in Argentina may be initiated by any individual. However, once a claim is filed, it is at the Competition authority's sole discretion whether to perform an investigation. There are no legal instruments to force the Competition authority to do so.

Once an investigation is initiated, the Competition authority grants the defendants a 10-day-period to submit their explanations regarding the conduct in question. If the Competition authority, after a pre-investigation period, finds that there are grounds to file charges against the defendants, it issues a resolution opening the investigation and grants the defendant a 15-day period to submit its defences and designate its evidences.

The evidence production period can be from 90 to 180 business days, depending on the investigation, leaving the Competition authority 60 business days to subsequently issue the final resolution.

During the procedure the Competition Authority may issue injunctions ordering the parties to suspend the conduct in question until the final resolution is issued.

The parties may also propose a voluntary suspension of a conduct subject to approval by the Competition Authority.

Once a final resolution is issued by the Secretary, an anticompetitive case can only be appealed before the Federal Court of Appeals.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

The Competition authority cannot require parties which have information relevant to its investigation to produce information and/or documents.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

In order to enter the premises of parties implicated in an investigation, the Competition authority must obtain a seize order from a judge and shall strictly restrict its seizure to the scope of the judicial authorisation.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

The Competition authority does not have the power to undertake interviews with the parties in the course of searches being undertaken.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

The Competition authority can remove original/copy documents as a result of a search being undertaken only if it has been expressly authorised by a judge to do so.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

The Competition authority can take electronic copies of data held on the computer systems at the inspected premises/off-site only if it has been expressly authorised by a judge to do so.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The Competition authority does not have general surveillance powers. This is an exclusive power of criminal courts. The following are the main investigatory powers:

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	yes	yes
Carry out compulsory interviews with individuals	yes	yes
Carry out an unannounced search of business premises	yes *	yes
Carry out an unannounced search of residential premises	yes *	yes
■ Right to 'image' computer hard drives using forensic IT tools	yes *	yes
■ Right to retain original documents	yes *	yes
■ Right to require an explanation of documents or information supplied	yes	yes
■ Right to secure premises overnight (e.g. by seal)	yes *	yes

Please Note: * indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

The party accused of anti-competitive conduct has two opportunities to submit its response. It can first provide explanations once a claim is filed and it can later provide its defence and offer evidence once formal charges are made by the Competition authority.

4.9 How are the rights of the defence respected throughout the investigation?

The rights of the defence are constitutionally guaranteed during the investigation. The investigated party is guaranteed access to all the investigation and may question any irregularity in the process either with the Competition authority or at the Courts.

4.10 What rights do complainants have during an investigation?

Once a complainant files a claim with the Competition authority it does not have any rights on the investigation. It cannot access the file unless the Competition authority expressly recognises the complainant a right to be a party in the process. This decision is at the Competition authority's full discretion and so far there are no known cases in which a complainant was granted such privilege.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Third parties do not have any right in relation to an investigation. Third parties cannot access the file unless the Competition authority expressly recognises the complainant a right to be a party in the process. This decision is at the Competition authority's full discretion and so far there are no known cases in which a complainant was granted such privilege.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The Competition authority has powers to issue interim measures in case of a suspected competition infringement. Those powers are very broad and have been used very broadly by the Competition authority. Possible interim measures include the temporary cease of conduct until the case is solved. Since sometimes cases are never closed, then the interim measures become permanent decisions.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

Pursuant to Section 54 of the antitrust law, the applicable limitation period for the imposition of sanctions for an anti-competitive conduct is five years.

7 Co-operation

7.1 Does the competition authority in Argentina belong to a supra-national competition network? If so, please provide details

The Competition authority in Argentina does not belong to a supra-national competition network. Argentina is a member of Mercosur where there is a Competition Agreement signed in 1996 but not yet in force. Argentina has signed a very broad cooperation agreement with Brazil on competition issues but there are no known cases in which this agreement has influenced any investigation in either country.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

Not applicable.

8 Leniency

8.1 Does the competition authority in Argentina operate a leniency programme? If so, please provide details.

There is no leniency programme for companies in Argentina but the CNDC has announced, in December 2008, that it plans to implement a Leniency Programme sometime in 2009.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

Pursuant to Section 46 of the antitrust law the sanctions, which may be imposed to companies involved in cartel cases, are:

a) The cessation of the acts or conducts set forth in chapters I and II and, if relevant, the removal of its effects.

b) In case of commitment of any of the acts forbidden by chapters I and II and by Section 13 of chapter III, fine from AR$10,000 to AR$150,000,000, which shall be adjusted on the following basis: 1) the loss suffered by the persons affected by the forbidden activity; 2) the benefit obtained by the persons involved in the forbidden activity; and 3) the value of the assets involved belonging to the people indicated in item 2 at the moment when the violation was committed. In case of default in the payment, the amounts of the fine shall be doubled.

c) The compliance with measures aiming at neutralisation of the distorting aspects of competition or the request of the competent judge to order that the offending companies be dissolved, liquidated, dispersed or divided.

Section 47 of the antitrust law makes companies liable for the conduct of individuals who had acted in their name, with the help or for the benefit of the legal entity, even if the act on which the representation was based was ineffective.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

Section 48 of the antitrust law states that "when the infractions set forth by this law are committed by a legal entity, a fine shall also be applied jointly to directors, managers, administrators, trustees or members of the Syndic Office, agents or legal representatives of the said legal entity who by means of their action or omission of their duties of control, supervision or security, had contributed, encouraged or allowed the commission of the infraction". There are no known cases in which corporate management has been sanctioned for cartel cases, though there are cases in which they are being investigated. There are no prison sanctions for individuals.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

Pursuant to Section 50 of the antitrust law, anyone who impedes or obstructs the investigation or does not meet the requirements of the court can be fined in an amount of up to AR$500 per day (approximately US$130). The Competition authority has imposed a series of these fines and, when appealed, they have been upheld by the courts of appeal.

10 Commitments

10.1 Is the competition authority in Argentina empowered to accept commitments from the parties in the event of a suspected competition law infringement?

The Competition authority in Argentina is not empowered to accept commitments from the parties in the event of a suspected competition infringement because that power was vetoed from the original competition bill in 1999.

10.2 In what circumstances can such commitments be accepted by the competition authority?

Not applicable.

10.3 What impact do such commitments have on the investigation?

Not applicable.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

During an investigation a party which is concerned by a decision act or omission of the competition authority may appeal to the Courts only if the decision has an immediate adverse effect on the party (e.g. an interim measure).

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Pursuant to Section 52 of the antitrust law, the following Competition authority's resolutions can be appealed:

a) Imposition of fines.

b) Cessation or abstention of a form of behaviour.

c) Dismissal of an accusation by the Competition authority.

The appeals of fines have suspensive effects, while the other appeals are to be conceded with returning effect.

Section 53 of the antitrust law states that appeals should be filed within 15 days of the notification of the final resolution. The competition authority then has five days to submit the file to the pertinent federal court of appeals.

Currently, there is a jurisdiction problem in the city of Buenos Aires since there is more than one federal court of appeals. According to Decree 89/2001, which implements certain aspects of the antitrust law, the Civil and Commercial Federal Court of Appeals should be competent to hear antitrust cases. However, in a decision of 2006 the Supreme Court of Justice held that the Economic Criminal Federal Court of Appeals should be the judicial body in charge of analysing antitrust appeals.

Up till now the CNDC keeps sending the appeals to the Civil and Commercial Federal Court of Appeals since the Supreme Court decision omitted to declare the unconstitutionality of the provisions of Decree 89/2001. Therefore, the Competition authority is obliged to follow what the Decree states.

In order for this dispute to end, the Supreme Court would have to take a position on the constitutionality of Decree 89/2001. Until such decision is issued, the appeal of antitrust cases in the city of Buenos Aires will be handled by either the Civil and Commercial Federal Court of Appeals or the Economic Criminal Federal Court of Appeals, depending on what chamber takes the case.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

The national judicial bodies have a review role in the competition enforcement procedure. Although their agreement is not needed to implement the competition sanctions, the fines are not enforceable until the judicial review process is finished. Without the authorisation of the national judicial bodies, the Competition authority cannot perform many crucial investigative tools, such as seizures.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

The Competition authority in theory is not a party before the national courts. The courts however have allowed the Competition authority to respond to the party's appeals both at the Court of Appeals and the Supreme Court of Justice levels. In those cases the Competition authority has further developed the arguments to sustain its decision.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Section 51 of the antitrust law grants individuals or legal entities damaged by the acts forbidden by this law the right to initiate an action for damages before a judge with jurisdiction on the matter. There is no need to have a previous resolution issued by the Competition authority. In order to access the courts, a judicial fee of 3% of the claimed amount shall be paid in advance.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

There are no known cases of successful civil damage claims in the past in Argentina.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Argentina covered by the national competition rules?

An anti-competitive conduct outside Argentina is covered by the prohibition as long as it affects the general economic interest. The 1999 law adopted the "Effects Doctrine" and introduced in its Section 3 the principle of extraterritoriality of the law. However, there has not been any known case in which this principle has been enforced.

14.2 Please set out the approach adopted by the national competition authority and national courts in Argentina in relation to legal professional privilege.

So far both the national competition authority and the national courts in Argentina have respected the legal professional privilege.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Argentina in relation to matters not covered by the above questions.

The fight against cartels in Argentina has been treated as an anti-inflation instrument in recent years. The two most important cartel fines, imposed in 2005, have been announced by the Minister of Economy in press conferences amidst other anti-inflation measures.

The last vertical restriction case related sanction imposed by the Competition Authority was a refusal to deal case in 2002.

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Chapter 4

Australia

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Australia? If more than one, please describe the division of responsibilities between the different authorities.

The Australian Competition and Consumer Commission (**ACCC**) (www.accc.gov.au) is a non-judicial, independent statutory authority that has primary responsibility for enforcing all competition laws in Australia.

The principal enforcement functions of the ACCC are the investigation of, and commencement of proceedings in relation to, possible contraventions of the *Trade Practices Act 1974* (**TPA**). While the ACCC has these extensive powers, Australian courts have sole jurisdiction in determining whether a contravention has occurred and the appropriate remedy and/or penalty to be imposed.

Notably, the ACCC has an important role in considering both immunity applications for cartel conduct as well as proposed mergers or acquisitions. In relation to cartel conduct, the ACCC has the power to grant immunity if certain criteria are met. In relation to mergers or acquisitions, the ACCC can apply to the court for injunctive relief to block a proposed merger or acquisition on the basis that it substantially lessens competition in a market in Australia. Alternatively, the ACCC may provide informal clearance for a transaction and may require the acquiring party to provide court-enforceable undertakings.

In some very limited instances, the Australian Competition Tribunal (**Tribunal**), an independent statutory body that is headed by a judge of the Federal Court of Australia, can review decisions of the ACCC or may be asked to make a determination on a matter.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

There are a number of independent State and Federal bodies in Australia which oversee the economic regulation of specific sectors such as electricity, gas, water, railways and ports. While these bodies do not strictly enforce Australia's competition laws, they have some supervisory and administrative responsibilities relating to competition law and policy.

1.3 How does the competition authority determine which cases to investigate, and which of those to prioritise in Australia?

The ACCC is a well resourced and sophisticated body that pervades all aspects of the Australian economy.

Over the last five years, the ACCC has strategically moved towards a more analytical, informed and proactive enforcement model rather than the more traditional complaint-driven model. In this regard, the ACCC has recently revamped and refined its Immunity Policy which has led to the disclosure of cartel conduct that may have otherwise remained undetected.

Generally, the ACCC exercises its discretion to direct resources to the investigation and resolution of matters that provide the greatest overall benefit for consumers and businesses.

In determining which cases to investigate and prioritise, the ACCC takes into account a range of matters, including whether the conduct results in significant consumer detriment, is of significant public interest or concern, is a blatant disregard for the law, involves national or international issues and involves a significant new or emerging market. The ACCC also considers whether action is likely to have a worthwhile educative or deterrent effect and whether there is a history of previous contraventions.

The ACCC also considers that it may, where appropriate, pursue matters that test or clarify the law.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

Part IV of the TPA contains:

- "*per se*" prohibitions on exclusionary conduct, price fixing, resale price maintenance and third line forcing. Defences are available in certain circumstances. For example, exclusionary conduct and price fixing will not be prohibited if engaged in for the purposes of a joint venture and there is no substantial lessening of competition;
- prohibitions on anti-competitive arrangements, exclusive dealing and mergers or acquisitions if they substantially lessen competition; and
- a prohibition on firms with substantial market power taking advantage of that power for a proscribed anti-competitive purpose.

The Australian Government is currently proposing to introduce criminal provisions for serious cartel conduct (i.e. contracts, arrangements or understandings between competitors to fix prices, share markets, control output or rig bids). These new laws are likely to be in force by the end of 2009.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

While Australia has tended to avoid sector-specific competition law regulation, there are some competition law provisions that apply to certain industries. For example, Part XIB of the TPA contains industry specific prohibitions in relation to anti-competitive conduct in the telecommunications industry. These provisions apply in addition to the provisions of Part IV of the TPA which generally cover all sectors of the Australian economy.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

Mergers or acquisitions

In relation to a proposed merger or acquisition, a party to the transaction can seek prior approval from the ACCC by informal clearance or formal clearance. An informal clearance does not provide merger parties from immunity under the TPA from legal action by the ACCC or third parties, though in practice it is extremely rare that such action is taken. Formal clearance means neither the ACCC nor any other party may initiate action under the TPA.

Parties can also approach the Tribunal for authorisation of a proposed merger or acquisition.

Informal clearance

The informal clearance process is the most widely used merger control process in Australia.

Parties to a proposed transaction can approach the ACCC to seek its view in relation to whether a proposed merger or acquisition is likely to contravene the TPA. The ACCC will consider the application and make appropriate market enquires and if it is satisfied that the transaction is unlikely to have the effect of substantially lessening competition in a market, it may grant informal clearance.

Formal clearance

An acquiring party can apply to the ACCC for formal clearance of a merger or acquisition. The ACCC will make appropriate market enquires and if it is satisfied that the transaction is unlikely to have the effect of substantially lessening competition in a market, it may grant formal clearance. This process is seen as less flexible than informal clearance and has not been used to date.

Authorisation

An applicant can apply to the Tribunal to "authorise" a merger or acquisition. The Tribunal will conduct appropriate market enquiries including seeking assistance from the ACCC and if it is satisfied that the public benefits of the transaction outweigh the anti-competitive detriments, it may authorise a transaction that would otherwise contravene the TPA.

Other conduct

In relation to other conduct, parties may seek to obtain the views of the ACCC prior to engaging in the conduct. The ACCC will not give legal advice or approve individual conduct but it may express competition concerns.

Authorisations and notifications

In relation to certain types of anti-competitive conduct, there are two other processes that may be used to obtain immunity for conduct. In essence, the ACCC will grant immunity if it is satisfied that the public benefits arising from the conduct outweigh the public detriment.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

There is no formal procedure for complaints to be made to the ACCC. The ACCC, however, enables complaints to be made by telephone, written letter or by submitting a prescribed electronic form.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

There are no statistics on the proportion of ACCC investigations which commence as a result of third party complaint or through its own enquiries.

In terms of general complaints and enquiries, the ACCC in 2007-2008 received approximately 800 telephone calls and emails regarding anti-competitive conduct. In relation to cartel conduct, it appears that the majority of investigations arise out of applications made under the ACCC's Immunity Policy.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

As the ACCC's investigative powers are very wide and pervasive and subject to limited judicial review, there are no set rules or indicative time lines for the period of time between the commencement of an investigation and the decision by the ACCC to commence legal proceedings for a contravention.

The nature, extent and timing of any investigation will depend upon a number of matters including, the complexity of the subject matter, the number of parties involved, access to parties and their documents, the volume of documents involved and the objectives of the ACCC in undertaking the investigation.

Generally, the ACCC will thoroughly investigate a possible contravention prior to making a decision to commence proceedings. Once the decision to commence proceedings is made, the court determines whether there has been a contravention and what, if any, remedies and/or penalties ought to be imposed.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Pursuant to s155 of the TPA, the ACCC has extensive powers to obtain information, documents and/or evidence from a person if it has reason to believe that the person is capable of furnishing information, producing documents or giving evidence relating to a matter that may constitute a contravention of the TPA.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

Pursuant to Part XID of the TPA, the ACCC can obtain a search warrant to conduct "dawn raids" on the business or other premises

of any party if it has reasonable grounds for suspecting there may be documents on the premises that may afford evidence relating to a contravention of the TPA.

The ACCC may search the premises for, make copies of, and remove documents (ss154E and 154G of the TPA).

In order to obtain a search warrant, the ACCC must apply to a magistrate and demonstrate that it has reasonable grounds for suspecting there may be documents on the premises that may afford evidence relating to a contravention of the TPA (s154X of the TPA).

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

In a "dawn raid" on premises, the ACCC may, under a search warrant, require a person to answer questions or produce documents that may afford evidence relating to a contravention (s154R of the TPA).

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

The ACCC may, under a search warrant, remove from the premises original/copy documents that may afford evidence relating to a contravention (ss154E and 154G of the TPA).

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

In a "dawn raid", the ACCC may take electronic copies of data held on computer systems at the premises that is the subject of the search warrant.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

Pursuant to Part VIIA of the TPA, the ACCC may, with the approval of the relevant Minister, hold an inquiry into and/or monitor the prices, cost and profits of goods or services in any industry or business. In holding the inquiry, the ACCC may require a person to provide written submissions, give evidence, produce documents and/or answer questions.

The Australian Government is proposing to enhance the ACCC's investigative powers relating to cartel conduct by enacting new laws that would enable it to use surveillance and potentially phone tapping devices. These new laws are likely to be in force by the end of 2009.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

Typically, an ACCC investigation (whether "dawn raid", formal investigation or request for information) will, in general terms, identify the suspected anti-competitive conduct which is the subject of the investigation.

In these circumstances, it is open for a party to wait for the conclusion of the investigation and possible commencement of legal proceedings by the ACCC at which time it can defend the action in the courts. The party may also provide voluntary submissions to the ACCC during an investigation.

4.9 How are the rights of the defence respected throughout the investigation?

The ACCC respects the right of a party that is the subject of an ACCC investigation to obtain legal advice and be legally represented.

A party also has the right to withhold legally privileged documents in relation to an ACCC investigation but does not have the right to withhold documents on the basis of privilege against self-incrimination.

4.10 What rights do complainants have during an investigation?

Generally, if a complainant wishes to remain anonymous in relation to an ACCC investigation, the ACCC will not disclose its identity. If disclosure is essential for the proper conduct of the investigation, the ACCC may require the complainant to provide an undertaking of ongoing assistance to the ACCC (which may include the provision of documents and information).

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Third parties do not have any rights in relation to an ACCC investigation but may be required to provide documents and information to the ACCC.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The ACCC can commence proceedings for interim relief but it is the court that determines whether the relief sought is appropriate. Apart from the acceptance of court-enforceable undertakings under s87B of the TPA, the ACCC does not have the power to impose interim (or final) relief in relation to suspected contraventions of the TPA.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The limitation periods under the TPA depend upon on the remedy or penalty sought by the ACCC.

Where **injunctive relief** is sought, there is no time limit within which proceedings must be commenced, although significant delay in commencing proceedings may be taken into account by the court when exercising its discretion as to whether to award injunctive relief.

Where **damages** are sought (by private litigant only), proceedings must be commenced within six years from when the cause of action relating to the conduct accrued, namely when damage was first suffered by the person due to the contravention.

Where **other remedial orders** are sought (such as an order varying or declaring a contract void, an order directing a refund of money or an order to pay compensation), proceedings must be commenced within six years from when the cause of action relating to the conduct accrued.

Where a **pecuniary penalty** is sought, proceedings must be commenced within six years of the contravention.

7 Co-operation

7.1 Does the competition authority in Australia belong to a supra-national competition network? If so, please provide details

The ACCC is a member of the International Competition Network and has also entered into a number of agreements with competition law enforcement authorities in overseas jurisdictions to cooperate and exchange information relating to competition law enforcement.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

To the extent that parties to an international merger or acquisition have provided information to competition law enforcement authorities in overseas jurisdictions and those authorities are not prohibited from disclosing the information to the ACCC, the ACCC may use the information to investigate a transaction.

In relation to other conduct, such as global cartels, information may generally be provided by competition law enforcement authorities in overseas jurisdictions to the ACCC by way of background information or to facilitate the awareness of suspected anti-competitive conduct.

8 Leniency

8.1 Does the competition authority in Australia operate a leniency programme? If so, please provide details.

The ACCC operates an Immunity Policy for cartel conduct.

"Cartel conduct"

Under the ACCC's Immunity Policy, "cartel conduct" is defined as situations in which two or more competitive businesses engage in activities such as price fixing, market sharing, entering into agreements restricting or prohibiting competition between them or instituting production or sales quotas.

Applying for immunity

An application for immunity can only be made by a single person (corporate or individual). Derivative immunity is available to cover individual employees, directors and officers of a corporation with corporate immunity.

"First in"

Where a person intends to make an application for immunity, the person may approach the ACCC and request a "marker" be placed. A marker allows the person a limited amount of time to gather the information necessary to demonstrate that the person satisfies the criteria for immunity. As long as a person holds the marker for particular cartel conduct, no other person involved in the same cartel will be allowed to take the person's place in the immunity queue, even one who is able to satisfy all conditions immediately.

Criteria for immunity

A corporation or individual will be eligible for conditional immunity from ACCC-initiated civil proceedings if the corporation or individual:

(i) is a party to a cartel;

(ii) admits to engaging in conduct in respect of the cartel that may contravene the TPA;

(iii) is the first to apply for immunity in respect of the cartel;

(iv) did not coerce others to participate in the cartel and was not the clear leader of the cartel;

(v) has either ceased involvement in the cartel or has indicated to the ACCC that it will cease involvement; and

(vi) undertakes to provide full disclosure and cooperation to the ACCC.

Cooperation policy

If an applicant is not eligible for immunity, its cooperation with the ACCC may be considered under the ACCC's cooperation policy which enables the ACCC to provide leniency to corporations and individuals in certain circumstances.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

Pursuant to s87B of the TPA, the ACCC commonly accepts formal undertakings from parties in a wide variety of circumstances, including to settle or avoid legal proceedings for a potential contravention of the TPA or for the purpose of obtaining authorisation.

Section 87B undertakings are also frequently used by parties to alleviate competition concerns held by the ACCC in relation to a proposed merger or acquisition (through the offer of divestments and/or changes to the firm's behaviour in the marketplace).

Other than the acceptance of s87B undertakings, the ACCC cannot generally determine whether alleged anti-competitive conduct contravenes the TPA or what remedies and/or penalties should be imposed in relation to contraventions. Rather, when the ACCC brings an action for remedies and/or penalties in relation to a contravention, the court decides whether there is a contravention and what remedies and/or penalties should be imposed.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

If the ACCC is successful in legal proceedings in relation to anti-competitive conduct that contravenes the TPA, it may seek pecuniary penalties.

The maximum penalty for **corporations** is the greater of A$10 million, three times the gain from the contravention or 10% of the turnover of the corporation and all of its related bodies corporate.

The maximum penalty for **individuals** is A$500,000. The court can also order that an individual be prohibited from being a director of a company or being involved in management for a period it considers appropriate.

The ACCC may also seek a range of other remedial orders including community service orders, corrective publishing orders, adverse publicity orders and compliance programmes.

The Australian Government is also currently proposing to introduce criminal penalties for serious cartel conduct (i.e. contracts, arrangements or understandings between competitors to fix prices, share markets, control output or rig bids). An individual who contravenes the proposed cartel provisions may face up to a maximum of 10 years imprisonment and pecuniary penalties. These new laws are likely to be in force by the end of 2009.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

If a company or an individual:

- refuses or fails to comply with an ACCC investigation but is capable of doing so; or
- knowingly furnishes information or gives evidence that is false or misleading,

the ACCC can bring an action before the court against the company or individual for committing an offence.

If the court determines that the company or individual is guilty of the offence, it can impose, for individuals, a maximum penalty of A$2,200 or imprisonment for 12 months, or a maximum penalty of A$11,000 for companies.

10 Commitments

10.1 Is the competition authority in Australia empowered to accept commitments from the parties in the event of a suspected competition law infringement?

Pursuant to s87B of the TPA, the ACCC may accept a written undertaking from a person in connection with a matter in relation to which it has a power or function under the TPA.

This provision provides the ACCC with a broad power to accept formal administrative resolutions rather than pursuing litigation. Undertakings are court-enforceable and are accepted by the ACCC in a wide variety of circumstances including to alleviate competition concerns held by the ACCC in relation to a proposed merger or acquisition.

10.2 In what circumstances can such commitments be accepted by the competition authority?

The ACCC does not have the power to demand or require a s87B undertaking but will generally accept one when it believes that a contravention is likely to occur and that an administrative resolution based on enforceable undertakings offers the best solution.

In deciding whether to litigate or accept enforceable undertakings, the ACCC takes into account a number of matters including:

- the nature of the alleged breach;
- the history of complaints against the relevant party;
- the cost-effectiveness for all parties of pursuing an administrative resolution instead of court action;
- the prospects for rapid resolution of the matter; and
- the good faith of the relevant party.

10.3 What impact do such commitments have on the investigation?

Section 87B undertakings provide the ACCC with an important compliance tool for use in situations where there is evidence of a potential contravention of the TPA that might otherwise justify litigation.

As the content of an undertaking will be a matter for agreement between the ACCC and the relevant party giving the undertaking, the ACCC can seek corrective action, compensation and/or immediate and long term compliance with the TPA.

On the other hand, the party giving the undertaking can, if the ACCC accepts it, proceed with its proposed transaction on the basis that the undertaking alleviates any competition concerns held by the ACCC. In this way, s87B undertakings are often used by parties to realise the benefits of a transaction without having to abandon the transaction altogether.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Given that the ACCC has a broad discretion in exercising its investigative powers, it is difficult to successfully appeal against an ACCC investigation.

There have, however, been a number of cases where parties have sought to challenge the extent of the ACCC's investigative powers or the scope of an ACCC investigation. Such challenges have been made on a variety of grounds including abuse of process, no reason to believe the party can provide information, burdensome or broad and uncertain requests and abrogation of privilege.

In general, appeals can be made to the Federal Court of Australia by the aggrieved party that is the subject of the investigation within 28 days of a relevant decision (though there are exceptions).

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Where the ACCC has commenced proceedings for remedies and/or penalties for a contravention of the TPA and the Federal Court (single judge) has made a decision on whether there has been a contravention and the remedies and/or penalties to be imposed, the relevant party or the ACCC can appeal the decision to the Full Court of the Federal Court (usually three judges). Generally, an appeal must be lodged within 21 days of the decision of the single judge.

In order to appeal, it must be demonstrated that the judge either applied an incorrect principle of law or made a finding of fact on an important issue which could not be supported by the evidence.

The Full Court of the Federal Court does not consider new evidence or information that was not presented in the original case (except in special circumstances) and does not call witnesses to give evidence. It does, however, review all of the relevant documents filed by the parties in the original case and considers legal argument from both parties to the appeal.

If a party is dissatisfied with the decision of the Full Court, it can seek leave to appeal to the High Court. There is no automatic right to have an appeal heard by the High Court and parties who wish to appeal must persuade the High Court that there are special reasons to cause the appeal to be heard. Decisions of the High Court on appeals are final.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

Australian courts have the responsibility of determining whether a contravention of the TPA has occurred and what, if any, remedies and/or penalties ought to be imposed upon the party in contravention.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

The ACCC has the power to commence proceedings against a company or individual in Australian courts for contraventions of the TPA. If the ACCC commences proceedings, it effectively has the same rights and powers of a private litigant including adducing evidence and making submissions before the court.

The ACCC can commence representative or class actions for a contravention of the TPA on behalf of a class of persons who have, for example, suffered loss or damage as a result of the contravention.

Where private legal proceedings are before the court in relation to contraventions of the TPA, the ACCC may apply as *amicus curiae* to be involved in such proceedings.

In relation to certain proceedings before the Tribunal, the ACCC can assist the Tribunal in making its decision.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Third parties can commence legal proceedings in national courts against other parties suspected of engaging in anti-competitive conduct. Private litigants may seek injunctive relief (although not in relation to a merger or acquisition), damages for loss suffered as a result of a contravention and/or other remedial orders.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

There have been many claims for damages or other remedies arising out of contraventions of the TPA that have resulted in successful settlements or court approved mediations. Private litigants have also been successful in obtaining interim injunctions for alleged anti-competitive conduct.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Australia covered by the national competition rules?

Anti-competitive conduct engaged in outside of Australia is subject to Australian competition laws if the relevant corporation is carrying on business within Australia (or if the relevant individual is ordinarily resident within Australia) and there is an impact on a market in Australia.

14.2 Please set out the approach adopted by the national competition authority and national courts in Australia in relation to legal professional privilege.

Generally, legal professional privilege will attach to a document where:

- the document records a communication between a solicitor and client where the dominant purpose of the communication is to provide or obtain legal advice; or
- the document is brought into existence for the dominant purpose of actual or contemplated litigation.

The ACCC and the courts recognise that documents that are protected by legal professional privilege are not required to be produced in response to an ACCC investigation and are not admissible as evidence in legal proceedings.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Australia in relation to matters not covered by the above questions.

The ACCC is one of the most vigilant competition law enforcement authorities in the world. It has significant resources and powers with offices in every state and territory. The ACCC's role as enforcer has been assisted in recent years by the Australian Government's strong focus on strengthening the TPA as well as the ACCC's investigative powers.

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Aldo Nicotra is a Partner of Johnson Winter & Slattery and has over 20 years experience in advising international and national companies on competition/antitrust law.
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Aldo is regularly recognised in Australian and international legal services directories as one of Australia's pre-eminent competition lawyers.

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Sar Katdare is a Senior Associate of Johnson Winter & Slattery and has over 9 years experience in advising clients on all aspects of Australian competition/antitrust law.
Sar has advised clients in relation to seeking informal clearance from the ACCC for mergers and acquisitions and has defended clients in ACCC prosecutions for price-fixing, misuse of market power and anti-competitive conduct. He has also submitted leniency applications to the ACCC on behalf of clients engaged in potential cartel conduct.
Most recently, Sar had a senior role in seeking informal clearance from the ACCC for BHP Billiton Ltd's proposed takeover of Rio Tinto Ltd, Australia's largest ever attempted corporate takeover and advised BHP Billiton Ltd in proceedings before the Australian Competition Tribunal. Sar has also acted for Google Inc, Boral Ltd, Wesfarmers Ltd and Crane Group Ltd.

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Johnson Winter & Slattery (**JWS**) is recognised as a leader in the area of competition/antitrust law in Australia.

JWS advises international and publicly listed companies on all contentious and non-contentious aspects of Australian competition/antitrust law and has extensive experience in dealing with the ACCC in relation mergers and acquisitions and investigations and prosecutions in respect of global cartel conduct, misuse of market power allegations and price-fixing agreements.

JWS has been involved in many of Australia's landmark competition law cases over the last 20 years. Its principal competition law partners, John Kench and Aldo Nicotra are regularly recognised as leading individuals in competition law by international publications including Global Competition Review, Chambers Global, Asia Pacific Legal 500, The International Who's Who of Competition Lawyers and Economists, PLC Which Lawyer Year Book and Best Lawyers International.

Austria

Dr Stephan Polster

Dr Philippe Kiehl

DORDA BRUGGER JORDIS Rechtsanwälte GmbH

1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Austria? If more than one, please describe the division of responsibilities between the different authorities.

Cartel Court: The Higher Regional Court Vienna (*Oberlandesgericht Wien*) as Cartel Court (*Kartellgericht*) is charged with enforcing competition law in Austria. The Cartel Court decides only upon application of (i) the Federal Competition Authority (*Bundeswettbewerbsbehörde* - "FCA"), (ii) the Federal Cartel Prosecutor (*Bundeskartellanwalt* - "FCP"), (iii) a regulatory authority, (iv) the Austrian Federal Economic Chamber (*Wirtschaftskammer*), (v) the Chamber of Labour (*Kammer für Arbeiter und Angestellte*) (vi) the President's Conference of the Austrian Chamber of Agriculture (*die Präsidentenkonferenz der Landwirtschaftskammern Österreich*) and (vii) every undertaking or every association of undertakings which has a legal or economic interest in the decision of the Cartel Court. However, only the FCA and the FCP may apply for an in-depth investigation of a concentration (second phase merger control proceedings) and for the imposition of fines and penalty payments.

FCA: The FCA (one of the two official parties) is Austria's main authority tasked with investigating and following up on competition cases, to investigate economic sectors, to render opinions on economic policy, etc. However, unlike, for example, the European Commission, the FCA does not have the power to render binding decisions, but only the right to apply for a decision of the Cartel Court.

FCP: The second official party, the FCP, is subordinated to the Austrian Minister of Justice and is in charge of representing public interests in the field of competition law. The FCP is independent of the Cartel Court when fulfilling its tasks.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

In Austria, there are a number of authorities that are entrusted with the regulation of particular sectors:

- *Energie-Control GmbH* (E-Control) is entrusted with monitoring, supporting and regulating the implementation of the liberalisation of the Austrian electricity and natural gas markets. The E-Control Commission is, *inter alia*, the appeal authority for rulings of E-Control.
- The Austrian Regulatory Authority for Broadcasting and Telecommunications (*Rundfunk und Telekom Regulierungs-GmbH* - *"RTR"*) is entrusted with regulation in the fields of telecommunications and broadcasting. The *Telekom-Control Kommission* is an independent authority, which serves as an appeal authority to the RTR and more importantly to determine undertakings which have significant market power on one or more relevant telecommunications markets and to impose specific obligations to remedy such market power.
- In the field of railway liberalisation, there is the Railway-Control GmbH (*Schienen-Control GmbH*) and the Railway-Control Commission (*Schienen-Control Kommission*).
- In the field of financial markets, the financial market authority (*Finanzmarktaufsicht*) is the competent authority.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Austria?

The FCA will mainly investigate cases which are brought to its attention by a complaint or a leniency application of an undertaking or an individual. Furthermore, the FCA may investigate economic sectors which are, in the public opinion, not considered to be competitive. The FCA may also investigate sectors or particular undertakings more closely if this is on the political (EC or national) agenda.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

Agreements and concerted practices: Section 1 of the Austrian Cartel Act (*Kartellgesetz* - ACA) is almost identically worded to Article 81(1) EC. However, Section 1 para 4 also prohibits unilateral recommendations for prices, price limits, calculation criteria, margins or discounts, which have as their objective or effect a restriction of competition. An exception to this prohibition is non-binding recommendations which shall not be enforced by imposing economic or social pressure. Section 2 of the ACA is almost identically worded to Article 81 (3) EC. In addition Section 2 para 2 ACA sets out restrictions of competition, which shall not be subject to the cartel ban of Section 1: (i) restrictions between undertakings which jointly hold an Austrian market share of not more than 5% or a market share of not more than 25% on any relevant geographical submarket in Austria; (ii) agreements with retailers of books, music supplies, newspapers etc concerning fixed prices; (iii) certain restrictions between cooperatives and their members; (iv) restrictions between groups of certain financial

institutions; and (v) certain agreements, decisions and concerted practices of producers of agricultural products and associations of such producers.

Abuse of a dominant market position: Section 5 ACA is similarly worded to Article 82 EC. One main difference to Article 82 is that joint dominance is not expressly mentioned in Section 5 ACA. However, although the Austrian Cartel Court has not yet rendered any decision concerning joint dominance, it is likely that the rules on joint dominance developed by the European institutions would also be applied by the Austrian competition authorities. As regards the existence of a dominant market position, Section 4 ACA provides for the legal presumption of the existence of a dominant market position, if (i) the undertaking has a market share of at least 30% or (ii) has a market share of more than 5% and is subject to competition of not more than two other undertakings or (iii) holds a market share of more than 5% and belongs to the four biggest undertakings on this market, which have a joint market share of at least 80%. This legal presumption may be rebutted in a proceeding before the Cartel Courts.

The Austrian Local Supply Act (*Nahversorgungsgesetz*) expressly prohibits the unequal treatment of resellers by a supplier, unless such behaviour is objectively justified. According to Austrian case law, this non-discrimination obligation conferred upon suppliers does not require a dominant market position in order to be applied. However, it is not yet clear if, at least to a lesser extent, some market power of the supplier is required.

Criminal law: In general there is no criminal liability for infringements of competition. The only exception is Section 168 b of the Austrian Criminal Code (*Strafgesetzbuch*), which sanctions bid-rigging actions in public procurement proceedings with a prison sentence of up to three years. It should be noted that the criminal courts and not the Cartel Court is charged with the prosecution of persons involved in bid-rigging activities. Furthermore, there are reported cases where the FCA asked the public prosecutor to initiate criminal proceedings charging fraud against employees of undertakings involved in a bid-rigging cartel for filing mock tenders.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

In regulated sectors, such as telecommunications, electricity and gas, special provisions apply, most importantly relating to the access of undertakings to networks of other undertakings. Furthermore, the Austrian Telecommunications Act 2003 (*Telekommunikationsgesetz 2003*) authorises the Austrian regulatory authority to impose obligations on undertakings with significant market power (even if such undertakings do not abuse their dominant market position). For example, the authority may impose obligations of non-discrimination, transparency, accounting separation, the duty to give access to network facilities and network functions as well as price control provisions.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

No. However, in critical cases the parties may approach the competition authorities and ask for legal guidance.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

As mentioned above under question 2.2, apart from the official parties and certain chambers, every undertaking or association of undertakings having a legal or economic interest in a decision, may file an application (particularly a complaint) with the Cartel Court. However, since it is very difficult for an individual party to gather sufficient evidence, an undertaking will usually approach the FCA in order to convince it to start investigations (and making use of their investigative powers). To this end, the FCA provides a form which may be downloaded from its website (www.bwb.gv.at) and which should be used for such complaints.

3.3 What proportion of investigations occur as a result of a third party complaint and what proportion occur as a result of the competition authority's own investigations?

Although the FCA regularly launches sector inquiries, the major part of investigations occur as a result of a complaint of a third party or a leniency application of an undertaking concerned.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

Following a complaint or a leniency application, the FCA will require between four months and one year to investigate an average case. Firstly, the FCA will do some research on the undertakings concerned, the relevant markets, etc. Then the FCA will send information requests to the undertakings concerned and, possibly, third parties, will hear witnesses, conduct house searches or inspections, etc. Once the investigation is completed, the FCA may decide to drop the case or to file an application with the Cartel Court.

The Cartel Court will circulate the application to the undertakings concerned which have the opportunity to give statements to the application. In the procedure to take evidence, the Cartel Court will call on witnesses, and expert witnesses, obtain expert opinions etc. Depending on the complexity of the case, the Cartel Court will render a decision in approximately six to 15 months. If the decision is appealed, the Austrian Supreme Court as Higher Cartel Court will usually render its decision in a further four to 12 months.

Please note that Austrian merger control provides for maximum periods within which a decision will have to be reached (first phase: one month; second phase: another five months; appeal: another two months).

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Yes. The FCA is authorised to request undertakings (or associations of undertakings) to provide all necessary information within a reasonable period of time, if this is necessary for the purpose of the FCA's investigation. It should be noted that not only undertakings suspected of anti-competitive conduct, but also all other undertakings (particularly, customers or competitors of suspected undertakings) which may have relevant information, may be requested by the FCA to produce the information they have at their

disposal. If the respective undertaking does not comply with the FCA's request, the FCA will have to apply for a decision of the Cartel Court ordering the undertaking to provide the requested information. Without such an order of the Cartel Court, the information request of the FCA is not enforceable.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

Yes. On application of the FCA, the Cartel Court will have to order a house search, which will be conducted by the FCA, if (i) there is a reasonable suspicion of an infringement of Article 81 or 82 EC or (equivalent national provisions) and (ii) the house search is necessary to obtain information from the business records of the suspected undertaking. In the decision ordering the house search the Cartel Court must exactly define the premises to be searched. When carrying out the searching of the premises, the FCA has the following investigative powers: The FCA may: (a) enter all premises mentioned in the court's order; (b) inspect the premises; (c) take copies of files including files that are stored on computer hard drives; (d) call on independent experts to interpret the files; (e) conduct interviews with the undertaking concerning the whereabouts and the content of files; and (f) may call on the police in order to carry out the house search.

Pursuant to the rules laid down in Regulation (EC) No 1/2003, the European Commission may request the FCA to obtain the order from the Cartel Court that an inspection will have to be undertaken.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

Yes. The undertaking concerned has to cooperate with the competition authorities and provide answers to all questions posed by the FCA concerning the whereabouts and the content of certain documents/files. However, beyond this duty, the undertaking concerned is not required to actively support the investigations.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

Austrian competition law does not provide for the removal of original documents. However, the competition authorities may take copies of documents found in the course of the house search. If the party does not allow the inspection of a document, the document will be sealed and handed over to the Cartel Court, which will decide whether and to what extent the FCA may inspect and/or copy the document. Please also refer to question 14.2.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

Yes. The owner of relevant data is under the obligation to give the FCA access to this data and to provide it in a common file format.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

For the main powers of the competition authorities please refer to questions 4.1, 4.3 and 14.2. There are no other specific investigative powers. Austrian law allows the surveillance of persons (bugging the telephone) only if those persons are suspected of a criminal offence. As mentioned above, the only infringements of competition which also constitute criminal offences are bid-rigging or fraud. Thus, in such exceptional cases surveillance may be ordered by a criminal court.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

Already in the stage of investigation (before a court proceeding has been opened), the FCA has to give the suspected undertaking opportunity to render a statement on the results of the FCA's investigations. Only if the FCA plans to apply for a fine or a periodic penalty payment before the Cartel Court, the suspected undertaking has no right to be heard by the FCA. However, in the proceeding before the Cartel Court the suspected undertaking will have to be heard on the subject of the proceeding and of the applications and submissions of the other parties. A decision of a court that is based on results of the investigation with regard to which the suspected undertaking's right to be heard was violated may be appealed.

4.9 How are the rights of the defence respected throughout the investigation?

Persons who would, *inter alia*, be in danger of criminal prosecution or an immediate proprietary disadvantage if they testified have the right to refuse the testimony. Please also refer to questions 4.4 and 14.2.

4.10 What rights do complainants have during an investigation?

Not only the suspected undertakings but also every other party of the proceeding has the right to be heard and the right to refuse to testify as described in questions 4.8 and 4.9 above. However, in practice, individuals will often merely file a complaint with the FCA in order to convince the authority to make the necessary application before the Cartel Court. In such cases the individual will not be a party to the court proceeding and will thus not have to be heard by the Cartel Court. As a witness the individual may still refuse to testify if the conditions set out in question 4.9 are met.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Undertakings that are subject to a house search or an information request have the same rights relating to their right to refuse a testimony, etc as a suspected undertaking.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The Cartel Court may take interim measures if an applicant (see question 1.1) provides sufficient evidence showing that an infringement of competition law is likely in the case at hand.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

A fine may only be imposed if the respective application is made within five years of the date the restriction of competition ended. In practice, the competition authorities do not prosecute violations of competition law, which occurred before the entry into force of the Cartel Act 2002, i.e. before July 1, 2002.

7 Co-operation

7.1 Does the competition authority in Austria belong to a supra-national competition network? If so, please provide details

The FCA belongs to the European Competition Network.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

With regard to the enforcement of the Articles 81 and 82 EC in Austria, Article 12 of Regulation (EC) No 1/2003 applies (please refer to the chapter on the European Union). As regards the application of Austrian competition provisions equivalent to the Articles 81 and 82 EC, the ACA provides that the FCA may request information from other competition authorities if this is necessary for fulfilling its tasks.

8 Leniency

8.1 Does the competition authority in Austria operate a leniency programme? If so, please provide details.

Yes. The successful leniency applicant may either not be fined at all or at least a have a reduced fine imposed on it.

No fine: The FCA may abstain from applying for the imposition of a fine if the undertaking (or association of undertakings):

- ceased to participate in a cartel;
- informed the FCA of the cartel;
- efficiently and thoroughly cooperates with the FCA in order to clarify the facts concerning the cartel; and
- did not force the other undertakings or associations of undertakings to participate in the cartel.

Reduction: Furthermore, if the FCA is already aware of the cartel, the FCA may apply for a reduced fine, if the undertaking (or association of undertakings):

- ceased to participate in a cartel;
- efficiently and thoroughly cooperates with the FCA in order to clarify the facts concerning the cartel; and
- did not force the other undertakings or associations of undertakings to participate in the cartel.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

Mainly, the Cartel Court may render (i) declarations of current and, provided the applicant has a legitimate legal interest, past infringements of competition, (ii) orders to terminate infringements, decisions on the imposition of (iii) fines and (iv) penalty payments. All these decisions may also be taken in the form of an interim measure. Please note that the Cartel Court may not award compensation for damages to the applicant.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

Austrian competition law does not distinguish between companies and individuals but rather refers to 'undertakings'. As under EC law the term 'undertaking' extends to any entity engaged in an economic activity, regardless of its legal status. Thus, companies, partnerships, sole traders, cooperatives, etc. may form an undertaking and may therefore be subjected to a fine by the Cartel Court. The criminal offences of bid-rigging and fraud apply to the responsible employee or manager of the respective undertaking.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

If an undertaking (i) does not, following a respective order of the Cartel Court, provide information or documents or (ii) provides incorrect or misleading information, the Cartel Court has the right to impose fines of up 1% of the turnover achieved by the undertaking in the last business year. Furthermore, the Cartel Court may impose on an undertaking periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day.

10 Commitments

10.1 Is the competition authority in Austria empowered to accept commitments from the parties in the event of a suspected competition law infringement?

Instead of rendering an order of termination the Cartel Court is empowered to accept commitments from the undertakings concerned if it can be expected that these commitments will exclude future infringements. Commitments are also very common in merger control proceedings.

10.2 In what circumstances can such commitments be accepted by the competition authority?

Please see question 10.1 above.

10.3 What impact do such commitments have on the investigation?

If the Cartel Court deems the offered commitments to be sufficient to resolve its competition concerns, the proceeding will be suspended.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

A party may appeal to the Higher Cartel Court against a procedural decision of the Cartel Court such as an information request or the order of a house search. However, such an appeal does not have suspensive effect.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Against the decision of the Cartel Court, an undertaking has the right to appeal to the Supreme Court as Higher Cartel Court within four weeks from the date of receipt of the Cartel Court's decision.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

As mentioned above, the Cartel Court is competent to enforce competition law in Austria: (i) Interim measures of the Cartel Court; (ii) final decisions of the (Higher) Cartel Court; and (iii) settlements concluded before the (Higher) Cartel Court constitute execution warrants which will be enforced by (a) the competent District Courts or (b), in case of fines and penalty payments, by the Cartel Court.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

The FCA may provide administrative assistance in competition matters to the (Higher) Cartel Court and other courts and administrative authorities including the regulators and the FCP. Moreover, pursuant to the EC Cooperation Notice, OJ 2004, C101/52 the European Commission and the competition authorities of other Member States may be called by the national court as *amici curiae*.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Yes. One can distinguish three main legal instruments:

- As mentioned above, a third party which has a legitimate legal or economic interest may directly apply for a decision of the Austrian Cartel Court (for the different types of decision please see question 9.1 above).
- Pursuant to the Austrian Unfair Competition Act a third party may also sue an undertaking before the Austrian commercial courts for injunctive relief or for damages resulting from an infringement of competition.
- Moreover, a third party may bring an action for damages before the Austrian civil courts ("private enforcement").

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

To date there has been only one reported successful private enforcement action for damages in Austria (District Court Graz, 16.3.2007, 4 C 463/06 h - *Grazer Fahrschulen*).

14 Miscellaneous

14.1 Is anti-competitive conduct outside Austria covered by the national competition rules?

The ACA applies to anti-competitive conduct which has an impact on the Austrian market, irrespective of whether the conduct is realised in Austria or abroad.

14.2 Please set out the approach adopted by the national competition authority and national courts in Austria in relation to legal professional privilege.

It is established under Austrian law that a lawyer must not give evidence against his client, unless he is released from his obligation by the client. According to this principle, also attorney-client communication, which is found in the office of the lawyer, is protected. However, attorney-client communication found by the competition authorities in the course of a house search in the client's office or private premises is not protected. Therefore, on the basis of the law as it stands, the competition authorities are entitled to use such attorney-client communication as evidence in the competition proceeding.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Austria in relation to matters not covered by the above questions.

There is no other additional information to provide.

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DORDA BRUGGER JORDIS ATTORNEYS AT LAW

Founded in 1976, DORDA BRUGGER JORDIS is a leading law firm in Austria, providing legal services in all areas of corporate, civil and commercial law.

In a legal environment affected by the ever-growing relevance of national and European competition laws, DORDA BRUGGER JORDIS advises domestic and international clients on all aspects of this practice area. In addition to competition and cartel law, the firm's activities focus on corporate, M&A and restructuring, banking & finance, capital markets, tax, CEE projects, real estate and employment law. Lawyers in these core practice areas are familiar with adopting a multi-disciplinary approach to client work.

For projects in Central and Eastern Europe, the DORDA BRUGGER JORDIS' "Best Friends" programme, a close co-operation with leading independent CEE law firms, has well proven its worth. This network comprises more than 300 lawyers who either work in Austria or in CEE countries, including Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania, Serbia, Slovakia and Slovenia.

The firm also has links with large accountancy firms and works within a strong and effective network of contacts worldwide.

Brazil

Fabio Francisco Beraldi

Lino, Beraldi, Bueno e Belluzzo Advogados

Marcio de Carvalho Silveira Bueno

1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Brazil? If more than one, please describe the division of responsibilities between the different authorities.

Competition law is enforced by the Brazilian System of Economic Defense (SBDC), which comprises three different agencies: Economic Law Secretariat of the Ministry of Justice (SDE), which is responsible for initiating and carrying out investigations into anticompetitive practices; the Economic Monitoring Secretariat of the Ministry of Finance - SEAE which is currently mostly dedicated to merger review; and the Administrative Counsel of Economic Defense - CADE, which is the ultimate administrative body in respect to competition law. Both SDE and SEAE will provide non-binding opinions which are then submitted to CADE's panel (formed by seven commissioners) which will issue a final decision. In addition to that, the Office of Public Prosecutors has authority to seek criminal sanctions for antitrust violations before Judicial Courts.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

Regulatory Agencies have concurrent investigative powers in respect to offence of competition law on their specific sectors (such as telecom, energy, oil, transports, etc.), which however does not exclude the powers from SDE and SEAE to also undertake inquiries on such markets. The Regulatory Agencies will likewise produce a non-binding opinion at the end of the investigations and submit them to CADE which will always have the ultimate administrative jurisdiction in respect to enforcement of competition law.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Brazil?

The authorities have the obligation to conduct at least a preliminary investigation into all complaints received, but a formal inquiry will only be launched by the SDE when it concludes that there are sufficient indications that there might have been a violation to competition law. There are no legal guidelines in respect to prioritisation of cases. Hence, this is left to the discretion of the authorities. In recent years, the Brazilian authorities have publicly declared that combat of cartels has been the number one priority.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The substantive and procedural competition provisions are set forth within Law 8,884/94. The statute: (i) grants and allocates enforcement powers to and among the authorities which together form the Brazilian System of Economic Defense (SBDC); (ii) defines what constitutes a antitrust violation; (iii) establishes the respective sanctions; and, (iv) sets out the enforcement procedures. It also contains provisions in respect to merger review, private enforcement, among others. Criminal provisions are contained within a specific statute (Law 8,137/90).

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

There are sector-specific provisions granting investigative powers to Regulatory Agencies only.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

It is not possible to receive informal guidance from the competition authorities in respect to any matter. The formal guidance procedure (Consultation) is very restrictive - CADE will only respond to theoretical questions, rather than concrete cases.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

There is no formal procedure for complaints but SDE Regulation 04/06 sets out the basic elements that should be addressed on a complaint, which are: (i) identification of the parties; (ii) a clear-cut, detailed and consistent description of the facts to be investigated; (iii) relevant documentation; and (iv) further relevant elements to the clarification of the matter. The complaints can be made anonymously and even through forms which are available at the authorities' websites.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

Even though there are no public statistics available on that issue, we observe that the vast majority of the investigations are a result of third party complaints.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

Before commencing a formal inquiry, the SDE will conduct a preliminary review of the complaint. When confident there are enough elements to indicate a violation of the competition law, SDE will produce a technical note (similar to a Statement of Objections) which will be used to support the opening of the formal investigation.

The defendants will then have 30 days to present a defence. Following that SDE and the parties will have the opportunity to produce evidence, through hearings, economic studies and requests for information and documents to the defendants and third parties. SDE investigative powers include inspections on the premises of the defendants and also search and seizure measures, upon judicial authorisation. SDE may also ask SEAE for an economic opinion.

At the conclusion of the inquiries, SDE will prepare a preliminary report and defendants will have five days to comment it. After that, SDE will issue its (non-binding) opinion and forward the case to CADE for final decision. Before taking the case for the decision of the panel, the Reporting Commissioner may conduct further inquiries and also receive opinions from CADE's Attorney General and from the Office of Public Prosecutors.

Unfortunately, it is not possible to provide a timeline, since these will vary greatly from case to case.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

All three Brazilian competition authorities have powers to request information and documents that are relevant to the investigation from the parties or even from third parties. The Law sets out specific sanctions for failure to provide the requested data. On the other hand, the Brazilian Constitution assures the right to be silent to those that are under investigation. Hence, defendants may refuse to provide information and documents without being sanctioned.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

Yes. SDE can enter the premises of parties under investigation for inspection and also search and seizure measures, upon specific authorisation from a judicial court.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

The competition authorities do not have the power to undertake interviews with the parties, during the searches. Interviews and hearings of the parties can only occur at a previously scheduled date and location.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

On an inspection the authorities may only take (hard and electronic) copies of documents and files while when carrying a search and seizure warrant officials may apprehend objects, as described on the warrant.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

The competition authorities are legally allowed to take electronic copies of data held on the computer systems of the investigated party.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The competition authorities do not have surveillance powers, but the Law authorises them to cooperate with the Federal Police, who upon specific authorisation from a judicial court, may use extensive investigative powers, including wiretapping (phone and e-mail) and planting surveillance devices. The use of covert human intelligence is not allowed.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

Before the commencement of the formal investigation, when SDE is conducting preliminary inquiries, the access to the files may be limited. Once the formal procedure is initiated, then the parties have full right of access to the files of the investigation, not only to the technical note in which the facts should be described as well as the law provisions allegedly violated, but also to all documents and material produced. This is except to documents containing confidential data from third parties. Parties have 15 days to respond to the technical note. At the end of the production of evidence, SDE will produce a preliminary report and parties will again have the right to respond to that.

4.9 How are the rights of the defence respected throughout the investigation?

Defendants have a very broad right of the defence during investigations. It is possible to bring facts and arguments at any stage of the investigation and only unjustifiable requests to produce evidence can be refused by the authorities. As mentioned above, the Brazilian Constitution assures the right to be silent (avoiding self-incrimination) to those that are under investigation. Hence, defendants may refuse to provide information and documents without been sanctioned.

4.10 What rights do complainants have during an investigation?

Complainants also have access to the files and may present evidence and counter-arguments to the defence at different stages of the procedure.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Third parties that show an effective interest in the matter will have granted access to the files (not to confidential information) and will be able to present evidence and counter-arguments to the defence at different stages of the procedure in a similar way as complainants.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

SDE and CADE have powers to impose interim measures when there is a high risk that the conduct under investigation may, directly or indirectly cause irremediable (or almost irremediable) damages to the market or that the outcome of the investigation may be useless. The interim measures usually try to preserve the status quo ante, prohibiting a new conduct, clause or termination of a contract.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The law foresees a typical time limit of five years to the authorities to commence enforcement proceedings or impose sanctions. However, when the conduct is also subject to criminal enforcement, then this time limit is extended up to 12 years.

7 Co-operation

7.1 Does the competition authority in Brazil belong to a supra-national competition network? If so, please provide details

The Brazilian authorities are active members of the International Competition Network (ICN) and also take part in some activities of the Organization for Economic Co-operation and Development (OCDE), where Brazil is an "enhanced engagement country".

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

In order to be used in competition law enforcement procedures undertaken by Brazilian authorities, the exchange of information with foreign authorities must be allowed under specific bilateral cooperation agreements. Currently, Brazil has such agreements with Argentina, Canada, Portugal and the USA.

8 Leniency

8.1 Does the competition authority in Brazil operate a leniency programme? If so, please provide details.

There is a leniency programme under Brazilian law. The agreement has the following requirements: (i) the applicant (company or individual) should be the first one to reveal the cartel and must admit its participation in the cartel; (ii) the applicant must have ceased involvement with the cartel; (iii) the applicant cannot be the leader of the cartel; (iv) the applicant must commit to fully cooperate with the investigation; (v) the cooperation must lead to others cartel's participants, and to relevant evidences of the cartel; and (vi) at the time of the proposal, SDE must not have sufficient evidence of the cartel.

If all the requirements are fulfilled the leniency programme ensures administrative immunity, repelling the sanctions of a condemnation at the conclusion of the investigation. On the other hand, if the SDE already has prior knowledge of the alleged conduct, the penalty will only be reduced by one to two thirds.

The procedure starts with the "marker" which grants the applicant the certification to be the first-in and giving a 30-day period to bring further information and evidences to SDE. The applicant shall to provide summary information about the conduct and then present the documents that support its complaint. The 30-day period may be renovated if necessary up to twelve months. During such time a draft of the leniency agreement must be negotiated between the applicant and the authority.

The leniency agreement shall include: (i) full identification of the beneficiary and its legal representatives, including contact information; (ii) full description of the alleged conduct, including identification of other participants and their roles in the cartel; (iii) confession of participation in the alleged conduct; (iv) statement of the beneficiary that it was not the leader of the cartel; (v) statement of the beneficiary that its participation in the cartel has ceased; (vi) list of all documents provided or to be provided by the beneficiary in order to demonstrate the existence of the alleged conduct; (vii) obligation of the beneficiary to fully cooperate with the authorities throughout the investigation; (viii) provision that the non-compliance with obligations will result in loss of immunity for fines and other penalties; (ix) SDE's statement that the beneficiary was the first one to apply the Leniency; and (x) SDE's statement that did not have sufficient evidence to ensure the condemnation of the beneficiary.

The identity of the beneficiary of the Agreement will be kept confidential in relation to the general public throughout the course of the investigation until the judgment of the case by CADE, when it's going to be verified the compliance of the agreement.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

In case of a judgment considering a conduct as anti-competitive, the CADE board will apply a fine and an instruction to immediately cease the conduct. If the condemned company does not cease the conduct, CADE can apply others daily fines and also require a judicial court order to the compliance of the decision.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

To companies the main penalty consists of a fine from 1% to 30% of the gross pretax revenue thereof as of the latest financial year, which fine shall by no means be lower than the advantage obtained from the underlying violation.

To managers the fine should be set within 10% to 50% of the fine imposed on the company, which shall be personally and exclusively imposed on the manager. Fines imposed on recurring violations shall be doubled.

Also, there are other non-assets sanctions such as: (i) the publication of the summary sentence in a newspaper; (ii) ineligibility for official financing or participation in public tenders; (iii) annotation of the violator on the Brazilian Consumer Protection List; (iv) recommendation that the public agencies grant compulsory licenses for patents held by the violator; (v) recommendation that tax authority deny the violator instalment payment of federal overdue debts, or order total or partial cancellation of tax incentives or public subsidies; and (vi) the company's spin-off, transfer of corporate control, sale of assets, partial discontinuance of activities, or any other antitrust measure required for such purposes.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

In case of refusal, omission, misinformation, unjustifiable delay and non-cooperation with the competition authorities, they may impose daily fines, reaching the amount of over US$200,000. As mentioned above, the Brazilian Constitution assures the right to be silent (avoiding self-incrimination) to those that are under investigation. Hence, defendants may refuse to provide information and documents without being sanctioned.

10 Commitments

10.1 Is the competition authority in Brazil empowered to accept commitments from the parties in the event of a suspected competition law infringement?

CADE may accept a Cease and Desist Commitment offered by a defendant at any stage of the investigation. The Commitment shall include: (i) the obligation to cease the action under investigation; (ii) the fine for noncompliance with such obligations; and (iii) the payment of a cash contribution, which is mandatory when the party is being investigated for cartel activities.

10.2 In what circumstances can such commitments be accepted by the competition authority?

The law establishes that CADE has discretion to accept a Cease and Desist Commitment if it understands that this would be on the interest of free competition.

10.3 What impact do such commitments have on the investigation?

If the Commitment is accepted by CADE it will suspend the investigation procedure against such party until the fulfilment of all obligations. After the Commitment is fully accomplished, the case, regarding this particular party, will be closed. If the party fails to fulfil its obligations under the Commitment, then a fine may be imposed and the investigation may proceed.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

CADE has ultimate administrative jurisdiction in respect to competition law enforcement. Thus, CADE's decisions cannot be appealed to another administrative body. Only in case of new facts, can recourse be presented to CADE itself, within the limit of 30 days. CADE's regulation defines new facts as those that the parties did not have knowledge before judgment or those which could not be used at that time.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Even though, an appeal within the administrative instance is not possible, CADE's decisions are subject of judicial review. The extension of such review is widely debated. Some say judicial courts could only revert the decision of the competition authority in case of violation of procedural rules, while others will recognise that judges can go further and review standard of proof and adequate application of the law.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

As mentioned above, the judicial courts can play a role either on the authorisation of search and seizure and surveillance measures and also reviewing CADE's decision. In case of non-voluntary compliance with its decisions, CADE will need to file a lawsuit before a federal court to seek enforcement measures.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

Even on private litigation actions before judicial courts, CADE may be invited to provide input if the judge finds that the expert assistance from the competition authority may be useful.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

The law specifically provides that any private party who is a victim of a competition law infringement can bring private claims before judicial courts. On such suits, the victim may not only claim damages but also interim measures and remedies to enforce competition law and be granted an order to the violator to cease the anticompetitive conduct.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

So far the has been very few private enforcement actions before judicial courts. However, there is an ongoing suit filed by a distributor against a steelmaker, claiming for damages resulted from cartel. The steelmaker and its competitor were previously condemned by CADE for market allocation. Based on that the distributor has already obtained an interim measure from the court through which the producer has been obliged to supply steel on "pre-cartel prices".

14 Miscellaneous

14.1 Is anti-competitive conduct outside Brazil covered by the national competition rules?

Yes. Even if the anti-competitive conduct is perpetrated outside the country if it produces effects on the Brazilian market, then national competition authorities will have jurisdiction and will enforce local competition law.

14.2 Please set out the approach adopted by the national competition authority and national courts in Brazil in relation to legal professional privilege.

The competition authorities are bound to respect legal professional privilege, which means that no communication with external legal counsel can be used as anyway in any kind of investigation. In respect to documents produced by in-house lawyers there is some discussion whether they are also protected by legal professional privilege.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Brazil in relation to matters not covered by the above questions.

There is a proposal to amend the Brazilian competition law under discussion before the Congress. The two major modifications to be introduced to the competition law enforcement in Brazil are: (i) the introduction of the pre-closing merger review system, similarly to most jurisdictions in the world; and (ii) a new institutional architecture where the investigative agency (SDE) and the administrative tribunal (CADE) are merged into one agency.

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He assists companies on public biddings, as well as legal actions involving this matter. Lastly, he is also engaged in Consumer Law, having represented multinational companies before consumer protection agencies and before Courts.
He is the Chief Justice of the High Court of Sportive Justice of Brazilian Horse Riding (2007-2011).

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Prior to the foundation of Lino, Beraldi, Bueno e Belluzzo Advogados, he worked for six years in one of the most reputable law firms in this area, where he had a direct participation in the analysis of mergers and acquisitions and investigations involving antitrust practices before agencies comprising the Brazilian Antitrust System, including cases of high publicity and technical complexity.
He has been a member of the Board of the Brazilian Institute for Studies on Competition, Consumer Relations and International Trade -IBRAC (2005-2009), and of the Commission on Competition Studies and Economic Regulation of the Brazilian Bar Association, São Paulo Section, since 2004. He attended a post-graduate programme in Administrative Law at Pontifícia Universidade Católica de São Paulo (2001-2004).

LINO, BERALDI, BUENO e BELLUZZO ADVOGADOS

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Formed in May 2005 the firm, has already obtained international recognition of its antitrust law practice.

The practice areas of the firm also includes: banking, litigation and dispute resolution, contracts, consumer affairs, international trade dispute, public procurement and corporate law.

Bulgaria

Borislav Boyanov & Co.

Peter Petrov

1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Bulgaria? If more than one, please describe the division of responsibilities between the different authorities.

The Commission on Protection of Competition (the Commission) is the national authority of the Republic of Bulgaria responsible for the enforcement of Bulgarian national and Community competition law. The Commission: (1) establishes infringements under the Protection of Competition Act (Promulgated, State Gazette, Issue 102 of 28.11.2008) as well as under Article 81 and Article 82 of the EC Treaty; (2) imposes sanctions as provided for in Protection of Competition Act; (3) establishes that no infringement under the Protection of Competition Act has been committed or there are no grounds for taking action for committed infringement under Article 81 and Article 82 of the EC Treaty; (4) cooperates with the European Commission and the other national competition authorities of the Member States of the EU in accordance with Regulation (EC) No. 1/2003; (5) issues the authorisations as provided for in Protection of Competition Act; (6) proposes to the competent state authorities and local government bodies, to revoke or amend administrative acts, issued by them, that have or may lead to the prevention, restriction or distortion of competition; (7) imposes interim measures in the cases provided for Protection of Competition Act; (8) approves the undertaking of commitments by undertakings or imposes measures to restore competition in respect of undertakings, whose behaviour is subject to investigation for prohibited agreements, decisions or concerted practices or for abuse of dominance under the Protection of Competition Act and/or under Article 81 and Article 82 of the EC Treaty, as well as the remedies for the preservation of competition; (9) orders termination of the infringements, including by imposing the appropriate behavioural and/or structural remedies to restore competition; (10) conducts sector inquiries of the competitive environment; (11) rules on any other requests, related to Protection of Competition Act; (12) interacts with other state authorities, including the authorities of the executive branch, as well as with local government authorities, institutions and non-governmental organisations, by participating in drafting legislative acts, expressing opinions on draft and existing legislative and general administrative acts, exchanging information and other forms of cooperation; (13) proposes and organises initiatives related to raising awareness of the rules of competition; (14) adopts the Rules of organisation, as well as any other acts as provided for Protection of Competition Act; and (15) keeps an electronic register of the adopted acts.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The Commission is the only authority responsible for enforcing competition laws across all sectors. At the same time certain sectoral regulators have powers which allow them to intervene actively to preserve and enhance competition in their sector. Most notable among these is the Commission on Regulation of Communications, which has powers which are even wider ranging, than the Commission, and include price regulation, approval of general terms and conditions as well as conducting sector analyses in the communications sector, and identifying communications operators enjoying significant market power. This does not exclude the communications sector from the scope of the Commission's competences, and it has been very active in intervening particularly on dominance issues.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Bulgaria?

In accordance with Article 38 of the Protection of Competition Act (which contains the grounds for initiating proceedings before the Commission) the Commission is obliged to initiate a proceeding if there are grounds to do so. In practice this means that the Commission will initiate an investigation whenever a formal complaint requesting a proceeding is submitted to it. More discretion is exercised when in the absence of a formal complaint, the Commission assesses whether to initiate an investigation on its own motion.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The Protection of Competition Act contains the substantive competition law provisions in Bulgaria and aims to ensure protection and conditions for promotion of competition and free economic initiative. In particular, the Protection of Competition Act regulates protection against agreements, decisions and concerted practices, abuse of monopolistic and dominant position and any other acts or actions that may result in prevention, restriction or distortion of competition in the country and/or affect trade between the Member States of the EU, as well as against unfair competition. The Commission also enforces and administers the rules on control on concentrations between undertakings. As a national competition authority the Commission also enforces the provisions of Article 81

and Article 82 of the EC Treaty, within the framework of Regulation (EC) No. 1/2003 of the Council of 16 December 2002 on the implementation of the rules of competition laid down in Article 81 and Article 82 of the EC Treaty (Regulation 1/2003).

There are no criminal provisions in respect of anti-trust violations in Bulgaria.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

The only sector which can be said to have a specific set of provisions on protection of competition is the communications sector. In line with the new European communications regulatory framework, the Commission on Regulation of Communications is invested with significant powers to enhance and protect competition, particularly in respect of operators enjoying significant market power.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

At this time, there are no procedural possibilities for the parties to approach the Commission and obtain prior approval of a proposed agreement or course of action.

The Commission will sometimes issue informal guidance or respond to a notification of an agreement or course of action by reminding the relevant legislative rules, that it considers relevant to the case.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

Proceedings before the Commission may be initiated on a request by a complainant who claims to be injured by a competition law violation.

A standard complaint form has been approved by the Commission, and the minimum requirements to the content and attachments of the complaint are set by the law. These include:

- the name/title and particulars of the registration/personal identification number of the applicant and the person against whom the complaint has been brought;
- the address/registered office and business address of the applicant and of the person against whom the complaint has been brought;
- description of the circumstances upon which the complaint is based and the alleged infringement;
- details of the form of protection sought;
- evidence in support of the application;
- signature of the person who files the application or of its authorised representative; and
- receipt for the state fees paid.

The complaint should be submitted in Bulgarian, and any accompanying evidence should be translated into Bulgarian.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

The Commission does not issue official statistics based on this specific criterion. Nevertheless, in the Commission's Annual reports it is reported that for the year 2008 the Commission launched 9 proceedings on possible infringements of the prohibited agreements rules of the former Protection of Competition Act - 7 of these proceedings were initiated on written applications of the persons whose interests have been affected or threatened by the infringement, and 2 of them were initiated on the Commission's own initiative.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

The investigation of the Commission may be initiated at its own motion, or on a complaint of an interested party, affected by the claimed violation (ordinarily a competitor). The investigation may also be initiated on the basis of a leniency application or on a request by the public prosecutor. The Commission will initiate proceedings also in case it is requested to do so under Article 20 or Article 22 of Regulation 1/2003.

Where the proceedings are initiated upon a complaint of an interested party, affected by the violation, the statement of complaint will go through a phase of preliminary control within 7-10 days after it is filed. It is not unusual that during this phase the Commission will require additional information or documents to consider the complaint admissible. Once the additional information and documents are presented, or the complaint is otherwise considered complete, the Chairman of the Commission will initiate the proceedings, and appoint a reporting member as well as a working group of case handlers.

Where the proceedings are initiated at the Commission's own motion, they are usually preceded by preliminary internal research, assigned by the Chairman to officers of the respective internal division of the Commission. The Commission's interest may be triggered by written or verbal information received from an injured party, which does not constitute a formal complaint, by information published in the media or data obtained from other sources. There is no timeline for such research. The preliminary research will end with an internal report, addressed to the Commission, recommending opening or not opening proceedings in the case. The proceedings are opened with a decision of the full panel of the Commission.

There is no deadline for the completion of the investigation on the case.

Once the case handlers consider that they have collected sufficient evidence and information, they prepare a report of their findings to the reporting member of the Commission. The reporting member, informs the Chairman who should schedule a closed session of the Commission within 14 days. At the closed session the Commission may dismiss the case, return the case to the case handlers with instructions on the collection of additional information and evidence, or approve a statement of objections, based on the findings contained in the report.

The statement of objections is notified to the parties to the proceedings, including the defendant/s and any interested parties, such as the complainant. The statement should give to them a period not shorter than 30 days in which to present their own objections to the statement, as well notify them that within this period they are allowed to have access to the file.

Upon submitting their response to the statement of objections the parties are obliged to present all evidence in their possession in support of their position. The defendant may, within the period allowed to respond to the statement of objections, also offer to undertake commitments. Should such commitments be approved with a decision of the Commission, it will terminate the infringement proceedings without finding a violation.

In all other cases the Chairman will schedule a hearing with the participation of the parties, not earlier than 14 days following the expiration of the deadline for submission of responses to the statement of objections.

Following the hearing, the Commission, following discussion in a closed session, will pass a definitive decision which either ends the administrative proceedings before the Commission, or by a ruling - broaden the scope of the proceedings in respect of new claimed violations, or return the file to the case handlers for additional investigation.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

All natural persons and legal entities, including undertakings, associations of undertakings, state and local authorities, non-governmental organisations are obliged to cooperate with the Commission when it exercises its powers under the Protection of Competition Act. Persons from whom cooperation is requested (including the presentation of statements and other evidence) cannot refer to manufacturing, commercial or other protected secret to object to the presentation of the requested information.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

The Commission has the power to visit the sites of the companies or associations under investigation for a suspected infringement of the Protection of Competition Act (including both anti-trust and merger control provisions) or Articles 81 and 82 of the EC Treaty without prior notice. An inspection requires, however, an authorisation by a judge from the Sofia Administrative Court.

The Commission may:

1. enter any premises, means of transport and other locations used by the undertakings and associations of undertakings;
2. examine all books and records, related to the business of the undertakings or associations of undertakings, irrespective of the medium on which they are stored;
3. seize or obtain information in hard, digital or electronic copy, copies of, or extracts from such books and records, irrespective of the medium on which they are stored or, where this is impossible, seize the originals, as well as any other material evidence;
4. seize or obtain electronic, digital and forensic evidence, including traffic data, from all types of computer data carriers, computer systems and other information carriers as well as seize the devices for transmission of information;
5. receive access to all types of information carriers, including information stored on servers, accessible by computer systems or other means located in the inspected premises;
6. seal for a certain period of time any premises, means of transport and other sites, used by the inspected undertakings or associations of undertakings, as well as commercial or accounting books or other information carriers; and
7. take down oral statements of any representative or member of the management and staff of the undertakings or associations of undertakings, on circumstances, related to the subject matter and purpose of the inspection.

Any document or evidence found, may be seized if it contains data raising well-founded doubts of other infringements under the Protection of Competition Act or under Article 81 or Article 82 of the EC Treaty.

Failure to cooperate may lead to fines. Fines can, for instance, be imposed if the investigated undertaking is found guilty of any of the following:

- Incomplete production of records (i.e. the production of books and records in incomplete form, the provision of incorrect oral information, a failure to provide clear explanations leading to relevant documents being overlooked, removal of relevant material, etc.).
- Incomplete access to a company's premises.
- An unjustified refusal to comply with a request for oral explanation.
- Destruction of evidence during the investigation.
- Refusal to cooperate with inspectors.

Where a party has impeded the collection of information in respect of certain facts, the Commission is entitled to assume that these facts have been proven, and base its decision upon them.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

During an inspection the Commission may take down oral statements of any representative or member of the management and staff of the undertakings or associations of undertakings, whose premises are inspected, on circumstances, related to the subject matter and purpose of the inspection.

The reporting member in charge of the investigation and the case handlers have the general power to take statements within the framework of the investigation. A protocol should be drawn up for the statements taken, and be signed by the person that has given the statement and by the case handlers that conducted the interview.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

The Commission officers in principle are required to take only copies of the documents found during an inspection. Originals may be taken only where the taking of a copy is not possible. Both the copies and the originals taken must be returned upon the entry of the decision of the Commission into effect. Upon request by the relevant undertaking or the association of undertakings from which they were seized, the Commission may return the originals of the documents even before the coming of the decision of the Commission into effect. The Commission is obliged to do so where the exercise of rights under the documents is linked to their physical possession.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

The Commission may take electronic copies of documents, digital, electronic and forensic evidence seized during an inspection in the inspected premises.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

Outside on-site inspections, the general investigative powers of the Commission include:

- to request information and corporeal, written, digital and electronic evidence, irrespective of the carrier on which they are preserved;
- to take written and oral statements;
- to assign the preparation of expert reports to outside experts; and
- to request cooperation and information form the national competition authorities of other Member States of the European Union, as well as from the European Commission.

The Commission does not have powers of surveillance.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

The accused party is entitled to receive a statement of objections, where the Commission, by a ruling, has accepted that the claims of a committed infringement are likely credible and substantiated. Within a period of not less than 30 days (set in the statement of objections) the accused party will be entitled to submit a response to the statement of objections. In addition, during this time the accused party will be entitled to access the case file. Finally, the accused party will be entitled to be heard at the hearing conducted by the Commission following the expiration of the period for submission of responses to the statement of objections.

In cases where the proceedings were initiated upon a complaint by an interested party, it is standard practice of the Commission to present the accused party with a copy of the complaint at the beginning of the proceedings and request its position. Although previously the Commission presented also its own decision on the initiation of proceedings where the proceedings were initiated at its own motion, recently it has discontinued this practice and presents only the legal, but not the factual grounds for the initiation of the proceedings to the accused, in the beginning of the proceedings.

4.9 How are the rights of the defence respected throughout the investigation?

Within the general framework of the right of defence in administrative proceedings, the parties throughout an investigation are entitled to be represented by an attorney at law. Correspondence between an attorney and its client is legally privileged and may not be seized or used as evidence. The right of defence of the parties is guaranteed by way of their right to receive a statement of objections where the Commission considers that a claim for a violation is likely justified, to receive access to the file (excluding confidential information submitted by the other parties), to be heard by the Commission, and to submit evidence in their defence throughout the investigation. In general the Commission is not friendly to requests by the parties to collect evidence itself, for example in cases where the relevant party is unable to obtain such evidence independently.

Finally the defendant is entitled to appeal the various acts of the Commission, as further explained in Section 11 below.

4.10 What rights do complainants have during an investigation?

In the first place, in almost all cases (with the exception of cases where the complainant is unable to prove its legal interest in the investigation, or has not fulfilled the minimum requirements of the law to the content of the complaint and its attachments) the Commission will initiate a proceeding upon a complaint submitted by an interested party.

The complainant has also the right to receive the statement of objections prepared by the Commission, and submit its response, as well as supporting evidence. The complainant has the right to be heard along with the defendant.

Finally the complainant has the right to appeal the various acts of the Commission, as further explained in Section 11 below.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Third parties, which have a legitimate interest, may join the proceedings as an interested party. The Commission may allow such joining based on a motivated application from the relevant third party. After acceding to the proceedings the interested parties will have the same powers as the complainant and the defendant, depending on their particular legal interest.

Third parties, which have not been constituted as interested parties in the proceedings, do have the right to appeal the Commission's decisions within 14 days after the relevant decision is published in the electronic register accessible through the web site of the Commission. It has to be noted though, that the Supreme Administrative Court, the judicial review instance for the decisions of the Commission, has set a high standard of legal interest to allow an appeal of a decision by a party, which has not been a party to the proceedings before the Commission.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

If, during an investigation of prohibited agreements, decisions and concerted practices, or during an investigation of abuse of monopoly or dominant position, or of infringements of Article 81 and Article 82 of the EC Treaty there is sufficient evidence of an infringement, in urgent cases where there is a risk of serious and irreparable damage to competition, the Commission may (at its own initiative or on request of the persons whose interests are affected or threatened by the infringement) order the immediate termination of the practice by the undertaking or the association of undertakings, or impose other necessary measures, taking into account the objectives of Protection of Competition Act. The Commission may not impose measures which are of the competence of other authorities and are stipulated in other Acts. The interim measures may be ordered at any time during the course of the proceedings. The Commission imposes the interim measures with a reasoned ruling stating the objectives of the imposed measure and giving the grounds for its urgency. If the ruling is appealed, the appeal does not suspend the application of the interim measure.

The initial term of effect of the interim measures can be up to 3 months as of the time they are ordered. If necessary, the time limit may be extended. The interim measures may have effect until the adoption of the Commission's decision on the merits. The Commission may revoke the interim measure also before expiry of the term of its effect where the illegal practice is terminated and the damage to competition is prevented.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The infringements under the Protection of Competition Act will not be prosecuted if the period of limitation has expired, which is:

- 3 years - for violations related to failure to provide information or cooperate with inspections.
- 5 years - for all other violations.

For continued violations the period of limitation will start as of the moment the violation has been discontinued. The period of limitation is interrupted with the initiation of proceedings by the Commission, or by a competition authority of a Member State or by the European Commission in respect of the violation. During the proceedings the period of limitation is suspended.

7 Co-operation

7.1 Does the competition authority in Bulgaria belong to a supra-national competition network? If so, please provide details

In relation to the membership of Bulgaria in the EU, the Commission, as a national competition authority, participates in the enforcement of the Community competition rules in cooperation with the European Commission and the national competition authorities of the other Member States. This cooperation takes place mainly in the framework of the European Competition Network (ECN). The Network plays a key role in the allocation of work among the national authorities, the EC and the courts, and ensures the coherent application of EU legislation. The ECN membership is related to constant exchange of information with counterparts, which facilitates the elicitation and maintenance of efficient competition throughout the EU.

The Commission is a member of the International Competition Network (ICN). ICN deals with issues in the field of antitrust legislation and competition policy. The Network is aimed at strengthening the cooperation between the competition authorities and achieving convergence between legislation and law enforcement practices. The Commission became a "liaison agency" in the Support System created in August 2008.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

The ECN provides the Member States' national competition authorities with the opportunity to exchange information which is an important prerequisite for ensuring a unified and coherent enforcement of legislation. Information obtained from other competition authorities may be used in the course of the investigation, but only within the framework of Regulation 1/2003. Correspondence between the Commission and the European Commission or national competition authorities of other Member States cannot be disclosed to the parties upon their access to the file.

8 Leniency

8.1 Does the competition authority in Bulgaria operate a leniency programme? If so, please provide details.

The Commission has adopted a leniency programme allowing a participant in a secret cartel, which comes forward with information about the infringement to receive immunity or significant reduction of sanctions to be imposed by the Commission.

The following are the criteria that an undertaking should answer to benefit from full immunity from sanctions:

- before all other participants in the secret cartel the undertaking submits evidence that is sufficient to allow the Commission to receive a court order for a dawn raid, provided that at the time of the application the Commission did not have such evidence;

  OR

- before all other participants the undertaking submits evidence that is sufficient to prove the alleged offence, and at the time of the application the Commission has not granted conditional immunity from sanctions to another undertaking for the same offense, and the Commission has not had sufficient evidence to prove the alleged offense;
- by the time of submission, the undertaking has terminated its participation in the cartel;
- the undertaking has not and does not coerce other undertakings to participate in the alleged cartel;
- the undertaking effectively aids the Commission during the whole investigation procedure and provides all evidence and information available to it;
- before the submission of its application the undertaking has not destroyed or forged evidence; and
- before the submission of its application the undertaking has not disclosed its plan to submit an application, neither its content, except to other authorities of the ECN.

The first 2 criteria are alternative, and each of them is cumulative with the remaining five criteria.

The following are the criteria that an undertaking should answer to benefit from a reduction in fines:

- where the undertaking voluntarily submits evidence during the investigation which adds substantial value to evidence already collected;
- the undertaking has terminated its participation in the cartel prior to the submission of evidence;
- before the submission of its application the undertaking has not destroyed or forged evidence; and
- before the submission of its application the undertaking has not disclosed its plan to submit an application, neither its content, except to other authorities of the ECN.

The first eligible undertaking will qualify for a reduction in the fine of between 30 to 50%, the second between 20 to 30% and subsequent applications will qualify for a reduction of between 10-20%.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

At the end of the proceedings, the Commission will adopt a final decision whereby it: (1) orders the initiation of an in-depth investigation; (2) establishes the infringement committed and the

infringer; (3) imposes pecuniary sanctions, periodic sanctions and/or fines; (4) exempts from sanction or reduces the amount of the sanction in compliance with its leniency programme; (5) establishes that no infringement has been committed or that there is no ground for taking actions for committed infringement under Article 81 and Article 82 of the EC Treaty; (6) terminates the proceedings; (7) approves commitments undertaken and defines the period for their implementation; (8) rules that the respective decision on block exemption shall not apply to the specific case and specify a time limit within which the parties must bring their agreement into compliance with the Protection of Competition Act or terminate it; (9) withdraws the application of an EU Regulation on block exemption from the prohibition of Article 81, paragraph (1) of the EC Treaty in case that the conditions under Article 29 of Regulation 1/2003 are present and specifies a time limit within which the parties have to bring their agreement into compliance with Article 81, paragraph (3) of the EC Treaty or terminate it; and (10) orders the termination of infringements, including by imposing appropriate behavioural and/or structural measures to restore competition.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

The sanctions depend on the seriousness of the infringement that the undertaking committed, as well as on the facts if there are any aggravating or/and mitigating circumstances, if there is a possibility the company re-accomplishes the same infringement, etc. The Commission imposes a pecuniary sanction the amount of which can reach 10% of the annual turnover of the infringing undertakings. In determining the amount of the pecuniary sanction the gravity and duration of the infringement will be taken into account as well as the circumstances mitigating or aggravating the liability. The exact amount of the sanction is determined in compliance with a methodology adopted by the Commission.

Individuals who have assisted in the commitment of infringements of the provisions of the Protection of Competition Act, will be liable to a fine of BGN 500 to BGN 50,000.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

When an undertaking or an association fails to comply with the obligation for cooperation or fails to furnish complete, accurate, true and not misleading information or impedes an inspection under Art. 50 of the Protection of Competition Act, the Commission may impose a pecuniary sanction for up to 1% of the turnover of the undertaking or association.

Periodic pecuniary sanctions to the amount of up to 1% of the average daily turnover for the preceding financial year for each day of the violation, may be imposed for continuing the violation.

Persons who fail to submit in time the evidence requested or fail to supply complete, accurate, trustworthy and not misleading information will be liable to a fine of BGN 500 to BGN 25,000.

10 Commitments

10.1 Is the competition authority in Bulgaria empowered to accept commitments from the parties in the event of a suspected competition law infringement?

The defendant in the proceedings before the Commission may, within the period for submitting of its response to the statement of objections of the Commission, propose to undertake commitments with the aim of terminating the conduct, in respect of which the proceedings were initiated.

The Commission may approve these commitments by a decision. In such cases the Commission will terminate the proceedings without establishing an infringement, concluding that there are no longer grounds to continue the proceedings. In its decision the Commission may prescribe the period within which the commitments shall be effective.

10.2 In what circumstances can such commitments be accepted by the competition authority?

Commitments can be undertaken in all proceedings for the investigation of violations related to abuse of dominance, and/or prohibited agreements, decisions or concerted practices, except to remedy severe violations. As "severe", are considered those violations which may affect considerably and on a lasting basis the competitive environment in respect of a significant part of the national market.

10.3 What impact do such commitments have on the investigation?

Where commitments are accepted by the Commission, the Commission must terminate the proceedings without finding a violation. However if the decision to accept commitments is not complied with, the Commission may open new proceedings, to the extent that such non-compliance represents a separate violation of the Protection of Competition Act.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

In general interim rulings of the Commission issued within the proceedings may not be appealed separately from the final act of the proceedings. Exceptions to this rule include the following interim acts:

- rulings of the Commission imposing interim measures;
- rulings of the Commission ordering the suspension of proceedings;
- rulings of the Sofia Administrative Court authorising and inspection by the Commission at the premises of the respective undertaking or association; and
- rulings of the Commission to overrule a party's request for confidentiality of data and documents.

The above rulings of the Commission can be appealed before a three member panel of the Supreme Administrative Court sitting as a single instance, within 7 days of the relevant party being notified. The rulings of the Sofia Administrative Court authorising and inspection by the Commission can be appealed within three days of the relevant party being notified, before the Supreme Administrative Court acting in a panel of three members. In each case the judgment of the Supreme Administrative Court is final.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

The decision of the Commission at the end of the proceedings can be appealed by the parties to the proceedings, as well as by interested third parties. Interested third parties include any person, undertaking or association whose interests may be affected by an infringement of the Protection of Competition Act. The appeal should be addressed to the Supreme Administrative Court and should be submitted within 14 days of the day on which the relevant party to the proceedings has been notified, and in respect of third parties - as of the day in which the decision is published in the electronic register maintained by the Commission, which is accessible through its web site.

The grounds for appeal of the Commission's decisions can be:

- lack of competence;
- non-compliance with the required form, set by the law;
- material breach of the rules of administrative procedure;
- contravention of the provisions of substantive law; and
- non-conformity with the objectives of the law.

The decision of the three member panel of the Supreme Administrative Court, on its part can be subject to cassation appeal on one or more of the following grounds:

- nullity;
- inadmissibility; and
- illegality - due to violation of substantive law, or material violation of judicial procedure rules or lack of sufficient reasoning of the decision.

The Supreme Administrative court, sitting in a three member panel may:

- declare the Commission's decision null and void (e.g. in case of lack of competence);
- annul the Commission's decision in whole or in part;
- amend the Commission's decision; or
- uphold the decision and reject the appeal.

When the Supreme Administrative Court declares the decision null and void or annuls it in whole or in part, it should rule on the substance of the case, unless this is not possible due to the matter being subject to the discretionary judgment of the Commission, or where due to the nature of the matter the court is unable to pass a decision on the substance. In these cases, the court must return the case to the Commission, with obligatory instructions on the application of the law.

The Supreme Administrative Court sitting as a cassation instance in a five member panel, when reviewing the decision of the three member panel may:

- declare the decision of the three member panel invalid;
- declare the decision of the three member panel inadmissible;
- annul the decision of the three member panel in whole, or in part; or
- uphold the decision and reject the appeal.

Where the five member panel of the Supreme Administrative Court has annulled the decision of the lower instance, it has to rule on the substance. If however the annulment has been due to material procedural violations, or new facts need to be established which cannot be established by the collection of written evidence alone, or where the court has declared the decision of the lower instance invalid, it must return the case to the lower instance, sitting in a three member panel comprised of different judges, with mandatory instructions on the application of the law. Where the five member panel of the Supreme Administrative Court has declared the decision of the lower instance inadmissible, it has the options (depending on the reasons for inadmissibility) to terminate the proceedings, or return the case for a new review to the lower instance, or send the case to the competent court or the competent authority.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

The involvement of the Bulgarian administrative courts in the competition enforcement procedure is limited to their judicial review role. Actual enforcement of a fine is conducted by the public enforcement agency, which enforces all public dues, including fines, taxes, duties etc.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

The Commission is a party to the proceedings before the Supreme Administrative Court for judicial review of its decisions and rulings. As such, the Commission has equal rights with all other parties to these proceedings to present evidence, plead and appeal the decisions of the court. International competition anti-trust enforcement bodies, at this time, are not entitled to join the judicial review proceedings before the Supreme Administrative Court.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Private claims to enforce competition law in the Bulgarian civil courts can be brought either as individual actions or as class actions.

Individual actions for damages as a result of competition violations, would regard these violations as torts, and absent any special provision would be subject to the general regime of torts.

In contrast to other kinds of torts, where only direct and immediate damages of an infringement are to be compensated, the Protection of Competition Act provides that all legal and natural persons, to whom damages have been caused, are entitled to compensation even where the infringement has not been aimed directly against them. This special rule allows the compensation of damages suffered by persons or entities (e.g. final customers and consumers) which have not been a direct counterparty of the infringer/s but the results of the infringement were passed on to them by the intermediate commercial operators.

The decision of the Commission that has not been appealed or has been upheld by the courts on appeal is binding on the civil courts when resolving a civil action brought before them.

The Bulgarian Civil Procedure Code provides for three types of actions that can be brought as a class action:

1. An action to establish an infringement (the infringing action or omission, its illegality and the fault).

2. An action to bring an infringement to an end and/or to remedy the consequences of the infringement.
3. A damages action on account of an infringement.

The private enforcement of competition law violations is independent of the administrative enforcement by the Commission, and may serve as a fully alternative enforcement route, not requiring enforcement by the Commission.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

To our knowledge there have been no successful claims for damages or other remedies arising out of competition law infringements yet.

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14 Miscellaneous

14.1 Is anti-competitive conduct outside Bulgaria covered by the national competition rules?

Anti-competitive conduct engaged in outside Bulgaria, would fall within the ambit of the Protection of Competition Act where such conduct may result in prevention, restriction or distortion of competition in Bulgaria and/or affect the trade between the Member States of the European Union. In general the Commission will prosecute prohibited agreements, decisions or concerted practices, or abuse of dominance which have effect in Bulgaria, even if they have been committed outside the country.

14.2 Please set out the approach adopted by the national competition authority and national courts in Bulgaria in relation to legal professional privilege.

According to the Bulgarian Bar Act, attorney's papers, dossiers, electronic documents, computer equipment and other information carriers cannot be reviewed, copied, investigated or seized. Any correspondence between an attorney and its client, irrespective of the manner in which it is conducted, including electronic correspondence, cannot be reviewed, copied, investigated or seized and cannot be used as evidence. An attorney may not be questioned about his/her conversations or correspondence with its client, their conversations or correspondence with another client, the matters of a client, or the facts and circumstances he/she has become aware of in the course of his defence and support functions for the client.

These rules apply only to registered attorneys (i.e. they do not apply to in-house counsel and other consultants which are not attorneys) and are observed strictly by all authorities and the courts.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Bulgaria in relation to matters not covered by the above questions.

This is not applicable.

Denmark

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Bech-Bruun

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Denmark? If more than one, please describe the division of responsibilities between the different authorities.

In Denmark, the Danish Competition Council is the principal enforcement authority for the enforcement of general Danish competition law. The Competition Council is composed of a Chairman and 17 members. The Danish Minister for Economic and Business Affairs appoints the Chairman and the members for a term of up to four years. The Council has comprehensive insight into public, as well as private, enterprise activity, including expertise in legal, economic, financial and consumer-related matters. The Chairman and eight members of the Council are independent of commercial and consumer interests. One of these members has special insight into government enterprise activity. According to specific directions given by the Minister for Economic and Business Affairs, seven members are appointed on the recommendation of trade organisations, one member is appointed on the recommendation of consumer organisations, and one member with special insight into public enterprise activity upon recommendation from Local Government Denmark (in Danish "*Kommunernes Landsforening*"). The members of the Council are appointed on the basis of their personal and professional qualifications and they act independently when carrying out their duties.

The Competition Authority serves as secretariat to the Competition Council in respect of cases under the Danish Competition Act No. 1027 of 21 August 2007 (the "**Act**") and handles the day-to-day administration of the Act on behalf of the Competition Council.

Decisions made by the Competition Council or the Competition Authority may be brought before the Danish Competition Appeals Tribunal.

Decisions of the Competition Appeals Tribunal may be brought before the Danish courts, and the prosecution of offences takes place before the courts. Private parties who have been harmed by violations of Danish and EC competition law may bring civil actions before the courts.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

Steps taken by the European Union to liberalise and open competition in sectors previously characterised by state-controlled monopolies have been implemented in Danish law. Accordingly, a number of directives, including directives regulating the postal sector, electronic communication as well as directives regarding gas and electricity have been implemented in Danish law by way of a series of acts, executive orders, *etc.* To some extent, such sector specific regulation contains pricing provisions as well as provisions ensuring transparent and non-discriminatory access to relevant networks.

Regulation enforcing sector competition law applies concurrently with the application of the Act. Such sector specific regulation is enforced by independent regulatory agencies.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Denmark?

The Competition Council may consider cases on its own initiative, upon notification or complaint, or as a result of a referral from the European Commission or other competition authorities of the European Union. Some cases may be considered by the Competition Authority by delegation without involving a decision by the Competition Council.

Cases considered by the Competition Council on its own initiative are typically initiated as follow-up on merger notifications, dawn raids, or based on media coverage of specific issues. Many cases are initiated on the basis of complaints or notifications (especially mergers).

According to Section 14(1) of the Act, the Competition Council may decide whether there are sufficient grounds for an investigation or for making a decision in a case, including whether the consideration of a case should be suspended or discontinued. The Competition Council may prioritise its cases based on political reasoning as well as available resources.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The substantive Danish competition law provisions of the Act are found in chapter 2 of the Act on the prohibition of anti-competitive agreements, chapter 3 on the abuse of dominance and chapter 4 on merger control. Apart from minor linguistic differences, these rules largely mirror the corresponding EC provisions (Articles 81 and 82 of the EC Treaty as well as the rules set out in Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings).

Moreover, chapter 8 of the Act sets out provisions on penalty, according to which a party will be punished with a fine if, intentionally or by gross negligence, that party violates one or more of the arrangements listed in Section 23(1) of the Act.

Cases concerning violation of Articles 81 and 82 of the EC Treaty, including cases involving parallel application of Sections 6 (prohibition of anti-competitive agreements) and 11 (Abuse of dominance) of this Act, may be dealt with by the national competition authorities if such cases have ties to Denmark. Ties to Denmark exist if agreements between undertakings, decisions within an association, concerted practices between undertakings or the conduct shown by a dominant undertaking have anti-competitive effects in the Danish market, or if an undertaking located in Denmark is involved in an agreement, *etc.* which has anti-competitive effects in the European Union.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

The Act does not contain any provisions that apply to specific sectors only. However, sector specific regulation on postal services, telecommunication, electricity and gas distribution contains provisions ensuring transparent and non-discriminatory access to network, pricing obligations, *etc.* Such provisions apply to their specific sectors only and are applied by independent regulatory agencies.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

According to Section 8(2), the Competition Council may, upon notification, exempt an agreement between undertakings, a decision within an association of undertakings or a concerted practice between undertakings from the prohibition against anti-competitive agreements, if the Council finds that the following conditions are satisfied. The agreements, *etc.*:

(i) contribute to improving the efficiency of the production or distribution of goods or services or to promoting technical or economic progress;

(ii) provide consumers with a fair share of the resulting benefits;

(iii) do not impose on the undertakings restrictions that are not necessary to attain these objectives; and

(iv) do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

The notification of such an agreement, *etc.*, may be submitted to the Competition Authority.

Decisions made by the Competition Authority to exempt an agreement must specify the period for which the exemption is effective. Moreover, exemptions may be granted on specific terms.

According to Section 8(4), the Competition Council may, upon notification, extend an exemption where the Council finds that the conditions stipulated above are still satisfied.

The Competition Council may alter or revoke a decision made to exempt an agreement, *etc.*, if:

(i) the facts of the situation have changed in any respect that was important for the decision;

(ii) the parties to the agreement, *etc.*, fail to comply with the terms imposed; or

(iii) the decision has been based on incorrect or misleading information from the parties to the agreement, *etc.*

If an agreement, *etc.*, has been notified to the Competition Council for exemption in accordance with Section 8(2) or (4), provisions on penalty do not apply from the date of notification until the Council has communicated its decision.

According to Section 11(5), the Competition Council may declare, upon notification from one or more undertakings, that on the facts in its possession a certain form of conduct does not fall under the prohibition of abuse of dominance. If an undertaking has received a Section 11(5)-declaration, the undertaking will not be subject to fines, if the Competition should change its perception at a later stage of time.

If the Competition Council assesses that notification under Section 8(2) or 11(5) relate to agreements or practices which are capable of affecting trade between Member States, the Council can refrain from reaching a decision.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

There is no formal procedure for complaints to be made to the Danish competition authorities. Accordingly, provided that the required legal interest exists, complaints may be brought to the Danish competition authorities by letter, email or phone.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

No such information is publicly available.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

Action

The Competition Authority receives a complaint or considers a possible violation of the Act on its own initiative.

The Competition Authority carries/conducts a market investigation, by approaching the undertakings suspected of breaching the Act with a demand for information, or carries/conducts a controlled investigation of the premises of these undertakings.

A formal case is opened with the Competition Authority. The Competition Authority examines the information received. Based on this examination, the Competition Authority decides on one of the alternative steps below:

(i) The case is handed over to the Public Prosecutor for Serious Economic Crime (the "**SEC**"), who carries out the subsequent investigation. The SEC may engage in criminal interrogations or (further) control investigations. The investigations carried out by the SEC are carried out in accordance with criminal procedures. The case handling will typically last for one to three years. The case is concluded with a decision to a) close the proceedings with no further actions, or b) bring charges against the undertaking(s) concerned before the courts.

(ii) The case is turned over to the Competition Council. The Act's provisions on case handling, consultation procedures, right to

appeal apply. Case handling will typically last for one year. The case is typically concluded with an injunction, which may be appealed to the Competition Appeals Tribunal. Decisions made by the Competition Appeals Tribunal may be brought before the courts. During the course of (ii), the Competition Authority may decide to turn over the case to the SEC.

(iii) The Competition Authority may decide to close the proceedings with no further actions.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

According to Section 17 of the Act, the Competition Council may demand all the information, including financial statements, accounting records, transcripts of books, other business documents and electronic data, that it believes necessary for its activity or for deciding whether the provisions of this Act apply to a certain situation. Section 17 may be applied to legal or physical persons not involved in a suspected violation of the Act, for the purpose of conducting an investigation.

Parties failing to comply with a request to provide information pursuant to Section 17 may be subject to fines, and the Competition Council may also impose daily or weekly penalty payments on any party failing to submit information demanded by the Competition Council.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

For use in connection with the Competition Council's activities, the Competition Authority may conduct control investigations, which imply that the Competition Authority is granted access to the premises and means of transport of an undertaking or association for the purpose of gaining insight into and making copies of information kept at the site, including financial statements, accounting records, books and other business documents, regardless of the information medium used.

The Competition Authority's control investigations may only be conducted on the basis of a previously obtained court order and against due proof of the investigators' identities.

The Act does not contain any restrictions as to how frequent the Competition Authority may conduct control investigations. In recent years, the Competition Council has carried out approximately 10 control investigations per year.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

In connection with control investigations, the Competition Authority may request oral statements and demand that persons who are comprised by the investigations show the contents of their pockets, bags, *etc.* to enable the Competition Authority to obtain knowledge of such contents and, if necessary, make copies thereof.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

The Competition Authority may make copies of documents as a result of the search being undertaken.

If the conditions of the undertaking or association make it impossible for the Competition Authority to make copies of documents comprised by the investigation on the day when the control investigation is conducted, the Competition Authority is entitled to take the documents away for copying. The material which the Competition Authority has removed must be returned to the undertaking together with a set of copies of the information the Competition Authority has extracted for its further examinations, not later than three weekdays after the day of the inspection.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

The Competition Authority may make identical electronic copies (mirror images) of the data content of electronic media comprised by the control investigation. The mirrored material must be sealed when the Authority leaves the premises of the undertaking or the association. The undertaking that is the target of a control investigation is entitled to appoint a representative who can be present when the seal is broken and during the Authority's review of the mirrored material. The Competition Authority is obliged, not later than 25 weekdays after the control investigation, to deliver to the undertaking that is the target of the investigation, a set of copies of the information that the Authority may have extracted from the mirrored material. When the review of the mirrored material has been completed, the mirrored material must be stored in a sealed condition. The mirrored material must be deleted if in the Authority's assessment it does not contain evidence of any violation of the competition rules. If the Authority decides to proceed with the case, the mirrored material must be deleted when the case has been finally decided.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The competition authorities do not have any other investigative powers than those explained above.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

If the Competition Authority decides that a suspicion of anti-competitive conduct is strong enough to open formal violation proceedings, the competition authorities are obliged to hear the undertaking concerned before a formal decision is made. In the course of such hearing procedure, the undertaking concerned is entitled to file a written representation. Moreover, the undertaking concerned may request a meeting with the competition authorities to make an oral representation.

Before formal infringement proceedings have been initiated, the undertaking concerned may demand access to file and thereby gain access to relevant documents of the proceedings. However, the access to such documents is limited to a certain extent and does not comprise information obtained with regards to a criminal investigation.

4.9 How are the rights of the defence respected throughout the investigation?

If the Competition Authority has probable cause to suspect that an infringement of the Act will lead to a criminal conviction, the

Competition Authority is obliged to hand over the case to the SEC. Accordingly, undertakings concerned will be treated as "suspects" and will thus be protected by the provisions of the Administration of Justice Act. Accordingly, the right against self-incrimination applies. Moreover, the "suspect" has the right to be represented by a lawyer.

If the Competition Authority does not expect that an infringement of the Act will lead to a criminal conviction, the right to defence of the undertakings concerned will be covered by its right to be heard.

4.10 What rights do complainants have during an investigation?

The Act contains certain rights for a party to an investigation. In a case initiated by a compliant from a third party, the undertaking subject to the complaint is considered a party to the case. To the contrary, the complainant will in most cases not be regarded as a party to the complaint. Accordingly, the rights of complainants are limited, and complainants' rights are generally limited to access to file with regard to information about themselves.

The reason for the limited access to information regarding an investigation is based on the need to prevent competitors from gaining access to confidential information gathered by the competition authorities during an investigation to the detriment of effective competition.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Third parties have very limited rights in relation to an investigation. Third parties may apply for access to file under the Act on Public Access to Documents in Administrative Files. However, access to file under these rules is generally exempted from application under the Act, and the access to file for third parties is therefore very limited. Generally, no other rights apply to third parties in relation to investigations conducted by the Danish competition authorities.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The Danish Competition Act does not explicitly provide for interim relief. However, interim relief is available under the Danish Administration of Justice Act and may presumably also be available in cases regarding competition law violations.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

There are no restrictions on the Danish Competition Authority's ability to bring enforcement proceedings and/or impose sanctions with regards to ongoing infringements of applicable competition law. However, if an infringement has ended, the Competition Authority must initiate proceedings to impose sanctions no later than five years after the infringement ended, as the offence is subsequently obsolete.

7 Co-operation

7.1 Does the competition authority in Denmark belong to a supra-national competition network? If so, please provide details

Yes. The Danish competition authorities cooperate with the European Commission and all other European Member States through European Competition Network (ECN).

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

According to Article 12 of 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, the Commission and the competition authorities of the Member States can provide one another with and use in evidence any matter of fact or of law, including confidential information, for the purpose of applying Articles 81 and 82 of the Treaty.

Information exchanged may only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under Article 12 may also be used for the application of national competition law.

With regards to natural persons, information can only be used in evidence to impose sanctions where the laws of the transmitting authority provide similar sanctions for infringements of Article 81 and 82 of the Treaty, or the information has been collected in a way which respects the same level of protection of the rights of defense of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

8 Leniency

8.1 Does the competition authority in Denmark operate a leniency programme? If so, please provide details.

Yes. Anyone who acts in breach of the prohibition against anti-competitive agreements under the Act or Article 81 of the Treaty by entering into a cartel agreement may upon application be granted withdrawal of the charge that would otherwise have led to a fine being imposed for participating in the cartel, if the following criteria are satisfied:

The applicant must be the first one to approach the authorities about the cartel, submitting information that was not in the possession of the authorities at the time of the application, and: (i) before the authorities have conducted a control investigation or a search regarding the matter in question, the applicants must give the authorities specific grounds to initiate a control investigation or conduct a search or inform the police of the matter in question; or (ii) after, the authorities have conducted a control investigation or a search regarding the matter in question, enable the authorities to establish an infringement in the form of a cartel.

Withdrawal of the charge will be granted only if the applicant cooperates with the authorities throughout the entire course of the

case, brings his participation in the cartel to an end no later than by the time of application, and has not coerced any other party into participating in the cartel.

If an application for withdrawal of the charge does not meet the requirements set out above, the application will be treated as an application for reduction of the penalty.

Moreover, anyone in breach of the prohibition against anti-competitive agreements under the Act or Article 81 may apply for the reduction of the fine that would otherwise have been imposed for participation in the cartel, if the applicant submits information about the cartel that constitutes significant added value compared with the information already in the possession of the authorities, and if the applicant cooperates with the authorities throughout the entire course of the case, brings his participation in the cartel to an end no later than by the time of application, and has not coerced any other party into participating in the cartel.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

The Competition Council may issue orders to put an end to infringements of the Act. Moreover, acting upon concerns that it may have in relation to infringements of the Act, the Competition Council may, furthermore, decide that commitments made by an undertaking are binding.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

Infringements of the Act constitute criminal offences which may be punishable by fine. Fines may be imposed on both undertakings and individuals. The prosecution of offences under the Act is generally left to the public prosecutor. The Danish Competition Act does not contain an explicit maximum fine level mirroring Community legislation. However, it can generally be assumed that the Danish courts will apply a (significantly) lower level of fines than applied by the EC Commission. The largest single fine incurred by a Danish undertaking engaged in antitrust violations was EUR 670,000 (DKK 5 million) incurred by Danish dairy producer Arla in 2006.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

The Competition Authority may impose daily or weekly penalty payments on an undertaking failing to submit information demanded by the Competition Council under the Act. Moreover, the Competition Authority may request the SEC to initiate proceedings to impose fines on an undertaking infringing the Act by failing to comply with requirements to provide information or providing incorrect or misleading information to the competition authorities or concealing matters of importance for the case for which the information is obtained.

10 Commitments

10.1 Is the competition authority in Denmark empowered to accept commitments from the parties in the event of a suspected competition law infringement?

If an undertaking suspected of competition law infringement makes commitments to accommodate concerns of the Competition Council, the Competition Council may conclude an infringement investigation by making the commitments binding on the undertaking. The Competition Council must respect the principle of proportionality when accepting commitments. Accordingly, the Competition Council will not be able to make offered commitments binding upon an undertaking, where such commitments are more extensive than necessary.

10.2 In what circumstances can such commitments be accepted by the competition authority?

For commitments to be acceptable to the Competition Council, the commitments must meet the concerns of the Competition Council. Moreover, such commitments must effectively bring an end to the anti-competitive practice identified by the Competition Council or in other ways fulfil the purpose of the Act to promote efficient resource allocation in society through workable competition for the benefit of undertakings and consumers. However, the Competition Council has the discretion to determine whether commitments offered meet the concerns of the Competition Council.

10.3 What impact do such commitments have on the investigation?

If the Competition Council makes commitments binding on an undertaking, the investigation of a possible infringement will be terminated.

The Competition Council may revoke a decision to make commitments binding, if the actual conditions have changed on a point important for the decision, the conduct of the parties to an agreement, *etc.*, is contrary to the commitments made, or the decision was made on the basis of incorrect or misleading information from the parties to the agreement, *etc.*

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

It is not possible to appeal procedural decisions made by the Competition Authority or the Competition Council to the Competition Appeals Tribunal during an investigation.

Decisions that may not be appealed to the Competition Appeals Tribunal may be brought before the Danish courts or the Danish Ombudsman (in Danish: "*Folketingets Ombudsmand*").

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Section 19(1) of the Act contains an exhaustive list of decisions by the Competition Authority or the Competition Council that may be appealed to the Competition Appeals Tribunal. Decisions by the Competition Council must be appealed to the Competition Appeals Tribunal no later than four weeks after the decision became known to the complainants.

Such decisions may not be brought before the Danish courts or another administrative authority, before the Competition Appeals Tribunal has made its decision.

The Competition Appeals Tribunal consists of a Chairman, who is qualified for the post as a Supreme Court Judge, and four other members. Two of these are legal experts, while two are economic experts. The Competition Appeals Tribunal can carry out a complete examination of a case on its merits, both regarding the applicable law and the factual circumstances of the case. Based on this examination, the Competition Appeals Tribunal may decide to revoke a decision made by the Competition Authority or the Competition Council and remit the case for renewed assessment or replace the decision with its own. Moreover, the Competition Appeals Tribunal may adhere to the decision.

Decisions made by the Competition Appeals Tribunal may be brought before the courts of law within eight weeks after the decision has been communicated to the parties concerned. If this time limit is exceeded, the decision of the Appeals Tribunal is final.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

As described above (see question 4.3), the Competition Authority's control investigations may only be conducted on the basis of a previously obtained court order and against due proof of the investigators' identities.

Before a control investigation, the Competition Authority files a request for a court order with the relevant city court. The court will generally only verify that the Competition Authority has the necessary authority to carry out the contemplated control investigation. Accordingly, the court will not try the discretion made by the Competition Authority that a control investigation is necessary.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

According to Article 15 of Council Regulation (EC) No. 1/2003, the Danish competition authorities, acting on their own initiative, may submit written observations to the Danish courts on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the Danish courts. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to the Danish courts. With the permission of the court in question, it may also make oral observations.

The Act does not contain a similar access for the Danish competition authorities to submit written or oral observations to Danish courts on issues relating to the application of Danish competition law. However, pursuant to the Danish Administration of Justice Act third parties have access to intervene in cases before the courts, if such third parties can demonstrate the necessary legal interest. Accordingly, it is assumed that the Danish competition authorities are able to submit written or oral observations to Danish courts under the right to intervene.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Private parties affected by conduct infringing applicable competition law may bring actions before the Danish courts to challenge the infringing conduct for the purpose of stopping the conduct and/or claim damages. Such actions take place before the civil courts in accordance with the rules set out in the Danish Administration of Justice Act.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

In a recent decision by the High Court of Eastern Denmark of 20 May 2009, *Forbruger-Kontakt a-s* was awarded damages of EUR 10 million (DKK 75 million) from Post Danmark A/S as a consequence of Post Danmark A/S's abuse of its dominant position by way of selective price cutting (exclusionary practices). This is the highest amount of damages awarded by the Danish courts for competition law violations.

This case is a landmark decision in Denmark and sets out the court's position in relation to several issues, such as the basis of liability, fulfilment of other conditions for the award of damages and not least the calculation of the loss.

Cases regarding private enforcement actions before the Danish courts are still rare. Save from the decision of the High Court of Eastern Denmark of 20 May 2009 mentioned above, we have, *inter alia*, knowledge of the following successful claims for damages arising out of competition law:

- **Decision by the Supreme Court of 20 April 2005 (case 387/2002) *GT Linien A/S***: The Supreme Court ordered the Danish State Railways to pay an amount of EUR 1.34 million (DKK 10 million) to the bankruptcy estate of GT Linien A/S for breach of dominance contrary to Article 86 (now Article 82) of the EEC Treaty.
- **Decision by the Maritime and Commercial Court of 15 October 2004 (cases V 174/02, V 175/02 and V 176/02) *Ekko A/S***: Damages for infringement of the prohibition against anti-competitive agreements by application of dissimilar conditions to equivalent transactions.
- **Decision by the Maritime and Commercial Court of 3 October 2002 (case V 15/01) *Ekko A/S:*** Damages for infringement of the prohibition against anti-competitive agreements by application of dissimilar conditions to equivalent transactions.
- **Decision by the Gentofte City Court of 5 May 2006 (case BS 18/2005) *Peter Dahl A/S***: Damages for infringement of the prohibition against anti-competitive agreement in relation to the participation in a cartel agreement.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Denmark covered by the national competition rules?

The Act is applicable to anti-competitive agreements and/or conduct that have effects in Denmark irrespective of the location of the undertakings concerned. Accordingly, anti-competitive conduct outside of Denmark that has anti-competitive effects in Denmark is covered by Danish competition law. Moreover, cases concerning infringement of Articles 81 and 82 of the EC Treaty, including cases involving parallel application of sections 6 and 11 of this Act, may be dealt with by the national competition authority if the case has ties to Denmark.

14.2 Please set out the approach adopted by the national competition authority and national courts in Denmark in relation to legal professional privilege.

According to Community practice (case 155/79, *AM & S Europe Limited* and cases T-125/03 and T-253/03, *Akzo*) correspondence between a client and its external legal counsel is covered by the legal privilege and such correspondence may not be included in the competition authorities' investigations of anti-competitive conduct. There is no Danish practice on the extent of the legal privilege under Danish law. However, it is assumed that the principle of legal privilege applies under Danish law.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Denmark in relation to matters not covered by the above questions.

As stated in question 9.2 above, infringements of the Act constitute criminal offences which may be punishable by fine. Fines may be imposed on individuals. Accordingly, fines have been imposed on managements of undertakings (managers or managing directors) in various cases, such as:

- **Decision by Copenhagen City Court of 1 April 2009 (case SS 2-1923/2008) *Danish Bus Operators*:** Fine imposed on members of the management amounting to EUR 3,350 - 4,700 (DKK 25,000 - 35,000) for their participation in infringements of the prohibition against anti-competitive agreements; and
- **Decision by Frederiksberg City Court of 17 February 2009 (case SS 2-7791/07) *Danish Christmas Tree Growers Association*:** Fine imposed on a member of the management amounting to EUR 2,100 (DKK 15,000) for the members participation in infringements of the prohibition against anti-competitive agreements.

In other cases, members of management have accepted ticket fines of up to EUR 13,400 (DKK 100,000) for their participation in infringement of the Act.

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Since 2003, Jesper has been a renowned lecturer at the University of Copenhagen lecturing the course "Competition and Marketing law", and he has been lecturing the course "Procurement and Competition Law" at the Danish Bar and Law Society.
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Simon's main areas of specialisation are EC-law, Competition Law, Public Procurement Law, State Aid law, Contract Law and litigation. Simon has extensive experience as a lecturer at Copenhagen University, University of Aarhus and University of Stockholm. Moreover, Simon has considerable litigation experience and he has litigated cases before the Court of First instance and the Danish Maritime and Commercial Court as well as the Danish High Court. Within his areas of expertise Simon advises public authorities as well as national and international private clients. Simon has filed a number of notifications to the European Commission and the Danish Competition Authority pursuant to the Treaty of Rome, the Merger Control Regulation and the Danish Competition Act.
Simon is named "skilled, energetic and ambitious" by Chambers. Moreover Simon is credited in Legal 500.

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Estonia

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Estonia? If more than one, please describe the division of responsibilities between the different authorities.

The Estonian Competition Authority (*Konkurentsiamet*; hereinafter referred to as the '**ECA**') is primarily responsible for enforcing competition laws (the Competition Act, *Konkurentsiseadus*) in Estonia. The ECA is a governmental agency within the administrative jurisdiction of the Ministry of Economic Affairs and Communications.

As some competition law violations (such as cartels and repeated offences in dominance and merger control related violations) are criminalised, the proceedings with respect to such matters are led by the State Prosecutor's Office, who co-operates with the ECA. In such cases sanctions are imposed by the courts.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The ECA is an integrated authority, which merged with previously separate communications, the energy market and railway regulators at the beginning of 2008. Further to the merger, the ECA consists of three divisions - competition division, railway and energy regulatory division and communications regulatory. Hence, the different divisions of the ECA regulate also specific sectors.

The ECA is not responsible for the enforcement of rules on state aid and unfair competition, which are also contained in the Competition Act. State aid rules are enforced by the European Commission, but internal coordination related thereto is the responsibility of the Ministry of Finance; unfair competition provisions are subject to private enforcement.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Estonia?

There are no specific, publicly available rules or principles on the prioritising cases. However, the ECA officials announced in 2008 that the fight against hard-core cartels is the ECA's main focus. Cases relating to abuse of dominance (in particular, by incumbent companies) are also rather frequent. As concerns opening investigations based on complaints, the ECA officials have indicated that they choose the cases to be investigated based on whether a violation of competition rules appears likely and significant on the basis of the complaint.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The first chapter of the Competition sets out the scope of application of the Act (Section 1) and defines some basic concepts ("undertaking" in Section 2 and "goods market" in Section 3).

The second chapter of the Competition Act regulates restrictive agreements. Section 4(1) sets out the general prohibition on agreements, concerted practices and decisions by associations of undertakings which restrict competition similarly to Article 81(1) of the EC Treaty. Section 4(2) provides an exemption to certain agreements of agricultural producers and Section 5 establishes the *de minimis* exemption. Section 6 provides grounds for exemptions similarly to Article 81(3) of the EC Treaty and Section 7 sets the legal basis for adopting group exemption regulations. Finally, Section 8 provides the restrictive agreements are void from conclusion.

The third chapter of the Competition set out rules for dominant undertakings. Section 13(1) provides a definition for "an undertaking in dominant position", Section 14 for "an undertaking having special or exclusive rights" and Section 15 for "an undertaking in control of essential facilities". According to Section 13(2), undertakings with special or exclusive rights or in control of essential facilities are considered dominant. Section 16 contains a prohibition on the abuse of dominant position similarly to Article 82 of the EC Treaty. Further, Sections 17 and 18 set out certain specific restrictions and obligations on undertakings with special or exclusive rights or in control of essential facilities.

The sanctions for the breach of the above referred rules are contained in the ninth chapter of the Competition Act and in the Penal Code. Section 735 of the Competition Act sets out misdemeanour sanctions for abuse of dominance and Section 737 for the violation of obligations of undertakings with special or exclusive rights or in control of essential facilities, whereas Sections 399 and 402 of the Penal Code (respectively) set out criminal sanctions for the repeated violations of the same rules. The sanctions for the violations of the prohibition on restrictive agreements are set out in Section 400 of the Penal Code.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

The Competition Act contains certain exemptions to agreements of agricultural producers (see the extract of the Competition Act § 4(2) in question 2.1 above). Laws on some specific sectors (such as

electronic communications, energy markets, water supply) also contain sector specific market regulation rules.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

There is no official procedure to obtain ECA's approval prior to a course of action (except in the case of notifiable mergers). Nevertheless, the ECA is generally open to unofficial meetings with undertakings to discuss the contemplated actions. However, the opinions given by the ECA official in the course of such discussions are not binding to the ECA.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

Complaints can be made under administrative, misdemeanour or criminal procedures.

A complaint (application) for initiating administrative procedures should be submitted to the ECA in writing and should contain the following information: name of the person submitting the application; clearly worded content of the application; date of submission; preferred manner of delivery of an administrative act or other document; and details necessary for delivery. The application must be signed by the person filing the application or by the representative of the person. Any relevant documentation available to the person submitting the application should be annexed to the application. If the application is clearly unjustified or if an action concerning the same matter has been filed with the European Commission or a decision of the European Commission concerning the same matter has entered into force, the ECA returns the application without a review. The ECA may return the application without review also if an action concerning the same matter has been filed with a competition authority of another Member State.

The law does not set out specific rules on the complaints to be submitted under misdemeanour or criminal proceedings in competition cases. Hence, the general procedural rules are applicable. A complaint for initiating misdemeanour procedures can be submitted with the ECA, who should notify the complainant within 15 days whether it initiates misdemeanour proceedings or not. The law does provide more specific rules on the content of such complaint.

A complaint for initiating criminal procedures should be submitted to the ECA or the Prosecutor's Office orally or in writing. An oral report of a criminal offence which is submitted directly on site of the commission of the offence is recorded in a report, and a report of a criminal offence communicated by telephone is recorded in writing or audio-recorded. There are no more specific requirements on the complaint of a crime.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

No official statistics are available, but based on the overview of cases published on the ECA's website, the majority of cases appear to have been initiated based on third party complaints.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

The stages of an investigation process depend on the type of proceedings.

In administrative proceedings, the proceedings are carried out by the ECA. There are no specific stages or time limits for the investigation. However, it is a general principle of the Estonian administrative law that administrative proceedings must be carried out without delay.

In misdemeanour proceedings, the ECA acts as a body performing extra judicial proceedings and can impose misdemeanour penalties on undertakings violating the Competition Act. No specific stages or time limits are set out for such proceedings.

In criminal proceedings, the ECA acts as a pre-trial investigator in close co-operation with the State's Prosecutor Office to bring the matter to the court. The final decision is taken and the fine is imposed by the court. Hence, in case of criminal proceedings, pre-trial and trial phase can be distinguished.

In practice, the administrative and misdemeanour proceedings and the pre-trial investigation phase by the ECA usually take less than a year. There is not enough practice available yet to make generalisations on the duration of the trial phase of criminal proceedings.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Yes, under the administrative procedure, the ECA may request the submission of information from all natural and legal persons, or their representatives, as well as from all central and local government agencies, or from officials representing them. The ECA must provide a written request, which must set out, *inter alia*, the purpose of and the legal basis for the request for information. The term for submission of the information cannot be less than ten calendar days. The ECA may also require the submission of originals of documents, drafts or other materials, or true copies of these.

The ECA has rather broad rights also under the criminal procedure rules - it can require submission of documents; perform hearing of witnesses, interrogation, confrontation, comparison of statements to circumstances, presentation for identification and investigative experiments; and inspect the scene of events, documents and any other objects.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

Yes, under the administrative procedure, the ECA may inspect (without prior warning or special permission) the registered office and place of business of an undertaking (including the enterprises, territory, buildings, rooms and means of transport of the undertaking) during working hours of such place of business.

Outside of working hours, the inspection may only take place with the consent of the undertaking. The inspection must be carried out with the knowledge of the undertaking, or its representative or employee, and they have the right to be present during the inspection. The inspector performing the investigation must be authorised by the ECA. The inspector has the following rights during the inspections:

(i) to immediately examine documents, their drafts, and other materials relating to the activities of the undertaking, and to obtain, at the expense of the person under inspection, copies or transcripts thereof;

(ii) to immediately examine data or databases kept in electronic form on computer and electronic data media held at the registered office or place of business of the undertaking under inspection and to make printouts and electronic copies of these at the expense of the undertaking under inspection; and

(iii) to request the undertaking (or a representative or an employee) to submit explanations in writing.

In case of criminal proceedings, it is possible to perform a search of any building, room, vehicle or enclosed area in order to find and remove evidence necessary for the adjudication of a criminal matter. Such search may be conducted on the basis of an order of the Prosecutor's Office or a court ruling, or exceptionally of the ECA.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

Yes, it can request individuals to provide explanations at the ECA or on the site (including during on-site inspections). Please see also questions 4.2 and 4.3 above.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

Yes, please see questions 4.2 and 4.3 above.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

Yes, please see questions 4.2 and 4.3 above.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

In case of criminal proceedings, the ECA can request the Police Board and the Security Police Board to collect evidence through surveillance activities such as covert examination and replacement of object, covert examination of postal or telegraphic items, covert observation of information transmitted through technical communication channels and staging of a criminal offence. Some of such activities require the permission of a preliminary investigation judge.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

The opportunities depend on the type of the proceedings.

In administrative proceedings, before the ECA issues an injunction or takes any measures, the alleged infringers (but also complainants and third parties) have the possibility to provide their opinion and objections in a written, oral or any other suitable form. In practice, the ECA usually send the draft of its intended decision to affected persons for commenting before adopting it. In general, everyone has the right, in all stages of administrative proceedings, to examine documents and files, if such exist, which are relevant in the proceedings and which are preserved with an administrative authority, subject to exceptions necessary to protect confidential information.

In misdemeanour proceedings, the accused has the right to know which misdemeanour matter is subject to hearing with regard to him/her and examine the reports on procedural acts and give statements concerning the conditions and course of the procedural acts, the results of the proceedings and the reports on the procedural acts, whereas minutes must be taken of the statements. After the misdemeanour report is issued, the accused has the right to file objections and evidence concerning the misdemeanour proceeding with the ECA and examine the misdemeanour file at the ECA within 15 days as of the receipt of a copy of the misdemeanour report.

In criminal proceedings, during the pre-trial investigations the suspect has the right to know the content of the suspicion and give, or refuse to give testimony with regard to the content of the suspicion, submit evidence, requests and complaints, examine the report of procedural acts and give statements on the conditions, course, results and report of the procedural acts, whereas minutes must be taken of the statements. After the pre-trial investigation is completed, a copy of the criminal file is given to the party for examination. The party has may submit requests to the Prosecutor's Office within ten days thereafter and the Prosecutor's Office is to review the request within ten days.

4.9 How are the rights of the defence respected throughout the investigation?

The rights of defence depend on the type of proceedings.

In administrative proceedings, the party can have a representative, who may represent him/her in a proceeding in all procedural acts which, arising from law, need not be performed personally by the party in the proceeding.

In misdemeanour proceedings, the rights of the defence are respected from the first procedural act performed. The ECA has to provide the party with the opportunity to use the means of communication in order to contact the counsel. The counsel defending the party may participate in the performance of a procedural act concerning the party, but the failure of the counsel to appear will not hinder the performance of the act. The counsel has the right to submit evidence and requests and use technical equipment in the performance of the defence obligation unless this hinders the performance of a procedural act; participate in the proceedings together with the person subject to proceedings or independently and contest a procedural act or decision of the ECA. In principle, the party may apply for state legal aid if its rights of defence could not be secured otherwise.

In criminal proceedings, the rights of defence are essential and that is why they are more thoroughly set out in law than in previous proceedings. A counsel may participate in a criminal proceeding as of the moment when a person acquires the status of a suspect in the proceedings and in a pre-trial investigation it is already mandatory as of presentation of the criminal file. The right to the assistance of a counsel, to confer with the counsel without the presence of other persons and to be interrogated and participate in confrontation, comparison of testimony to circumstances and presentation for identification in the presence of a counsel, are considered to be few of the main rights of a suspect. A counsel has the right to submit

evidence, requests and complaints, examine the report of procedural acts and give statements on the conditions, course, results and minutes of the procedural acts, whereas minutes must be taken of such statements; use technical equipment in the performance of the duties of defence if this does not obstruct the performance of procedural acts; participate in the investigative activities carried out in the presence of the person being defended during the pre-trial investigation, and pose questions, examine the record of interrogation of the person being defended and the record of detention of the suspect and, upon the completion of pre-trial investigation, all materials in the criminal file. In certain instances there is a possibility that a counsel is appointed by an investigative body, Prosecutor's Office or court.

4.10 What rights do complainants have during an investigation?

The rights of complainants depend upon the type of proceedings.

Please see question 4.8 above on the rights of complainants in administrative proceedings.

The law does not set any specific rights for complainants in misdemeanour proceedings. However, as noted in question 3.2, where a complaint for initiating misdemeanour procedures is submitted with the ECA, the ECA should notify the complainant within 15 days whether it initiates misdemeanour proceedings. If the proceedings are not initiated, the complainant has the right to file an appeal against the activities of the ECA (see question 11.1 below).

There are no specific rights for complainants in criminal proceedings either. However, the ECA or the Prosecutor's Office should notify the complainant whether criminal proceedings are initiated or not within ten days as of the receipt of the complaint. Under the general rules of criminal proceedings, victims of a crime have various rights. There is no practice yet as concerns victims in competition crimes.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Third party rights depend on the type of proceedings.

Please see question 4.8 above on the third party right in administrative proceedings.

In misdemeanour proceedings, there are no rights specifically stipulated in law for the third parties.

In criminal proceedings, the third parties have the right to submit evidence, requests and complaints, examine the report of procedural acts and give statements on the conditions, course and results of the procedural acts, whereas minutes must be taken of such statements. If confiscation of the property of the third party is decided in criminal proceedings, then he/she has the right to know the content of the suspicion and give or refuse to give testimony with regard to the content of the suspicion; know that his/her testimony may be used in order to bring charges against him/her and be interrogated and participate in confrontation, comparison of testimony to circumstances and presentation for identification in the presence of a counsel.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The availability of interim injunctions depends on the type of proceedings.

In case of administrative procedures, the ECA can impose an injunction (please see question 9.1 below), which could in fact constitute an interim measure or a final decision.

Under the general rules of criminal proceedings, the Prosecutor's Office and preliminary investigation judge may:

(i) exclude suspect or accused from office if the person may continue to commit criminal offences in case he/she remains in the office, or if remaining in the office may prejudice the criminal proceeding;

(ii) seize property if it is necessary to secure a civil action, confiscation or fine; and

(iii) prohibit the suspect or accused from leaving his/her residence or place suspect or accused under arrest, if the he/she might otherwise evade criminal proceedings or continue committing crimes.

It is not clear whether and to what extent such injunctions are applicable in case of competition crimes.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

There are no specific timelines in the case of administrative procedures.

Time limits exist for conviction of misdemeanour and criminal offences - misdemeanour offences expire after two years have passed between the commission thereof and the entry into force of the conviction decision, and competition crimes expire after five years. In the case of a continuous offence, the limitation period is calculated as of the termination of the continuous act.

7 Co-operation

7.1 Does the competition authority in Estonia belong to a supra-national competition network? If so, please provide details

Yes, the ECA co-operates with competition authorities from other EU member states within the European Competition Network (ECN). When necessary, it assists the European Commission in carrying out competition supervision and on-site controls. In addition, the ECA participates in the activities of the International Competition Network, and attends the OECD's annual Global Forum on Competition and the WTO round tables at the Ministry of Foreign affairs. The ECA has established close co-operation with the competition authorities of Latvia and Lithuania.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

There are no clear national rules on this, but the principles concerning information exchange with the ECN are set out in the European Commission's Notice on cooperation within the Network of Competition Authorities. In general the networks could be used for informing each other of new cases and envisaged enforcement decisions, coordinating investigations, assisting each other with investigations, exchanging evidence and other information and discussing various issues of common interest.

8 Leniency

8.1 Does the competition authority in Estonia operate a leniency programme? If so, please provide details.

Currently, there is a procedure resembling leniency in some of its aspects, but it does not constitute a leniency programme comparable to the ECN model leniency programme, as the granting of leniency is in the discretion of the State Prosecutor only. However, a new leniency program, which is similar to the ECN leniency programme, is currently pending in the parliament.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

In case of administrative procedures, the ECA may issue injunctions requiring the addressee to perform the act required by the injunction, refrain from a prohibited act, terminate or suspend activities which restrict competition or restore the situation prior to the offence. In the case of failure to comply with an injunction, the ECA may impose a penalty payment of up to 50,000 Estonian kroons (approximately €3,200) on individuals and up to 100,000 Estonian kroons (approximately €6,400) on legal persons. The penalty payment can be imposed repeatedly until the injunction is adhered to. Moreover, the ECA can also make recommendations to state agencies, local governments, legal persons and individuals as to improvement of the competitive situation.

In case of misdemeanour and criminal proceedings the ECA or the court (respectively) can impose the sanctions described in question 9.2 below.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

The maximum fine for legal entities in misdemeanour cases (i.e. mainly the abuse of dominance cases) is currently 500,000 Estonian kroons (approximately €32,000) and for individuals 18,000 Estonian kroons (approximately €1,150).

The maximum punishment for legal entities in criminal cases (i.e. cartels and repeated abuse of dominance) is a fine of 250 million Estonian kroons (approximately €16 million) and for individuals a fine of 500 average daily wages and/or up to three years' imprisonment. The law sets out a general rule, which requires the confiscation of the assets gained as a result of a crime. It is not clear how this rule should be applied to competition offences. The draft law pending in the parliament envisages also a five-year ban on entrepreneurial activities as a sanction for competition crimes and provides more specific rules on the determining the minimum and maximum amount of fine in hard-core cartel cases.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

Please see question 9.1 above. Additionally, a legal person who refuses to submit or fails to timely submit documents or information required by the ECA, who submits false information or who submits documents or information in a manner which does not permit exercise of supervision may be fined with up to 50,000 Estonian kroons (approximately €3,200).

In case of misdemeanour and criminal cases, the offences against administration of justice may be punishable by a fine, arrest or imprisonment, depending on the nature of the offence.

10 Commitments

10.1 Is the competition authority in Estonia empowered to accept commitments from the parties in the event of a suspected competition law infringement?

There is no clear regulation on commitments. In practice, recommendations with respect to a certain course of conduct set out in the ECA's decisions could have a comparable effect. Moreover, the parties' cooperativeness and willingness to offer unofficial commitments could have an impact on the choice of the type of proceedings initiated by the ECA.

10.2 In what circumstances can such commitments be accepted by the competition authority?

Please see question 10.1 above.

10.3 What impact do such commitments have on the investigation?

Please see question 10.1 above.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

The details related to submitting appeals during investigation depend on the type of procedures.

In administrative proceedings, any person whose rights have been affected by the investigations, may file a challenge with the director general of the ECA or a complaint with the administrative court within 30 days from becoming aware of the act or measures affecting his/her rights. The challenge is to be reviewed by the director general of the ECA within ten days, but in case there is a need for further investigation, the deadline may be extended by up to 30 days. The decision rendered in the challenge proceedings can be appealed with the administrative court within 30 days. The court is to review the complaint within reasonable time.

In misdemeanour proceedings, a party concerned by the proceedings and also third persons can submit a complaint on the acts of the ECA with the director general of the ECA any time during the investigations until the ECA has rendered its final decision (the decision on the termination of proceedings or on confiscation can be challenged within 15 days from the receipt of the copy of the respective decision). The director general of the ECA is to review the complaint within five days. The decision of the director general can be appealed with a county court within ten days from the receipt or from becoming aware thereof. The county court is to review such complaint within five days.

In criminal proceedings, a party concerned by the proceedings and also third persons can file a complaint on the acts of the ECA with the Prosecutor's Office and on the acts of the Prosecutor's Office with the State Prosecutor's Office any time before statement of charges has been drawn up. The State Prosecutor's Office is to review the complaint within 30 days. The decisions of the State Prosecutor's Office can be appealed with a county court within ten days from becoming aware thereof. The court is to review such complaint within 30 days.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

The details related to submitting appeals on final decisions depend on the type of procedures.

In administrative proceedings, the procedure is similar to the appeals that can be submitted during the investigation. This means that any person whose rights have been affected by the investigations, may file a challenge with the director general of the ECA or a complaint with the administrative court within 30 days from becoming aware of the act or measures affecting his/her rights.

In case of misdemeanour decisions, appeals against the ECA's decisions in misdemeanour proceedings can be filed with a county court by the parties to the proceedings within 15 days of the date when the decision became available for examination at the ECA. The court reviews the matter in regular court proceedings. The judgment of the county court can be appealed with the Supreme Court by way of cassation, subject to the Supreme Court granting the leave for cassation.

In case of criminal proceedings, the final decision is rendered by a county court and such decisions can be appealed with the district court. The judgment of the district court can be appealed with the Supreme Court by way of cassation, subject to the Supreme Court granting the leave for cassation.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

As explained above, in criminal cases final decisions are made and sanctions imposed only by the courts.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

In hearing a matter related to the application of Articles 81 or 82 of the EC Treaty, the courts are to involve the ECA in the proceedings to provide an opinion.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Yes, third parties can bring private claims in civil proceedings or as a civil claim in criminal proceedings.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

There have not been court decisions on claims for damages in civil or criminal proceedings.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Estonia covered by the national competition rules?

In principle, such conduct could be covered by national competition rules if it has impact on the markets in Estonia. There is no relevant practice on any such cases.

14.2 Please set out the approach adopted by the national competition authority and national courts in Estonia in relation to legal professional privilege.

Not enough practice available to make generalisations in this respect.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Estonia in relation to matters not covered by the above questions.

The Estonian procedural rules related to competition law enforcement are rather complicated as three types of proceedings are possible. This has caused problems in practice and in number of occasions the ECA's decisions made rendered in misdemeanour proceedings have been overruled due to procedural infringements.

The choice of the type of proceedings and hence, the applicable measures and sanctions, is to a great extent in the ECA's discretion, as there is no case law setting out clear principles in the respect. Furthermore, in some instances, it is theoretically possible that the same case could be investigated simultaneously in different proceedings. Therefore, it is often difficult to predict possible consequences of competition law violations.

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LEPIK&LUHAÄÄR | LAWIN

Lepik & Luhaäär LAWIN has ample expertise in handling matters related to all aspects of competition law, including merger control, restrictive agreements, abuse of dominance, etc. The lawyers of the competition law team have a long-term experience in advising reputable local and international clientele with everyday matters and complicated cross-border actions, but also in representing clients in the Estonian Competition Authority and courts.

The firm puts a strong emphasis on the prevention of competition violations by the clients and managing their competition risks. The firm works closely with the Estonian Competition Authority to organise trainings to leading Estonian and international undertakings, as well as to carry out competition compliance programmes and audits.

Lepik & Luhaäär LAWIN's competition law team is considered as one of the best in Estonia by the international independent law directories:

"Lepik & Luhaäär LAWIN earns a place in our top-tier due to a client list of global companies which the firm advises on standalone competition issues as well as merger clearance for significant transactions" (Legal 500 EMEA 2008).

"This firm has a long-standing practice, and is "fully equipped with competition lawyers", according to observers, who also praise its lawyers' endeavours to boost awareness of current Estonian competition legislation among clients" (Chambers Europe 2008).

Finland

Mikko Eerola

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Waselius & Wist

1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Finland? If more than one, please describe the division of responsibilities between the different authorities.

The Finnish Competition Authority ("the **FCA**") is the principal competition enforcement authority in Finland responsible for investigating alleged competition restrictions and taking necessary actions to eliminate competition restrictions and their harmful effects. The FCA also makes proposals to the Market Court on prohibiting mergers and competition restraints and on imposing competition infringement fines.

The Market Court is a special court hearing competition public procurement and certain market law cases. The Market Court is the first instance regarding decisions on prohibiting mergers and on imposing fines, and acts as the first appellate instance regarding the decisions made by the FCA. The decisions of the Market Court can, with certain limitations, be appealed against to the Supreme Administrative Court.

In addition to the FCA, competition restrictions are investigated by State Provincial Offices, particularly with respect to regional competition restrictions. By order of the FCA, the State Provincial Offices can initiate proceedings with a view to eliminating such restrictions.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The provisions of the Electricity Market Act (172/2004, as amended) and the Natural Gas Market Act (508/2000, as amended) are enforced by the Energy Market Authority, whereas the Communications Market Act (393/2003, as amended) is enforced by the Finnish Communications Regulatory Authority ("**FICORA**"). Where there is more than one competent authority in relation to a particular matter, it is for the authorities to agree on which authority will be responsible for investigating the restriction. The FCA has agreed on broad terms of cooperation and allocation of cases with both the Energy Market Authority and the FICORA. For more details on sector-specific legislation please refer to question 2.2.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Finland?

According to Section 12 of the Act on Competition Restrictions (480/1992, as amended, "the **Competition Act**"), if the FCA finds that a business undertaking or an association of business undertakings restrains competition it shall initiate necessary proceedings. However, the FCA may decide not to take action if, regardless of the competition restriction, competition in the said market can be deemed to be effective as a whole. According to the preparatory works of this Section, such situations may be at hand, for example, when the prohibited activity has already been terminated, or when the investigations have no relevance for the protection of effective and sound economic competition as a whole. In this assessment particular attention is paid to the effect of the competition restriction on the functionality of the markets, benefit of the consumers and to the protection of the freedom of undertakings to operate without unjustified barriers and restrictions.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The substantive competition law provisions are laid down in Chapter 2 of the Competition Act, which includes provisions on anti-competitive agreements (Section 4 which is analogous to Article 81 of the EC Treaty), and abuse of a dominant position (Section 6 which is analogous to Article 82 of the EC Treaty). The rules on merger control are laid down in Chapter 3a. Competition law infringements are not criminalised under the Competition Act.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

Finland has adopted some sector-specific regulation, i.e. the Communications Market Act, the Electricity Market Act and the Natural Gas Market Act. These sector-specific rules are applied concurrently with the general rules of the Competition Act.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

Since 1 May 2004, it is no longer possible to obtain prior approval of any agreement or course of action.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

There is no formal procedure for complaints in terms of a complainant having to use, for example, a specified form for the complaint. However, the FCA has issued guidelines as to what information a complaint should generally include.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

There are no specific statistics available from the FCA, but it is likely that the majority of investigations are based on requests for action made by a third party, such as customers, competitors and suppliers.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

The FCA can start investigations on its own initiative or based on requests for action made by a third party, whose right, interest or obligation is affected by the competition restriction. Before initiating an investigation based on Article 81 or 82 of the EC Treaty, the FCA must inform the Commission and the members of the ECN in accordance with the Council Regulation (EC) No 1/2003.

The FCA can start investigation by, for example, conducting a dawn raid at the premises of the undertaking, or request information from undertaking(s) involved in an alleged competition restriction and from third parties. In practice, proceedings before the FCA involve submission of written responses and other communication, including meetings, with the FCA.

The FCA also hears the parties concerned before making its decision. As a rule, this is carried out by giving the parties concerned an opportunity to comment on the FCA's draft decision.

Whilst according to the principles of administrative law, decisions must be given without undue delay, there are no specific statutory time limits set for the proceedings in the FCA, the Market Court or the Supreme Administrative Court.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Yes. According to Section 10 of the Competition Act, a business undertaking or an association of business undertakings shall, at the request of the FCA, provide the FCA with the necessary information and documents needed for the investigation of the content, purpose and impact of a competition restriction and clarifying competitive conditions. The information shall, whenever requested, be delivered in writing. The obligation to provide information and produce documents does not generally apply to business secrets of technical nature.

Pursuant to Section 15a of the Competition Act, the Market Court may oblige a party concerned to appear before it and to produce its business correspondence, book-keeping and other documents clarifying the competition restriction. If this obligation is not complied with or the party concerned fails to appear before the Market Court without a legal hindrance, the party concerned may, with a threat of a fine, be obligated to produce the documents or appear before the Market Court.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

Both the FCA and the State Provincial Office have the right to conduct an investigation in business premises. The investigation can be conducted by giving prior notice or by conducting dawn raids. The undertaking concerned must, for the purpose of inspection, allow the authorities to enter any business premises, storage areas, land and vehicle in its possession. The official conducting the inspection has the power to examine the correspondence, book-keeping, computer files and other documents of the undertaking concerned which may be relevant for the investigation. The official can also seal business premises and books or records for the period of investigation to the extent deemed necessary. When necessary, the police can, upon request by the FCA and the State Provincial Office, provide official assistance in the course of an inspection.

If the European Commission has, pursuant to the Council Regulation (EC) No 1/2003, ordered an inspection to be conducted in premises other those referred to above, the Market Court may, upon application by the Commission, grant an authorisation to conduct such an inspection. The Market Court may, however, prohibit an inspection if it would be arbitrary or excessive.

The rules on competition authorities' powers to enter premises for the purpose of conducting investigations are expected to be amended in connection with a reform of the Competition Act proposed to become effective in January 2010. For more details, please refer to question 14.3.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

Section 10 of the Competition Act covers also interviews with the parties concerned. Further, the officials conducting an investigation at the business premises have the right to request oral explanations on the spot and make a record of the answers obtained.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

The competition authorities have the right to take copies of the documents found during the investigation, but the original documents cannot be removed.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

When conducting investigations at the undertaking's business premises, the authorities can require that electronic data be made accessible. Accordingly, the right to take copies applies also to electronic copies of data held on the systems at the inspected premises.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

In addition to what has been presented above, the competition authorities have no other investigative powers.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

The party accused of anti-competitive conduct has the general right to defence and, in connection therewith, the right to be heard. This right entails, among other things, the right to submit responses to grounds and evidence presented against it. Further, prior to issuing an interlocutory injunction or an undertaking pursuant to Section 13 of the Competition Act, the FCA shall also grant the party accused of anti-competitive conduct an opportunity to be heard unless the urgency of the matter or some other specific reason demands otherwise.

During preliminary proceedings at the Market Court the party accused of anti-competitive conduct is granted an opportunity to respond to the proposal either orally or in writing. The proceedings may, however, be completed even if the party accused of anti-competitive conduct has not submitted the requested reply on the proposal.

4.9 How are the rights of the defence respected throughout the investigation?

Even though the party accused of anti-competitive conduct has an extensive obligation to contribute to the investigations of the competition authorities (in terms of, e.g. producing documents), it is settled decisional practise that the respective party has the right to refuse to answer such oral or written questions, in which the undertaking is required to evaluate the legality of its conduct. Whilst the FCA has no right for that particular reason to demand, for example, acknowledgment of an undertaking's participation in a competition restriction, the party accused of anti-competitive conduct may, however, be obliged to provide the competition authorities with documents wherefrom the undertaking's actions may emerge.

As explained above, the party accused of anti-competitive conduct has the right to be heard and it can also submit statements to the FCA on its own initiative. The undertaking also has, with certain limitations, the right to access documentation relating to the competition restriction which may affect the investigations.

Although the party accused of anti-competitive conduct is obliged to provide documents including business secrets, the competition authorities must, with certain limitations, keep the respective information in secret. The obligation to provide information does not generally apply to business secrets of technical nature.

4.10 What rights do complainants have during an investigation?

The complainant has the right to be heard and it can also submit statements to the FCA on its own initiative. The complainant is further entitled to see documents relating to the competition restriction which may affect the investigations. This entails, with certain limitations, the right to see confidential documents. It should, however, be noted that the complainant is not automatically considered as a party concerned following an appeal against the FCA's decision. In such cases the right to access files is subject to conditions laid down below in connection with the question 4.11.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

The FCA can request comments or statements from third parties (e.g. competitors, customers and suppliers) during the course of the investigations. Interested third parties can also submit statements to the FCA on their own initiative. However, third parties have no guaranteed right to make representations or be heard.

The right of third parties to access documents is governed by the Act on the Openness of Government Activities (1999/621, as amended). This provides that a request to obtain a document must be sufficiently detailed to enable the FCA to identify the document concerned. The FCA must assist the party requesting information to make the request individualised.

The party that requests information is not generally required to submit any grounds for the request or prove its identity. The FCA decides whether to provide or disclose all or part of the requested document or not. If the FCA decides not to do so, it must state its reasons. A request for obtaining documents must be processed without undue delay.

According to a recent decision of the Supreme Administrative Court (Case No. 12.4.2006/883), the FCA has the right not to disclose information if disclosure would jeopardise the successful completion of its pending investigations.

The rules relating to access to file are expected to undergo some changes in the forthcoming reform of the Competition Act. For more details, see question 14.3.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

If the application or implementation of a competition restriction needs to be prevented immediately the FCA may issue an interlocutory injunction to such effect. The FCA may also temporarily obligate, for example, a business undertaking to deliver products to another undertaking on similar conditions as offered by the same business undertaking to other undertakings. To enforce an injunction or an obligation, the FCA may propose a conditional fine. The decision to impose the conditional fine is resolved by the Market Court.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

Although the majority of competition restrictions investigated by the FCA concern ongoing suspected competition restrictions, the FCA has, when necessary, also powers to investigate alleged infringements carried out in the past.

The FCA must make a decision on the principal issue or a proposal for a competition infringement fine within 60 days from issuing an interlocutory injunction. Upon the FCA's application made during that period, the Market Court may extend the time limit. If the FCA fails to make a decision on the principal issue or fails to make a proposal by the time limit laid down, the injunction or obligation will lapse.

A competition infringement fine cannot be imposed unless the issue has been referred to the Market Court within five years from the date of expiry of the competition restriction or from the date the

FCA has been informed of the competition restriction. This rule is expected to be further clarified in the forthcoming reform of the Competition Act. For more details, please refer to question 14.3.

7 Co-operation

7.1 Does the competition authority in Finland belong to a supra-national competition network? If so, please provide details

Yes. The FCA is member of the European Competition Network (the "**ECN**") and the International Competition Network (the "**ICN**"). Further, the cooperation between Nordic competition authorities is active, in addition to which the FCA has entered into a bilateral cooperation agreement with the Russian competition authorities.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

When applying Articles 81 or 82 of the EC Treaty, the FCA and the Commission can provide one another with necessary information relating to the concerned competition infringement. Pursuant to Council Regulation (EC) No 1/2003, if natural persons are concerned, such information can only be used in evidence to impose sanctions where the laws of the transmitting Member State provide for similar sanctions for a breach of Articles 81 and 82 to those in the receiving Member State. Further, if the information has been collected in a manner respecting the same level of protection of defence as is required under the laws of the receiving Member State it can be used in evidence to impose non-custodial sanctions.

8 Leniency

8.1 Does the competition authority in Finland operate a leniency programme? If so, please provide details.

Yes. The leniency programme under Sections 8 and 9 of the Competition Act entered into force on 1 May 2004. Full immunity from the competition infringement fines can be granted for cartel-related infringements such as price-fixing, market-sharing, limiting supplies or bid-rigging that are in breach of Article 81 of the EC Treaty and the equivalent national provision, Section 4 of the Competition Act.

Full immunity is available only for individual business undertakings and not for associations of business undertakings. However, the fact that a company has acted as a ringleader in a cartel does not prevent it from receiving full immunity.

Alternatively, a reduction of the fines (up to 100%) may be granted for infringements of both Articles 81 and 82 of the EC Treaty as well as the equivalent national provisions, Sections 4 and 6 of the Competition Act. The reduction can be granted to individual business undertakings as well as to associations of business undertakings. Reductions of fines are also available for ringleaders.

The leniency application is submitted to the FCA, which is the only authority that can grant full immunity from fines under Section 9. The Market Court can, after the proposal of the FCA, decide on the reduction of fines or, alternatively, not to impose any fines.

The rules on leniency are proposed to undergo changes in the forthcoming reform of the Competition Act. For more details, please refer to question 14.3.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

When the FCA has reached its final decision the accused party(ies) and parties concerned are informed and, subsequently, a public version is published on the FCA's website. In the decision the FCA can make orders (obligations, injunctions and prohibitions) including that:

- the infringing party terminate the conduct that breaches the Competition Act;
- a party must deliver a product to another undertaking under certain conditions; and
- certain commitments shall be binding on the party.

The FCA can attach conditional fines to these orders which can be made final by the Market Court, as explained in question 9.3.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

If the FCA finds that a business undertaking or an association of business undertakings has infringed Articles 81 or 82 of the EC Treaty or the corresponding provisions of the Competition Act, it can ask the Market Court to impose a competition infringement fine, unless the conduct is deemed to be minor or the imposition of the fine is otherwise unjustified in respect to safeguarding competition.

In fixing the amount of the fine, the gravity, extent and duration of the competition restriction are relevant. The Market Court can impose competition infringement fines up to 10% of the undertaking's annual global turnover. Personal civil or criminal liability cannot attach to individual directors or managers under the Competition Act, but such a liability may arise, for example, when submitting false evidence to an authority. For more details, please refer to question 9.3.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

The FCA can also impose a conditional fine to enforce the obligation to notify and to provide information relating to merger control, the obligation to produce information/documents detailed in question 4.2 and the obligation to allow inspection at the undertakings premises. The Market Court shall order the conditional fine to be paid if the business undertaking concerned fails to comply with these obligations by, for example, refusing to hand out necessary documentation or by interfering with the inspections.

10 Commitments

10.1 Is the competition authority in Finland empowered to accept commitments from the parties in the event of a suspected competition law infringement?

Yes. The FCA can close the case by making a decision ordering that certain commitments are binding on the party(ies) involved in the alleged competition restriction. Commitments may be both structural and/or behavioural.

10.2 In what circumstances can such commitments be accepted by the competition authority?

Whilst commitments can only be presented by the party accused of alleged anti-competitive conduct, they are often negotiated with the FCA towards the end of the investigation. The FCA has a wide discretion as to whether to accept the commitments or not. In order for the commitments to be accepted they must be capable of eliminating the restrictive nature of the conduct concerned.

10.3 What impact do such commitments have on the investigation?

The effect of commitments accepted by the FCA is the termination of the competition infringement investigations. The FCA can, however, re-open the case if any fact on which the decision is based has significantly changed, if the undertaking(s) concerned violate their commitments or if the decision has been based on insufficient, false or misleading information.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

No. The FCA's decisions to conduct inspections, impose injunctions or impose temporary obligations or the decisions of the Market Court to authorise inspections cannot be appealed against. Also, if the FCA has given intermediate decisions as to, e.g. the existence of a dominant position, such decisions cannot be appealed against separately.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

The FCA's decisions can be appealed to the Market Court by the subject of the decision and by other persons whose right, obligation or interest is directly affected by the decision. The appeal must be filed within 30 days from receipt.

The Market Court's decisions can in turn be appealed to the Supreme Administrative Court by the subject of the decision and by other persons whose right, obligation or interest is directly affected by the decision. The same time limit of 30 days applies to the appeal to the Supreme Administrative Court.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

In addition to what has been detailed above, the FCA has no wider judicial scrutiny.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

When appealing against the decision of the FCA to the Market Court, the FCA has a status as a party. Also, if the decision of the Market Court is appealed to the Supreme Administrative Court, the Supreme Administrative Court has a possibility to hear the FCA.

When a private party brings an action for damages before a court, the FCA is sometimes heard as an expert.

As stated above in question 4.1, before starting an investigation based on Article 81 or 82 of the EC Treaty, the FCA must inform the Commission and the members of the ECN in accordance with the Council Regulation (EC) No 1/2003. The Commission may, in its discretion, submit its observations pursuant to the Council Regulation (EC) No 1/2003.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

The FCA can initiate investigations of alleged competition restrictions based on complaints by third parties. Furthermore, such third parties, i.e., undertakings that have suffered damage from another undertaking's intentional or negligent breach of the Competition Act or Article 81 or 82 of the EC Treaty, can challenge abusive conduct and bring an action for damages before district courts or arbitral tribunals (when arbitration has been chosen by contracting parties as dispute resolution venue). Damages that could be compensated by an infringing party may entail expenses, price difference, lost profits and other direct or indirect damage resulting from such action.

The damages can be adjusted should full compensation be unreasonable in view of the nature and extent of the damage suffered, the circumstances of the parties involved and other relevant issues. No punitive damages can be awarded.

The rules on private action are expected to be revised in the forthcoming reform of the Competition Act. For more details, please refer to question 14.3.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

There is no reliable information on the frequency or success of private enforcement actions as a significant part of such actions are brought in arbitration proceedings or out of court settlements. The frequency of actions before the district courts has so far been limited, and it would appear that successful claims are also limited in number.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Finland covered by the national competition rules?

The Competition Act's substantive provisions are not applicable to competition restrictions which restrain economic competition outside of Finland insofar as they are not directed against Finnish customers. Further, the Competition Act does not apply to

competition restrictions that may affect trade between the EU Member states. These restrictions are covered by Articles 81 and 82 of the EC Treaty.

14.2 Please set out the approach adopted by the national competition authority and national courts in Finland in relation to legal professional privilege.

Even though the Competition Act does not include any provisions in respect of legal professional privilege, it follows from the principles of administrative and procedural law that any correspondence relating to the defence between outside attorney and the undertaking accused of anti-competitive conduct is considered confidential. The decisional practise on legal professional privilege in Finland is close to non-existent, but it is generally considered that the competition authorities will apply the principles laid down in Community legislation.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Finland in relation to matters not covered by the above questions.

The Competition Act is currently undergoing a comprehensive reform, which is proposed to become effective in January 2010. Although no definitive information on the exact contents of the reform are available at the moment, among other things, the procedural rules governing the investigation of competition restriction matters and actions for damages are expected to be revised. Currently, some of the most important reform proposals having a bearing on the enforcement provisions of the Competition Act include the following:

- increased possibilities for the FCA to prioritise matters and close cases without initiating any investigations;
- the parties involved no longer have access to documents for so long as the FCA's investigation is pending, if the disclosure of such documents would adversely affect the investigation of the matter;
- information submitted in leniency proceedings would be treated as confidential, if the disclosure of such information were to adversely affect the investigation of the matter or the position of the leniency applicant;
- the officials of the FCA and the Provincial State Offices would, pursuant to the Market Court's authorisation, be entitled to conduct inspections or investigations (including dawn raids) also in other than business premises, such as in the homes of employees;
- the clarification of the rules relating to the statutory limitation periods applicable to the right to claim damages based on the Competition Act, including the introduction of the statutory limitation period to ten (10) years from the occurrence or termination of the competition infringement or two (2) years from the final (non-appealable) decision of the FCA or a court;
- the possibility for other than undertakings, including consumers and public bodies, to bring an action for damages under the Competition Act;
- laying down detailed provisions on the conditions for receiving a reduction of competition infringement fines in cartel matters and by establishing transparent applicable reduction percentages;
- the clarification of the rules relating to the limitations to the imposition of a competition infringement fine: the infringement fine could no longer be imposed unless the issue has been referred to the Market Court within five (5) years from the date of expiry of the competition restriction; and
- a possibility for the FCA to allow a leniency applicant to continue participation in cartel activities in order to secure the successful investigation of the cartel without alerting other cartel members to the ongoing investigations.

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Mikko has over the past 10 years acted for a number of leading international and domestic corporations subject to the FCA's investigation and proceedings before the Market Court, both in respect of alleged abuse of dominance cases and cases involving alleged horizontal competition restrictions. Mikko has also acted for both notifying parties and interested third parties in numerous merger control proceedings before the FCA. Mikko is recognised as a leading EU and competition lawyer in Finland in a number of leading legal reference guides.

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WASELIUS & WIST

Waselius & Wist is a leading Finnish commercial law firm committed to providing highly specialised legal services in complex business transactions. The EU and competition law practice of Waselius & Wist covers all aspects of EU and national competition law, including cartels, prohibited agreements and practices, abuse of a dominant market position, merger control, public procurement and state aid.

We regularly take charge of submitting notifications to the national and EU competition authorities and coordinate multi-jurisdictional merger control notifications in large international transactions. We also assist clients in identifying and assessing possible competition law concerns in agreements, trade practices and business policies and offer assistance with competition audits, compliance programmes and training.

Our team also has extensive experience in advising on general EU law in a wide range of industries and regulated markets, including in particular EU regulations and directives in the fields of capital markets, banking, financial services, insurance, consumer goods as well as the energy and telecommunications industries.

France

Olivier Cavézian

Jones Day

Sabine Thibault-Liger

1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in France? If more than one, please describe the division of responsibilities between the different authorities.

The enforcement of competition laws in France was reformed by the Law for the Modernisation of the Economy No. 2008-776 of 4 August 2008 ("LME"), supplemented by several implementing ordinances and decrees, along with the Law No. 2009-526 of 12 May 2009 on the simplification and clarification of law and streamlining of procedures. All these texts recast the relevant Articles of the French Code of Commercial Law ("FCC").

The Competition Authority (the "Authority"), which replaced the Competition Council in January 2009, has quasi-exclusive jurisdiction to enforce national and EC competition law in France. Investigations of cases handled by the Authority are supervised and carried out by the Authority's Instruction Services headed by the *Rapporteur Général*.

Until 2009, the enforcement of competition law in France was divided between the former Competition Council, and the French Minister of Economy (the "Minister"), whose services were mainly involved in the investigation phase.

Since the entry into force of the LME, the Minister is only entrusted with residual jurisdiction over small and medium undertakings' practices impacting competition on local markets, without any effect on the trade between the EU Member States (*Article L. 464-9 FCC*), the so-called "micro-anticompetitive practices" ("micro-PACs").

The Minister's residual jurisdiction has been strongly criticised inasmuch as it could arguably unnecessarily emphasise the dual enforcement of French competition laws in France, and insufficiently protect the rights of the defence of small and medium undertakings in the field of micro-PACs (mainly due to the opacity of the applicable procedure, and to the absence of any review/appeal process provided by law against the Minister's decisions).

Furthermore, French courts are also entitled to apply French and EC competition law (*see below questions 12.1 and 13.1*), as well as the provisions laid down in Book IV, Title IV of the FCC which prohibit unfair/restrictive commercial practices.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

Micro-PACs excepted (*see question 1.1 above*), the Authority enjoys a monopoly for the enforcement of competition law in all economic sectors provided that the anticompetitive practice concerns an economic activity (production, distribution or provision of services), irrespective of the private or public status of the undertakings concerned (*Article L. 410-1 FCC*).

In particular, the Authority is fully competent to handle cases involving regulated activities. The agencies in charge of the regulation of specific sectors (ARCEP for postal services and electronic communications, CSA for audiovisual communication, and CRE for energy) which suspect the existence of anticompetitive practices in their sector, are required to refer the case to the Authority. They can also request an opinion from the Authority on competition issues raised in their sector. Conversely, the Authority will consult ARCEP, CSA and CRE when applying competition law in their respective sectors.

The Authority is also bound to consult the Banking Commission (*Commission bancaire*) in abuse of dominant position or anti-competitive agreement cases involving credit institutions in the financial and banking sectors (*Article 511-4 of the Monetary and Financial Code*).

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in France?

The Authority decides to investigate a case either on its own motion, upon proposal of the *Rapporteur Général*, further to receiving a complaint, or pursuant to a referral by the Minister of Economy. Complaints can be lodged by undertakings, the Minister of Economy, local authorities, and various organisations such as trade-unions and trade associations, chambers of commerce, and approved consumer associations. It must be noted that individual consumers cannot directly lodge complaints with the Authority.

The Authority dedicates its available resources to the most harmful infringements (cartels and most serious abuses of dominant position), and may carry out sector inquiries if it has reasonable grounds for suspecting that potential antitrust infringements have been perpetrated in the sectors concerned.

Furthermore, the Authority is entrusted with consultative powers which have been enhanced by the LME. The Authority is entitled to issue non-binding opinions concerning the competitive functioning of markets, on its own motion or upon request of various entities or organisations. The Authority can also address recommendations to the ministry in charge of the sector concerned aimed at improving the functioning of competitive markets. In addition, the Authority must be consulted regarding legislation regulating prices and draft legislation that is likely to restrict competition.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The Authority (and the Minister of Economy as far as micro-PACs are concerned) enforces the rules enshrined in Book IV, Title II, of the FCC. These rules provide for the control of: (i) anti-competitive agreements and concerted practices (*Article L. 420-1 FCC*, a prohibition which mirrors Article 81(1) EC); (ii) abuses of an individual or a collective dominant position (*Article L. 420-2(1) FCC*, a prohibition which mirrors Article 82 EC); (iii) abuses of a state of economic dependence by an undertaking or group of undertakings (not necessarily dominant) *vis-à-vis* a supplier or a customer (*Article L. 420-2(2) FCC*); and (iv) abusively low pricing practices (*Article L. 420-5 FCC*).

The practices which fall foul of the Article L. 420-1 and/or L. 420-2 prohibitions can be justified on the basis of Article L. 420-4 FCC when they (i) result from the implementation of laws or regulatory provisions, or (ii) promote economic progress (this second exemption basically mirrors Article 81(3) EC).

The Authority is also bound to apply Articles 81/82 EC when trade between the EU Member States can be affected by the practices investigated. The enforcement of Article 81(2) EC providing for the annulment of anticompetitive agreements which cannot be exempted is however vested in the civil or commercial courts.
Furthermore, individuals who fraudulently, personally played a decisive role in the creation, organisation or implementation of a cartel or an abuse of dominant position may be sued before the French criminal courts, in particular upon referral of the case by the Authority to the public prosecutor. However, these criminal provisions are seldom applied outside public procurement cases.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

The aforementioned substantive competition rules apply to all sectors provided that an economic activity is concerned (*Article L. 410-1 FCC*). That said, specific provisions applicable to the retail industry entitle the Authority, upon referral of mayors, to impose fines and/or behavioural or structural injunctions in case of abuse of dominant position or of economic dependence by one or several firms running retail stores (*Article L. 752-5 and L. 752-26 FCC*).

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

The parties cannot obtain prior approval of their agreements or market conduct from the Authority (or from the General Directorate for Competition Policy, Consumer Affairs and Fraud Control within the Ministry of Economy (DGCCRF)/Minister of Economy) and bear the burden of assessing their agreements themselves and deciding on the accurate course of action.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

Complaints can be lodged either with the Authority or the DGCCRF.

In the first case, one original and three copies of the complaint, along with one digital copy thereof, must be filed with the Authority's *Bureau de la Procédure* by certified letter or be hand-delivered to the Authority between 9 AM and 7 PM. Complaints must be made in writing and drafted in French. They must contain comprehensive background information on the facts, markets, undertakings concerned and provisions that have allegedly been infringed, as well as relevant supporting documentation. Upon receipt, the head of the *Bureau de la Procédure* sends the complaint to the *Rapporteur Général* who decides whether to investigate the case. In case of inadmissibility or withdrawal of a complaint, the Authority can investigate the case *ex officio*.

In the second case, if the DGCCRF intends to investigate the complaint, it must inform the Authority of the complaint prior to beginning the inquiry. The Authority can decide to investigate the case itself or leave it up to the DGCCRF to carry out the inquiry. In the latter case, the DGCCRF must inform the Authority of the outcome of said inquiry. The Authority may then decide whether or not to deal with the case.

No public information is available on the cases pending before the Authority and the DGCCRF as a result of a complaint or initiated *ex officio*.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

In 2008, among the 50 new cases investigated by the Authority, 38 were initiated by complainants, 6 by the Minister of Economy and 6 *ex officio*. In addition, 18 applications for leniency were filed in 2008.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

Basic timeline for an Authority investigation. On average, a period of eighteen months elapses between the initiation of a given case and the decision of the Authority on such case.

Action/Decision	Time Period
Initiation of the procedure (complaint / referral / *ex officio*)	
Inquiry and instruction (inspections / hearing of the parties by the case-handler if necessary / requests for information) Pre-SO, possibility to submit commitments (*see questions 10.1, 10.2 and 10.3*)	No specific timeframe - may last for several months / years from the initiation of the case
SO drafted by the case-handler and notified to the parties, the complainant and the Government Representative (*Commissaire du Gouvernement*) by the *Rapporteur Général* (possible decision to apply the simplified procedure in the most simple and/or least harmful cases)	No specific timeframe - several months / years from the initiation of the case
Written observations of the parties, complainant and *Commissaire du Gouvernement* to the SO / access to the file Application of the non contest/settlement procedure. At this stage, the parties can also chose not to contest the objections raised in the SO and benefit accordingly from a reduction of the fine	Two months from receipt of the SO + one additional month when exceptional circumstances require so

Report of the case-handler notified to the parties, the complainant and the *Commissaire du Gouvernement* (no report if the simplified procedure is applied; the case is brought directly to the collegial board)	No specific timeframe - in practice, several weeks/months from the receipt of the observations in response to the SO, or more in specific cases raising major difficulties
Reply of the parties to the report	Two months upon receipt of the report + one additional month when exceptional circumstances require so
Possible observations of the parties on the proceedings are sent to the hearing officer (HO) / Non-binding report of the HO to the President of the Authority	Observations submitted post-SO (no set timeframe) - HO's report delivered ten days prior to the hearing before the collegial board
Hearing before the Authority's collegial board / Oral observations of the *Rapporteur Général*, the parties, and the *Commissaire du Gouvernement*	No specific timeframe - generally, two to six weeks following the receipt of the replies to the report
Decision of the collegial board (the decision cannot rely on additional grounds of infringements to those contained in the report)	One or two months after the hearing
Notification of the decision to the parties - Publication of the decision on the Competition Authority's website (http://www.autoritedelaconcurrence.fr)	

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

The Authority can request parties to supply information and/or documents which are relevant to the case investigated. Such requests can be made orally during inspections at the undertakings' premises, at the Authority's premises upon request of the case-handler, or on the basis of written requests for information prior or further to inspections, if any.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

The agents of the Authority's Instruction Services are entitled to enter the parties' business premises and conduct unannounced inspections ("dawn raids") thereof. These inspections may be carried out either without any prior judicial authorisation (Article L. 450-3 FCC inspections), or on the basis of such prior judicial authorisation delivered by a judge (*juge des libertés et de la détention*) in whose jurisdiction the inspected premises are located (Article L. 450-4 FCC inspections). Article L. 450-4 FCC grants wider inspection powers than Article L. 450-3 FCC. The agents of the Authority may be assisted by DGCCRF agents in conducting the inspection.

Both kinds of inspection can be carried out on business premises, land and means of transport used for professional purposes. However, searches of private residences of directors, managers and other members of the staff of the investigated undertaking require prior authorisation of a judge. During both kinds of inspections, the agents can investigate physical records but also electronic data stored in computers, and interview members of the staff regarding factual issues. They cannot however require self-incriminating statements.

Furthermore, Article L. 450-4 entitles agents (i) to take original documents from the business or private premises (while only copies thereof can be seized during Article L. 450-3 inspections), and (ii) to place any commercial premises, documents and information media under seal for the duration of the inspection of those premises.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

During inspections authorised by a judge, the Authority's agents are entitled to interview individuals/employees about the suspected infringement.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

Originals of relevant documents can be seized *in situ* during an inspection authorised by a judge, either on the premises of the undertaking or at the managers'/employees' residence, provided that the documents seized are relevant to the case and not legally privileged. Only copies of documents may be taken when the inspection is not based on prior judicial authorisation.

The documents seized (original or copies) are listed in the official record (*procès-verbal*) which is drawn up at the end of the inspection.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

The Authority's agents are entitled to take electronic copies of data stored on the computer system at the inspected premises or at the managers'/employees' residences.

Digital evidence gathering methods raise critical issues with regard to the protection of the rights of the defence inasmuch as they may lead to illegal seizures of confidential or legally privileged digital documents, and/or information having no relevance to the case.

The *Cour de cassation* (French high civil court) considers that the inspection cannot be annulled in its entirety for this sole reason. Rather, the appeal judge having to decide on the validity of the conditions of the inspection has to identify the digital information illegally seized and request the Authority's agents to set aside/hand over such information unduly seized (*Judgment of the Cour de cassation of 20 May 2009, No. 07-86437*).

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

Upon request of the case-handler or the parties, the Authority's *Rapporteur Général* may appoint one or several experts during the instruction of the case. The expert investigation is subject to the adversarial principle. The expert fees are borne by the party who requested the expertise or, if requested by the case-handler, by the Authority itself, unless the Authority decides to have these fees paid by the infringing parties.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

The parties are granted the right to submit observations in response to the SO and a reply to the case-handler's report, if any (no report is issued under the simplified procedure). The parties also have the right to be heard by the hearing officer on procedural issues. Once they have received the SO they are granted full access to the file. Finally, they are entitled to deliver oral observations at the hearing before the collegial board of the Authority.

4.9 How are the rights of the defence respected throughout the investigation?

During inspections, the inspected undertaking has the right (i) to be informed of the nature of the alleged infringement prior to the beginning of the inspection, (ii) to be assisted by a lawyer, and (iii) not to incriminate itself for the suspected infringement when interviewed *in situ*. In addition, an ongoing Article L. 450-4 FCC inspection can be suspended or terminated by the judge who authorised such inspection in case of patent violation of the rights of the defence. Finally, an official record, listing the documents seized and mentioning potential incidents that occurred during the inspection, is drawn up at the end of the inspection.

Subsequently, the parties have a right of access to the investigation file once the SO has been issued. Furthermore, they are entitled to submit observations on the SO and a reply to the case-handler's report, in accordance with the adversarial principle requirements. Further to the parties' observations on the SO, the case-handler can remove certain objections which therefore do not appear in his/her report. The report circumscribes the scope of the decision which cannot be based on objections which are not mentioned in the report.

Since the LME, the parties can also submit written and/or oral observations to the Authority's hearing officer on alleged violations of their rights of the defence which occurred post-SO. The hearing officer may then recommend remedies to the breach in a non-binding report sent to the Authority's President (*Articles L. 461-4 and R. 461-9 FCC*).

Finally, the parties can submit oral observations at the hearing before the collegial board.

4.10 What rights do complainants have during an investigation?

The SO and the report are notified to the complainants, which are then entitled to submit written observations on said SO and report. Complainants can also submit observations to the hearing officer on procedural issues as soon as the SO has been notified, and deliver oral observations at the hearing before the collegial board of the Authority.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Third parties are entitled to provide the Authority with relevant information in relation to the case investigated. In practice, absent any public information on the cases pending before the Authority, third parties can provide such information when so requested by the Authority. Third parties can also request to be heard by the Authority at the hearing if they believe they can provide valuable information for the case (*Article L. 463-7 FCC*).

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The Authority can impose interim measures on contravening firms when so requested in case of emergency to protect the complainant's rights, economy, the industry concerned, and/or the consumers' interests (*Article L. 464-1 FCC*). Interim measures aim at preventing irreversible harm to competition resulting from suspected infringements to Articles L. 420-1, L. 420-2 or L. 420-5 FCC.

The request for interim measures must be subordinated to a claim on the merits of the case, and supported by sufficient evidence to presume the existence of an anticompetitive practice.

The Authority can order any interim measure that it considers necessary and appropriate to prevent or remedy the competition concerns. It is not bound by the requests of the complainant. Interim measures may consist in, *inter alia*, suspending the litigious practice, returning to the *status quo ante*, granting third parties access to an essential facility on non discriminatory conditions, etc.

The Authority may impose periodic penalty payments on the party concerned in order to guarantee the swift implementation of the interim measures granted, and fines in case of breach of the interim measures or failure to implement them.

A fast-track procedure, which generally lasts for less than six months, is followed. The parties and the *Commissaire du Gouvernement* can present their observations on the request for interim measures, and consult the file. No SO and no report are issued. Hearings on interim measures are held about three months following the request. Further to the interim measure decision, an investigation of the merits of the case is carried out, according to the ordinary procedure (*see above question 4.1*).

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The applicable time limits are aligned on those provided in EC competition rules (*Article 25 EC Regulation 1/2003*). The Authority cannot examine facts that took place more than five years earlier without any action having been taken to establish or sanction them. In any case, the limitation period applies if ten years have passed since the infringement has been brought to an end, without the Authority having reached a decision on the case. (*Article L. 462-7 FCC.*)

7 Co-operation

7.1 Does the competition authority in France belong to a supra-national competition network? If so, please provide details

The Authority is a member of the European Competition Network (ECN) which is composed of the national competition authorities (NCAs) of the 27 EU Member States and the EU Commission. The ECN promotes close cooperation between its members, through information exchange and case allocation in cases where Articles 81 and 82 EC apply. The Authority also takes part in the work of the ICN (along with the DGCCRF) and various other international fora including ECA (European Competition Authorities), the United Nations Conference on Trade and Development (UNCTAD), and the Competition Committee of the OECD.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

As a principle, the information, including confidential information, received from the ECN can be used by the Authority as evidence in a given case under investigation by the Authority and for which Articles 81/82 EC apply (*Article 12(1) EC Regulation 1/2003*). However, the confidential nature, as the case may be, of the

information collected through the ECN must be guaranteed (*Article 28 EC Regulation 1/2003*). In addition, the information regarding individuals originating from cases investigated by other NCAs cannot be used in national proceedings to impose criminal sanctions, unless both the law of the authority providing the information and that of the authority receiving it provide for similar criminal sanctions against individuals in similar cases (*Article 12(3) EC Regulation 1/2003*).

8 Leniency

8.1 Does the competition authority in France operate a leniency programme? If so, please provide details.

The Authority has been operating a leniency programme since 2001 on the basis of which total or partial immunity from fines may be granted to companies involved in cartels that apply for leniency (*Articles L. 464-2(IV) and R. 464-5 FCC; Competition Authority Procedural Notice of 2 March 2009 relating to the French Leniency Programme*).

Immunity from a fine or a reduction of the fine can be granted provided that the leniency applicant (i) provides the Authority with sufficient evidence of the existence of the cartel, (ii) ceases its involvement in the cartel (unless the investigation requires otherwise), (iii) fully co-operates with the Authority during the investigation proceedings, and (iv) has not destroyed or faked evidence, or disclosed its application for leniency except to other competition authorities.

Total immunity can be granted to the first applicant, provided that (i) it submits, orally or in writing, sufficient evidence of the existence of the cartel, and (ii) it did not take steps to coerce other undertakings into participating in the infringement. Undertakings which do not meet the conditions for total immunity may be eligible for a reduction of their fine (up to 50%), provided that they provide the Authority with evidence which represents significant added value with respect to the evidence already in the Authority's possession.

The application for leniency must be filed with the Authority through the *Rapporteur Général* either by certified letter, or orally. Further to the registration of the application, a written or oral statement is made by the undertaking's representative to the case-handler. The collegial board decides, on the basis of the case-handler's proposal, whether full immunity or a reduction of a fine can be granted.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

If the Authority considers that competition law has been infringed, it is entitled to issue a decision which orders the parties to put an end to their anti-competitive practice(s) and to impose a fine. The decision is published on the Authority's website. In general, the Authority's decision has immediate effect. The Authority may also issue injunctions aimed at restoring competition. It may also order the parties to publish the infringement decision or parts thereof in the press.

Conversely, the Authority may decide that there are no grounds for continuing the proceedings (i) in case of *de minimis* anticompetitive practice, (ii) when it considers that the existence of a prohibited practice has not been established, (iii) in case of commitments offered by the parties and accepted by the Authority (*see questions 10.1, 10.2 and 10.3*), or (iv) when a NCA of another EU Member State or the EU Commission has already dealt or is currently dealing with the same facts under Articles 81/82 EC.

The Authority may also close the case by issuing a non-admissibility decision in case of absence of *locus standi* of the complainant, time bar, or incompetence of the Authority to deal with the case.

Finally, the Authority may decide to stay the proceedings and refer the case to the Instruction Services for further investigation, or to stay the proceedings until the occurrence of a specific event.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

Before the Authority, infringing companies incur an individual fine of up to 10% of the annual worldwide turnover of the group to which they belong. If the infringer is not an undertaking, the maximum individual fine is EUR 3 million (*Article L. 464-2(I) FCC*). When the Authority applies the non contest/settlement procedure the maximum amount of the fine incurred is capped at 5% of the worldwide turnover and EUR 1.5 million for entities other than undertakings (*Article L. 464-2(III) FCC*). When the simplified procedure applies, the individual fine cannot exceed EUR 750,000 (*Article L. 464-5 FCC*).

The Authority is also entitled to order structural measures (dismantling, sale, etc.) in order to restore competition which has been hindered by the abuse of its dominant position by a merged entity (*Article L. 430-9 FCC*).

The competent civil or commercial courts may pronounce (i) the annulment of the infringing companies' anticompetitive agreements, and (ii) the payment of damages to the victims of their anticompetitive practice(s).

Finally, individuals who played a decisive part in the infringement risk a four-year prison sentence and/or a fine up to EUR 75,000 imposed by a criminal court (*Article L. 420-6 and L. 462-6 FCC*).

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

Undertakings which or individuals who oppose the conduct of the investigation incur criminal sanctions (a six-month prison term and/or a fine up to EUR 7,500) (*Article L. 450-8 FCC*). This includes cases where, for instance, the undertaking opposes the inspection as a whole, refuses to provide the requested information or documents, or provides incomplete, incorrect or misleading information or documents. The undertaking which opposes the conduct of the investigation also incurs an administrative fine up to 1% of its worldwide turnover (*Article L. 464-2(V) FCC*).

In addition, undertakings can be subject to a daily periodic penalty payment of up to 5% of their average daily turnover in order to comply with an order of the Authority to (i) provide the requested information or documents, and/or (ii) appear before the Authority in order to be heard during the proceedings (*Article L. 464-2(V) FCC*).

10 Commitments

10.1 Is the competition authority in France empowered to accept commitments from the parties in the event of a suspected competition law infringement?

The Authority is empowered to accept commitments from the parties instead of issuing an infringement decision, if they offer to modify their behaviour in a way that alleviates the competition

concerns raised by the Authority (*Articles 464-2(I) and R. 464-2 FCC; Competition Authority Notice on Competition Commitments of 2 March 2009*).

The commitments must aim at alleviating competition concerns which may constitute potential infringements to Articles L. 420-1, L. 420-2 or L. 420-5 FCC. They can materialise in all sorts of undertakings such as, for example, modifications or clarification of contractual clauses or membership criteria applicable to a selective online distribution network, and granting access to scarce or essential resources.

The commitment decision makes the commitments binding upon the offering parties either for an indefinite period of time, when the competition concerns must be remedied on a long-term basis, or for a limited period of time when the return to a competitive environment is anticipated.

10.2 In what circumstances can such commitments be accepted by the competition authority?

The Authority has discretion to accept or reject commitments offered by the parties. It is more likely to accept commitments in cases which do not necessarily *a priori* require the imposition of a fine, i.e. mainly unilateral or vertical practices restricting access to the market (e.g., refusals of access to rare resources, exclusivity clauses or a potential margin squeeze effect preventing market access, contractual clauses imposed by suppliers which prevent distributors from selling online their products, etc.). Conversely, the Authority refuses commitments in cases involving the most serious violations of competition law, such as cartels and abuses of dominant position cases that have already caused significant damage to the economy.

The commitments must be relevant, credible, verifiable, and proportionate. This latter condition requires that the commitments be necessary and sufficient to alleviate the competition concerns.

In addition, the commitments must be submitted by the parties prior to the SO within a timeframe set by the case-handler or the Authority's collegial board.

When the collegial board refuses the commitments, it refers the case back to the Authority's Investigation Services.

10.3 What impact do such commitments have on the investigation?

If the Authority accepts the commitments, its decision makes them binding upon the parties and concludes that there are no longer grounds for action, thereby closing the investigation of the case without any infringement decision. As opposed to infringement decisions, the commitment decisions do not draw conclusions on the anti-competitive nature of the litigious practice. They terminate the procedure without any recognition of liability of the parties, or imposing any sanction on them. The parties may however be bound to report to the Authority regularly on their compliance with the commitments imposed.

The Authority has full discretion to review commitments and, if needed, to decide, of its own initiative or upon request of a complainant, of the Minister of Economy, or of any other interested undertaking, to reopen the proceedings (i) in light of any developments that may occur on the relevant market, (ii) in case of failure to comply with the commitments, or (iii) if the commitment decision was based on incomplete, incorrect or misleading information provided by the parties. The violation or failure to comply with commitments may result in a fine not exceeding 10% of the undertaking's total worldwide turnover (*Article L.464-3 FCC*).

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

The parties (and the public prosecutor (*ministère public*)) can challenge the validity of (i) the judicial order authorising an Article L. 450-4 inspection, and (ii) the conditions in which the inspection itself was carried out before the First President of the Court of Appeal in whose jurisdiction the judge who delivered the judicial order authorising the inspection was (*Article L. 450-4 FCC*). Both appeals must be filed within ten days, and have no suspensive effect. An appeal against the conditions of the inspection itself can also be lodged within the same timeframe by persons brought into the proceedings subsequently on account of items seized during the inspection. The appeal procedure before the First President of the Court of Appeal may last six to eight months. The order rendered by the First President of the Court of Appeal can be further appealed on legal issues only before the Criminal Chamber of the *Cour de cassation*.

The conditions of Article L. 450-3 FCC inspections can be challenged *a posteriori* before the Authority when deciding on the merits of the case, and, on appeal, before the Paris Court of Appeal.

Post-SO, the parties can submit observations to the Authority's hearing officer on potential violations of their rights. The hearing officer delivers a non-binding report to the President of the Authority ten days prior to the hearing before the collegial board, which remains free to follow or not the hearing officer's conclusions.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

1. The parties (along with the Minister of Economy) can lodge an appeal for annulment or reversal of the Authority's decisions enforcing French and EC competition rules before the Paris Court of Appeal within one month from the notification of the decision (*Article L. 464-8 FCC*). Appeals against interim measure decisions must be filed by the parties or the *Commissaire du Gouvernement* before the same Court within ten days (*Article L. 464-7 FCC*). Commitment decisions can be appealed within one month either by the Minister of Economy or the complainant, provided that the latter can prove a legitimate interest, that is to say that the said commitments may have an effect on its own situation.

The appellant can request that the decision be set aside or amended. The appeal does not suspend the execution of the challenged decision, which remains fully enforceable (although the First President of the Court may decide otherwise if requested to do so).

Except in the case of appeals against interim measure decisions (where such appeals must be decided within one month), the Paris Court of Appeal is not bound by any time limit to render its judgment. In practice, the judgments are adopted within about six months from the filing of the appeal. The Court of Appeal can uphold or overrule the Authority's decision. In case of annulment of the decision, the Court of Appeal does not refer the case to the Authority but has to decide on the case, unless further investigation is required from the Authority.

2. The Paris Court of Appeal's judgments (including those related to interim measures) can be appealed within one month before the Commercial Chamber of the *Cour de cassation* by the parties to the appeal procedure, the Minister of Economy, and/or the President of the Authority when the Paris Court of Appeal has annulled or reformed the Authority's decision. (*Article L. 464-8 FCC*) Before the *Cour de cassation*, the appeal must be brought on legal, as opposed to factual, grounds only since the *Cour de cassation* has no jurisdiction to review the facts of the case.

The appeal before the *Cour de cassation* has no suspensive effect. There is no time limit for the *Cour de cassation* to render its judgment. In practice, the judgments are issued within about twelve months from the filing of the appeal.

The *Cour de cassation* can either (i) reject the appeal, thereby closing the case, or (ii) quash the appealed judgment. In the latter case, it may chose either to (i) remand the case to the modified bench of the Paris Court of Appeal, or (ii) settle the matter if it considers that it is able to do so.

It must be noted that French law does not provide for any review/appeal process against the Minister of Economy's decisions on micro-PACs. However, some commentators consider that the silence of the recent LME and corresponding decree might not prevent appeals against these decisions before the *Conseil d'Etat*, which is the Minister's natural judge.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

Civil and commercial courts have jurisdiction to apply French and EC competition law (*see below question 13.1*). As for criminal courts, they can theoretically impose antitrust criminal sanctions, although criminal antitrust suits have been very rare so far.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

The Authority and the EU Commission are entitled to intervene during court proceedings either by way of an *amicus curiae* brief and/or oral intervention on competition issues arising from the cases pending before a court. Written observations can be submitted even *ex officio* by the Authority and the EU Commission. Submission of oral observations is subject to prior approval by the national court.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Third parties that suffer damage as a result of an anti-competitive agreement or market conduct in breach of Articles L. 420-1 to L. 420-5 FCC and/or Articles 81/82 EC can initiate a private action to seek damages (either standalone or follow-on damages claims) and/or the annulment of said agreement before the competent civil or commercial courts. A 2005 decree has designated specialised courts throughout the country (eight civil courts (*Tribunaux de grande instance*) and eight commercial courts (*Tribunaux de commerce*)) with exclusive regional jurisdiction for antitrust litigation (*Decree No. 2005-1756 dated 30 December 2005 fixant la liste et le ressort des juridictions spécialisées en matière de concurrence, de propriété industrielle et de difficulté des entreprises*).

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

Thus far, very few private actions led to compensation of damage due to anti-competitive practices. Some of the main obstacles to the success of these claims are the burden of proof to enable the courts to calculate the damages awarded and the principle of strict compensation of the damage actually suffered.

One of the few examples of antitrust damages claims brought by consumers in France is the mobile phone operators cartel case where an approved consumer association introduced an action before the Paris commercial court in 2007, further to a 2005 decision of the then French Competition Council imposing a fine on the three French mobile phone operators for unlawful exchange of information which had led to increased prices (the case is still pending on appeal). In fact, since the average damage is estimated at about EUR 60 per capita, the damages awarded to each claimant would, in any event, be very limited.

14 Miscellaneous

14.1 Is anti-competitive conduct outside France covered by the national competition rules?

French competition rules may apply to anti-competitive conducts which have been initiated or implemented outside France provided that they have as their object or effect to restrict competition in France.

14.2 Please set out the approach adopted by the national competition authority and national courts in France in relation to legal professional privilege.

The Authority considers as legally privileged (i) written communications between outside lawyers (as opposed to in-house counsels) and their clients, along with (ii) internal notes which report the text or the content of such communications, and (iii) preparatory documents not necessarily exchanged with an outside lawyer provided that they were drawn up exclusively for the purpose of seeking legal advice from an outside lawyer in relation to the exercise of the client's rights of the defence in the present case.

In case of breach of legal privilege, the procedure is not automatically void in its entirety. A case-by-case approach is followed. In particular, the annulment of the whole procedure is unlikely when the Authority has relied upon other significant non-privileged documents to establish the infringement.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to France in relation to matters not covered by the above questions.

The enforcement of the FCC provisions prohibiting unfair/restrictive commercial practices enshrined in Book IV, Title IV of the FCC has not been entrusted to the Authority but remains within the jurisdiction of the civil and commercial courts. These

provisions prohibit practices which may harm competitors, but also clients or suppliers, without necessarily having an adverse impact on the market/competition. In particular, the application of these provisions does not require the existence of any collusion/anticompetitive agreement, nor any dominant position. Such provisions impose, *inter alia*, obligations regarding the content of invoices, require the communication of conditions of sale when requested, prohibit resale at a loss, abrupt termination of commercial relationships, etc.. The unfair/restrictive practices are investigated by the DGCCRF which can subsequently refer them to the courts.

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Greece? If more than one, please describe the division of responsibilities between the different authorities.

The Hellenic Competition Commission is the authority responsible for the enforcement of Greek law 703/1977, "On the Control of Monopolies and Oligopolies and the Protection of free Competition". As for the telecommunications/electronic communications/postal sector, the competent authority is the Hellenic Telecommunications and Post Commission. The Director General of the Directorate General of Competition ('DGC') oversees the general operation of the leniency programme.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The Hellenic Telecommunications and Post Commission (HTPC) ensures the proper implementation and the enforcement of competition laws in the telecommunications/electronic communications sector.

The Regulatory Authority of Energy (RAE) ensures the proper operation and the protection of competition laws in energy sector. The purpose of the RAE is to facilitate free and healthy competition in the energy market, the ultimate objective being to serve the interests of the consumer, whether the private householder or business, heavy or light industry, thereby contributing to the viability and development of the medium-sized business.

Both HTPC and RAE are independent administrative decision-making bodies ensuring the proper operation of the relevant markets and possess regulatory and supervisory powers to those of the HCC regarding the application of competition rules in those sectors.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Greece?

HCC conducts investigations, either upon a complaint lodged by the party interested, or upon request of the Minister of Development or *ex officio*, of specific sectors of the Hellenic economy. If HCC concludes that there are no conditions of effective competition in the aforementioned sector, it may, take any absolutely indispensable measure which concerns the structure of the market and aims at the creation of conditions for effective competition. Priority is given to cases which have a substantial impact on the functioning of markets in Greece and that are of actual importance to consumers.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

Greek law 703/1977, "On the Control of Monopolies and Oligopolies and the Protection of free Competition". The aforementioned law is based upon two basic rules which prohibit agreements between undertakings, and concerted practices that restrict, prevent, or distort competition (article 1) and abuse of dominant position in the relevant market (article 2). Furthermore, preventive control is expected to determine whether concentrations between undertakings affect competition (article 4 - 4f).

Agreements between undertakings, decisions by associations of undertakings and concerted practices of whatsoever kind, which have as their object or effect the prevention, restriction or distortion of competition, and in particular those which: a) directly or indirectly fix purchase or selling prices or any other trading conditions; b) limit or control production, markets, technical development or investment; c) share markets or sources of supply; d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby impeding competition in particular by refusing without valid justification to sell, purchase or conclude any other transaction; and e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts are prohibited. Any abuse by one or more undertakings of a dominant position within the national market as a whole or in a substantial part of it, shall be prohibited. Such abuse may, in particular, consist of: a) directly or indirectly imposing fixed purchase or selling prices or other unfair trading conditions; b) limiting production, consumption or technical development to the prejudice of consumers; c) applying dissimilar conditions to equivalent transactions with other trading parties, in particular by refusing without valid justification to sell, purchase or conclude any other transactions, thereby placing certain undertakings at a competitive disadvantage; or d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations or supplementary contracts which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The basic provisions of law 703/77 are implemented on restrictions on competition that do not affect the trade among member states. When trade among member states is affected, articles 81 and 82 of the EC Treaty are implemented and sanctions are imposed, when

necessary, against their infringement, in accordance with Greek legislation.

Penal sanctions are provided for in article 29 of law 703/77; any person who, either personally or as representative of a legal entity, concludes agreements, takes decisions or applies a concerted practice prohibited or abuses a dominant position in market of his own undertaking or the undertaking he represents with respect to him or to the undertaking he represents, shall be punished by a fine of not less than 3,000€ nor more than 30,000€. In case of relapse, the aforementioned limits shall be doubled. A sentence of at least three (3) months' imprisonment and a fine of not less than 5,000€ nor more than 15,000€, shall be imposed on any person who: a) impedes, in any way, the investigations carried out by the authorised officials, especially by creating obstacles or concealing documents; b) delays or refuses to supply the Competition Authority or its authorised officials with information requested; c) knowingly provides the Competition Authority or its authorised officials with false information or conceals true information; and d) refuses to give sworn or unsworn evidence to an authorised official of the Competition Authority or to any other authorised official when called upon to do so during an investigation. The same applies to anyone who, in giving evidence, knowingly makes a false statement, denies or conceals the truth. In case of relapse, the aforementioned limits shall be doubled.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

Law 3592/2007 on the 'Concentration and Licensing of Media Undertakings and other provisions' (Government Gazette Issue A 161/19.07.2007) entered into force having as its objectives to safeguard pluralism, transmission of news and information objectively and on equal terms, transparency and healthy competition in the media sector. The above mentioned law introduced dominance thresholds ranging from 25 per cent to 35 per cent, depending on the number of the media sector markets (i.e., the markets of television, radio, newspapers, magazines), in which the natural person or undertaking concerned is active. In energy sector laws 3426/2005 (electricity linearisation act) and law 3428/2005 (gas linearisation act) regulate the gradual liberalisation of electricity and gas market, enforcing competition rules with regard to eligible customers in accordance with article 86 of the Treaty, third party access to natural gas systems and other infrastructures that resemble natural monopolies, the designation of operators for the natural gas transmission and distribution systems and the ensured independence of the said operators from vertically integrated natural gas undertakings, so as to enhance competition.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

Upon application by the undertaking or association of undertakings concerned, which is submitted to the Secretariat, the Competition Committee may certify within two months after such submission, that, on the basis of the facts in its possession, there is no infringement of the provisions of Articles 1(1), and 2 of Law 70/77. Such clearance may be sought even for a cartel, abuse of a dominant position or of a relation of economic dependence, which are merely anticipated to arise in the future.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

Complaints are being lodged in writing, by the complainant, who must complete a special form, either printed or electronic, which can be downloaded from the website of the Hellenic Competition Commission or the premises of the Hellenic Competition Commission and must include minima the facts and relevant evidence the reasons substantiating the infringement.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

There are no detailed statistics from the HCC.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

The Director General collects data necessary for the establishment of an infringement. For this reason the Directorate - General contacts the suspected undertaking in order to collect evidence and information.

The duration of the investigation varies from case to case, while Law 703/77 does not provide for a specific deadline. When the DG believes that he has sufficient grounds to establish an infringement, he will send to the parties under investigation a "statement of objections". The statement of objections has to be notified to the parties at least 60 days before the hearing, unless the case under examination is urgent. It sets out the facts on which the DG relies, the legal basis of the infringement and the actions proposed. In order to carry out the investigation, the Directorate - General may proceed, upon instruction of the President of the Hellenic Competition Commission, to a series of actions, such as: carrying out inspections in the offices and the premises of undertakings or associations of undertakings; carrying out inspections in non-business premises, means of transport of the undertakings or the associations of undertakings, as well as in the homes of directors, managers, and other members of staff of the undertakings and associations of undertakings concerned, under the conditions set by law; sending questionnaires to undertakings directly or indirectly involved and to market operators; examining books and other records, irrespective of the medium on which they are stored, and making copies, in any form, of extracts from such books or records; and taking testimony and evidence from representatives or members of the staff of the undertaking or the association of undertakings involved, and demanding explanations regarding the facts or documents relating to the subject-matter and the purpose of the investigation. Upon conclusion of the investigation, a report is drafted and submitted to the Competition Commission, which is the competent authority to decide whether the alleged infringement has been substantiated or not. The decision of the Competition Commission is issued, within fifteen (15) days after the session in which the examination of the case was concluded.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Yes they can.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

The officers of the DG carry out the searches of business and/or residential premises. The officers may ask the assistance of any competent authority (such as the Public Prosecutor). Investigations of residential premises have to be performed under the presence of the judicial authority.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

The officers of the DG may take testimonies and explanations on the facts or documents relating to the subject-matter and the purpose of the investigation from representatives or members of the staff of the undertaking or the association of undertakings involved.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

In principle no, but a court order may be issued for this reason in special cases.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

Yes they can.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

There are no formal general surveillance powers, although the list with the investigatory powers is indicative and not exhaustive. On this ground, the surveillance cannot be excluded, provided that constitutional rights are not violated. The officers of the DG have the authority not only to require an explanation of documents or information supplied, but also to take statements (sworn or not).

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

The parties are allowed to have access to the file in order to review the investigation documents.

The parties have to submit their written response to the HCC at least 30 days before the hearing. In the written response, the parties may ask to exercise their right for an oral hearing. At least 15 days before the hearing, the parties may submit a supplementary written response. Third parties may submit their statements at least 15 days before the hearing.

After the right to be heard has been exercised and upon the application of the parties, the Chairman may grant to the parties the right to submit a supplementary written response.

4.9 How are the rights of the defence respected throughout the investigation?

The undertakings involved may: Have access to non-confidential parts of the file after the completion of the statement of objectives, so that they can prepare their defence. Participate in the proceedings of the case through representation by their attorneys to support their views before the Competition Commission. Orally present their opinions during the proceedings of the case. Recommend witnesses for examination under oath during the proceedings of the case. Submit statements, upon request. Appeal against a decision of the Competition Commission by lodging an appeal before the (Athens) Administration Court of Appeal within sixty (60) days after the notification. The judgments of the Athens Administration Court of Appeal are subject to an appeal before the Council of State.

4.10 What rights do complainants have during an investigation?

The complainant may be granted access to confidential and non-confidential documents and/or information of the file after the notification of the Statement of Objections to them. Participate in the oral hearings of the case and either appear in person or be represented by their lawyers. Propose and examine witnesses during the oral hearings of the case. Submit statements. File an application for annulment of any decision of the Competition Commission before the Athens Administrative Court of Appeal within sixty (60) days from the notification of the Competition Commission's decision. The judgments of the Athens Administrative Court of Appeal may be brought for judicial review (control of legality) before the Council of State.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Third parties may be requested to supply the HCC with documents or information and they may submit their statements at least 15 days before the hearing.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The Hellenic Competition Commission may take interim measures in case of suspected infringement of articles 1, 2, 2a and 5 of law 703/77 on the basis of an "urgent need" to prevent "an imminent and incurable damage to the complainant or the public interest. In the case of interim measures taken *ex officio* or upon request of the Minister of Development, the Competition Commission may threaten to impose a penalty payment of up to 5,000€ (five thousand) for every single day of noncompliance with its decision.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

Greek law does not provide for a limitation period. Case law and literature deems a five-year limitation period as applicable by analogy to the European law.

7 Co-operation

7.1 Does the competition authority in Greece belong to a supra-national competition network? If so, please provide details

The Hellenic Competition Commission co-operates closely with the Directorate - General for Competition of the European Commission and the National Competition Authorities of the other member states of the European Union, mainly through the European Competition Network (ECN).

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

In order to inform each other of new cases and decisions, coordinate their investigations, when necessary exchange evidence. In this way, an effective mechanism is being created to pursue undertakings using cross-border restrictive practices.

8 Leniency

8.1 Does the competition authority in Greece operate a leniency programme? If so, please provide details.

In March 2006, the HCC adopted a leniency programme on immunity from fines and reduction of fines in cartel cases. The Greek leniency/immunity programme covers undertakings which have participated in secret horizontal collusive practices which infringe Article 1(1) Law 703/1977 and/or Article 81(1) EC aiming at fixing prices, production or sales quotas, sharing markets (including bid-rigging or restrictions of imports or exports), they fall under the competence of the HCC and wish to terminate their involvement and inform the HCC of the existence of such collusive practices.

The HCC has adopted the distinction of the EU 2002 Notice between immunity from fines (i.e. total immunity meaning 100 per cent discharge of financial penalties) and reduction of fines. Immunity is available only to the first cartel member to submit sufficient evidence which enables the HCC to initiate the investigation procedure or evidence to find a serious infringement (provided the cumulative conditions set out below under section 4 are met). Immunity may only be granted if the HCC did not have at the time of the submission sufficient evidence to initiate the investigation procedure or prove the infringement (paras 1-4 of the Decision).

A reduction in fines is granted to undertakings which do not meet the conditions for immunity, provided they submit evidence of 'significant added value' with respect to the evidence already in the DGC's possession. The concept of 'significant added value' refers to the extent to which the relevant evidence strengthens, by nature and/or level of detail the ability of the HCC to find an infringement. Furthermore the applicant must terminate its involvement in the suspected infringement no later than at the time at which it submits the evidence. In essence, the level of reduction will depend on the time at which the relevant evidence was submitted and the degree of 'added value' of the submitted information.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

The decisions of the Competition Commission are notified by the Directorate - General for Competition and published in the Official Government Gazette.

The HCC, when finding an abuse of a dominant position, may:

- oblige the undertakings to terminate their anti-competitive behaviour and refrain from repeating it in the future;
- accept the interested undertakings' commitment to terminate the infringement and render this commitment mandatory;
- impose behavioural and structural remedies on them, which must be both necessary and appropriate for the termination of the infringement and proportionate with the nature and gravity of the infringement. Structural remedies, however, can only be imposed on the condition that no behavioural remedies of equal effect are available or that all behavioural remedies of equal effect appear to be more onerous than the structural remedies;
- address recommendations in case of infringements and threaten the undertakings with a fine or penalty or both, should the infringement continue or be repeated;
- consider the fine or the penalty or both forfeit when it certifies by its decision the continuance or the repetition of the infringement; and
- impose fines on the undertakings that have committed an infringement.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

If the Competition Commission finds that there is an infringement, the imposed fine may amount up to 15 (fifteen) per cent of the gross income of the undertaking in the current or preceding financial year. In fixing the amount of the fine, consideration must be given to the gravity and duration of the infringement. In addition, the law entrusts the Competition Commission with wide powers in order to ensure that its decisions are enforced. The Commission may threaten to impose fines or periodic penalty payments, or both of these sanctions, in cases of continued or recurrent infringements: in the case of an investigation initiated either upon a complaint lodged or *ex officio*, the anticipated penalty payments come to the amount of up to 10,000€ (ten thousand) per day of non- compliance with the decision, as of the date stipulated in the decision. In the case of interim measures taken *ex officio* or upon request of the Minister of Development, the Competition Commission may threaten to impose a penalty payment of up to 5,000€ (five thousand) for every single day of noncompliance with its decision. The imposed or threatened fine can be up to 15 (fifteen) per cent of the gross turnover of the undertaking for the current or previous fiscal year, depending on the gravity and the duration of the infringement, while the penalty for every day of non-compliance with the HCC decision, may amount to 10,000€.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

If the undertaking refuses, creates difficulties or delays in providing the information requested, or provides incorrect, incomplete, or

misleading information, the Competition Commission may impose a fine of no less than 15,000€ (fifteen thousand), but not exceeding 1 (one) per cent of the total turnover. If an undertaking refuses to allow of obstructs an investigation on its premises The Competition Commission may impose a fine of from 15,000€ (fifteen thousand) to a 100,000€ (hundred thousand), and request the aid of the Prosecuting Authorities. Furthermore, individuals who obstruct an investigation are punished with at least three (3) months imprisonment and a fine.

10 Commitments

10.1 Is the competition authority in Greece empowered to accept commitments from the parties in the event of a suspected competition law infringement?

Yes it is.

10.2 In what circumstances can such commitments be accepted by the competition authority?

The decision of whether to accept binding commitments is at the discretion of the Competition Authority. The Competition Authority is likely to consider it appropriate to accept commitments in cases where the competition concerns are fully addressed by the commitments offered, the proposed commitments are being considered to be sufficient and capable of being implemented effectively and, if necessary, within a short period of time.

10.3 What impact do such commitments have on the investigation?

If the interested undertakings' commitments are accepted, the Hellenic Competition Commission render this Commitments mandatory and the investigation is no longer continued.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Since no certain or final infringement decision has been issued a party may not appeal to another body.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

HCC decisions can be appealed before the Athens Administrative Court of Appeals within sixty (60) days of notification to the parties and the latter's decisions are appealable before the *Conseil d'Etat*. The filing of the appeal does not suspend the enforcement of the decision of the CC, yet such enforcement may be suspended by an order of the chairman of the court. Decisions issued by the Athens Administrative Court of Appeals may be challenged before the Council of State, the supreme administrative court in Greece. The object of judicial review is the legitimacy of the decision of the Administrative Court of Appeals and, therefore, the Council of State may not deal with errors of fact or proceed to a *de novo* examination of the case.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

Courts rule preliminarily on the existence of abusive behaviour. However, in practice such cases are rare because persons complaining of infringements of the competition law provisions address themselves to the HCC, since the latter has exclusive authority to oblige infringing undertakings to terminate the infringement.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

Under article 24 of Law 703/773, the secretaries of the national Courts are obliged to send, free of charge, copies of decisions issued in accordance with competition law to the Competition Committee. The Competition Commission sends the above mentioned decisions to the European Commission.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Third parties who have suffered a loss as a result of anti competitive conduct may bring a civil claim for damages in the Greek courts. The basis of such claim would be article 914 of the Civil Code, which establishes tort liability. Such actions can be brought regardless of whether the HCC has already issued an infringement decision in respect of the relevant conduct.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

There is no data available.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Greece covered by the national competition rules?

Law 703/1977 is applicable to all restrictions of competition that have consequences or may precipitate consequences in Greece. This applies even if those restrictions are confined to agreements between undertakings, decisions by associations of undertakings, concerted practices between undertakings or associations of undertakings or concentrations of undertakings, that may be realised or decided outside Greece, or that do not have an establishment in Greece.

14.2 Please set out the approach adopted by the national competition authority and national courts in Greece in relation to legal professional privilege.

During an investigation the authorised officers of the Competition Commission usually await for the external legal advisors to arrive before they commence the investigation. There is no specific provision or case-law covering legal professional privilege. The officers of the HCC have in the past seized communication between the in-house legal counsel and the company under investigation, but the existence of an in-house lawyer/client privilege has not been yet addressed by the courts.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Greece in relation to matters not covered by the above questions.

There is no additional information to report.

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fdma
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Fortsakis, Diakopoulos, Mylonogiannis & Associates ("FDMA") is a leading Greek law firm, which provides legal services covering all areas of company law, as well as public law. The firm's client list contains both domestic (Greek) and international corporations, including companies involved in manufacturing, construction projects, energy, telecommunications, information technology and electronics, defence contractors, banks, professional associations, public utility companies, public enterprises, as well as government agencies, local authority organisations and the State. Moreover, the firm provides specialist legal advice to other law firms or groups of lawyers both in Greece and abroad. The firm's quality of service, extensive and proven expertise and wide range of clients lend to our multi-faceted experience in representing domestic and international clients on a wide variety of corporate and commercial matters, investing and doing business in Greece in general.

Ireland

Damian Collins

McCann FitzGerald

Maureen O'Neill

1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Ireland? If more than one, please describe the division of responsibilities between the different authorities.

Ireland has adopted a "strict separation" model of competition law enforcement. The Competition Authority investigates and compiles evidence in respect of suspected infringements of domestic and EC competition law under the Competition Act 2002 (Competition Act) and Articles 81 and 82 of the EC Treaty (Articles 81 and 82 EC) respectively. The Irish courts, however, have sole competence to take decisions, make orders, grant remedies (behavioural or structural), including interim relief, and impose penalties in respect of breaches of competition laws.

Following an investigation, if the Competition Authority concludes that there has been an infringement of competition law, it can initiate summary proceedings in the District Court. In the case of serious (indictable) offences, the Competition Authority's file is referred to the Director of Public Prosecution (DPP) who may bring proceedings in the Central Criminal Court. Alternatively, the Competition Authority can bring civil court proceedings before the Circuit Court or High Court for an injunction or declaratory order.

Recently, the Commission for Communications Regulation (ComReg) was given concurrent powers to those of the Competition Authority in the electronic communications sector.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

Since the coming into effect of the Communications Regulation (Amendment) Act 2007, ComReg has concurrent jurisdiction with the Competition Authority in respect of the enforcement of domestic and EC competition law in the electronic communications sector. No other sector regulator has specific competition law enforcement competencies, although in regulated sectors provisions concerning the protection of competition law are often included in licences, e.g. in the gas sector.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Ireland?

The Competition Authority states in its Strategy Statement for 2009 - 2011 that it aims to give the highest priority to those breaches of competition law which do the greatest harm to consumers. To date, the Competition Authority has prioritised the investigation and prosecution of hard-core cartel offences.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The Competition Act is Ireland's principal competition law statute and sections 4 and 5 of the statute contain the prohibitions of anti-competitive conduct.

Section 4 is based on Article 81 EC and prohibits anti-competitive agreements, decisions and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State (i.e. the Republic of Ireland).

Section 5 is based on Article 82 EC and prohibits the abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or any part of the State.

Sections 6 and 7 of the Competition Act provide that it is a criminal offence to breach section 4 or section 5 of the statute and Articles 81 and 82 EC. Infringements are punishable by fines and in the case of hard-core cartel offences, i.e., price fixing, market or customer sharing and limitation of sales or output, by imprisonment as well as fines.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

The Competition (Amendment) Act 2006 provides for specific rules on the unilateral conduct of non-dominant firms in the grocery trade. "[G]rocery goods undertakings", regardless of whether they enjoy market power, are prohibited from engaging in certain unilateral behaviour, including resale price maintenance. The scope of these prohibitions may, however, be quite limited in practice as they apply only to the extent that it can be demonstrated that the conduct "*…has as its object or effect the prevention, restriction or distortion of competition in trade in any grocery goods in the State or in any part of the State.*" The prohibitions on "grocery goods undertakings" are civil (rather than criminal) in nature and are without prejudice to the prohibitions in section 4 and section 5 of the Competition Act.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

No it is not.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

No. An online complaint form is available on the Competition Authority's website. Alternatively, however, a complainant may contact the Competition Authority by e-mail, phone, fax, or post.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

No up-to-date statistics are available.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

The Competition Authority will firstly screen a complaint to determine if the matter falls within the scope of the Competition Act. If so, a case officer is allocated and the complaint will be further examined and formal statements may be taken from complainants and third parties. If a full investigation is opened, the appointed case officer will usually contact the undertaking that is the subject of the complaint for its observations. There are a range of possible outcomes after a full investigation:

- the case may be closed without further action;
- the Competition Authority may negotiate an out of court settlement;
- the Competition Authority may take civil proceedings in the High Court; or
- the Competition Authority may initiate criminal proceedings in the District Court, or in the case of serious (indictable) offences, it will send the file to the DPP recommending that criminal charges be brought.

There is no way to determine in advance how long the Competition Authority's investigation or, eventually, court proceedings, will take.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Yes, under section 31(1) of the Competition Act, the Competition Authority can require a witness that has been summoned to produce any documents in his or her control. In addition, under section 45 of the Competition Act, during an inspection the Competition Authority can require the production of books, documents and records relating to any activity of the company suspected of a breach of competition law.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

Yes. Under section 45(a) of the Competition Act, on production of a court-issued warrant, authorised officers of the Competition Authority are permitted to enter premises, "*if necessary by force*", to search premises (or vehicles) at which a business under investigation is carried on. Under section 45(b), again on production of a court-issued warrant, the private dwellings of directors, managers or employees of a business under investigation may be searched if there are reasonable grounds to believe that records relating to the carrying on of the business are kept in such dwellings. Search warrants are obtained from the District Court which, unless they state otherwise, allow members of the police to accompany and assist authorised officers of the Competition Authority.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

Yes. Under section 45(d) of the Competition Act, during a search an authorised officer of the Competition Authority may require an employee to give the officer such information reasonably required regarding entries in books, documents or records provided during the search. Section 45(f) and (g) provide that such person may also be required to give the authorised officer any other information reasonably required in relation to the business under investigation and those engaged in the business.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

Yes. Under section 45(e) of the Competition Act, during a search an authorised officer of the Competition Authority may inspect, copy or take extracts from any books, documents and records found. He or she may remove the original as well as copy documents.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

Yes. The power to remove documents during the course of an inspection pursuant to section 45 of the Competition Act relates to documents in written, mechanical or electronic form and "written" includes any form of notation or code whether by hand or otherwise and regardless of the method by which, or medium in or on which, the document concerned is recorded (section 12(7) of the Competition Act).

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 provides that, where a warrant has been issued by the Minister for Justice, the police or another public authority vested with investigatory powers (including the Competition Authority) may intercept postal and telecommunications messages for the purposes of a criminal investigation. Wiretapping does not appear to have been used, to date, by the Competition Authority. However, it has in the past

conducted other covert surveillance of parties suspected to be engaged in cartel behaviour.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

Typically, in civil cases (i.e., where the Competition Authority does not bring criminal charges (cases other than those involving hard-core cartels)), the accused party is given an opportunity to comment on the Competition Authority's findings or to remedy the infringement before court proceedings are initiated. No such opportunity will be provided in the case of criminal prosecution for cartel involvement. Once court proceedings are initiated, in civil cases the Competition Authority will have to prove that "on the balance of probabilities", the defendant engaged in the alleged anti-competitive conduct and in a criminal prosecution, the DPP will have to prove the Authority's case "beyond a reasonable doubt". The defendant will have the usual procedural and due process rights before the court.

4.9 How are the rights of the defence respected throughout the investigation?

The rights of the defence are assured throughout the investigation by the judicial control over the conduct of the investigation exercised by the courts, which have exclusive competence to reach a legally binding decision in respect of the investigation and to which, therefore, the Competition Authority must prove its case including that, at all times during the investigation, it respects the right of the defence.

4.10 What rights do complainants have during an investigation?

The Competition Authority will notify the complainant to acknowledge receipt of the complaint. The Competition Authority will not, however, comment on the progress of the complaint. The complainant will only be notified again when the case is being closed.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

The rights of third parties interested in an investigation are extremely limited. Essentially, only a party that can demonstrate that it has the requisite *locus standi* will be permitted by the Irish courts to be paired to the proceedings.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The Competition Authority does not itself have powers in relation to interim measures. It may, however, apply to the Circuit Court or the High Court, under Section 14(5) of the Competition Act, for injunctive relief, which may be granted on an interim basis.

Injunctions are a discretionary remedy and the Competition Authority would have to satisfy the court that:

- there is a serious question to be tried;
- damages are not an adequate remedy; and
- the balance of convenience lies in favour of granting the relief sought.

Generally, an applicant for interim relief would have to give the court an undertaking as to damages in the event that the applicant does not succeed at the full hearing of the matter.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The Competition Act does not provide for any express limitation period in respect of civil proceedings in competition matters by the Competition Authority and the standard Irish limitation period, i.e. six years, therefore applies. Regarding criminal prosecutions, section 8 of the Competition Act provides that summary proceedings brought in respect of breaches of domestic and EC competition law, may be instituted within two years after the day on which the offence was committed. There is no time limit in respect of indictable offences.

7 Co-operation

7.1 Does the competition authority in Ireland belong to a supra-national competition network? If so, please provide details

The Competition Authority has been a member of the European Competition Network since its establishment in 2004 and is a member of the European Competition Authorities, the forum for cooperation between the competition authorities in the European Economic Area.

On an international level, the Competition Authority is a member of the International Competition Network and Ireland is a member of the Competition Committee of the Organisation for Economic Co-operation and Development.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

Article 12 of Regulation 1/2003 provides that, for the purposes of applying Articles 81 and 82 EC, the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information. This information can only be used in respect of the subject matter for which it was collected by the transmitting national competition authority. Where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged may be used for the application of national competition law as well as Articles 81 and 82 EC.

In relation to natural persons, information exchanged pursuant to Article 12 of Regulation 1/2003 can only be used in evidence to impose sanctions where the laws of the transmitting competition authority foresee similar sanctions in relation to a breach of Articles 81 or 82 EC. Where the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority, it can be used to impose sanctions (though not custodial sanctions) on natural persons.

8 Leniency

8.1 Does the competition authority in Ireland operate a leniency programme? If so, please provide details.

The Competition Authority operates a Cartel Immunity Programme in conjunction with the DPP, which provides immunity from criminal prosecution subject to certain conditions being met. The Competition Authority considers applications for immunity but has no jurisdiction to grant immunity. Rather, the Competition Authority recommends to the DPP, whose role it is to prosecute offences under the Competition Act, that it refrains from prosecuting successful immunity applicants.

Only the first applicant to apply and satisfy the conditions for immunity will be granted immunity. The Competition Authority operates a marker system, whereby applicants may reserve their place "in the queue". The first applicant is given a certain amount of time (at the Competition Authority's discretion) to "perfect its marker", i.e. to complete its application for immunity. If it fails to meet the conditions for immunity or otherwise to perfect its marker, the next in the "queue" is given an opportunity to qualify for immunity.

Leniency is generally not granted to second or subsequent applicants. However, the DPP has publicly indicated that he considers that his office has a residual discretion to grant immunity, so it is possible that immunity may be granted to additional applicants if they bring important evidence to the prosecution. Where a company qualifies under the programme, it may be granted immunity for both the company and for its present and past officers, directors and employees. Where a company does not apply for immunity, an individual (e.g. a director of that company) may nonetheless apply, in his/her personal capacity, for immunity.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

The Irish courts have sole competence to take decisions, make orders, grant remedies (behavioural or structural), including interim relief, and impose penalties in respect of breaches of domestic and EC competition laws.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

Criminal sanctions may be imposed on both companies and individuals for breaches of domestic and EC competition law.

Section 8(1) of the Competition Act provides that hard-core cartel offences are punishable, on summary conviction, by fines not exceeding €3,000 and/or six month's imprisonment in the case of individuals and on indictment, by fines of €4m or 10% of turnover and/or five years' imprisonment in the case of individuals.

Section 8(2) of the Competition Act provides that, for other (non-hard core) breaches of domestic and EC competition law, penalties are limited to fines, i.e. there is no scope for imposition of prison sentences. Fines of up to €3,000 may be imposed on summary conviction and up to €4m or 10% of turnover on conviction on indictment.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

It is an offence under section 31(4) of the Competition Act for a witness that has been summoned to attend before the Competition Authority to fail to attend or cooperate with the Competition Authority. Under section 45(10) of the Competition Act, obstructing or impeding an authorised officer in the exercise of his or her investigative powers is also an offence. Both offences are punishable on summary conviction by fines of up to €3,000 and/or imprisonment for up to six months.

10 Commitments

10.1 Is the competition authority in Ireland empowered to accept commitments from the parties in the event of a suspected competition law infringement?

The Competition Authority may agree not to proceed with a court action in exchange for commitments to bring to an end conduct it considers to infringe domestic and/or EC competition laws. Such a settlement may be agreed after legal proceedings have been initiated, in which case the court will usually be asked to sanction the settlement. Equally, the Competition Authority may accept legally binding commitments without any involvement of the court.

10.2 In what circumstances can such commitments be accepted by the competition authority?

There are no established rules regarding the circumstances in which the Competition Authority may accept commitments. Typically, commitments are accepted where appropriate from an enforcement priority and administrative efficiency perspective.

10.3 What impact do such commitments have on the investigation?

Where the Competition Authority accepts commitments, it will close the investigation.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

The Competition Authority does not have the power to take decisions in respect of breaches of competition law, as this competence is reserved to the courts. It may, however, decide to close its file in respect of a complaint or suspected infringement. Although it is under no obligation to pursue every complaint or suspected infringement, a third party could seek leave of the High Court for judicial review of such a decision. In such a case, however, the court is likely to grant the Competition Authority a wide margin of discretion.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Final decisions in competition cases may be appealed in the same way that other civil or criminal cases may be appealed. Decisions of the Circuit Court can be appealed to the High Court and decisions of the High Court can be appealed to the Supreme Court.

There is no constitutional or common law right of appeal from the District Court to the Circuit Court, but a person convicted in the District Court has a statutory right of appeal to the Circuit Court against his or her conviction or sentence, or both (section 18(1) of the Courts of Justice Act 1928). Notice of appeal must be served on every party directly affected by the appeal within 14 days of the date of the decision being appealed.

Appeals from the Circuit Court or the Central Criminal Court are to the Court of Criminal Appeal. There is no absolute right of appeal to the Court of Criminal Appeal and a party must apply to the trial judge for leave to appeal, which involves satisfying the court that one of the following grounds of appeal exist: that the case raises a question of law, that the trial appears to have been unsatisfactory, or the court considers that there are any other sufficient ground of appeal. This application must be made at close of trial or within three days thereafter. Notice of appeal must be served within 14 days of the date on which the certificate was granted.

There are three grounds of appeal in respect of appeals to the Supreme Court:

- references by the DPP challenging points of law which led to the defendant's acquittal;
- consultative cases stated from the Circuit Court; and
- cases from the Court of Criminal Appeal that raise a point of law of exceptional public importance.

Notice of appeal to the Supreme Court must be served within 21 days of the judgment or the order appealed against.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

The Irish courts have sole competence to take decisions, make orders, grant remedies (behavioural or structural), including interim relief, and impose penalties in respect of breaches of competition laws. The Irish courts also issue search warrants required by the Competition Authority to carry out searches in the context of its investigation into suspected breaches of competition laws.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

Under Article 15 of the Modernisation Regulation, the Competition Authority may submit written (and, with the permission of the court, oral) observations to the courts on issues relating to the application of Articles 81 and 82 EC. Where the coherent application of Articles 81 and 82 EC so requires, the European Commission may submit written (and, with the permission of the court, oral) observations to the Irish courts.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Yes. Third parties may bring private claims for damages, injunctive relief and declarations in the Irish courts in respect of infringements of domestic and EC competition laws. In respect of domestic competition law, civil claims may be brought under section 14 of the Competition Act by any person (including a legal person) who is aggrieved in consequence of a practice which is prohibited by the Competition Act. In respect of EC competition law, civil claims by third parties may be brought on the basis of the direct effect of Articles 81 and 82 EC. A right of action arises against the company that has engaged in the anti-competitive conduct and any director, manager or other officer of that company.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

While damages have been sought in a number of cases involving competition law infringements, there is only one reported case where the plaintiffs' claim was successful (*Donovan an Ors v Electricity Supply Board*, [1997] 3 IR 573).

14 Miscellaneous

14.1 Is anti-competitive conduct outside Ireland covered by the national competition rules?

Yes. The prohibitions set out in the Competition Act apply to anti-competitive conduct that has an effect in the State or any part of the State and applies, therefore, regardless of the location of the parties or where the conduct took place. To date, there have not been any convictions under Irish law in respect of anti-competitive conduct outside Ireland.

14.2 Please set out the approach adopted by the national competition authority and national courts in Ireland in relation to legal professional privilege.

Any documents or communications made between the undertaking in question and its legal advisors, including in-house legal counsel, for the purposes of obtaining legal advice will be considered to fall within the protection of legal professional privilege. Further any documents or communications produced in contemplation of legal proceedings are considered to be legally privileged and would not be available to the Competition Authority for the purposes of its investigations.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Ireland in relation to matters not covered by the above questions.

The Central Criminal Court recently handed down a judgment in the case of the "Citroën Dealers Association" cartel (CDA) (*DPP v Patrick Duffy*, Unreported, Central Criminal Court, 23 March 2009), which highlights the seriousness with which the Court views cartel offences and its determination to impose real jail time on parties found guilty of participating in such activities.

In its judgment, the Court set out the first set of detailed guidelines

on cartel sentencing in Ireland, providing clarity on the issues that can be taken into account in sentencing convicted cartel offenders. They include:

- recognition of the importance of the deterrent effect of sanctions;
- clarification that pleas in mitigation will not generally be available for cartel offences;
- confirmation of the relevance of certain factors including the duration of the offences, the degree of culpability in implementing and enforcing the cartel agreement and whether the conduct was contrary to compliance guidelines;
- confirmation that the Court may grant leniency to participants who cooperate with the Competition Authority's investigation, even if those participants do not benefit from the agency's immunity programme; and
- clarification that the Court can take account of the turnover of the firm's entire business in setting the level of the fine, and not just the Irish turnover, or the turnover in the market(s) implicated in the cartel.

Although imprisonment was not imposed in this case for reasons of "equality before the law" (previous members of the CDA had not been imprisoned for similar offences), the Court indicated that, going forward, custodial sentences (rather than suspended sentences) would be imposed on cartel offenders.

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Damian contributed, together with Gerald FitzGerald, the chapter on Ireland in "Competition Cases from the EU" published by Sweet & Maxwell in December 2007. In addition, he co-authored the chapter on Ireland in 'The Effective Application of EU State Aid Procedure, The Role of National Law and Practice' published by kluwer in 2007.
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Korea

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Korea? If more than one, please describe the division of responsibilities between the different authorities.

The Korea Fair Trade Commission ("KFTC") is the primary agency responsible for the enforcement of the Monopoly Regulation and Fair Trade Act of Korea ("MRFTA") which is the main competition law in Korea. In cases that warrant a criminal prosecution, the KFTC will file a criminal complaint with the public prosecutors' office.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The Korea Communications Commission manages competition policies related to broadcasting and communications.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Korea?

The determination as to which cases should be investigated is made by the investigator at his/her own discretion.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The KFTC enforces the provisions in the MRFTA relating to abuse of market-dominant position, anti-competitive business combinations, cartels, unfair trade practices, maintenance of resale prices, etc. The KFTC may issue a corrective order, publicly disclose the issuance of corrective order, impose a penalty, file a criminal complaint, etc., against the violators of such MRFTA provisions.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

The MRFTA does not have any provision which only applies to a specific sector.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

The KFTC has a voluntary review system under which an enterprise may request the KFTC to review an act to be carried out by the enterprise and determine in advance whether it would constitute a violation of the MRFTA. Under this system, the KFTC will notify the enterprise of such determination within 30 days from the request date.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

Anyone can report a violation of the MRFTA to the KFTC in writing by specifying the violation and providing supporting data. In some cases, the report could be made orally or via telephone.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

According to the KFTC, from 1981 to 2007, the proportion of investigations started by a third party complaint and the KFTC's own inquiry was 50.4% (22,605 cases) to 49.6% (22,237 cases).

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

Investigation Procedures	Important Procedure
Case recognition	The KFTC may commence an investigation if it detects, or receives a report of, a potential violation of the MRFTA.
Preparation of investigation report	If the investigation reveals a violation of the MRFTA, the KFTC prepares an investigation report and presents its opinion on the measures that should be taken such as issuing a corrective order, imposing a penalty, etc.
Referring the case to the committee/sub-committee of the KFTC	The KFTC forwards the investigation report to the committee or a sub-committee of the KFTC.

Decision of the committee/sub-committee	The committee/subcommittee's decision process will be in the form of adversarial proceedings where the investigator and the defendant will present their arguments. After such proceedings, the committee/sub-committee will agree on whether the defendant violated the law and what measures should be taken. Then, the decision of the committee/sub-committee will be prepared.
Measures	The committee/sub-committee may take the following measures with respect to the defendant: (i) an issuance of re-investigation order; (ii) a closing of the investigation process; (iii) a finding of no violation; (iv) a case closure; (v) a suspension of investigation, etc.; (vi) a warning; (vii) a corrective recommendation; (viii) a corrective order; and (ix) a filing of a criminal complaint with the public prosecutors' office, etc.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

The KFTC has the authority to order parties (i.e., the enterprise under investigation, interested parties, witnesses, etc.) to produce information/documents relevant to the investigation.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

The KFTC has the authority to enter the premises of the enterprise under investigation to examine its data and materials. In this regard, such authority is a discretionary authority of the KFTC, and thus, it is not necessary for the KFTC to acquire a search warrant from the court.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

During the entire investigation process including the search process, the KFTC has the authority to interview the parties to obtain information related to the investigation.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

The KFTC has the authority to request a submission of the original/copy documents and to impose a penalty if such request is not accepted.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

The KFTC has the authority to enter the premises of the enterprise under investigation and take electronic data stored in the computer systems located on or off such premises.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The KFTC has the authority to obtain information from financial institutions pertaining to affiliates of large corporate groups. The purpose of authority (which will expire on December 31, 2010) is to investigate illegal financial assistance between the affiliates of large corporate groups.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

During the investigation procedure, the accused party will receive a copy of the investigation report from the KFTC, and thereafter, the accused party will have an opportunity to present its written opinion thereon to the KFTC.

4.9 How are the rights of the defence respected throughout the investigation?

During the KFTC investigation process, the accused party will be provided with a right of defence. For example, the accused party will: (i) have a right to retain counsel; (ii) receive the KFTC investigation report and have an opportunity to present its opinion on the report; (iii) have a right to question and investigate the evidence presented against the accused party; (iv) have an opportunity to appear before the committee/sub-committee hearings and present its arguments; and (v) have the opportunity make the final closing statement during the committee/sub-committee hearing.

4.10 What rights do complainants have during an investigation?

During the KFTC investigation process, the complainant will have the right to: (i) be informed of the current stages of the investigation; (ii) receive the KFTC investigation report; and (iii) withdraw the complaint or re-submit the complaint.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

The third parties have the right to present their opinions before the KFTC and submit data relevant to the investigation.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

There is no general interim relief for a violation of the MRFTA. However, in case a signage or an advertisement is clearly false or misleading or in case consumers or competitors could incur damages that are difficult to recover due to such signage or advertisement, the KFTC may order a temporary suspension of such signage or advertisement.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The KFTC cannot impose sanctions related to violations that are more than five years old.

7 Co-operation

7.1 Does the competition authority in Korea belong to a supra-national competition network? If so, please provide details

Korea belongs to the International Competition Network (ICN). Korea has been an active member of the steering group at ICN since its inception in 2001 and the chair country of the working group at ICN as well.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

The guidelines and best practices adopted by ICN are not binding on its member countries. However, Korea has in the past voluntarily accepted some guidelines and best practices of ICN related to mergers and cartels and consequently amended the following provisions of MRFTA: (i) the reporting threshold for foreign-to-foreign mergers (which was increased from KRW3 billion to KRW20 billion); (ii) the market concentration measurement during merger reviews (which was changed to HHI); and (iii) the confidentiality of the identity of the leniency applicant (which was strengthened).

8 Leniency

8.1 Does the competition authority in Korea operate a leniency programme? If so, please provide details.

The KFTC operates the following leniency programme which provides a complete immunity or a reduction from corrective measures and penalties for cartel members which report their illegal cartels or which cooperate with the KFTC's cartel investigations:

(i) The first member of the cartel to report the illegal cartel before the KFTC commences its investigation will receive a complete immunity from the KFTC's penalties and corrective measures.

(ii) The first member of the cartel to cooperate with the KFTC after the commencement of the investigation will receive a complete immunity from penalties and a complete or partial immunity from corrective measures, if the cooperation is extended while the KFTC is unable to prove the cartel by itself.

(iii) The second member of the cartel to report the illegal cartel or cooperate with the KFTC will receive a 50% reduction in penalties and may receive reduced corrective measures.

(iv) If a cartel member under investigation for participating in an illegal cartel ("Cartel One") is the first member to submit evidence relating to another illegal cartel ("Cartel Two"), such member will receive a complete immunity from the KFTC's corrective measures and penalties that would otherwise be imposed on the member for participating in Cartel Two and will also receive an immunity or a reduction in penalties and may receive a reduction in corrective measure for participating in Cartel One (note: this is known as the Amnesty Plus System).

(v) The leniency application must be made alone by a cartel member (although a joint application by more than one cartel member will be allowed starting on June 25, 2009 in certain situations such as when the joint applicants are affiliates). The leniency applicant ranking will be based on the order of receipt of the leniency application. The leniency application may be made in writing or orally.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

Please see question 2.1 above.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

If the violator of the MRFTA is a company/individual, the KFTC may impose an administrative sanction (e.g., corrective order, public disclosure of the issuance of corrective order, penalty, etc.) and may also refer the case to the public prosecutors' office for criminal prosecution (in which case the court may impose a criminal penalty).

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

The KFTC may impose a fine on companies and individuals that do not cooperate or interferes with the KFTC investigations. In practice, the KFTC may also closely monitor such companies, conduct direct investigations into such companies, impose stiffer penalties and/or take away immunity/reduction.

10 Commitments

10.1 Is the competition authority in Korea empowered to accept commitments from the parties in the event of a suspected competition law infringement?

The KFTC does not operate a consent decree system. However, there is a proposed amendment to the MRFTA which, if adopted by the National Assembly of Korea, will introduce a consent decree system in Korea.

10.2 In what circumstances can such commitments be accepted by the competition authority?

This is not applicable in Korea.

10.3 What impact do such commitments have on the investigation?

This is not applicable in Korea.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

It is not possible for a party to appeal a decision or act of the KFTC during its investigation. An appeal by the accused party is possible after the KFTC has made a decision or taken an action.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

In case it is determined that there was a violation of the MRFTA, the KFTC may issue corrective orders, impose a penalty, publicise the issuance of corrective order or refer the case to the public prosecutors' office. In such case, the party receiving such sanction may either (i) file an objection to the KFTC and, upon receiving a response thereon from the KFTC, file an administrative lawsuit with the appellate court or (ii) file an administrative lawsuit with the appellate court without filing an objection to the KFTC.

(i) Filing an objection to the KFTC - the objection to the KFTC can be filed within 30 days from the date of receiving the sanction notice and in writing by describing the details of objection and submitting evidence in support of the objection.

(ii) Filing an administrative lawsuit with the appellate court - an administrative lawsuit may be filed with the Seoul High Court within 30 days from the date of receiving the sanction notice or a response from the KFTC on the objection, as the case may be.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

The KFTC will determine whether there was a violation of the MRFTA and, if so, the type and degree of the appropriate sanction to be imposed on the accused party. If the accused party files an administrative lawsuit with the appellate court, it will review the determination of the KFTC and render a decision as to whether there was in fact a violation of the MRFTA and whether the type and degree of the imposed sanction was appropriate.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

If an enterprise incurs damages as a result of a violation of the MRFTA by another enterprise and files a lawsuit with a court for compensation of such damages, the court may ask the KFTC to submit case records. However, the KFTC does not have a legal obligation to produce the case records to the court.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

An enterprise which has incurred damages as a result of a violation of the MRFTA by another enterprise may seek damages against the other enterprise in court. However, there is no system in Korea where the enterprise could bring private claims to enforce competition law in the national courts.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

Recently, there were cases where (i) private individuals who have suffered damages due to a school uniform manufacturer cartel filed a damage compensation lawsuit and received damages compensation from the court and (ii) the Ministry of Defence filed a lawsuit against petroleum companies in Korea for rigging oil bids and received an advantageous ruling from the court.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Korea covered by the national competition rules?

The MRFTA could apply to business activities conducted outside Korea that have an impact on the Korean market. In this regard, in 2002, the KFTC imposed a penalty of KRW8.8 billion (approximately US$6.3 million on the members of the international graphite electrodes cartel consisting of Japanese, German and U.S. companies, and in 2003, imposed KRW3.4 billion (approximately US$2.4 million) on the members of the international vitamin cartel consisting of Swiss, German and other companies.

14.2 Please set out the approach adopted by the national competition authority and national courts in Korea in relation to legal professional privilege.

During the KFTC investigation and the court proceedings, the accused party is entitled to receive attorney-client privilege.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Korea in relation to matters not covered by the above questions.

Historically, the KFTC has limited the geographical span of its enforcement of the MRFTA to business activities conducted inside Korea. In recent years, however, the KFTC has abandoned this historical approach and adopted a new enforcement approach which expands the geographical span of its enforcement of the MRFTA to the business activities conducted outside Korea that have an impact on the Korean market. In light of the foregoing, it may be advisable for foreign companies contemplating business activities outside Korea (e.g., international business cooperation, foreign-to-foreign mergers, etc.) which might have an impact on the Korean market to consult with their local counsel in Korea about the relevant MRFTA requirements.

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Latvia

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Latvia? If more than one, please describe the division of responsibilities between the different authorities.

The Latvian competition authority is the Competition Council (*Konkurences padome*). The Competition Council ("CC") deals with the investigation of prohibited agreements, abuses of dominant position and merger control. The Ministry of Finance (*Finanšu ministrija*) is responsible for administration of state aid provisions.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

In Latvia, the regulation on securing of public services is performed in such sectors as: energy; electronic communications; mail and railway; waste management; water; and heat supply. The regulation is performed by the Public Utilities Commission ("PUC"). However at the moment regulation regarding waste management, water and heat supply is performed by the local municipality regulators in the regions (except for the City of Riga where regulation is already performed by the PUC). Nevertheless, right now a reform of regulation of public services is pending. According to the plan of the said reform as from 1 January 2010 all regulatory functions including regulation of waste management, water and heat supply in the regions will be preformed solely by the PUC.

Besides, it should be noted that the sector of financial services is singled out of the above system of regulated services. The sector of financial services is supervised by the Financial and Capital Market Commission.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Latvia?

Generally, investigations are initiated by the CC upon:

1) application of a person who has legitimate interest in preventing a violation of the Competition Law (a person whose rights and legal interests have been or could be infringed as a result of the violation of the Competition Law, as well as a person involved in the violation);
2) initiative of the CC; and
3) report of other institutions.

Thus, the CC must initiate an investigation on the basis of every reasoned and sufficiently grounded application submitted by the third party except for where potential infringement has minor effect on the competition. With regards to the cases initiated on the basis of its own initiative the CC makes it owns judgment as to which sectors of the economic the CC should pay a more specific attention. These particular sectors can vary from one year to another. In the year 2009 the prioritised sectors are: road construction; groceries market; bank payment card sector; market of postal and courier mail services; wholesale and retail sales of various food products (for instance, fruit, flour); and electronic household appliances.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The key provisions of the competition legislation in Latvia are stipulated in the Competition Law of the Republic of Latvia ("CL"). In addition the Cabinet of Ministers has adopted a several regulations which deal with particular aspects of the enforcement of CL, such as: block exemptions for vertical restraints; block exemption for horizontal agreements; method of calculation of fines; etc. The CC is responsible for the enforcement of Article 11 of CL which deals with the prohibited agreements and is an equivalent of Article 81 of the EC Treaty. Article 11 stipulates a non-exhaustive list of the possible infringements which is similar to the case law of the European Court of Justice ("ECJ").

The CC is also responsible for the enforcement of Article 13 of CL which deals with the abuse of dominant position and is an equivalent of Article 82 of the EC Treaty. Besides Paragraph 2 of Article 13 of CL stipulates separate regulation for dominant position held in retail markets. Thus, in Latvia two parallel regulation regimes regarding dominant position exist: first, Paragraph 1 of Article 13 prohibits abuse of the dominant position in general, and second, Paragraph 2 of Article 13 prohibits abuse of the dominant position in retail trade. Both Paragraph 1 and Paragraph 2 of Article 13 consist of a list of possible abuses. The list regarding overall abuses of dominant position is non-exhaustive and is similar to the case law of the ECJ.

In addition, the CC may apply Articles 81 and 82 of the EC Treaty directly.

Finally, the CC is also responsible for enforcement of a merger control in Latvia.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

Yes, specific definition of the dominant position held in retail trade exists. This regulation basically applies to retail chains operating in the groceries market. There is also a specific exhaustive list of abuses in the retail stipulated in CL.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

Yes, according to the CL before signing an agreement or coming thereof in force the parties submit the agreement to the CC for initial review. CC may prohibit closing of such agreement, permit closing of the agreement or permit closing of the agreement by imposing several binding conditions, for example, in respect to the term of validity of the agreement.

Besides, according to the Administrative Procedure Law, it is also possible to ask the CC to provide a legally binding opinion regarding intended course of action by submitting a respective request to CC.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

Yes, according to Article 23 of CL a case may be initiated if a person justifiably interested in prevention of a violation of the law submits a written complaint. A justifiably interested person according the law is a person whose rights and lawful interests have been or may have been infringed due to the violation, as well as the person involved in the violation. Usually these persons are actual or potential competitors or clients of the undertaking concerned.

In the complaint the person must indicate documentarily justified information regarding:

1) persons involved in the possible violation;
2) evidence, which proves the possible violation and which the complaint has been based on;
3) norms of the CL, which may have possibly been violated;
4) the facts that bear evidence of the justifiable interest of the person in prevention of a violation of the law; and
5) measures which have been performed to cease violation prior to receipt of the complaint by CC.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

In the year 2008, 88% percent of the cases were initiated on the basis of third party complaints.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

The key stages are following:

Stage	Indicative time line
From the submission of the complaint with CC until a formal decision to initiate a case or decline the initiation of the case is adopted.	Up to two months from the date when the complaint is submitted.
From the opening of the formal investigation until the moment when the Statement of Objections ("SO") is sent (at this stage CC is requesting information from the parties of the case and gathering information from other sources).	No longer that two years since the investigation is opened.
CC sends SO to the parties (SO is sent in any case whether or not infringement is likely to be found).	No longer that two years since the investigation is opened.
The parties may become acquainted with the case file* and submit an opinion regarding facts stipulated in SO.	Ten days from the moment when the parties have received SO.
CC adopts the final decision.	Up to two years from the date the investigation is opened. Nevertheless, on average the investigation of the case takes approximately nine months.

* Please note that in normal circumstances the parties may have access to the case file at any time during investigation, please see the answer to question 4.8 below.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Yes, the CC may request the information (including confidential information and documents) necessary for investigation of the case from any person if there are justifiable grounds for suspicion that the documents or information received from such person might serve as evidence of violation of CL. Moreover, the CC has a right to visit any person and review the documents and seize documents or property of the person during the visit, which may be used as evidence in the case. In addition, the CC has rights to summon any person to give oral explanations. Please see the answer to question 4.3 below for detailed description of the rights of the CC during investigation of the case.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

Yes, the CC has rights to enter premises (business and private) in both events - with or without a warrant of the court.

In accordance with CL the CC has the authority to perform the following activities without the court warrant:

1) request from any person and association of persons to provide information necessary for performance of the tasks established by CL, including access to restricted information or information containing business secrets; this authority further includes the right to receive written or oral explanations from the appropriate persons;
2) summon the person, whose explanation may be relevant in the case for the CC, to give explanations; and
3) pay a visit to the market participant (with or without prior notice); during the visit duly authorised employees of the CC are entitled to obtain written or oral explanations from the appropriate persons, to review all documents located at the site (including electronic documents) and to take hold of these documents, duplicates, photocopies, or extracts thereof and to seize property and documents of the market participants and their employees, if it may affect prosecution of the case.

In accordance with CL the CC has authority to perform much wider range of activities subject to the warrant of the court. These activities can be preformed concerning any person if there are justifiable grounds for suspicion that documents or property items that might serve as evidence of a violation of CL are being stored in non-residential premises, means of transport, flats, structures and other immovable and movable objects in the ownership, possession or use of such person. CC has rights to perform following activities subject to the court warrant:

1) without prior notice and in the presence of police, to enter the non-residential premises, means of transport, flats, structures and other immovable and movable objects that are in the ownership, possession or use of a market participant or an association of market participants, open them and get in the storage facilities located therein;
2) carry out a forced search of the objects and the storage facilities therein and perform inspection of the existing property and documents therein including the information (data) stored on computers, floppy disks and other information media in an electronic information system;
3) if a person whose property or documents undergo the search refuses to open the objects or storage facilities located therein, the officials of the CC are entitled to open them without causing substantial harm;
4) during forced search and inspection the officials of the CC are entitled to:
    a) prohibit the persons who are present at the site under inspection from leaving the site without permission, from moving and from conversing among themselves until the end of the search and inspection;
    b) become acquainted with the information included in the documents and in the electronic information system (including information containing commercial secrets);
    c) withdraw property items and documents which have been found and which may be of importance to the case;
    d) request and receive derivative documents certified in accordance with the procedures set out in regulatory enactments;
    e) print out or record the information (data) stored in the electronic information system to electronic information media;
    f) request and receive written or oral explanations from the employees of the market participant; and
    g) temporarily, but not longer than 72 hours, seal the non-residential premises, means of transport, structures and other objects and the storage facilities therein, in order to ensure the preservation of evidence.

Besides the CL specifies obligations for the market participant, the employees of such market participant and other persons connected with the violation under investigation during these investigatory activities. Said persons have the duty to:

1) ensure access to any of the non-residential premises, means of transport, flats, structures and other immovable and movable objects owned by them, in the possession thereof, or used by them, by opening them and the storage facilities therein;
2) ensure access to documents compiled or stored in any way or form, as well as to information (data) stored in the electronic information system;
3) provide full and truthful requested information within a specified period of time;
4) present the requested documents, true copies (copies) or extracts thereof, and certify the accuracy thereof in accordance with the procedures set out in regulatory enactments; and
5) attest to the authenticity of print-outs of the information (data) stored in the electronic information system and the authenticity of the records made in electronic information media.

In addition officials of the CC are entitled to prepare a report regarding an administrative violation which would, then after, result in the administrative penalty for the company or employees of officials of the company.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

Yes, in both cases when the search is performed without a court warrant and when the search is performed subject to the court warrant the officials of the CC have powers to interview the parties. Moreover the CC may request that the interview shall take place at the premises of the CC and the person to be interviewed has an obligation to come to the CC at the particular time agreed between the CC and the person.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

Yes, in both cases when the search is performed without a court warrant and when the search is performed subject to the court warrant the originals can be removed. However, please note that it is usual practice of the CC to remove only the copies of the documents if such possibility exists. For more details please see the answer to question 4.3 above.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

Yes, in both cases when the search is performed without a court warrant and when the search is performed subject to the court warrant electronic copies can be taken. However, please note that according to the position currently adopted by the case law if the inspection is conducted without a court warrant the officials of the CC may not have the right to perform search of the electronic data storage devices (hard disks of computers, servers, floppies, etc.) without consent of the person. Nevertheless, the person has a right to present particular information requested by the officials of the CC (for example, e-mail sent by Janis Berzins to Karlis Ozolins on May 15, 2009 at 15:45) to the officials of the CC. For more details please see the answer to question 4.3 above.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

No, it does not. However, the CC may use the evidence gathered by other state authorities (for example, the state police) collected by using surveillance powers if such evidence is passed to the CC upon initiation of another state authority.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

When the CC has gathered all necessary information in order to take a decision the CC sends SO to the incriminated party. SO consists of information on the basis of which the CC makes its judgment and the opinion of the CC which stipulates whether or not

right now the CC considers that action performed by the incriminated person has infringed the CL. The incriminated party has the right to comment on SO and/or submit additional evidence within a period of ten days after SO is received. In addition, the incriminated party has rights to access the case file (except for confidential information) during the entire period of investigation of the case, save for, if the CC decides that reviewing of the file may adversely affect achievement of the goals set by the law. Nevertheless, even in such case the incriminated party has a right to submit evidence and opinion during the entire investigation period of the case.

4.9 How are the rights of the defence respected throughout the investigation?

CC respects the right of legal privilege and the CC respects the right of the incriminated person to qualified legal advice (for example, during "dawn raids" the CC would wait for an external counsel to arrive up to half an hour if the incriminated party requests so). Besides, the incriminated party has the right not to answer self-incriminating questions.

4.10 What rights do complainants have during an investigation?

The complainant has a right to access the case file (except for confidential information) during the entire investigation period of the case except for if the CC decides that reviewing of the file may adversely affect achievement of the goals set by the law. Besides the complainant has the right to submit evidence and opinion during the entire investigation period of the case. In addition, SO is sent also to the complainant, therefore it has a right to comment on the opinion expressed by the CC in SO.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Any person whose rights or legal interests may be infringed by the decision of the CC may request the CC to get involved in the case in a capacity of the third party. In such case the CC must adopt a formal decision which gives a status of the third party in the case to such person. The third party has rights to express opinion and submit evidence to the case as well as the right to appeal against the decision of the CC.

In addition, the CC has a right to request the information or opinion from any person (for example, competitors, experts, associations, other state institutions, etc.) and in such case the information or the opinion of such person will be enclosed to the case materials.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

According to CL if the CC has any evidence of a potential breach of the EC competition law at its disposal and if failure to cure this breach can result in material and irrevocable damage to the competition the CC can adopt a decision on imposition of interim measures and impose an obligation on the market participant to perform a certain activity within a certain period of time or, alternatively, prohibit a specific activity. The decision on interim relief is in force until the moment when the final decision of the Competition Council in the relevant case is no longer subject to dispute. The decision of the CC on interim measures can be appealed at the administrative court; however, while pending this appeal does not suspend the validity and enforceability of the decision.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

A limitation period is not set by CL directly. However, the CC has stated that is assumes that general limitation period of ten years could be applicable to infringements of CL. Thus, the CC can investigate alleged competition infringement which occurred no later than ten years ago. However, the CC has stated that the limitation period can be calculated on a case-to-case basis.

7 Co-operation

7.1 Does the competition authority in Latvia belong to a supra-national competition network? If so, please provide details

Yes, the CC is a member of the European Competition Network (ECN) and International Competition Network ICN. Besides, the CC has concluded several bilateral agreements with the authorities from other states outside EU (for example, Russia and Ukraine).

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

The CC complies with EC Regulation 1/2003. According to the said Regulation information (including confidential information) received from another authority within EU can be used as evidence in the case providing that laws of the country where the receiving authority is located, do not provide for stricter fines regarding the same infringements and do not grant less rights of defence than laws of the country, where the authority providing the information is located. The CC has used the information provided by the authority of another member state of EU for investigation purposes in practice.

8 Leniency

8.1 Does the competition authority in Latvia operate a leniency programme? If so, please provide details.

Yes. The undertaking involved into a cartel infringement may submit a notification to the CC asking: to grant the first number for submission of the leniency application; to exempt the undertaking from the fine or reduce the fine. In order to receive full immunity from the sanctions all the following circumstances must be met: the undertaking has submitted the leniency application at its own initiative and the information contained in the notification is full and complete; at the moment when notification is submitted the CC does not posses enough information regarding cartel in order to initiate formal proceedings or adopt a decision on cartel infringement; the undertaking has not destroyed any evidence relating to the infringement; the undertaking has not been an initiator of the cartel; after submission of the notification the undertaking has ceased its participation in the cartel save of if the CC has decided otherwise;

the undertaking has fully cooperated with the CC during the investigation; and the undertaking has not informed other members of the cartel about the fact that it has submitted the leniency application. Nevertheless, if some of the above mentioned criteria are not met the undertaking still has the right to decrease the fine granted. In addition, reduction of the fine may be granted also to other members of the cartel even if they submitted the notification after the first notification had already been submitted. The CC allocates the status of confidentiality to the information submitted in the leniency application and even does not disclose identity of the person which has submitted the notification in the final decision regarding the cartel case. Nevertheless, up to the date of this overview there has not been a single case where the leniency programme would be used.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

The CC sends the adopted decision to all parties of the case. In those decisions the CC does not indicate the confidential information, except for, if such information is submitted by the respective party itself. Besides, the CC publishes non-confidential version of the decision stating that the infringement is established or the case is dismissed (substantive decisions on the case matter) on the website (on its abandonment) and in the official gazette (*Latvijas Vestnesis*) not later than ten days after adoption of the decision.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

The maximum fine for breaches of Article 11 of CL (equivalent to Article 81 of the EC Treaty) is 10% of the undertaking's turnover of the previous financial year. The maximum fine for breaches of Article 13 of CL (equivalent to Article 82 of the EC Treaty) is 5% of the undertaking's turnover of the previous financial year. The maximum fine for breaches of Article 13 (2) of CL (abuse of the dominant position in retail trade) is 0.05% of the undertaking's turnover of the previous financial year, or 0.2% in case of repeated offence. The particular amount of fine is set forth according to the procedure set by the regulations adopted by the Cabinet of Ministers. According to the said procedure such factors as type of the infringement, effect of the infringement on the competition, role of the particular undertaking, duration of infringement and aggravating/mitigating factors are taken into account when deciding on the particular amount of fine.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

There are administrative fines prescribed for not providing information to the CC or provision of false information or for non-compliance with lawful requests of CC up to LVL 500 (about EUR 715) for natural persons and up to LVL 10,000 (about EUR 14,300) for legal persons.

In addition, according to Criminal Law there are also penalties up to imprisonment for a term not exceeding two years, or community service, or a fine not exceeding LVL 18,000 (about EUR 26,000), with or without deprivation of the right to engage in entrepreneurial activity for a term not less than two years and not exceeding five years for failure to comply with the lawful requests of the CC if such offences are committed repeatedly within a period of one year, or if they are associated with causing substantial harm to the interests of the State or consumers. This penalty is applicable to both natural and legal persons. However, we are not aware of a single case when the said criminal penalty would be imposed.

10 Commitments

10.1 Is the competition authority in Latvia empowered to accept commitments from the parties in the event of a suspected competition law infringement?

Yes, such possibility is relatively new and is available since the amendments to CL of March 13, 2008 came into force. At the moment several commitments are accepted by the CC. All commitments adopted until the time of this overview result in behavioural remedies at the undertakings; however, theoretically it is possible that the CC accepts also structural remedies.

10.2 In what circumstances can such commitments be accepted by the competition authority?

CL states that commitments can be accepted if the CC considers that acceptance of commitment is appropriate. There are no further criteria set by the law.

10.3 What impact do such commitments have on the investigation?

In case the commitments are accepted investigation is terminated. However the CC has a right to reopen investigation at any time. In case the investigation is reopened the term of investigation is calculated from the moment of reopening of the investigation.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

During investigation the party concerned by the decision may appeal against certain actions taken by the CC if such actions qualify under definition of "actual action" set by the Administrative Procedure Law (for example, such actions may be actions taken by CC during "dawn raids"). Such appeals shall be made to the Administrative District Court within one month from occurrence of such actions. Besides, it is possible to appeal against the court warrant which allows "dawn raids". Such appeal should be made to the Administrative Regional Court within 10 days from receipt of the decision (day when "dawn raid" is conducted). However, appeal of such court warrant does not suspend its validity.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

The final substantive decision of the CC can be appealed at the Administrative Regional Court (please note that this is the court of the second instance according to the general administrative litigation procedure) within one month from the moment when the addressee of the decision has received the decision. The judgment of the court then can be appealed afterwards by submitting a cassation claim to the Administrative Department of the Supreme Court the judgment of which is final.

The appeal of the decision ceases the obligation of the party to pay the fine imposed by the decision; however, it does not release the party from the obligation to fulfil certain remedies imposed by the decision. The decision can be appealed on its merits and also on the grounds of procedural errors made by the CC during the investigation proceedings. Besides, please note that the decision to terminate the case may be appealed by the complainant (person which submitted the claim to the CC).

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

The court of general jurisdiction is involved in issuing of a warrant allowing the CC to conduct "dawn raids".

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

The CC and the Administrative Court may ask for the opinion of the European Commission if the court proceedings deal with cases under Article 81 or 82.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Yes, the third party can bring a claim to the national court with a request to recognise the infringement of CL or seek for indemnity of damages.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

No, we are not aware of a single case where indemnification of the damages is granted on the grounds of the infringement of CL.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Latvia covered by the national competition rules?

CL specifically states that it is applicable to any person (also foreign persons), who performs or is preparing to perform economic activity in the territory of Latvia or whose activity influences or can influence the competition in the territory of Latvia. In various occasions the CC has stated that it is competent to decide only about actions of the undertakings which have or could have influenced competition within the territory of Latvia.

14.2 Please set out the approach adopted by the national competition authority and national courts in Latvia in relation to legal professional privilege.

The CC applies the standards established by the ECJ and the European Commission, that is, the CC respects the rights of privilege of correspondence between the external legal counsel (having a status of an attorney recognisable within EU) and the employees or official of the undertaking.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Latvia in relation to matters not covered by the above questions.

Amendments to CL have been recently adopted by the Parliament. These primarily deal with the regulation with regards to dominant position held in retail trade (please note that the criteria for a retailer to be recognised as a holder of the dominant position in retail trade are lower that those based on which one is recognised as the holder of "classic" dominant position within the meaning of EC Competition Law).

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Lithuania

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Lithuania? If more than one, please describe the division of responsibilities between the different authorities.

The Competition Council of the Republic of Lithuania ("the Competition Council"), consisting of the chairman and four members, is a relevant competition authority vested with implementation of the state competition policy and supervision of compliance with competition rules.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The Competition Council has exclusive jurisdiction to enforce competition laws in all sectors of the economy.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Lithuania?

There is no official data on criteria, which are used by the Competition Council to select cases for further investigation. However, having analysed the statistics published by the Competition Council, it could be presumed that the Competition Council does not have clear methodology on the selection of cases to be investigated, as the vast majority of investigations are commenced on the basis of claims submitted by the injured parties or public institutions. In principle the Competition Council is obliged to investigate each complaint which corresponds to the formal requirements and falls under the competence of the authority.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The substantive provisions of Lithuanian competition law enforced by the Competition Council are contained within Articles 4, 5, 9, 10-14 and 16 of the Law on Competition. In particular:

- Article 4 prohibits public authorities from adopting legal acts that discriminate undertakings;
- Article 5 prohibits anti-competitive agreements, i.e. all agreements which have as their object the restriction of competition or which may restrict competition;
- Article 9 prohibits the abuse of a dominant position, i.e. it is prohibited to abuse a dominant position within the relevant market by carrying out actions which restrict or may restrict competition, limit without cause the possibilities of other undertakings to act in the market, or violate the interests of consumers;
- Articles 10-14 establish control of concentrations and conditions under which the transactions can be implemented only having clearance from Competition Council; and
- Article 16 prohibits unfair commercial practices.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

All provisions of the Law on Competition are equally applicable to all sectors of economy. However, if sector-specific legislation establishes derogations from general competition rules, such special laws would prevail.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

The Law on Competition does not provide the possibility to approach the Competition Council to obtain prior approval of a proposed agreement/course of action. In practise, however, it is possible to approach the Competition Council for consultation to facilitate self assessment of the legality of the intended agreements or conduct, but such consultations are informal, non-binding and cannot be relied upon as an official position of the Competition Council.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

The complaints on infringement of competition law may be submitted to the Competition Council by:

- undertakings whose interests have been infringed due to restrictive practices;
- public and local authorities; and
- associations and unions representing the interests of undertakings and consumers.

There is no special/standard form for filling of a complaint, however, Work Regulations of the Competition Councils set some formal requirements concerning information which must be provided in the complaint. The complaints must be submitted in a written application, together with the supporting documents which confirm all the relevant factual circumstances of restrictive practices indicated in a complaint. Having received such information and documents, the Competition Council must within 30 days decide on the commencement of investigation or rejection of complaint. The 30-day term may be prolonged if supplementary information is needed.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

The analysis of statistical data provided by the Competition Council reveals that almost in all cases the investigations are initiated by third parties, rather than Competition Council.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

The enforcement procedure established in the Law on Competition may be divided into several stages: initiation of investigation; commencement and conduction of investigation; hearing of the case; and adoption of a final decision. Those stages are comprised of the following actions:

- complaint made (if applicable);
- preliminary enquiries by the Competition Council (the Competition Council must examine requests for the investigation within 30 days from submission of the written application and supporting documents);
- matter closed/formal investigation commences (in case a formal investigation is commenced, the Competition Council must complete it no later than within 5 months from the commencement; this period may be extended by the Competition Council each time by up to 3 months; in practice investigations of abuse of dominant position cases or anticompetitive agreements take from 12 to 18 months);
- the investigation is terminated/the investigation is completed and the statement of objections is being issued;
- written representation stage i.e. submission of response to the statement of objections (as a general rule, the parties are entitled to exercise the right to submit their written observation within 14 days from the receipt of statement of objections, but the parties may request for the extension of this term; usually the Competition Council agrees to extend the term for up to 1 month);
- oral representation stage, i.e. public hearing of the case;
- issuance of acquittal / infringement decision to the parties (in most of the cases the Competition Council renders its decision immediately after the hearing while written resolution including the detailed arguments is issued within 14 days following the public hearing); and
- publication of operative part of Competition Council decision in Official Gazette.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Yes. The Competition Council has the power to receive from any undertakings or authorities all data and documents concerning the undertaking under investigation.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

While conducting the investigation the Competition Council is entitled to enter and check premises, territory and means of transport used by an undertaking under investigation. In addition, the Competition Council also has the power to enter and check any other premises, territory and means of transport, including residential and other premises of managers or employees of the undertaking, in case there are sufficient grounds to believe that documents or other evidence which may be important for proving hard-core infringement of competition law are being kept in such places.

The abovementioned actions may be performed only with the prior agreement of Vilnius District Administrative Court. However, this does not necessarily evoke a delay in the Competition Council's investigation as it can ensure the success of dawn-raid by sealing the premises used by undertaking under investigation until the authorisation of court to make inspection of such premises is received.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

Yes. The Competition Council has the power to request oral and written explanations from the persons related to the activity of undertakings under investigation during the process of dawn-raid. Such persons may also be requested to arrive to the office of the investigating officer to provide the requested explanations already after completion of dawn-raid.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

Yes. Throughout the investigation, officials of the Competition Council are entitled to take into possession original documents having evidential value. However, in practice the Competition Council takes into possession only copies of such documents.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

Yes. Throughout the investigation, officials of the Competition Council have a power to take electronic copies of all data held on the computer systems, irrespectively if such data is held at the inspected premises or off-site.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

In addition to the abovementioned powers, the Competition Council has a power to seal up premises of the undertaking where the

documents are being stored, despite their medium. The premises may be sealed up for the time period and to such extent which is necessary for the investigation to be approved by the court, but no longer than for 3 calendar days. The Competition Council also has a right to audit the economic activity of the undertaking and obtain findings of expert institutions on the material of inspection. However, the Competition Council does not have surveillance powers.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

Having completed formal investigation the Competition Council submits to the undertakings statement of objections specifying findings of investigation, unless the Competition Council decides to terminate the investigation. Having received such statement of objections, undertakings are entitled to familiarise themselves with the case file, except the documents that contain commercial secrets of other undertakings. The undertakings alleged of infringement of competition law may express their position as to the findings stated in the statement of objections in their written response and public hearing of the case at the sitting of Competition Council. In addition, the undertakings may also submit their oral or written observations at any stage of investigation.

4.9 How are the rights of the defence respected throughout the investigation?

The undertakings under investigation may submit oral and written observations (see questions 4.8). In addition, the undertaking may also appeal the unlawful actions of investigators and illegal acts adopted by the Competition Council. For more details see question 11.1.

4.10 What rights do complainants have during an investigation?

The Law on Competition provides complainants with identical rights as those ensured to undertakings alleged of infringement of competition law (see questions 4.8 and 4.9), except for the possibility to appeal illegal actions of investigators. In addition, complainants also have a right to request the protection of their commercial secrets at any stage of the proceedings.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

According to the Law on Competition, other undertakings whose interests are directly related to the case under investigation may also be recognised as parties to the investigation (in addition to the complainant and undertaking alleged of infringement of competition law) upon the decision of the Competition Council. In case such decision is adopted, such parties are granted with procedural rights analogous to those provided to the complainant (see question 4.10).

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The Competition Council has the power to apply interim measures that are necessary to ensure the possibility to enforce the final decision of the Competition Council, which shall be adopted in the future. Interim measures may be applied in case the Council has sufficient evidence of infringement of the Law on Competition, and seeks to prevent substantial or irreparable damage to the interests of undertakings or public.

The Law on Competition establishes two types of interim measures which may be applied on undertaking suspected of infringement of the Law on Competition the Competition Council:

- imposition of an obligation on the undertakings to cease an illegal activity; and
- imposition of the obligation on the undertakings to perform certain actions. Such interim measures may be applied only having the consent of the Vilnius District Administrative Court and only in case the failure to perform certain actions would result in serious damage to other undertakings or public interests or incur irreparable consequences.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The Competition Council may impose sanctions for infringement of the Law on competition not later than within 3 years from the date of the alleged infringement, or, in case of continued violation, within 3 years from the date of the performance of the last actions. Notably, the Competition Council considers that no time restrictions are provided for initiation of enforcement proceedings, however such position is currently under judicial review and no clear conclusion on this point could be made.

7 Co-operation

7.1 Does the competition authority in Lithuania belong to a supra-national competition network? If so, please provide details.

The Competition Council participates in several supra-national competition networks:

- European Competition Network. The Competition Council, together with the European Commission and national competition authorities from other European Union ("EU") countries, belong to and cooperate with each other through European Competition Network ("ECN"). Through ECN the European Commission and competition authorities from EU member states inform each other of new cases and envisaged enforcement decisions, coordinate investigations where necessary, help each other with investigations, exchange evidence and other information, discuss various issues of common interest.
- European Competition Authorities. The Competition Council is also a member of an informal forum for discussion the European Competition Authorities ("ECA") which connects the competition authorities in the European Economic Area. The work of ECA consists of the annual meetings of national competition authorities' chairmen aimed at discussing common competition issues.
- Organisation for Economic Co-operation and Development. Although the Competition Council is not a member of Organisation for Economic Co operation and Development ("OECD"), it participates in the work of OECD's Competition Committee, as well as in the working group No. 2 Competition and Regulation, and working group No. 3 Co-

operation and Enforcement as observer since 2001.

- International Competition Network. The Competition Council is a member of International Competition Network ("ICN"). By enhancing convergence and cooperation, the ICN promotes more efficient, effective antitrust enforcement worldwide. The Competition Council has participated in ICN work since 2002.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

Information received by the Competition Council through networks of competition authorities can be used only for the subject matter for which it was collected by the members of the network.

8 Leniency

8.1 Does the competition authority in Lithuania operate a leniency programme? If so, please provide details.

The Competition Council does operate a leniency programme, which is applicable to members of cartel agreements. The members of the cartel are entitled full immunity from fines so long as 4 cumulative conditions are satisfied:

- the undertaking provides information prior to the commencement of the proceedings;
- such undertaking is the first of the parties to the cartel to provide such information;
- the undertaking provides complete information available to it regarding the cartel and co operates with the Competition Council during the investigation; and
- the undertaking was not an initiator of the cartel and did not induce other undertakings to participate in the cartel.

The rules on application of a leniency programme are further developed by the Rules on Immunity from Fines and Reduction of Fines for Participants of Cartels adopted by the Competition Council in 28 February 2008. These rules elaborate conditions for receiving full immunity from fines and expand the application of the leniency programme to initiators and promoters of the cartel agreement, as well as undertakings, which provided information on cartel already following the decision of Competition Council to commence the investigation of the cartel on which the information is submitted. Notably, in such cases the applicants may benefit only from partial reduction of fine.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

Having completed the investigation, the Competition Council has a power to adopt the following decisions:

- to impose penalties;
- to refuse to impose penalties where there are no legally established grounds;
- to close the case in the absence of infringements of the Law on Competition; or
- to remand the case for supplementary investigation.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

Having found an infringement of the Law on Competition the Competition Council may impose fines, behavioural or structural remedies (only in merger cases) on undertakings. In particular, the Competition Council may:

- oblige the undertaking to end illegal activity, to carry out actions to restore the situation which was prior to the infringement, to eliminate consequences of the infringement, including cancellation, amendment or conclusion of contracts; the Competition Council may also establish time limits and terms which must be followed by the undertaking when implementing such obligations;
- oblige the undertakings or controlling persons, who have effected concentration resulting in the establishment or strengthening of a dominant position or substantial restriction of competition in a relevant market without notifying the Competition Council or getting its permission, to carry out actions restoring the previous situation or eliminating the consequences of concentration, including obligations to sell the enterprise or a part thereof, the assets of the undertaking or a part thereof, shares or a part thereof, to reorganise the enterprise, to cancel or change contracts, as well as to set the time limit and lay down the conditions for fulfilling of the above obligations; and
- impose upon undertakings fines amounting up to 10 percent of gross annual income of the undertaking in the preceding business year.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

The Competition Council can impose fines in the amount of up to 1 percent of the annual turnover of the undertaking in cases of their non cooperation and interference with the investigation. In addition, the fine in the amount up to LTL 5,000 (approx. EUR 1,449) could be imposed on individuals that obstructed the investigation.

10 Commitments

10.1 Is the competition authority in Lithuania empowered to accept commitments from the parties in the event of a suspected competition law infringement?

Yes it is.

10.2 In what circumstances can such commitments be accepted by the competition authority?

The commitments shall be accepted by the Competition Council in case the actions of undertaking under investigation did not result in substantial damage and the undertaking voluntary ceased conduct allegedly infringing the competition law. The commitments must provide the obligation of the undertaking to cease the allegedly illegal conduct or perform actions that terminate the alleged infringement or provide the possibility to avoid potential infringements in the future.

10.3 What impact do such commitments have on the investigation?

In case the conditions provided in question 10.2 are satisfied, the investigation may be terminated without finding the infringement.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

All persons, which believe that their rights protected by the Law on Competition have been violated by the legal acts adopted by the Competition Council have the right to appeal such legal acts to the Vilnius District Administrative Court. Such appeals must be submitted to the court no later than 20 days after delivery of the decision or publication of its operative part in the *Official Gazette* (whatever comes first), except for decisions on application of interim measures, which may be appealed within 1 month. The decisions of the Competition Council may be appealed both on procedural and substantive grounds. Notably, the submission of an appeal does not suspend the implementation of such decisions unless the Vilnius District Administrative Court decides otherwise.

Undertakings alleged of infringement of competition law additionally have a right to appeal against the actions of investigators conducted during the investigation before the Competition Council within 10 days from performance of such actions. In case the said undertaking disagrees with the Competition Council's decision adopted with regards to such appeal or the Competition Council fails to adopt such decision in 10 days, the undertaking alleged of infringement of competition law may bring an appeal before the Vilnius District Administrative Court.

The decisions of the Vilnius District Administrative Court may be appealed within 14 days of its publication before the Supreme Administrative Court.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

For details of appeal see question 11.1, with the exception that only parties to the investigation proceedings are entitled to appeal final infringement and remedies decisions, i.e. the initiator of the investigation, undertaking alleged of infringement of competition law and other undertakings whose interests are directly related to the case and which were involved in the case by the decision of the Competition Council. Other undertakings, which may be interested in the outcome of the case, such as competitors, consumers, their organisations or governmental institutions do not have a right to appeal the said decisions.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

In the process of competition enforcement procedures, certain actions have to be sanctioned by the Vilnius District Administrative Court. In particular, prior approval is required:

- to enter and check the undertaking's premises, land and means of transport as stated in question 4.3;
- in order to apply interim measures by imposing an obligation on undertaking to perform certain actions;
- in order to apply restrictions of economic activity (in particular, suspend export-import operations, bank operations, the validity of the permit to engage in certain economic activity) of undertakings which default on the penalties imposed upon them; and
- in order that the European Commission could directly perform an investigation in Lithuania and implement investigatory rights provided in the EC Regulation 1/2003.

In addition to the above provided involvement in approval of certain activities, the courts perform a judicial review of decisions of the Competition Council in a manner prescribed in question 11.1.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

Theoretically, in civil actions the Competition Council could be nominated as expert providing its impartial opinion in the case. However, the Competition Council, being the institution responsible for enforcement of competition rules, almost in all cases would be partial and for thus reason in practice could not qualify for the position of expert.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Undertakings, whose legitimate interests have been violated by infringements of the competition law, may bring claims before the court for damages or for the suspension of such illegal actions. Such private enforcement actions are governed by the general rules on civil liability established in the Civil Code of the Republic of Lithuania and are subject to a 3-year time limit starting from the moment when a claimant became aware or ought to have become aware of the infringement.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

In practise there have been successful claims for damages resulting from infringement of competition law brought by private persons, however such cases are initiated very rare.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Lithuania covered by the national competition rules?

The anti-competitive conduct of the undertaking shall be caught by Lithuanian competition law only in case such conduct restricts competition in Lithuania.

14.2 Please set out the approach adopted by the national competition authority and national courts in Lithuania in relation to legal professional privilege.

The Law on Competition does not deal with the right of legal privilege, i.e. the Law on Competition does not secure confidential communications between lawyer and client from being disclosed. Nevertheless, the Law on Advocacy ensures such legal privilege for communication between advocates and clients. Although there are certain disputes whether such legal privilege could be applied in competition cases, in practice Competition Council respect such privilege.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Lithuania in relation to matters not covered by the above questions.

The analysis of Lithuanian competition law case practice shows that during the past few years, the courts become more wiling to analyse the content of decisions adopted by Competition Council and arguments raised by the parties, thus enhancing judicial control in competition cases.

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LIDEIKA, PETRAUSKAS, VALIŪNAS ir PARTNERIAI | LAWIN

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Luxembourg

Patrick Santer

Léon Gloden

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Luxembourg? If more than one, please describe the division of responsibilities between the different authorities.

The law of 17th May 2004 on competition (the 2004 Law) has created the Council for Competition Matters (the Council) and the Investigation Division for Competition Affairs (the Investigation Division). The Council is the decision-making body and the Investigation Division registers complaints for infringement of the 2004 Law or article 81 and 82 of the EC Treaty, investigates the case and submits its report to the Council.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The *Institut Luxembourgeois de Régulation* (ILR) is the regulatory body of the postal, telecommunications, electricity and gas sectors. In accordance with article 17 of the law of 30 May 2005 on the networks and services of electronic communications (the 2005 Law), the jurisdiction of the ILR should not interfere with that of the Luxembourg competition authorities, even though in practice such interference may occur.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Luxembourg?

The latest reports of the Council and the Investigation Division do not provide any information on such issue. We cannot provide any information.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The 2004 Law prohibits: (i) agreements which restrict competition; and (ii) any abuse by one or more undertakings of a dominant position within the market. It provides for the enforcement of articles 81 and 82 EC, and essentially mirrors Regulation 1/2003.

There are no specific criminal provisions regarding competition law. General criminal law applies, such as the prohibition of forgery or fraud.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

The Law of 30 July 2002 (the 2002 Law) regulating certain commercial practices and prohibiting unfair competition prohibits anti-competitive practices such as sale at loss. These anti-competitive practices, prohibited as such, may be considered as an abuse of dominant position if exercised by one or several undertakings in a dominant position in the relevant market.

The 2005 Law on the telecommunications sector contains provisions on competition law, such as the prohibition of squeeze-out practices or of entry barriers to the access of essential facilities.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

No it is not.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

No, the law does not impose any formalities and there are no filing fees. However, the website of the competition authority (www.concurrence.lu) provides guidelines and a template for complaints in order to be sure that all the essential information is provided by the complainant. It is recommended to address the complaint to the Investigation Division since the Council may not take a decision without a preliminary investigation carried out by the Investigation Division. However, if a complaint is lodged with the Council, the Council will hand it to the Investigation Division.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

The latest reports of the Council and the Investigation Division do not provide any information on such issue. We cannot provide any information.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

The Investigation Division may start its investigation either as a result of a complaint lodged by a person having a legitimate interest, the Minister for economic affairs or the European Commission.

After a preliminary investigation, the Investigation Division may close the file (due, for example, to the absence of jurisdiction in Luxembourg).

If the Investigation Division decides to continue its investigation, it may ask for information from the relevant undertakings. It may also carry out searches, proceed to the seizure of documents and ask for expert opinion.

After such investigation, the Investigation Division may come to the conclusion that there is no proof of an anti-competitive practice. It will submit a proposal to the Council to close the file. The Council may either follow the report of the Investigation Division or ask the Investigation Division to undertake an additional investigation.

If the Investigation Division finds that there is sufficient proof of an anti-competitive practice, it will then notify the communication of the claim to the concerned undertakings. From such notification onwards, those undertakings have a right of access to the file and no request for leniency or immunity may be made. The relevant undertakings will be granted a deadline to reply to the communication of the claim (minimum one month). Thereupon, the Investigation Division will hand the file to the Council with its report. The Council will hear the undertakings, the complainant, the Minister for economic affairs (or a representative) and the Investigation Division. This hearing will take place not less than two months after the notification of the communication of the claim. The Council may also hear any other person, whether legal or physical, that it deems necessary. Then the Council renders its decision, which may be challenged before the administrative judge.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Yes, the Investigation Division may ask any undertaking for information through a request for information or by way of a formal decision compelling the undertaking to provide the information. Only the formal decision may be challenged in court. The incompleteness of information may only be subject to a fine in case of a formal decision.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

According to article 15 (1) and (2) and 16 (1) and (2) of the 2004 Law, the Investigation Division can visit business, or other premises (i.e. residential premises) without external authorisation, review documents and demand an explanation or information. Prior authorisation by the president of the competent district court (which is a civil court) is only necessary if the Investigation Division intends to carry out searches and seizures of all documents and company books. The search will be carried out by investigators of the Investigation Division, who may be assisted by experts and by police officers.

The search has to be made in the presence of the representative of the undertaking or the owner of the premises (or a representative). The attendance of a lawyer is allowed.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

The Investigation Division may hear any person during the course of its investigation, including the parties. However, the witness has a right to remain silent and the Investigation Division cannot compel anyone to testify. Witnesses may be assisted by a lawyer.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

Yes, they can with the prior authorisation of the president of the competent district court.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

See answer to question 4.5.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The Investigation Division may appoint experts. It has no surveillance powers, including bugging.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

The Investigation Division may hear the parties during the course of its investigation. However, parties have a right to remain silent (right against self-incrimination). In addition, the Council must hear the parties before taking its decision unless they have waived their right.

4.9 How are the rights of the defence respected throughout the investigation?

The undertaking is allowed to be assisted by a lawyer throughout the investigation and the decision-making process. The communications between the undertaking and its lawyer are covered by the legal privilege. In addition, the communication of the claim informs the undertaking of the evidence gathered by the Investigation Division, the reproaches made to it and the conclusions of the Investigation Division. The undertaking must have at least one month to reply to the communication of the claim. From the communication of the claim, the undertaking may also have access to the file. Finally, the Council may not take its decision without having heard the parties.

4.10 What rights do complainants have during an investigation?

After the communication of the claim, the parties have an access to the file. Moreover, they have the right to be heard by the Council before it takes its decision. The parties have the right to remain silent and may be assisted by a lawyer.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

A third party may challenge the decision of the Council to close a file since it is an administrative decision. It must challenge it before the administrative court of first instance (*tribunal administratif*) provided that it shows a personal, direct and certain interest.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

Yes, it does. The president of the Council or his delegate may, after a hearing of the involved parties, order interim measures. Interim measures may only be ordered if the anti-competitive practice causes serious, imminent and irreparable harm to the public and economic order or to the complainant. The interim measure must be proportional to the anti-competitive practice. The order of interim measures being an administrative decision, an action may be introduced against such order before the court for administrative matters.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

Regarding infringement of the provisions of the 2004 Law concerning enquiries, the limitation period is three years. For all the other infringements the period is five years. It starts to run the day of the violation or in case of a continuous violation the day where it ends. The limitation period regarding the enactment of a sanction is set at five years. These limitation periods are subject to discontinuation.

7 Co-operation

7.1 Does the competition authority in Luxembourg belong to a supra-national competition network? If so, please provide details

Yes, it does. The Luxembourg competition authority belongs to the European Competition Network, whose objective is the cooperation between the European Commission and the national competition authorities in all EU Member States.

It also belongs to the International Competition Network and the European Competition Authorities, which are organisations regrouping competition authorities at the world level and European level respectively. These networks provide a forum to discuss matters regarding the application of competition law.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

Information received by the competition authority from such investors may be used in order to assess an anti-competition behaviour.

8 Leniency

8.1 Does the competition authority in Luxembourg operate a leniency programme? If so, please provide details.

Article 19 of the 2004 Law provides for a leniency and immunity regime for cartels only. The Council may exempt the undertaking from fines if the undertaking is the first to report the existence of a cartel of which neither the Council nor the Investigation Division have any knowledge. The Council may also reduce the fines, provided the undertaking reports the existence of the cartel prior to the notification of the communication of claim.

The exemption or reduction of fines is subject to the following conditions:

- the undertaking provides the Council and the Investigation Division with all the documents and information in its possession regarding the existence of the alleged cartel;
- the undertaking provides total and permanent cooperation until the final decision has been taken by the Council;
- the undertaking immediately stops participation in the cartel, at the latest when it reports the existence of a cartel to the Council or the Investigation Division; and
- the Council or the Investigation Division shall not be in possession of elements that prove that the undertaking has compelled other undertakings, by exercising its economic power or by any other means, to participate in the cartel.

The second undertaking to report the existence of a cartel may only be granted a reduction of the fine provided that the other conditions are met.

The Council is not obliged to grant an exemption or a reduction even if the above conditions are met. There are no scales according to which fines may be reduced. No fines, reductions of fines or exemptions have been decided so far.

The decision of the Council on the award of leniency or immunity may only be challenged in court with a decision on the merits of the infringement.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

The Council may decide either to close the file due to an absence of proof of an anticompetitive practice or if an anti-competitive practice has been established to request the undertakings to terminate such practice and/or to levy a fine against all or some of the undertakings.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

There are no criminal sanctions in the 2004 Law. Pursuant to article 18 of the 2004 Law, the Council may levy administrative fines and penalties against undertakings. The fine may not exceed a certain amount. The fine will be set by the Council in view of the importance and duration of the anti-competitive practice, the harm caused to the Luxembourg economy, the situation of the concerned undertaking and the reiteration of the anti-competitive practices.

Moreover the Council may impose on undertakings periodic penalty payments (per day of non compliance) not exceeding a

certain amount and calculated from the day appointed by the decision, in order to compel an undertaking to put an end to an infringement of article 81 or 82 or article 3 or 5 of the 2004 Law (cartel or abuse of dominant position) in accordance with its decision, to comply with a decision ordering interim measures or to comply with a commitment made binding by its decision.

The Council may also order the publication of its decision.

Furthermore, any person may introduce a claim in the civil court on the basis of liability in tort or contractual liability to obtain indemnification for the claimant who has suffered harm as a result of the existence of a cartel or an abusive practice.

Employees, managers or directors cannot suffer any sanction under the 2004 Law. However if those persons have committed any act or fault which have led to the involvement of the company/employee in a cartel or an abusive practice without the approval or the acknowledgment of the board or the employee, they may be subjected to the sanctions provided by the Law of 10 August 1915 on commercial companies or the Labour Law Code, as applicable.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

A fine may be imposed on the undertaking in case of refusal to provide correct information to the Investigation Division (whether such information has been requested by formal decision or not) or in its absence to provide correct information within the time limit indicated in the formal decision made by the Investigation Division. On several occasions the Council has imposed fines on undertakings which refused to submit complete information.

Moreover, penalty payment may be imposed in order to compel the undertaking to supply complete and correct information to the competition authorities.

10 Commitments

10.1 Is the competition authority in Luxembourg empowered to accept commitments from the parties in the event of a suspected competition law infringement?

According to article 12 of the 2004 Law, yes.

10.2 In what circumstances can such commitments be accepted by the competition authority?

Where the Council intends to adopt a decision requiring that any infringement be brought to an end and the relevant undertakings offer to meet the concerns expressed to them by the Council in its preliminary assessment, the Council may make those commitments binding on the undertakings. Such a decision may be adopted for a specified period.

10.3 What impact do such commitments have on the investigation?

The decision accepting the commitments shall conclude there are no longer grounds for action by the Council. If the involved undertakings do not comply with their commitments, the Council may impose penalty payments. In case of infringement to the commitments, the Investigation Division, the Minister for economic affairs or a party having a legitimate interest may also ask the Council to reopen the case.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

The decisions rendered by the Investigation Division may be challenged before administrative court of first instance (*tribunal administratif*). It has to be noted that the decision of the Council on the award of leniency or immunity may only be challenged in court with a decision on the merits of the infringement. An appeal against a judgment of the administrative court may be lodged before the administrative court of appeals (*cour administrative*) within 40 days of the notification of the judgment of first instance.

The authorisation granted by the president of the district court to allow the Investigation Division to carry out searches and seizures of all documents and company books may be challenged before the court of appeals (civil matters).

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

The undertaking may challenge the decision of the Council before the administrative court. An appeal against a judgment of the administrative court may be lodged before the administrative court of appeals within 40 days of the notification of the judgment of first instance.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

First, the decisions of the Council may be challenged before the administrative courts. In addition, according to the preparatory parliamentary documents, the courts (like the Council) may record the nullity of an abusive practice or an agreement or a concerted practice falling within the scope of article 81. The courts may also grant damages in reparation of the prejudice suffered by the claimant. However, the agreement of national judicial bodies is not needed to implement the competition/anti-trust sanctions.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

The national competition authority has no legal personality and thus cannot intervene in courts. However, article 29 of the 2004 Law provides that the Council may submit written observations to the court or, upon the court's authorisation, present oral observations. It may also produce minutes or investigate reports in court proceedings. The European Commission, however, will not be allowed to act as *amicus curiae* in proceedings before Luxembourg courts.

In addition, a decision rendered by a competition authority (national or international) will qualify as an element of proof. The above applies if a party produces documents, for example decisions or judgments rendered in similar cases to the case pending before a Luxembourg court, in order to sustain its arguments. However, if a party introduces an action before a Luxembourg court because of the occurrence of an antitrust practice, the Commission or a national or foreign authority has considered as being contrary to article 81 and / or 82 or not, a Luxembourg court would unlikely adopt a different decision.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

The courts may record the nullity of the abuse of a dominant position by the undertaking or the agreement or concerted practice falling within the scope of article 81. Thus private actions can be brought to courts in order to record the nullity of the practice and ask for reparation of the prejudice suffered by the claimant because of the abuse.

Third parties harmed by abusive practices may also only claim for damages before civil courts on the basis of article 1382 of the Civil Code, which is the common legal basis for any actions of liability in tort and provides that any damage caused by faults entails the liability of the author of the fault. Such third parties have to show a direct, certain and personal interest to sue for damages before Luxembourg civil courts. The amount of the damages is equivalent to the amount necessary to put the claimant in the position he would have been in if the abuse had not been committed. No punitive damages can be awarded.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

There have been no successful claims for damages or other remedies so far.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Luxembourg covered by the national competition rules?

The 2004 Law does not prevent the Investigation Division or the Council from taking into account actions that occurred outside Luxembourg that have effect on the territory of Luxembourg.

14.2 Please set out the approach adopted by the national competition authority and national courts in Luxembourg in relation to legal professional privilege.

Legal privilege in Luxembourg covers the correspondence between external lawyers as well as the correspondence between external lawyers and their clients.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Luxembourg in relation to matters not covered by the above questions.

The Luxembourg competition law is not much applied. Owing to the few decisions and investigations reported so far, no specific trend may be pointed out at this stage. So far, the Council has strongly relied on European law and case law to support its decisions.

The 2004 Law will be amended by a bill of law No. 5816, which was filed with Parliament on 20 December 2007. The main provisions of the bill of law are:

- the merger of the Investigation Division into the Council;
- the proceedings will be made more effective and less cumbersome;
- the maximum amount of the fines will be differentiated according to whether the undertaking was a party to cartel or has abused its dominant position, or has refused to submit information to the council during the investigation of the case; and
- the leniency regime will be adapted to the European leniency programme.

The bill of law No. 5816 may be amended during the course of the parliamentary process.

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Languages spoken:

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Netherlands

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in the Netherlands? If more than one, please describe the division of responsibilities between the different authorities.

The Dutch competition authority (NMa) is entrusted with the enforcement of competition law in the Netherlands. The NMa investigates suspected violations of the rules and imposes sanctions. National courts also apply competition law in cases brought before them. They can declare the invalidity of agreements which are incompatible with the rules and order the cessation of incompatible unilateral behaviour. In addition the courts can award damage claims resulting from infringements.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The NMa has an Energy Division to enforce the Electricity Act and the Gas Act, as well as a Transport Division to enforce (among others) the Railway Act and the Act for the Transport of Passengers. There are separate authorities responsible for market regulation in the post- and telecommunication sector (OPTA), the media sector (Dutch Media Authority) and the health sector (NZa). The OPTA supervises the application of the Post Act, the Telecommunication Act and the Permission Act on cable-connected telecommunication-infrastructure by market players. The Dutch Media Authority supervises the application of the Media Act. The NZa supervises the health markets in the Netherlands on the basis of the Act for the Regulation of the Health Sector. Each of these authorities has the power to take measures in their respective sectors where normal market forces are insufficient to ensure a healthy market. The enforcement of the Competition Act in these sectors is still the responsibility of the NMa, in consultation with each of these authorities.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in the Netherlands?

The NMa can start an investigation of its own initiative or following a complaint. The NMa is not obliged to investigate every suspected infringement and complaint. It sets it priorities on the basis of: economic significance, consumer interest, severity of the infringement and likely efficiency of the NMa action. The NMa also establishes specific priorities each year. In its annual "Agenda" the NMa identifies the sectors and themes to which it will give special attention in the coming year. As a result of the closer cooperation between the NMa and the European Commission since the modernisation of European competition policy, such policy plays a significant role in establishing these priorities.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The NMa enforces articles 6 and 24 of the Dutch Competition Act (*Mededingingswet*, Mw), and articles 81 and 82 EC Treaty. The Dutch articles closely mirror the European articles subject to the requirement of an effect on competition in the Netherlands instead of an effect on trade between Member States. The NMa is also responsible for concentration control.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

The Dutch Competition Act does not contain sector-specific provisions. However as a result of secondary legislation the thresholds for notification of a concentration in the health sector have, as of 1 January 2008, been lowered (Implementing regulation of 6 December 2007, 2007/518). In addition there are temporary rules for the assessment of media mergers (Act relating to Media Mergers). These rules prohibit media mergers which establish a player with 35% or more of the market for newspapers or shares on the markets for newspapers, television and radio programmes which together add up to 90% or more. The other most relevant additional legislation effecting regulation and the role of market forces in specific sectors is mentioned under question 1.2.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

Prior approval of concentrations is a precondition for implementation. It is by contrast not possible to obtain prior approval for a proposed cooperation agreement or (unilateral) course of action. In certain circumstances the NMa is however prepared to give an informal view as to the compatibility with the

competition law of a proposed agreement. The NMa only provides an informal view if (i) the case raises a new question of law, (ii) it has a social or economic significance and (iii) the applicant has provided sufficient information for the NMa to draw up an advisory letter.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

Any party, consumers and businesses, can file a complaint to the NMa. There are no special requirements for the form such complaint should take. It can be written or verbal. However the more detail it contains of the parties and behaviour concerned, the more likely the NMa will be able to take action.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

According to its Annual Report 2008, the NMa investigated 22 potential competition law breaches in that year. The Report does not specify how many of these were triggered by one of the 29 complaints submitted.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

During the first phase of its investigation into a suspected infringement, the NMa gathers information by sending question lists to the parties concerned and other market players. The NMa can also visit companies and question employees. If the NMa has a reasonable suspicion of an infringement, it sets out its findings in a report, which it sends to the parties concerned. The report and all other documents regarding the case are then made available for inspection by interested parties. These parties can then express their views, in writing or during a hearing. The NMa comes to a final decision on the basis of the report and the hearing. This decision can impose sanctions. There are no legislative deadlines within which the NMa needs to complete its investigation. The NMa has set itself the goal of finishing an average of 90% of its cartel and abuse of dominance cases within 20 months of starting the investigation.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

The NMa can ask anyone (the complainant, the suspected perpetrator and third parties) for written or oral information. The party questioned is obligated to answer truthfully. However, representatives or employees of a company which the NMa suspects of an infringement of the competition rules, are not obligated to answer questions that could lead to "self-incrimination" (confirmation by a party representing the company of a breach by the company). The NMa informs the persons concerned of this right. This right does not include the right to refuse to provide documents or answer factual questions.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

The NMa is entitled to enter and search all premises (offices, shops, cars). The NMa can, however, only enter and search private houses without the consent of the inhabitant if this is necessary to gather information. The NMa requires in such circumstances prior authorisation of the examining judge of the court of Rotterdam. The entrance and search take place under supervision of the examining judge. A public servant of the NMa makes a written report of the search, of which the inhabitant receives a copy.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

The NMa has the right to interview the parties in the course of searches or subsequently.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

In principle the NMa does not remove original documents. It takes copies of documents that are relevant for the investigation. Although 'relevant' should be interpreted broadly, so called 'fishing expeditions' are not allowed. Only if the documents cannot be copied on the spot, can the NMa remove originals.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

During the inspection the NMa can take digital copies. If the copied data contains privileged or private documents and the undertaking can identify such documents directly, the NMa deletes them from the digital copy on the spot. After the investigation, the undertaking receives an outline of all the data of which digital copies are made. It then has a second opportunity to request the deletion of privileged or private data. The data which is claimed to be privileged or private is then placed outside the investigation. An official not involved in the investigation will assess whether privileged claims are justified; another official will assess whether data is private.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The NMa can request the assistance of the police to obtain access to premises. It also has the right to seal business premises, to ensure that evidence will not be removed or tampered with.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

The undertaking under investigation has the right to receive a copy of the NMa's report, to submit (in writing or orally) its views on the findings, to view all documents regarding the case and to react to the submissions of interested parties.

4.9 How are the rights of the defence respected throughout the investigation?

An undertaking under investigation has a right to remain silent, as described under question 4.2. It has access to the file. It has the right to be heard. A finding of a breach cannot be based on facts, information or accusations to which the undertaking has not been given the opportunity to react.

4.10 What rights do complainants have during an investigation?

If (i) the complainant is an interested party (a party who has a direct interest in the outcome of the investigation), (ii) the complaint concerns the Dutch Competition Act and (iii) the complainant provides sufficient information with the complaint, the complaint can be regarded as a 'formal complaint'. The NMa is obliged to take a decision in respect of the investigation of formal complaints. If it decides not to initiate an investigation or to terminate an investigation, for example because of lack of proof, the complainant will be informed of this. If the NMa gets to the stage of drawing up a report in which it expresses a reasonable suspicion that the competition laws have been violated, the complainant has the right of access to the NMa's file. The complainant has the right to submit his views and to react to the views of others. He also receives a copy of the final decision.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Other interested parties also have the right of access to the file, the right to express their views about the report the views submitted by other interested parties.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The NMa does not have the power to take interim measures.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The NMa may impose a fine for breach of article 6 or 24 of the Dutch Competition Act up to five years after the violation has taken place. This term is extended by periods in which the NMa is carrying out an investigation or in which objection or appeal is lodged against a decision to impose a fine, subject to an absolute deadline of ten years after the infringement has taken place.

7 Co-operation

7.1 Does the competition authority in The Netherlands belong to a supra-national competition network? If so, please provide details

The NMa participates in the European Competition Network (ECN), which consists of the European Commission and the national competition authorities of the Member States of the European Union. The Members inform each other of new cases of suspected cross border anticompetitive behaviour. They coordinate investigations and inform each other of envisaged enforcement decisions. The NMa is also actively engaged in other international organisations such as the Organisation for Economic Co-operation and Development (OECD), the European Competition Authorities (ECA, an informal forum for competition authorities in the European Economic Area), and the International Competition Network (ICN).

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

The ECN members may for the purpose of applying articles 81 and 82 EC, provide one another with and use in evidence any matter of fact or law, including confidential information. Where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged may also be used for the application of national competition law. It can only be used as evidence leading to the imposition of sanctions on natural persons where the law of the transmitting authority provides for sanctions of a similar kind in relation to an infringement of article 81 or 82 EC or, in the absence thereof, the information has been collected in a way which provides the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in the last case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

8 Leniency

8.1 Does the competition authority in The Netherlands operate a leniency programme? If so, please provide details.

Natural persons or undertakings that are or have been involved in a cartel, can apply for leniency. The NMa has published leniency guidelines. To apply for leniency, the applicant has to submit a timely leniency request and cooperate fully with the NMa during its investigation. The NMa distinguishes three categories of leniency. The first applicant can apply for 100% leniency in case the NMa has not yet started investigations into the matter, the applicant has not forced others to take part in the cartel and he supplies the NMa with sufficient information to start an investigation (category A). The first applicant can get 60-100% leniency in case the NMa has started investigations but has not yet send a report to the interested parties, the applicant has not forced others to take part in the cartel and he supplies considerable additional information (category B). The applicant can get 10-40% leniency in case he is not the first applicant and no report is yet send to the interested parties or in case he is the first applicant but has forced others into participating in the cartel and (in both cases) he supplies considerable additional information (category C). The NMa adopted and applied more generous leniency guidelines in relation to the construction cases.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

The NMa can decide to terminate its investigation for example if

there is insufficient evidence of the suspected infringement. If there is sufficient evidence of an infringement it can adopt a decision to that effect, with or without imposing a fine.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

Both undertakings and individuals can be fined for competition law infringements. Individuals may be liable if they gave the instruction to commit the infringement or had the managerial responsibility for the prohibited actions. The sanction of individual fines only exists since October 2007 and has, at the time of writing, not yet been imposed. Individuals are however currently the subject of ongoing investigations.

The NMa can fine undertakings up to 10% of the turnover of the undertaking in the financial year preceding the decision and individuals up to €450,000. The NMa can also impose periodic penalty payments for non compliance.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

The NMa can impose a fine for non-cooperation or for breaking a seal. The maximum fine for individuals is € 450,000 and for an undertaking, 1% of its turnover in the financial year preceding the decision. In case of a breach of commitments (see section 10) the NMa can impose a fine of up to € 450,000 on individuals and on undertakings 10% of it turnover in the financial year preceding the decision.

10 Commitments

10.1 Is the competition authority in the Netherlands empowered to accept commitments from the parties in the event of a suspected competition law infringement?

The NMa may accept commitments from parties suspected of an infringement.

10.2 In what circumstances can such commitments be accepted by the competition authority?

An undertaking can offer commitments to the NMa and request the NMa to adopt a commitments decision as an alternative to a decision establishing an infringement and imposing sanctions. In a commitments decision the NMa declares binding commitments which prevent violations of articles 6 or 24 MW or that put an end to a suspected infringement of these articles. A decision by which the NMa accepts commitments is not the equivalent of a finding of an infringement. The NMa can adopt a commitment decision where in its opinion (i) it is ensured, as a consequence of the decision, that the undertaking will act in accordance with article 6 and 24 Mw, (ii) it can verify compliance with the commitments and (iii) taking such a decision is more efficient than imposing a fine.

10.3 What impact do such commitments have on the investigation?

When the NMa decides to declare the commitments binding, it terminates its investigation.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Appeal is only possible against final decisions. However complaints can be made to the complaints officer of the NMa or the national Ombudsman. When the complaints officer receives a complaint, he will first try to come to a solution by contacting the complainant. In case this is not successful, the NMa will eventually decide, on advice of the complaints officer, which consequences it attaches to the complaint. In case the complainant is not satisfied with the settlement of the complaint, he can make a complaint to the national Ombudsman. Depending on the matter, the national Ombudsman will make a quick intervention or start an investigation. After an investigation the national Ombudsman will draw up a report in which it decides whether the complaint is justified. This report can contain recommendations to the NMa.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Parties can appeal an infringement decision. The possible grounds for appeal are breach of law or of the general principles of good administration. Appeals can be made to the NMa itself and subsequently to the Court of Rotterdam or, if the NMa and all parties agree, directly to the Court of Rotterdam. Appeals need to be lodged within six weeks of the relevant decision.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

National courts have a review role, as described under question 11.2. Their agreement is, however, not needed to implement a fining decision.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

The NMa does not play a role in actions before the national court. Pending the case, national courts can ask questions of the European Commission about the application of EC competition law. This possibility is not frequently used.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

The Netherlands does not have a specific legislative framework for private enforcement of antitrust rules. Private claims are based on general civil law actions in conjunction with European and Dutch antitrust law. Third parties can bring before the national civil courts nullity actions based on articles 81 and 82 EC and/or articles 6 and 24 Mw. These actions can be based on article 3:40 of the Dutch Civil Code (DCC), which declares void legal acts contrary to mandatory rules. Acts or omissions in violation of European or Dutch competition law also constitute a tort. On this basis third parties can bring an action for damages or an action for an injunction or restraining order, possibly in conjunction with a periodic penalty payment. Another possibility is an action for undue payment or unjust enrichment.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

There have been successful claims for damages arising out of competition law infringements. The success took the form of a settlement rather than a court decision. The most well known example concerned more than a thousand claims in relation to a nationwide construction cartel. Most of these claims were settled. The NMa granted a discount on the fine imposed when the undertaking agreed to settle. Another example is the Interpay case, in which 1,200 claims were brought against Interpay, a Dutch banking institution involved in the processing of electronic funds transfer. Interpay was fined by the NMa for abusing its dominant position by charging excessive prices for PIN transactions. Various employers' organisations filed damages claims. These cases were settled.

14 Miscellaneous

14.1 Is anti-competitive conduct outside the Netherlands covered by the national competition rules?

Anti competitive conduct outside the Netherlands will only fall within the scope of the Dutch competition rules to the extent they have the aim or effect of restricting competition on the Dutch Market.

14.2 Please set out the approach adopted by the national competition authority and national courts in the Netherlands in relation to legal professional privilege.

The NMa may not review privileged documents. The NMa is obligated to respect the confidentiality of correspondence between clients and attorneys admitted to the bar. Also internal documents in which this correspondence is reflected or summarised are privileged. The procedure during the inspection relating to privileged documents is mentioned under question 4.6.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to the Netherlands in relation to matters not covered by the above questions.

Not applicable.

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Sarah Beeston leads the competition law practice of Van Doorne. After qualifying in the UK, Sarah worked for the European Commission. She entered private practice in 1991 and has since specialised in EU law and competition law. Sarah has practised in Brussels, Paris, London and, since 1998, Amsterdam. She has insight into how the EU and national regimes work in practice. In addition to her solid advisory practice, Sarah represents clients in proceedings before national and international courts and in investigations by competition authorities. She has guided numerous clients through national, EU and multi-jurisdictional concentration filings. She takes a practical approach to drafting and implementing tailor-made compliance programmes. Sarah represents clients from all industries including entertainment, financial services, agriculture and energy and has a special focus on the health-care sector. Sarah lectures as part of a Master class on competition Law at the University of Utrecht and gives workshops on competition compliance.

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After completing his studies in civil law, company law and European Private law, Steven Sterk entered private practice in 2007. Steven works in the competition law practise group of Van Doorne. He advises a broad range of clients with respect to antitrust proceedings and merger filings. Steven also specialises in state aid and public procurement law. Steven publishes regularly on competition law developments and has for example written articles on the burden of proof in antitrust proceedings.

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The Competition Law Group of Van Doorne is comprised of 2 partners and 8 associates. We have a wide practice extending to all areas of competition law. The defence of (suspected) cartels takes centre stage. We have achieved high levels of leniency and substantial reductions in fines in a significant number of high profile cases. We obtained for one of our clients the first and to date only commitments decision under the Dutch competition law. As a result of the excellent reputation of Van Doorne in the health sector we represent several clients in the ongoing NMa sector wide investigations into suspected cartels and have been involved in 40% of the transactions involving hospitals and nursing homes in the last year. We have also successfully defended abuse of dominance claims for several market leaders in the Netherlands. We work with and have regular referrals from our extensive international network of lawyers and advisers.

Portugal

Margarida Rosado da Fonseca

Morais Leitão, Galvão Teles, Soares da Silva & Associados

Luís do Nascimento Ferreira

1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Portugal? If more than one, please describe the division of responsibilities between the different authorities.

The enforcement of competition laws in Portugal is entrusted to the Portuguese Competition Authority (*Autoridade da Concorrência*). The Authority was created in 2003 by Decree-Law Nr. 10/2003, of January 18 (which also sets forward its Bylaws) and its powers were further detailed in the Competition Act (Law Nr. 18/2003, of 11 June). The Authority is a public entity with statutory independence for the performance of its attributions and enjoys administrative and financial autonomy. This independence is without prejudice to the guidelines on competition policy as defined by the Government, in line with the constitutional and legal framework, and of given acts being subject to review by the relevant ministry in accordance with the law.

The Authority has two bodies, the Council and the single auditor ("*fiscal único*"). The first is the decisional body entrusted with the enforcement of competition laws and with the management of the Authority's services. The services are composed of jurists, economists and other officials and currently include the merger control department, the restrictive practices department, the legal and litigation department, the economic studies cabinet, the international relations department and the financial and administrative department. The Council is composed of a chairman and two or four other members, appointed by the Council of Ministers upon proposal of the minister in charge of economic affairs and subsequently to the hearing of the ministers responsible for finance and justice affairs. The law provides that the members of the Council are persons of recognised competence and having experience in areas relevant for the pursuance of the competences that have been attributed to the Authority. Their nominations are for a period of five years and may be renewed once. Particularly relevant is the rule of impossibility for dismissal of the members of the board before the end of their mandate. Exceptions concern the dissolution of the Council by resolution of the Council of Ministers on the grounds of serious collective misconduct or as a result of extinction of the Authority and individual dismissal may occur in exceptional circumstances provided for in the Bylaws.

The second body is the single auditor who is responsible for the legal and economic control of the Authority's assets and financial management and also carries out an advisory role to the Council.

The Authority has sanctioning, supervisory and regulatory powers.

Please see hereunder in **question 1.2** for the relations between the competition authority and sector regulators.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The Competition Act applies to all sectors of activity and together with Decree-Law Nr. 10/2003 entrusts the Authority with the enforcement of competition laws in all those sectors. In this context, the Government has enacted Decree-Law Nr. 30/2004, of 6 February that establishes that the Authority receives a part of the fees charged by the sector regulators to the undertakings belonging to the sectors they oversee when rendering services to them. As explained above in **question 1.1**, the new competition regime establishes that the Authority has its own financial resources and is independent from the Government and given that the Authority is entrusted with the enforcement of competition law in all sectors of activity, it is justified that a part of the referred fees is awarded to it.

Notwithstanding, it is arguable whether the articulation of competences between the Authority and sector regulators is clearcut. More precisely, Article 15 (1) of the Competition Act provides that the Authority and the sector regulatory authorities shall work together to apply the competition legislation. As concerns restrictive practices and even though the Authority is competent to instruct and decide the case, the competent sector regulator shall be immediately informed of the same case and given a reasonable time-limit to present its Opinion. Should the latter become aware of a restrictive practice, it must immediately inform the Authority of the case and supply the essential facts. As for merger control, whenever a concentration of undertakings affects a market that is subject to sector regulation, before reaching a final decision the Authority shall ask the respective regulatory authority to state its opinion, within a reasonable period prescribed by the Authority. However, Article 39 provides that the referred articulation of competences shall not affect the exercise by the sector regulatory authorities of the powers that, within the scope of their specific duties, are legally conferred on them in relation to the concentration in question. This wording has already given rise to different interpretations particularly in important merger control cases.

In order to facilitate cooperation and assure coherence in the decision-making process, a Cooperation Protocol was established between the Authority and the telecommunications regulator. There is not, up to the present date, public information on any other Protocols having been signed with other sector regulators. In its annual reports of activities, the Authority gives out general information on ongoing cooperation with sector regulators.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Portugal?

There is no binding document on the Authority's priorities as

concerns its investigations. Notwithstanding, the Authority's annual plans of activity provide a useful hindsight of its envisaged priorities for the coming year as concerns the type of infringements that will be the focus of investigations as well as the sectors of activity which may be under surveillance. Moreover and similarly to what is the common practice at Community level, the Authority has taken the opportunity to reiterate the seriousness of given infringements of competition (more precisely, cartels) and the importance awarded to the investigations for its identification and condemnation in the context of publication of press releases concerning the outcome of given investigations. In addition to this, the Authority has developed monitoring of given sectors of activity which are considered of special importance, such as fuels, electricity and pharmaceuticals. In doing this, the Authority explained that this monitoring is due to the circumstance that they are either regulated or have a high degree of concentration in the market.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The Portuguese Competition Act does not provide for any criminal sanctions, all competition infringements constituting misdemeanours. Substantive competition law provisions include the following:

- **Article 4 (1)** is equivalent to article 81 (1) of the EC Treaty and prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings, whatever form they take, of which the object or effect is appreciably to prevent, distort or restrict competition in the whole or a part of the national market. The examples provided for are equivalent to the ones provided in article 81 (1) EC. Moreover, according to Article 4 (2), unlawful practices are null and void, similarly to Article 81(2) EC.
- **Article 5** is equivalent to article 81 (3) of the EC Treaty. Practices referred to in Article 4 may be considered justified when they contribute to improving the production or distribution of goods and services or promoting technical or economic development, provided that, cumulatively, they:
  a) offer the users of such goods or services a fair share of the benefit arising therefrom;
  b) do not impose on the undertakings in question any restrictions that are not indispensable to attain such objectives; and
  c) do not grant such undertakings the opportunity to suppress the competition in a substantial part of the goods or services market in question.

  The practices provided for in Article 4 may be the subject to prior assessment by the Competition Authority (for more details, please see **question 3.1** hereunder). It is worthwhile referring that practices prohibited by Article 4 are considered justified when, though not affecting trade between Member States, they satisfy the remaining application requirements of a Community regulation adopted under Article 81 (3) of the EC Treaty. Accordingly, the Authority may withdraw the benefit referred to above if, in a particular case, it ascertains that a practice covered by it has effects incompatible with the cumulative conditions referred to above.
- **Article 6** provides for the prohibition of abusive exploitation of a dominant position in the national market or a substantial part of it, with the object or effect of preventing, distorting or restricting competition and applies to single and collective abuses of dominance. This provision considers notably the following:
  a) any of the forms of behaviour referred to in Article 4 (1); and
  b) the refusal, upon appropriate payment, to provide any other undertaking with access to an essential network or other infrastructure which the first party controls, when, without such access, for factual or legal reasons, the second party cannot operate as a competitor of the undertaking in a dominant position in the market upstream or downstream, always excepting that the dominant undertaking demonstrates that, for operational or other reasons, such access is not reasonably possible.
- **Article 7** provides for the prohibition of abusive exploitation of economic dependence of any supplier or client on account of the absence of an equivalent alternative. An undertaking is understood as having no equivalent alternative when:
  a) the supply of the good or service in question, in particular that of distribution, is provided by a restricted number of undertakings; and
  b) the undertaking cannot obtain identical conditions from other commercial partners in a reasonable space of time.

  Furthermore, the following in particular may be considered abusive:
  a) Any of the forms of behaviour laid out in Article 4 (1).
  b) The unjustified cessation, total or partial, of an established commercial relationship, with due consideration being given to prior commercial relations, the recognised usage in that area of economic activity and the contractual conditions established.

The Authority's competences to enforce articles 81 and 82 EC when trade between member states is affected are expressly provided both in the Competition Act and in its Bylaws.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

One of the several innovations of the Competition Act consists in not distinguishing its applicability to any sectors of activity. Notwithstanding and as concerns specifically merger control provisions, the Television Act provides for the competence of the sector regulator to provide a binding Opinion on the concentration which, if negative, will impede the Authority to clear the concentration. The sector regulator may however only issue a negative opinion if the free expression and confrontation of opinions are in question.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

The Portuguese Competition Act expressly provides for a system of prior notification of agreements/practices equivalent to the one that existed at EU level until Regulation 1/2003 entered into force. Notwithstanding and with a view to harmonising the Portuguese competition regime with the EU one, the Council of the Competition Authority enacted Regulation 9/2005 which reduced substantially the scope of application of this system. More precisely, the Regulation provides that the Authority is competent to assess agreements/practices to which only Portuguese competition law is applicable. Furthermore, the regulation provides for high filing fees for the prior assessment of agreements/practices by the Authority (€7,500 to €25,000), the same for filings of

concentration, which may further refrain undertakings from seeking prior approval. In practice, since 2005 there are only records of very few agreements being notified and the Authority considered itself incompetent to assess them.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

The Authority provides for a complaint form in its website. Even though it is not mandatory, the Authority considers that this document should serve as guideline for the information to be provided by the complainant. The confidentiality of the information contained in the form is ensured by the Authority.

Together with the complaint form, the Authority published a short note on the applicable EU and national legal framework in order to clarify the Authority's powers and help complainants to characterise the alleged infringement of competition rules. Alternatively to the presentation of a formal document with the complaint, the Authority provides for an electronic complaint form on its website, which allows for anonymous complaints. The Authority initiates an investigation ("*inquérito*") when it acknowledges suspicions of unlawful practices either *ex officio* or subsequently to a complaint. In the latter case, the Authority should not dismiss the case before informing the complainant and establishing a reasonable timeframe for the latter to present comments on the proposed decision.

Please note that all the State's services as well as independent administrative authorities have the duty to report to the Authority any facts susceptible of constituting infringements of competition. It is not excluded that these same entities may acknowledge the alleged infringements as a result of complaints.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

There is no public information on the overall activity of the Authority as concerns investigations, even though the annual reports of activities refer to the most important cases (the most recent one refers to 2007). In accordance with the very scarce available information, no decisions have been adopted so far by the Authority under the leniency policy. In certain cases the Authority publishes a press release when adopting a decision of condemnation of alleged infringements of competition and refers whether the investigations started with a complaint or an *ex officio* investigation and also whether there was particular cooperation with the Authority which may have resulted in a reduction of fine. It would be a very positive step towards greater transparency and legal certainty if the Authority would disclose non-confidential versions of decisions in this field.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

The law provides that whenever the Authority becomes aware, from whatever source, of possible practices prohibited by Articles 4, 6 and 7, it shall initiate an investigation, within the scope of which it shall carry out the inquiries necessary to identify such practices and their agents. Once the inquiry is complete, the Authority shall decide either to take no further action, should it deem that there is not sufficient evidence of infringement (for the situations where the inquiry has been initiated by a complaint, please see above **section 3**); *or*, to continue with the proceedings by notifying the accused undertakings or associations of undertakings, should it conclude from the investigations carried out that there is sufficient evidence of infringement of the competition rules. In the latter case - which corresponds to the second phase of the proceedings ("*instrução*") - the notification by the Authority shall set a reasonable period for the accused to make its position known in writing with respect to the accusations and other questions that may concern the decision for the case and with respect to the evidence produced, as well as a reasonable period for the accused to request the further inquiries for evidence that they consider proper. In this context, at the request of the accused undertaking(s) or association(s) of undertakings, presented to the Authority within five days of notification, the hearing in written form may be completed or replaced by an oral hearing (this hearing shall take place on the date set by the Authority for the purpose, though in no circumstances before expiry of the period initially set for the hearing in written form).

When the evidence-taking is complete, on the basis of the report by the department gathering the evidence, the Authority shall make a final decision in which it may, depending on the case:

a) order that no further action on the case be taken;

b) declare that a practice restricting competition exists and, in this case, order the offender to adopt the preventive measures necessary for this practice or its effects to cease, within the period laid down;

c) apply the fines and other penalties; and

d) authorise an agreement, under the terms and conditions provided in the law.

It is thus not possible to provide an indicative time-line as moreover there is scarce public information on the Authority's practice on these decisions.

Please note that if the market(s) in question are subject to sector regulation, there are specificities concerning the procedure and the intervention of the sector regulator (please refer to **question 1.2** above).

As concerns interim measures, please refer to **question 5.1** below

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

In exercising its powers to sanction and supervise, the Authority, represented by its institutional bodies and employees, enjoys the same rights and powers and is subject to the same duties as criminal police institutions (Article 17 of the Competition Act). This enables the Authority notably to question the legal representatives of the undertakings or associations of undertakings involved and to ask them for documents and other elements of information that the Authority deems useful or necessary for clarification of the facts. Similarly, the Authority may question the legal representatives of other undertakings or associations of undertakings and any other persons whose declarations it deems relevant and to request them to supply documents and other information.

Article 18 of the Competition Act expressly provides for the cumulative conditions that a request for information must comply with. Moreover, the provision of the information and/or documents requested by the Authority in pursuance of this Act should be made within 30 days, unless, with a properly substantiated decision, the Authority lays down a different period. The time period only includes working days.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

As referred above, the Authority enjoys the same rights and powers and is subject to the same duties as criminal police institutions, as established by Article 17 of the Competition Act. Therefore, the Authority is able notably to search for, examine, gather, copy or take extracts from written or other documentation, at the premises of the undertakings or associations of undertakings involved, whether or not such documentation is in a restrictive area, whenever such inquiries prove necessary for the obtaining of evidence. These investigations require a warrant from the competent judiciary authorities, requested beforehand by the Authority in an application that is duly substantiated. The decision shall be handed down within 48 hours. Moreover the Competition Act requires that the Authority's employees who, externally, perform the investigations shall carry with them credentials issued by Authority stating the purpose of the investigation and the above-referred warrant. Whenever necessary, the Authority may request the action of the police authorities.

The Competition Act does not provide for the power of the Authority to enter any premises other than the ones referred above (such as the domiciles of managers) and this is explained by the fact that infringement of competition rules is not a criminal offence but a misdemeanour.

In the same way, the Authority is able to seal the premises of the undertakings in which elements of written or other documentation are to be found or are liable to be found, for the proceedings and to the extent strictly necessary for the inquiries referred to in the first paragraph to be completed.

The Authority may also require any other public administration services, including criminal police bodies, through the proper ministerial channels, to provide the co-operation necessary for the full discharge of their duties.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

The Authority is competent to conduct the inquiries referred in **question 4.2** above in the course of searches.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

As referred to above in **question 4.3**, the competition authority is entitled to gather, copy or take extracts from written or other documentation during a search to the premises of an undertaking being investigated. Notwithstanding, it is the Authority's duty to identify all the documentation in question and provide a copy of that same list to the representatives of the undertaking in question. The exception to the Authority's referred power concerns documents within the scope of legal professional privilege (see below **question 14.2**).

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

The Competition Act does not provide specifically for this possibility but the expression "written or other documentation" which may be copied or taken extracts from has been considered in practice as including electronic data. Notwithstanding, it is controversial whether the search warrant concerning correspondence (emails included) may be issued by the public prosecutor and also whether the Authority is entitled to gather/copy correspondence given the constitutional principle of protection of correspondence. So far, the case law of national courts has allowed the authority to conduct searches on the basis of an authorisation granted by the public prosecutor. National case law has also drawn a distinction between open and non-open correspondence, the latter being allegedly the only one covered by the constitutional protection of correspondence. Open correspondence (regardless of its format) is in this context considered normal documentation for the purposes of apprehension by the Authority.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

No. Infringements of competition rules constitute misdemeanours and not crimes, therefore, no surveillance powers are provided for.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

Once the inquiry is complete, should the Authority conclude from the investigations carried out that there is sufficient evidence of infringement of the competition rules and decides to initiate proceedings, the defendants are notified of that decision (statement of objections - "*nota de ilicitude*"). In the notification, the Authority shall set a reasonable period for the defendant to make its position known in writing with respect to the accusations and other questions that may concern the decision for the case and with respect to the evidence produced, as well as a reasonable period for the defendant to request the further inquiries for evidence that it considers proper. The referred hearing in writing may be completed or replaced by an oral hearing at the request of the defendant. This hearing shall take place on the date set by the Authority for the purpose, though in no circumstances before expiry of the period initially set for the hearing in written form. The Authority may officially order further inquiries to gather evidence, even subsequently to the above mentioned hearing(s), provided that it guarantees compliance with the principle of the adversarial system to the defendant.

4.9 How are the rights of the defence respected throughout the investigation?

The rights of the defendant during an investigation comprise essentially the following: right to access the file, right to exercise the defence according to the adversarial principle and right to appeal against interlocutory and final decisions adopted by the Authority.

Most of the Authority's decisions condemning undertakings for alleged anticompetitive practices have been appealed to court and several of them have been quashed for violation of the rights of defence. Therefore, it is difficult to draw clear-cut conclusions on this field.

4.10 What rights do complainants have during an investigation?

If the investigation (inquiry phase) has been instituted on the grounds of a complaint, the Authority may not terminate the proceedings without previously informing the complainant of its intentions, granting it a reasonable period to make its position known.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Third parties may participate in the proceedings on their own initiative, even though in a limited manner. The general rule in regard to the investigation of anti-competitive infringements in Portugal is that cases are not covered by investigation secrecy prior to the issue of the statement of objections. However the law entitles the Authority to determine the application of investigation secrecy to the phase of inquiry, under some conditions and in exceptional circumstances related to the course of the investigation or to the rights of the parties involved. If a case is protected by investigation secrecy, third parties will probably not be granted access to the file prior to the statement of objections. Differently, if the case is not protected by secrecy, third parties may have access to the public version of the file at the Authority's premises, provided that they demonstrate a legitimate interest to do so.

Even though not formally constituting a right, third parties (such as competitors, suppliers, customers, consumers and even public bodies) may also intervene in the procedure in reply to the Authority's requests for information and documents during the course of an investigation. If they fail to cooperate with the Authority, severe penalties may be imposed on them.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The Competition Authority is entitled to grant interim measures. Article 27 of the Competition Act, which provides for the circumstances when such type of measures may be granted, is strongly inspired by Article 8 of Regulation (EC) 1/2003 but refers not only to damages to competition but also to third parties.

Whenever the investigation indicates that the practice which is the subject of the proceedings may cause damage which is imminent, serious and irreparable or difficult to rectify for competition or for third party interests, the Authority may, at any moment in the investigation or evidence-taking, preventively order the immediate suspension of the practice or take any other provisional measures that are necessary to immediately re-establish the competition or are indispensable for the useful effect of the decision to be pronounced at the close of the proceedings (Article 27). These measures may be adopted officially by the Authority or at the request of any party concerned and normally shall remain in force until revoked by the Authority and for a period not exceeding 90 days, unless, for sound reasons, an extension is granted. The decision granting interim measures may be appealed to the competent commercial court but the order is not suspended in the event of an appeal.

In practice, the Competition Authority has only granted interim measures for the first time in January 2009. The case concerned a promotional campaign enabling the subscribers of a pay-television service operator to enjoy free tickets to films in cinemas managed by the same operator. Before issuing the decision that suspended the referred campaign, the Authority notified the undertaking to exercise its right to be heard, which the latter did and subsequently filed an appeal.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The Authority is not bound by any specific time limits in investigating alleged infringements (see response to **question 4.1** above).

The only restriction that the Authority has to take into account during its investigation has to do with the periods of limitation. The Authority's powers in proceedings concerning anti-competitive conducts are subject to a limitation period of five years. Five years is also the time limit for the enforcement of penalties.

The time limits mentioned above shall be suspended, e.g., for so long as a judicial review is pending. The time limit shall also be interrupted, *inter alia*, by a decision imposing a fine or any action by the Authority aiming at enforcing the payment of such fine. Each interruption shall start the time limit running afresh. However, the proceeding will expire if from the date of the infringement, and barring eventual suspensions, a period equal to 1.5 times the limitation period has elapsed.

7 Co-operation

7.1 Does the competition authority in Portugal belong to a supra-national competition network? If so, please provide details

The Authority is a member of at least three supra-national competition networks:

(i) the European Competition Network (ECN);

(ii) the Association of European Competition Authorities (ECA); and

(iii) the International Competition Network (ICN).

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

The ECN is the forum where consultations and exchanges of information between European competition authorities relating to enforcement of EC law take place. The conditions under which such exchanges may occur are provided for in Article 12 of Regulation 1/2003.

According to this provision, the European Commission and national competition authorities (*vis-à-vis* the former and amongst each other) may provide one another and use in evidence any matter of fact or of law, including confidential information.

Information so exchanged can only be used on two conditions:

(i) in evidence for the application of Articles 81 and 82 EC and for the subject matter for which it was collected by the transmitting authority; or

(ii) for the purpose of applying national competition law in parallel to Community competition law in the same case, provided that as regards the finding of an infringement the application of national law does not lead to an outcome different from that under Community law.

There is an extra safeguard relating to sanctions on individuals on the basis of information exchanged pursuant to Article 12. In these cases, information may only be used for either administrative or

criminal purposes where the laws of the transmitting authority and those of the receiving one provide for sanctions of a similar kind in relation to natural persons. If this condition is not met, information may only be used if the rights of the individual concerned as regards the collection of evidence have been respected by the transmitting authority to the same standard as they are guaranteed by the national rules of the receiving entity. However, in this last case, the information conveyed cannot be used by the receiving authority to impose custodial sanctions.

Outside the scope foreseen in Article 12 of Regulation 1/2003, Article 28 of the same regulation states that the European Commission and the competition authorities of the Member States, as well as their officials, servants and other persons working under their supervision, shall not disclose information acquired or exchanged by them in the light of the said regulation and of the kind covered by the obligation of professional secrecy. The term 'professional secrecy' is a Community law concept that includes in particular business secrets and other confidential information (see, e.g., case 53/85, AKZO *Chemie v. Commission*, Rec. 1986, p. 1965, paragraphs 26 *et seq.*).

Last, it should be mentioned that there is a special regime for the exchange of information obtained through leniency programmes. Indeed, Article 11 of Regulation 1/2003 provides that the European Commission and the national competition authorities must keep each other informed of all Article 81 and 82 EC cases they are dealing with. To protect the efficiency of leniency programmes, information voluntarily submitted by an applicant will only be transmitted to another member of the ECN in the following conditions:

(i) if the applicant has consented to the transmission to the authority in question;

(ii) if the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority; or

(iii) if the receiving authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain as a result of the information transmitted will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions *(a)* on the leniency applicant, *(b)* on any other legal or natural person covered by the leniency programme of the transmitting authority and *(c)* on any current or former employee of any of the persons covered by *(a)* or *(b)*.

Information submitted under a leniency programme and transmitted to the ECN in terms referred to above may not be used by the European Commission or any other national competition authority other than the receiving one(s) to start an investigation on its behalf.

8 Leniency

8.1 Does the competition authority in Portugal operate a leniency programme? If so, please provide details.

Portugal enacted its leniency programme in 2006, through Law No 39/2006, 25 August. This Act was subsequently complemented by Regulation No 214/2006, 22 November, which sets out the correspondent administrative procedure. There is also a specific form to apply for leniency, which is enclosed in Regulation 214/2006.

From an objective viewpoint, the leniency regime applies to agreements and concerted practices punishable under national or Community provisions (respectively, Article 4 of Law No 18/2003, 11 June, and Article 81 EC). From a subjective point of view leniency may be granted either to companies or to members of a company's board of directors or equivalent bodies, as the Competition Act also provides for the responsibility of natural persons in specific circumstances. The latter may apply for leniency on behalf of the company or individually (in the last case, immunity or special reduction will only benefit the applicant).

There are four types of lenient categories: full immunity; special reduction of fine above 50%; special reduction of fine up to 50%; and additional reduction of fine.

Common requirements to the four categories

To benefit from any of the four categories of leniency mentioned above companies have to comply with three conditions:

(i) cooperate fully and continuously with the Authority from the moment the application is filed. This requires providing all evidence available at the moment or in the future, responding to any information requests, abstaining from jeopardising the course of the investigation and refraining from informing the other participants in the agreement or concerted practice about the leniency application;

(ii) put an end to its participation in the infringement; and

(iii) not have exercised any coercion on the other companies to engage in the infringement.

Specific requirements for full immunity

Full immunity from fines is reserved to 'first in' situations, *i.e.*, companies or individuals presenting the Authority with information and evidence on an agreement or concerted practice before the Authority has initiated an investigation relating thereto.

Specific requirements for special reduction of fine above 50%

Reductions of fines above 50% are also granted in 'first in' situations. However, in this case, the company or individual bringing forward the elements on the infringement must do so at a time when the Authority has already initiated an investigation but has not yet issued a statement of objections.

To obtain leniency under this procedure it is also necessary that the information made available by the applicant has contributed decisively to the investigation and substantiation of the infringement.

Specific requirements for special reduction of fine up to 50%

A reduction of fines of up to 50% is possible if a natural or legal person 'comes in second' to an ongoing investigation in which the Authority has not yet issued a statement of objections. The same requirement applies on the importance of the information provided for the investigation.

Specific requirements for additional reduction of fine

There is also a possibility for an additional reduction in the fine, known as 'leniency plus'. This may apply to companies or individuals that have applied for leniency in respect of a given agreement or concerted practice and provide the Authority with information and evidence on another agreement or concerted practice in relation to which they will also apply for leniency.

The law does not provide for a specified amount of reduction in these cases and the benefit will only apply if the elements are offered prior to the Authority issuing a statement of objections in the second investigation.

Practical aspects of the leniency programme

A leniency application must be made in accordance with the form approved by Regulation 214/2006 and contain all information required therein. The application may be filed via physical delivery at the Authority's services, registered mail or certified e-mail.

The decision to grant or refuse immunity or reduction in the fines is made by the Authority's final decision in the proceedings. However, if during the course of the investigation the Authority considers that the applicant is no longer in condition to benefit from

lenient treatment (*e.g.*, because it ceased to cooperate with the Authority), it shall notify the applicant of such fact.

If the Authority does not grant immunity or reduction of fines, the documents delivered to it by the applicant will not be returned and may be used by the Authority to substantiate the infringement concerned. This is however without prejudice to the special regime for the exchange of information between European competition authorities obtained through leniency programmes, as mentioned in the response to **question 7.2**.

In accordance with the very scarce available information, no decisions have been adopted so far by the Authority under the leniency policy, although there have been some decisions in which companies cooperated with the Authority during the respective administrative proceedings and were thus granted a reduction in their fines under the general rules of the Competition Act (e.g., some companies in case 04/05 - *Abbott / Bayer / Menarini / Roche / Johnson & Johnson*).

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

If the Authority finds that there has been an anti-competitive conduct it shall issue a decision:

(i) authorising an agreement or concerted practice if they satisfy the conditions laid down in Article 5 of the Competition Act;

(ii) imposing a sanction (see response to **question 9.2**); and

(iii) ordering the offender(s) to adopt the measures necessary for the infringement or its effects to cease within a prescribed period.

Whenever behaviours affecting a market which is subject to sector regulation are in question, the Authority shall consult the respective regulatory body and ask for its opinion prior to adopting a decision pursuant to (ii) or (iii) above.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

Besides ordering that the infringement be brought to an end, the Competition Act provides mainly for the power of the Authority to impose fines where the same concludes that there has been a competition law breach. The maximum fine is 10% of the turnover of each of the participating undertakings and it applies, *inter alia*, in respect of prohibited agreements or concerted practices and abuses of dominant position. Fines are set on the basis of several circumstances, such as the seriousness and duration of the infringement, the advantages enjoyed as a result of such infringement, the level of cooperation with the Authority and the offender's conduct in eliminating the breach and repairing the damages.

If the seriousness of the infringement and the liability of the offender so justify, the Authority may, in addition to and simultaneously with the fine, impose ancillary penalties. These are of two kinds:

(i) publication in the official gazette or in a national newspaper, at the offender's expense, of the relevant parts of a decision finding an infringement; and

(ii) deprivation of the right to participate in procurement proceedings if the infringement found has occurred during or as a consequence of such proceedings. This sanction may only last for a maximum period of two years.

Moreover and whenever deemed necessary the Authority may impose a periodic penalty payment in cases of non-compliance with a decision of the Authority imposing a penalty or ordering the application of certain measures. This may result in a periodic payment of up to 5% of the average daily turnover of the infringing undertaking for each day of delay.

All legal persons shall be responsible for the offences provided for in the Competition Act when the infringement has been carried out on their behalf, on their account or in the exercise of duty by members of their corporate bodies, their representatives or their employees.

The members of the board of directors and equivalent bodies of companies held responsible under the Competition Act shall be subject to the penalty prescribed, especially attenuated, for the respective company when they knew or should have known of the infringement yet failed to take the appropriate measures to bring it to an end, unless a more serious penalty is applicable in pursuance of another legal provision.

Companies forming part of an association that is subject to a fine or a periodic penalty payment are jointly and severally responsible for payment of such sanction.

Finally, competition law breaches in Portugal are not regarded as criminal offences *per se* but civil sanctions may arise. Notably, all prohibited agreements and concerted practices are null and void and interested parties may claim for damages if that is the case (see response to **section 13**).

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

There is a penalty of up to 1% of the turnover of each undertaking failing to supply or supplying false, inaccurate or incomplete information to the Authority in the context of sanctioning or supervisory procedures. The same sanction applies to undertakings failing to cooperate with the Authority or obstructing the exercise of its powers of investigation and inspection.

According to public information, the Authority has adopted several of these 'non-compliance' decisions. In 2006, the Authority ordered three companies to pay fines ranging from €2,500 - €5,000 for failing to supply information in response to requests by the Authority in the context of investigations of infringements. According to the information available, none of the companies appealed the respective decision.

In 2005, the Authority imposed a fine of €1,000 on a professional bar association for supplying incomplete information during an infringement procedure. The Lisbon Commerce Court, which was then the competent court to hear appeals against the Authority's decisions (see response to **section 11**), confirmed the 'non-compliance' condemnation. Also in 2005, the Authority imposed on three companies fines ranging from €79,939.39 - €94,850.11 for refusing to provide information to the Authority in the exercise of its powers of supervision. This decision was quashed by the Lisbon Commerce Court.

10 Commitments

10.1 Is the competition authority in Portugal empowered to accept commitments from the parties in the event of a suspected competition law infringement?

Except where the leniency programme is concerned (see response to **section 8**), there is no legal provision in Portugal empowering the Authority to enter into settlement arrangements in respect of a suspected competition law infringement. Nevertheless, the Authority has introduced these procedures in its decision-making practice.

The public records show that the Authority has by now adopted at least four decisions with binding commitments, although information is only available on two of them: (i) *Bayer / Sapec case*, concerning a non-compete clause included in a contract between the two companies for the distribution of various agro-chemical products. The proceedings were terminated in 2007 with a decision incorporating binding commitments on Bayer to suppress the said clause in its relationship with the distributors; (ii) *Nestlé / Delta / Nutricafés / Segafredo case*, also involving a non-compete clause included in a vertical agreement for the supply of coffee to the HORECA channel. The Authority dropped the administrative proceedings in 2008, subject to several commitments undertaken by the companies involving modifications to the respective supply agreements.

It is worth mentioning that in 2008 the former president of the Authority presented to the Portuguese Parliament a proposal of amendment concerning several procedural aspects of the Competition Act, including the introduction of a provision on binding commitments.

10.2 In what circumstances can such commitments be accepted by the competition authority?

Given that there is currently no express legal basis on the matter we may assume that the Authority has total discretion to select the cases in which to accept commitments as well as the conditions to do so, within the limits of its competences and in pursuance of the aims provided for in the Competition Act.

10.3 What impact do such commitments have on the investigation?

In principle the main effect of such commitments is to terminate the investigation and render the undertakings concerned free from liabilities and penalties. The companies will be bound by the commitments imposed and the Authority will be bound by its decision unless significant modifications occur in the facts and/or assumptions concurring to its adoption.

The Competition Act does not contain a provision similar to Article 23(2) c) of Regulation 1/2003, stating that the mere breach of such commitments may lead to a fine, without the Commission having to prove any (other) anti-competitive behaviour. This means that the failure to comply with commitments made binding by an Authority decision does not constitute an infringement *per se*. In these cases, however, the Authority may reopen the proceedings to assess the conducts occurred and ultimately sanction them.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

During the course of an infringement investigation it is possible to file a judicial appeal against non-final decisions, orders and measures taken by the Authority, provided that these do not refer to preparatory measures for the final decision or for the imposition of a sanction. Any natural or legal person affected by the decision, order or measure concerned has *locus standi*. The appeal shall be lodged within 20 working days from the date the appellant becomes aware of such act or omission and shall have non-staying effect in the administrative proceeding.

The competent court to handle these appeals was until recently the Lisbon Commerce Court. After 2 January 2009 these pleadings are entrusted to the commerce section of the competent county court or, if the latter does not exist, the commerce section of the competent district court or, if this does not exist either, the Lisbon Commerce Court.

When an appeal has been filed against one of its decisions, orders or measures, the Authority shall forward the records to the Public Prosecution Office within 20 working days. It may also enclose further statements. Withdrawal of the accusation by the Public Prosecutors is dependent upon the Authority's agreement. If there is a court hearing, the court shall base its decision on the evidence presented in the hearing and in that gathered during the administrative proceedings.

Appealable judgments from first instance shall be challenged in the competent Court of Appeal, whose ruling shall be final. The Authority may appeal alone against first instance judgments.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

It is possible to file a judicial appeal against an Authority's final decision applying a fine or other penalty. The appeal shall follow the rules described in the response to **question 11.1**, except for the effect on the administrative proceedings. Appeals from final decisions shall suspend the enforcement of such decisions.

Courts may not place the appellant in a worse position than before it brought its challenge (the *reformatio in pejus* principle). However, in 2008 the former president of the Authority presented the Parliament with a proposal to amend this restriction, thereby suggesting that courts would be allowed to increase - and add interest to - the fines and sanctions imposed by the Authority.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

The role of judicial bodies in competition law matters is essentially restricted to the review procedure explained in the response to **section 11**.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

Concerning the Authority's powers to intervene in court actions, one has to distinguish between judicial proceedings arising from an appeal against an act or omission by the Authority and those relating to other matters of law if a competition issue may arise. The former follows the procedure detailed in the response to **section 11**. In respect to the latter, there are no specific national provisions on the subject, so the question is essentially governed by Article 15 of Regulation 1/2003 and the Commission's 2004 Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC.

As such, the Authority will probably act as an *amicus curiae*, a third party intervenient that may assist the court in matters of fact or law. This assistance will normally be provided under the form of information, opinions or observations. Typically, the assistance provided by the Authority is dependent on the initiative of the court. However, in cases involving the application of Articles 81 and 82 EC, Article 15(3) of Regulation 1/2003 makes a distinction between written observations, which the Authority may submit on its own initiative, and oral observations, which can only be submitted with the permission of the national court. In any case, the assistance provided by the Authority is not binding on the court and should be subject to adversary rule.

A similar procedural role is played by the European Commission in competition actions before Portuguese courts. In this case though, the Commission will only submit (written) observations on its own motion if the coherent application of Articles 81 and 82 EC so requires (the definition of the precise scope of this requirement is under assessment for the first time by the European Court of Justice in case C-429/07, X BV, the judgment of which is currently pending).

For the sole purpose of the preparation of their observations, the Authority and the Commission may request the relevant court to transmit or ensure the transmission to them of any information necessary for the assessment of the case.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

There are no specific provisions as to private competition enforcement. The subject-matter is governed in substance and in procedure by the general rules on tort provided for in the Portuguese's Civil Code and Code of Civil Procedure.

In this case, the plaintiff will have to claim and substantiate the existence of an unlawful behaviour in the light of national or Community antitrust provisions, the defendant's fault (even if only in the form of negligence), the damages suffered and the causal link between the damages and the unlawful conduct. The competent court to deal with the claim will be determined in accordance with the provisions on territorial jurisdiction.

Any injured person, either a company or an individual, has standing. Class actions are also possible under the general regime of Law No 83/95, 31 August.

The purpose of Portuguese tort law is to compensate the claimant for the actual harmful consequences of a violation. It is not intended to punish the responsible and therefore claims for the award of exemplary damages will not be accepted. The principle with regard to pecuniary compensation is to place the plaintiff, as far as possible, in the position in which he or she would have been should the violation had not taken place (the *restitutio in integrum* principle). This entails compensating emerging damages and/or loss profits.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

To the best of our knowledge, there have been no successful claims until now.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Portugal covered by the national competition rules?

The Competition Act applies to all practices and concentrations which have or may have effects in the Portuguese territory, whether in part or the whole of it.

Therefore, anti-competitive conduct carried outside Portugal may nevertheless be caught by the Competition Act provided that those conducts have, or are liable to have, an impact in the national territory.

The scope of territorial jurisdiction in the case of foreign conduct has been mainly tested by the Authority in the context of mergers (the so-called 'foreign to foreign' transactions; see case 07/2004 - *Otto Sauer Achsenfabrik / Deutsche Beteiligungs*). The Authority has in that context adopted a broad interpretation of the legal provisions on the matter, considering that the legislature created a wide notion of spatial connexion with the national territory. It may be assumed that this interpretation is also valid in respect of restrictive practices.

14.2 Please set out the approach adopted by the national competition authority and national courts in Portugal in relation to legal professional privilege.

Legal professional privilege in Portugal is protected by the Constitution, the Penal Code and the Lawyers Act. This protection covers all facts, information and communications relating to the provision of legal services by a lawyer. As a rule, legally privileged documents may not be apprehended by the Competition Authority during a search and the Authority is not entitled to ask for their disclosure.

Unlike European Law (see e.g. cases 155/79, *AM&S v. Commission, and T-125, 253/03, Akzo*), Portuguese law does not distinguish between independent lawyers and in-house lawyers. Legal professional privilege applies to both categories, since they are subject to the same professional and ethical duties.

This has been confirmed by a 2008 judgment, offered by the Lisbon Commerce Court in an appeal against a surprise inspection conducted by the Competition Authority in 2007, during which it collected a number of documents from the office of the company's in-house counsel. The Commerce Court stated that the Authority's action was in breach of legal privilege, which concerns independent and in-house lawyers equally.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Portugal in relation to matters not covered by the above questions.

There are some indications that the Authority is in the process of preparing a proposal to amend the Competition Act, which will subsequently be presented to the Government and/or the Parliament. Some of the changes planned may impact on procedural aspects of restrictive practices and agreements, especially in what concerns harmonisation with Regulation (EC) 1/2003 and judicial review.

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Romania

Musat & Asociatii

Anca Buta Musat

1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Romania? If more than one, please describe the division of responsibilities between the different authorities.

In Romania, the Competition Council is the only administrative authority in charge with the application of the law no. 21/1996 on competition (the "Competition Law"). The role of the Competition Council is not only to investigate and sanction any agreements, practices or unilateral conduct that is likely to restrain the competition on a given market, but also to prevent any such effects. Therefore, the council is the authority that monitors the markets, carries out sector inquires and intervenes anytime there is a likelihood that a distortion of competition will occur.

The Competition Council consists in several departments, out of which the most important are the Department for Services, the Department for Consumer Goods, the Department for Industry and Energy and the State Aid Department. Identifying which department is competent to assess and decide on an agreement or unilateral conduct depends on the object of the agreement and/or the statutory activities of the companies involved. For example, a cooperation agreement between two pharmaceutical companies for the production of a new drug will normally be notified and eventually authorised by the Department for Consumer Goods. It is noteworthy that despite the market players' demands, there is no further division between the Competition Council's responsibilities, meaning that the same counsellors belonging to a department will review all forms of agreements and conducts, including vertical and horizontal agreements, mergers, joint venture agreements, etc, across all commercial fields. This proved to be difficult in practice, leading to maximum time-limits for completing the authorisation procedures imposed by the law.

The State Aid Department was in charge with the application of law no. 143/1999 on State aids and the secondary legislation in this field. In the wake of Romania's accession to the EU from the 1st of January 2007, the State Aid Department's role was reduced to a mediator between the public authorities granting the aid and (possibly) the beneficiaries on one hand and the European Commission on the other hand.

Last but not least, it is also noteworthy that unfair competition acts and consumer protection rules fall within the ambit of different authorities.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

It should be underlined from the outset that the Competition Council is the only authority at administrative level that may enforce the provisions of the Competition Law and its secondary legislation such as regulations and guidelines passed by the Competition Council for the application of the Competition Law. Although there are certain legal provisions in certain specific sectors that among other responsibilities set out on the part of the respective sector's regulator provide for the maintenance of a competitive environment and market liberalisation, it is only the Competition Council that can make use of the investigative and preventive powers conferred by the Competition Law, as well as of the sanctions made available by the said enactment.

At a judicial level, the Romanian courts have the authority to directly apply the Competition Law in relation to any matter, regardless of whether the case was first assessed and decided upon by the Competition Council or not. The difference between the two foregoing situations would be that where the case was previously reviewed by the council, it is actually the decision of the Competition Council that is challenged before court as opposed to the situation where the case is brought before the court for the first time and where the practice or the conduct is primarily challenged.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Romania?

There are no guidelines or criteria that the Competition Council must follow when prioritising its duties and resources. There are usually the market specifics that dictate the approach of the competition authority towards a certain industry, sector or market. The simultaneous media statements made within a certain economic or commercial context also generated the launch of a sector inquiry by the Competition Council. Recently it has also been noticed that it is the ambition of the Competition Council to follow the same priorities of the Commission and therefore pursue the same cases as the ones investigated at the EU level (e.g. investigations on pharma markets, sector inquiry into the retail sector focused on the buying abusive practices, etc.).

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The Competition Law represents the main piece of legislation whereby the Competition Council was established as the sole authority in charge with enforcement duties in the competition field. Article 5 of the Competition Law prohibits any agreement or concerted practice by undertakings or associations of undertakings which are likely to distort, limit or eliminate the competition on a given market. Article 6 of the same law prohibits any abuse by a dominant company which may have the same effects and therefore negatively impact on trade and consumers. Last but not least, Chapter III of the law defines the concept of economic concentration and mandatorily subjects the transactions qualifying as an economic concentration to the prior assessment and authorisation of the Competition Council should certain turnover thresholds be concurrently met. The Competition Law also lays down extensive rules regulating the Competition Council's activity as administrative authority and the investigative powers thereof, including the sanctions and interim measures that may be imposed only by the Competition Council. Article 60 of the above-mentioned law qualifies as criminal offence the participation of a natural person, with a fraudulent intention and in a decisive manner to the conception, organisation or achievement of the practices prohibited by Article 5 and by Article 6, and which are not exempted according to the provisions of the Competition Law. The afore-said criminal offense shall be punished by imprisonment from six months to four years or by fine. The criminal proceeding shall be initiated upon the notification of the Competition Council. The court of law qualifying the practice as a criminal offence may order the publication of the final judgment in the media, at the expense of the party at fault.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

The provisions applicable only to specific sectors relate to the method of computation of the turnover for the purpose of the thresholds laid down in cases of economic concentrations and *de minimis* exemptions. The enforcement authority of the Competition Council is the same irrespective of the sector envisaged.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

Yes. The parties to an agreement may either (i) subject an agreement in relation with a proposed merger to the Competition Council for its approval, (ii) notify an agreement or unilateral conduct for obtaining the so-called certification of the non-intervention of the Competition Council, (iii) notify an agreement for obtaining an individual exemption from the application of Article 5 of the law, or (iv) request the council to issue an guidance non-binding letter if the agreement raises a novel or unresolved legal issue.

By certifying its non-intervention, the Competition Council admits that the agreement in question does not fall within the scope of Article 5 or Article 6 of the Competition Law and may be implemented with no other formalities being necessary to that effect. By contrast, by means of an individual exemption granted in relation to an agreement, the Competition Council acknowledges that the notified agreement falls within the scope of Article 5 of the Competition Law but its positive effects offset the negative consequences of such. The certification of the non-intervention of the Competition Council may be granted only if the agreement has not been put into practice already whilst the individual exemption may be granted anytime during the period of the agreement and in all instances it requires an investigation of the Competition Council before the individual exemption is eventually granted.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

As a general rule, it is only the person (be it natural or legal person) which has a legitimate interest that can file a complaint with the Competition Council. The Regulation of the Competition Council for the application of Articles 5 and 6 of the Competition Law following a complaint (the "Regulation") provides for a Form that has to be completed by the person filing a complaint. Exceptionally, the Council may agree to first receive only a part of the information required under the above-said Form, if it deems that the remaining missing information are not necessary for the case at hand. The complaint will be filed in two hard-copies and one electronic copy. The complainant will also provide the council with a non-confidential version of the complaint.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

In 2007 half of the investigations carried out by the Competition Council were launched *ex officio*, as opposed to 2008 when out of 18 investigations started by the council, only a third were as a result of a complaint made to that effect by a third party. It is worthy of note that not all the complaints eventually lead to the launch of an investigation by the council. Therefore, the number of the complaints during 2007 and 2008 was significantly higher than the number of investigations opened by the council on the bases of a previous complaint.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

Normally, a complaint filed and registered with the Competition Council opens a formal procedure under the Regulation that covers the following stages: (i) the examination of the complaint; (ii) the investigation being launched and carried out by the Competition Council if the latter concludes that there are sufficient grounds for such an investigation; (iii) the decision of the council; and (iv) the process of monitoring the measures imposed by the Competition Council in its decision. It is noteworthy that the investigation may be launched by the council only within 30 days as of the date when the complaint was registered with the council. In the absence of sufficient grounds justifying the investigation, the Competition Council will issue within the same 30-day term a decision whereby it rejects the complaint.

The investigation procedure typically comprises the following: (i) successive requests of information made by the council; (ii) on-the-spot inspections; (iii) the report on the investigation which is drawn up by the Competition Council and communicated to the parties involved; (iv) the hearing before the plenum of the council; and (v) the decision of the council.

In case the Competition Council decides to start an investigation, rather than reject the complaint (in which case the council has to comply with the 30-day time limit mentioned above), it is worth noting that the Competition Council is not restricted by any time-limits in conducting and completing its investigation. The period of time covered by the investigation may vary according to the complexity of the allegations in the complaint.

The time limits are usually incumbent on the parties subject to the investigation, which have to provide the requested information and data until a certain date established by the Competition Council, make comments on the investigation report within 30 days as of the date when the report was communicated to them, etc.

During the investigation, the Competition Council has a number of persuasive powers, such as the power to apply fines for inexact, incomplete or inaccurate information. In accordance with the provisions of Article 50 of the Competition Law, the following acts are contraventions and sanctioned with a fine up to 1% of the total turnover achieved in the year previous to the application of such sanction:

- providing inaccurate, incomplete or misleading information within a notification;
- providing inaccurate, incomplete or misleading information or documentation or refusal to provide such information requested by the Competition Council during its investigation; and/or
- refusal to submit to an inspection.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Yes, the Competition Council may require any piece of information and any data that it deems relevant for the matter under the investigation. In its investigatory work, the Competition Council was delegated the power to require information, having the prerogatives to apply a fine for incorrect or false information. The Council may use information that is already available to it, information that is provided voluntarily, information that the parties were compelled to provide based on a specific request, as well as documentary evidence seized during a dawn raid.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

Apart from requiring the production of specified information, based on an order issued by the chairman the Competition Council may carry out on-site unannounced inspections at the business premises of the investigated company where it has unlimited access to information and it can seize documents that are relevant for the case under assessment. The dawn raid may cover all the offices, lands and transport means belonging to the investigated undertaking. During the dawn raid the council may also interview the representatives and employees of the investigated company in connection with any relevant facts and documents.

If a reasonable suspicion exists that relevant documents related to the subject-matter of the investigation are being kept in other premises, lands, or transport means, such as the ones belonging to the managers, directors or employees of the investigated company, the Competition Council may enter and search such other places based on an order issued by the chairman of the council and a court warrant issued by the president or the delegated judge of the tribunal which has territorial jurisdiction over the place where the inspection is envisaged to be conducted. If the Competition Council envisages carrying out simultaneous on-site inspections at premises which fall within the territorial jurisdiction of different tribunals, the president of any of the competent tribunals may grant a sole court warrant for all the inspections.

According to Article 38 of the Competition Law, the request of the Competition Council for a court warrant must include all relevant information that justify the purpose of the inspection and the judge that has to rule on the request must verify whether the request is grounded or not. It is noteworthy that the judge may also participate in the inspection and suspend or end the inspection anytime it deems appropriate.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

According to Article 9 of the Regulation, the Competition Council may interview any person from the company which is investigated. A copy of the recorded interview will be made available to the company in question, the latter having the possibility to adjust the answers if the interviewed person was not authorised by the company to make any public statements in relation to and implicitly engaging the company.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

The Regulation provides that during a dawn raid the Competition Council may remove any copies or excerpts of the documents that it considers to be relevant for the matter investigated. In practice, the Competition Council asks for and takes only copies of the companies' documents and not the originals.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

Yes. During the on-site inspections, the council may check all the computers and electronic correspondence and, in relation to the data found to be relevant, the council may also ask for such information to be produced in a form that can be taken away.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

Besides requesting relevant information and data, inspecting the premises or other lands and interviewing the employees, representatives and/or managers of the investigated company during a dawn raid, the Competition Council may also at any time ask the parties under investigation to provide verbal information at the Competition Council premises.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

When the Competition Council considers that the investigation file is complete, it draws up a report that typically provides for a market description before and during the period covered by the alleged infringement, identifies the incriminated agreement, practice or unilateral conduct, as well as the parties involved, and proposes certain measures to be taken in relation to the above. The findings of the council during the investigation as they are included in the report must be grounded on clear evidence that is also explicitly and thoroughly referred to in the report so that the incriminated parties can build up a proper defence. After the report is communicated to the involved parties, the latter have 30 days for submitting their comments to the report and provide new evidence supporting their final arguments, if any. The foregoing term may be extended by the Competition Council to 60 days altogether and only once, if the respective involved party submits a grounded request to that effect.

Before submitting the comments to the report, within the same term of 30 days the Competition Council invites the concerned parties to inspect the entire investigation file at the Competition Council's premises and make copies of the documents that they consider relevant for its defence. The invitation normally has attached the list of all documents forming the investigation file that may consist of written correspondence, market surveys, answers to the council's questionnaires, agreements of the parties involved, information and data provided by competitors or relevant authorities, documents seized by the council during an unannounced on-site inspection, etc. The confidential information is generally excluded from the parties' review.

After submitting the comments to the report, the party accused of anti-competitive conduct has also the opportunity to make oral representations before the plenum of the Competition Council. The applicable legal provisions allow for new evidence to be brought also at this stage. Based on the other parties' representations and the issues discussed before the plenum, the parties may also, at their own initiative or upon the request of the council, submit new information before a final decision is made. It is also noteworthy that it is not mandatory for the Competition Council to produce minutes of the oral hearing. However, statements made at the oral hearing will be recorded and the parties may, on request, obtain a copy of the recording, bearing in mind that the business secrets and other confidential information will be deleted.

4.9 How are the rights of the defence respected throughout the investigation?

First of all, the undertaking subject to an investigation of the Competition Council is informed about the subject matter of the investigation. The undertaking normally has the right to be represented by a legal advisor and consequently have the requests of the Competition Council communicated to it through its legal advisor. The investigated undertaking may at any time submit evidence or information in support of its stance. When being requested by the council to provide or produce certain documents or information, the undertaking under investigation is usually granted sufficient time for drafting its response, time-limit that can also be extended based on a justified request to that effect. Moreover, in relation to the information provided, the council is bound to respect and safeguard the confidentiality.

Among its fact-finding powers mentioned above, the Competition Council may ask the parties subject to the investigation to make available all the documents and information which are in their possession regardless of whether such documents or information are self-incriminating or not.

The question, whether the lawyer-client communications are protected from disclosure, remains open despite the market players' demands to receive an official stance of the Competition Council. Given the jurisprudence of the European Court of Justice in this regard, we deem that there is a strong likelihood for the Competition Council to take the same approach and treat the said communications as an exemption from disclosure obligations incumbent upon the investigated companies.

For more information concerning the rights of defence of the accused parties, please refer to question 4.8 above.

4.10 What rights do complainants have during an investigation?

The most important rights that the complainants have further to filing a complaint are the following: (i) the right to submit all the information, data and documents that it deems necessary for the case at issue; (ii) the right to receive the decision of the council whereby the latter either rejects its complaint or starts an investigation within a 30-day maximum time-limit as of the date when its complaint was registered with the council; and (iii) the right to express its views in writing and verbally before the council rejects its complaint. Any other possibilities of getting involved during the investigation, such as the possibility of participating in a meeting together with the accused parties, or accessing the file and being granted the right to be heard, fall within the discretionary power of the council.

A complaint may be rejected by the Competition Council where (i) the complainant has not provided sufficient information to sustain the likelihood of an infringement of the competition rules, (ii) the conduct in view does not fall within the scope of the Competition Law (possibly due to the *de minimis* thresholds), or (iii) the conduct in view falls within the ambit of the Competition Law but it does not have an appreciable negative effect on trade and/or final consumers. Regarding the first ground for rejection mentioned above, it is noteworthy that according to the Guidelines of the Competition Council for the application of Articles 5 and 6 of the Competition Law following a complaint (the "Guidelines"), the council is not obliged to take into account all the factual circumstances that were not brought into its attention by the claimant but could have been discovered by the council during an investigation.

In case the Competition Council rejects the complaint before launching an investigation, Article 4 of the Regulation requires the council to inform the complainant of its reasons for rejecting the complaint and fix a time for it to submit further comments in writing and be heard before the commission of the Competition Council that decided upon its complaint. Before submitting its comments, the complainant may request to be granted access to the documents and information based on which the council rejected its complaint.

The Council's failure to adequately state its reasons may lead to the annulment of the decision in court.

In case the Council decides to launch an investigation, the Instructions provide that the Council may admit the request of the complainant to be heard, in which case the council will communicate to the complainant the investigation report only upon request and if it deems necessary for the purpose of the oral hearing.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

When launching an investigation, the council usually publishes a press release on its website whereby it states the purpose of the

investigation and invites the third parties to submit relevant information or comments. Therefore, the third parties normally have the right to submit any piece of information or evidence that they consider relevant for the subject matter of the investigation. Third parties may also file a request for being heard and implicitly having access to the file (taking due account of the confidentiality obligations incumbent upon the council), but the final decision always belongs to the council.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

According to Article 47 of the Competition Law, before issuing a final decision, the Competition Council may impose the undertakings concerned - by means of a decision for interim measures - to take any measure that the council considers necessary for restoring the competitive environment and maintaining the status quo.

The measures for suspension or prohibition of the ascertained anti-competitive practices as well as the mandatory instructions given to the undertakings to reinstate the previous situation shall only be ordered by the Competition Council, in the application of Arts. 45 and 46, upon ascertaining manifestly illicit deeds, constituting anti-competitive practices expressly prohibited by this law and which shall be removed immediately, in order to prevent or stop the occurrence of a serious and certain prejudice.

The measures outlined above are strictly limited, both in terms of duration and in terms of object, to what is necessary in order to correct the alteration of free competition.

The decisions made by the Competition Council with respect to interim measures are immediately communicated to the parties. Such decisions may be challenged by administrative way at the Bucharest Court of Appeal, within 30 days from the communication. The court may order, upon request, the suspension of the enforcement of the challenged decision.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The right of the Competition Council to apply sanctions is subject to the following statutory limitations: (i) three-year statutory limitation for sanctioning the refusal to provide the requested information or the provision of the requested information in an incomplete, inaccurate or misleading manner and the refusal to submit itself to a dawn raid; and (ii) five-year statutory limitation for sanctioning all other infringements of the Competition Law. The foregoing statutory limitation applies to the right of the Competition Council to apply fines and it does not preclude the council from finding an infringement by means of a decision. Moreover, it is noteworthy that the afore-said time constraints apply unless the council has taken formal steps to investigate or prosecute the infringement. In such case, the five-year limitation period is extended to a further five-year period from each such step.

7 Co-operation

7.1 Does the competition authority in Romania belong to a supra-national competition network? If so, please provide details

The Treaty establishing the European Community ("EC Treaty") provides common competition rules for the EU member states, which must be applied in a uniform manner within the entire EU. In this respect, Council 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 creates a system of parallel competences in which the European Commission and the competition authorities in EU member states can apply the competition rules laid down by the Treaty establishing the European Community. Based on their competences, the competition authorities of the member states and the European Commission form a network of public authorities acting in the public interest and cooperating closely in order to protect competition, called "European Competition Network" (ECN). By virtue of Romania being an EU member state, the Romanian Competition Council is a member of the ECN.

The ECN acts as a forum for discussion and cooperation in the application and enforcement of EC competition policy. The ECN also provides a framework for the cooperation of European competition authorities in cases where Articles 81 and 82 of the Treaty are applied, in order to detect multiple procedures and to ensure that each case is dealt with by a well placed competition authority.

At European level, Romania is also member of the ECA (European Competition Authorities) a network founded in Amsterdam in April 2001 as a forum for discussion of the competition authorities in the European Economic Area (EEA) (the Member States of the European Community, the European Commission, the EFTA States Norway, Iceland, Liechtenstein and the EFTA Surveillance Authority). The ECA is an informal association which serves as a forum where competition authorities operating within the EEA meet to discuss about the application and enforcement of competition rules and to improve the working relations amongst them.

The Romanian Competition Council is also a member of the International Competition Network (ICN). The concept for the ICN originated out of recommendations made by the International Competition Policy Advisory Committee (ICPAC). Embracing the IPAC initiative, on October 25, 2001, top antitrust officials from 14 jurisdictions - Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia - launched the ICN. The ICN provides antitrust agencies from developed and developing countries with a focused network for addressing practical antitrust enforcement and policy issues of common concern. The ICN constitutes a specialised yet informal venue for maintaining regular contacts and addressing practical competition concerns.

The Romanian Competition Council also participates in the meetings of the Competition Committee of the Organization for Economic Co-operation and Development (OECD) and of the Intergovernmental Competition Group of Experts within the UN Conference for Trade and Development (UNCTAD), Romania being member to the said organisations.

The Romanian Competition Council has also established formal bilateral relations with the competition authorities of the following states: Hungary; Italy; Croatia; Portugal; Turkey; Russia; Czech Republic; Belarus; Georgia; Bulgaria; South Korea; France; Slovakia; and the Republic of Moldova.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

The ECN constitutes a network aimed at enforcing a unitary approach of the EC competition rules by applying in a consistent manner the EC Treaty competition rules and also by ensuring the effective implementation of the procedural rules which amount to a system of parallel competences in which the European Commission and the competition authorities in EU member states deal with competition cases.

To such effect, the national competition authorities cannot - when ruling on agreements, decisions and practices under Article 81 or Article 82 of the Treaty which are already the subject of a European Commission decision - take decisions which would run counter to the decisions adopted by the Commission. Also, no later than 30 days before the adoption of a decision applying Articles 81 or 82 of the Treaty and requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block-exemption regulation, national competition authorities must inform the European Commission by sending a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. Also, although the obligation is to inform the European Commission, the information may be shared with the other members of the network. Mention must be made that any decision concerning the above can be adopted as long as the European Commission has not initiated proceedings based on the previous information.

From a procedural standpoint, the cooperation between member states also covers investigations, the European Commission or a national competition authority having the right to ask another national competition authority for assistance in order to carry out fact finding information. As regards the use of such information within law enforcement, the consultations and exchanges within the network are matters between public enforcers and do not alter any rights or obligations arising from EC or national law for companies. Each competition authority remains fully responsible for ensuring due process in the cases it deals with.

As regard the other networks to which the Romanian Competition Council is member, such constitute rather informal form in which members share individual issues raised in the enforcement of competition law and develop a common policy towards competition, which may be implemented nationally subject to the specific requirements of the applicable law.

8 Leniency

8.1 Does the competition authority in Romania operate a leniency programme? If so, please provide details.

The Competition Council operates a leniency policy which is subject to detailed provisions and procedures outlined in the Guidelines of the Competition Council regarding the criteria for the application of the leniency policy in accordance with Article 56 (2) of the Competition Law (the "Leniency Guidelines"). The Leniency Guidelines apply to the most severe restrictions on competition which are considered to be the following: (i) price fixing; (ii) fixing the level of the production; (iii) fixing the sale shares; (iv) market or client sharing; (v) bid rigging; and (vi) export or import bans or restrictions. The said guidelines provide for total immunity from fine and alternatively for the reduction of fines. In order to benefit from total immunity, the undertaking in question must provide sufficient conclusive information that permits the council to either open an investigation or find an anti-competitive practice. Additionally, for full immunity the following two conditions must be concurrently met: (i) the council did not hold the information provided from other source; and (ii) there was no other company involved in the cartel that was granted full immunity before. Moreover, cooperation remains an essential condition for the application of immunity. Thus, the applicant will not be granted immunity if they do not cooperate fully and permanently with the Competition Council during the entire procedure for the detection of the existence of the cartel, it does not end its involvement in the alleged cartel immediately after its application was filed or the latest when it provides the evidence, and it has not taken any steps in coercing other undertakings to join the cartel.

An applicant which does not qualify for immunity may nevertheless receive a reduction in the fine if it provides the council with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the council's possession, and if it ends its participation in the cartel immediately after filing the formal application for the reduction or (the latest) when submitting the evidence. The reduction in fine may be of up to 50% and is established by the council based on certain criteria.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

As previously mentioned, the Competition Council may start an investigation either *ex officio* or following a complaint. The investigation is usually closed by means of a decision whereby the Competition Council finds that either (i) the conduct does not fall within the scope of the Competition Law, (ii) the conduct although falls within the scope of the said law is not likely to have an appreciable negative effect on competition and consumers, or (iii) the conduct is anti-competitive and contrary to the requirement of the law. In the latter case the council will normally apply a fine of up to 10% of the turnover of the incriminated companies. For the purpose of the fine computation, the council will have in view the total revenues achieved in the preceding year, regardless of whether they were achieved on the relevant market on which the anti-competitive conduct took place or on a different market.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

In case the Competition Council finds a breach of the Competition Law it may impose fines and periodic penalty payments. The council shall apply a fine of up to 10% of the total turnover achieved by the involved parties in the preceding year for anti-competitive agreements or practices, abuse of dominance and implementing an economic concentration without the prior authorisation of the Competition Council when such authorisation was mandatory. In addition to the foregoing, the council may fine an undertaking also for the refusal to provide information or providing information in an incomplete or inaccurate manner, as well as for the refusal to submit itself to an announced on-the-spot inspection. The level of the fine in this latter case shall not exceed 1% of the turnover achieved by the fined company in the preceding business year. It is well-established that the reference to the turnover is to the total turnover achieved in Romania and not restricted to the turnover in the products on the relevant geographic market.

The exact amount of fine is established by having regard to the basic amount of fine and the aggravating and mitigating circumstances. In fixing the basic amount of fine, the council has in view the gravity and the duration of the infringement.

Article 54 of the Competition Law empowers the council to apply periodic penalty payments not exceeding 5% of the average daily turnover in the preceding year per day and calculated from the day of the decision, in order to compel the infringing party to comply with the decision and bring the infringement to an end, produce the required information and/or submit to an inspection.

In addition to the foregoing, the Competition Council may request the Bucharest Court of Appeal to eradicate a dominant position by taking one of the following measures suggested by the council:

- annulling the contracts that facilitate the abusive conduct, entirely or partially;
- limiting or prohibiting the access on the market;
- the sale of assets; and
- the spin-off or restructuring of the dominant company.

It is noteworthy that to date no such structural remedies were pursued by the competition authority.

Last but not least, it is worth mentioning that in the wake of the Romania's accession to the EU, the Competition Council and the domestic courts may directly apply Article 81 EC and Article 82 EC and impose sanctions triggered by the application of the aforesaid Community provisions.

The foregoing fines and penalties are not of a criminal law nature. They are administrative sanctions and they can also be applied directly by the court. However, personal criminal sanctions for cartel activities are also made available under the Competition Law (please see question 2.1 for more details).

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

The Competition Council may impose a fine of up to 1% of the total turnover from the preceding year for the refusal to submit to an inspection or provide complete and accurate information requested by the Council. For more information, please refer to question 9.2 above.

10 Commitments

10.1 Is the competition authority in Romania empowered to accept commitments from the parties in the event of a suspected competition law infringement?

Besides imposing fines as outlined above, it is also possible for the Competition Council to bind into decisions obligations on the parties as their future behaviour and monitoring programs (e.g. case TREFO from 1997). The obligations are limited in time as explicitly provided in the decision. Based on the monitoring programs, the Council may either decide that although the time limit was not reached, there are no grounds for keeping the obligations in place, or extend the time-limit. It is worth mentioning that it is not a common practice for the investigated companies to offer commitments. However, the possibility to discuss commitments with the council's case handlers before a final decision is reached depends on the level of communication established with the council during the investigation.

10.2 In what circumstances can such commitments be accepted by the competition authority?

The Competition Council has discretion as to whether to accept the proposed commitments or not. Normally, the commitments may be accepted if they are likely to be implemented effectively and in a timely manner. The commitments are hardly accepted in cases involving serious breaches of competition.

10.3 What impact do such commitments have on the investigation?

The commitments proposed by the parties subject to the investigation are not susceptible of undermining the council's investigative powers. However, depending on the specifics of the case, the commitments may speed up the investigation process by alleviating the most important concerns of the council. It is noteworthy that nothing precludes the council from re-opening an investigation where there is a material change in the facts or the parties infringe their commitments. In the latter case the council may also apply a fine for failure to comply by the infringing companies with a council's previous decision.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

During an investigation and until the final decision is made, the Competition Council may take a number of decisions, such as the decision for fining a company that refused to submit to a dawn raid, the decision for imposing periodic penalty payments or interim measure. The afore-said decisions represent administrative deeds and may be challenged by the concerned company in court under the conditions mentioned below at question 11.2.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

According to the Competition Law, the decisions of the Competition Council may be challenged only before the Court of Appeal in 30 days as of their communication. Given that the decision is communicated only to the parties involved, it is presumed that only those companies may file an appeal against such decision. The appellants may hold in their appeal that the decision of the Competition Council is either illegal or ungrounded. Upon request, the Court may decide to suspend execution of the contested decision until a final judgment on the merits of the case is rendered.

The judgment rendered by the Court of Appeal may be further challenged by means of a second appeal lodged with the High Court of Cassation and Justice (which is the highest tier in Romania) within 15 days as of the communication of the judgment of the Court of Appeal.

Before the Court of Appeal and High Court of Cassation both aspects may be raised, factual and legal.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

The decisions of the Competition Council whereby the latter finds an infringement and imposes the proper remedies are binding *per se* and therefore do not need to be endorsed by an administrative or judicial body. However, as previously mentioned, such decisions are open to appeal before the Court of Appeal within a prescribed time-limit.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

There is no express provision which states that if a court action is filed under the Competition Law the Competition Council has to be informed and/or granted access in the court proceeding. Moreover, the Competition Council has not expressed its intention in the past to intervene in court proceedings whose subject matter was the application of the Romanian or EC competition law. Therefore, the input of the Competition Council in court actions in which it is a not a party, is dramatically reduced. The parties to the litigation may nonetheless provide as evidence in support of their allegations the past decisions of the council which are relevant for the application of the legal provisions referred to in the court action. However, it is noteworthy that the past decisions of the Competition Council are not mandatory for the courts.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Yes, and there is no pre-condition to first address the matter to the Competition Council before going to court.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

The jurisprudence of the national courts in connection with private actions is rather scarce and non-conclusive given the difficulty in determining and proving the actual loss and the time and costs required by a trial.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Romania covered by the national competition rules?

The Competition Law applies to all anti-competitive agreements and conducts that have effects on the Romanian territory irrespective of the actual place where they have been concluded or taken place.

14.2 Please set out the approach adopted by the national competition authority and national courts in Romania in relation to legal professional privilege.

As previously mentioned, although the market players and the legal practitioners expressly asked the Competition Council in various occasions to officially reveal its stance towards the attorney-client professional privilege, the competition authority refrained itself from doing so. However, taking due account of the jurisprudence of the European Court of Justice in this regard, it is expected that once facing the argument the Competition Council will follow the same approach.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Romania in relation to matters not covered by the above questions.

It is undoubted that the Competition Council has recently made a significant progress in ensuring a proper enforcement of the Competition Law. During 2008 the Competition Council has conducted no less than 104 unannounced on-site inspections, as opposed to 2007 when only 42 such inspections were carried out by the competition authority. The total amount of fines imposed has also increased dramatically in 2008 as compared to the preceding year. Thus, last year the council imposed fines of more than 27 million Euro, this amount being almost 250 times higher than the total amount of fines applied in 2007.

The Competition Council acknowledges that the enforcement of the competition rules is essential taking into account the deterrent effects that it can produce. Third party actions play a material role in this structure by significantly increasing the litigation risk. However, the case law on third party actions is almost inexistent in Romania and this is most probably due to the lack of awareness on the part of the final consumers as well as the litigation costs which are significant and sometimes higher that the actual damages requested. It is indispensable for this mechanism to work within the envisaged parameters that the Competition Council adopts a more pro-active approach in this regard by organising seminars, promptly publishing its decisions on its website thereby inviting the third parties to ask for damages in court, launching consultative programs and propose legislative amendments implementing the developments of the European Commission at the EU level and facilitating the collective redress mechanism by allowing class actions.

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Ms Anca Buta Musat, Partner, coordinates Musat & Asociatii's long recognised Competition practice. She has an extensive experience in dealing with the whole array of competition issues, covering merger control, agreements between competitors, restrictive vertical agreements such as licensing and distribution, abuse of dominant position, exclusivity arrangements, technology transfer agreements and category management contracts. Ms Buta Musat has substantial knowledge and expertise in assisting the clients both before the European Commission and the Romanian antitrust authority for obtaining the requisite approvals, such as merger control authorisations or individual exemptions in connection with various agreements or transactions across a wide range of industries, including automotive, aviation, food and beverages, biotechnology, pharmaceutical, broadcasting and communication, chemicals, consumer products, energy, forest products manufacturing, packaging and telecommunications. The expertise of Ms Buta Musat also covers cartel investigations and related damage claims, leniency filings, sector inquiries, dawn raids, compliance programmes, State aid, public procurement and liberalisation.

Ms Buta Musat also specializes in Intellectual Property law, with particular focus on patents and technology litigation, industrial designs and trademarks registrations, as well as designing programs for ensuring transnational protection.

Ms Buta Musat holds an LLM in Transnational Business Practice from the University of Salzburg/University of the Pacific and a PGD in Competition from King's College in London. She speaks Romanian, English, French and Greek and is a member of the Bucharest and Romanian Bar Associations.

MUȘAT & ASOCIAȚII
Attorneys at Law

Musat & Asociatii's name stands for a high level of expertise in business matters and is therefore a leading law firm in Romania.

For almost 20 years, Musat & Asociatii has acted on behalf of multinational investors, banks and other financial institutions, venture capital funds, major Romanian public and private companies and government agencies. The firm focuses on providing value-added legal services, having proven to contribute full capacity and resources to properly understand and address its clients' goals and demands.

The practice covers the entire spectrum of business activities, the firm being the undisputed market leader in the fields of commercial and corporate law, competition, project finance, banking / finance and capital markets, mergers / acquisitions and privatisation, communications and information technology, and intellectual property law, delivering a broad and unparalleled expertise in all these areas. Musat & Asociatii has developed particular expertise in areas as pharmaceutical industry, broadcasting and communication, aviation, IT technology and financial services, as well as food industry. The firm has excellent litigation resources as well, extending to dispute management and arbitration.

Musat & Asociatii is the exclusive TerraLex representative in Romania, and has close contacts and alliances with some of the most prestigious law firms in the European Union and US, enabling the provision of a fully global client service.

South Africa

Daryl Dingley

Webber Wentzel

Nicci van der Walt

1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in South Africa If more than one, please describe the division of responsibilities between the different authorities.

The enforcement authorities are the Competition Commission (the Commission), the Competition Tribunal (the Tribunal) and the Competition Appeal Court (CAC). Although these three bodies interact, they are independent of each other.

The Commission must implement measures to increase market transparency and public awareness of the Competition Act. In relation to business conduct, the functions of the Commission are mainly investigative in nature; the Commission is charged with investigating and evaluating alleged restrictive practices and applications for exemptions from the Competition Act and to negotiate and conclude consent orders. It is also tasked with investigating the impact of mergers and acquisitions on competition; in the case of small and intermediate mergers, the Commission is the principal decision maker, although its decisions in this regard may be taken on appeal to the Tribunal; in respect of large mergers, the Commission makes recommendations to the Tribunal for final adjudication.

The Tribunal is tasked with: adjudicating large mergers, referred to it by the Commission; hearing appeals from, or review any decision of, the Commission that may be referred to it; assessing and adjudicating complaints regarding any conduct prohibited under the Competition Act to determine whether prohibited conduct has occurred, and if so, impose any remedy provided for in the Competition Act; granting interim relief orders; granting exemptions from the provisions of the Competition Act; and granting orders.

The CAC has the status of a High Court and must consist of at least three judges. The CAC reviews any decision by the Tribunal concerning legal error or jurisdiction, as well as considering the substantive merits of any final decision and any interim decision for which the Competition Act permits an appeal. The CAC may give any judgment or make any order, including an order to confirm, amend or set aside a decision or order of the Tribunal. In addition, the CAC may remit a matter to the Tribunal for a further hearing on any appropriate terms.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The Independent Broadcasting Authority Act, No. 153 of 1993 (the IBA Act) and the Telecommunications Act, No. 103 of 1996 (the Telecoms Act) contain provisions relating to control of dominance in the telecoms arena.

Section 49 of the IBA Act sets out limits to the control of the broadcasting services and section 50 sets out limits to the cross-media control of commercial broadcasting services.

Furthermore, section 52 of the Telecoms Act limits the control of telecoms services and section 53 regulates anti-competitive actions.

The Commission and the Independent Communications Authority of South Africa (ICASA) have entered into a memorandum of agreement (MOA) to regulate their relationship relating to competition matters in respect of the telecommunications and broadcasting sector. Furthermore, there is a MOA between the Commission and the national electricity regulator, as well as a MOA between the Commission and the postal regulator.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in South Africa

Prohibited practices must be initiated through a complaint, either by the Commission or a third party. In terms of section 49B(3) of the Competition Act, upon receiving a complaint or information from a third party about a prohibited practice, the Commission must initiate an investigation. The Commission, as the investigative body of the competition authorities, has extensive powers, subject to judicial oversight. In the *Pretoria Portland Cement case*, the Supreme Court of Appeal made it clear that an abuse of the Commission's investigative function would not be tolerated.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

Section 4 of the Competition Act regulates the interaction between competitors. Section 4(1) prohibits an agreement between, or concerted practice by, firms, or a decision by an association of firms, if it is between parties in a horizontal relationship and if it: (a) has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice or decision can prove any technological, efficiency or other pro-competitive gain that outweighs the anti-competitive effect; or (b) involves any of the following restrictive horizontal practices, which are all *per se* prohibited:

- directly or indirectly fixing prices or any other trading

condition;

- dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
- collusive tendering.

Section 5 of the Competition Act regulates vertical agreements. Section 5(1) prohibits an agreement between parties in a vertical relationship if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove any technological, efficiency or other pro-competitive gain that outweighs the anti-competitive effect. Section 5(2) of the Competition Act *per se* prohibits the practice of minimum resale price maintenance.

Sections 8 and 9 of the Competition Act set out the conduct that a dominant firm may not engage in and focus on the unilateral exercise of market power with regard to buyers and competitors by a single, dominant firm. Section 7 sets out the legal requirements for when a firm will be considered dominant.

Section 8 of the Competition Act sets out the list of prohibited practices concerning abuse of dominance by a firm. These can be divided into three categories:

- the *per se* prohibitions (charging an excessive price to the detriment of consumers and refusing to give a competitor access to an essential facility);
- the specific exclusionary acts set out in section 8(d), which are prohibited unless a firm can show that technological, efficiency or other pro-competitive gains outweigh the anti-competitive effect of the conduct (requiring or inducing a supplier or customer to not deal with a competitor, refusing to supply scarce goods to a competitor, tying or bundling, predatory pricing, and buying up a scarce supply of intermediate goods or resources required by a competitor); and
- the residual prohibition found in section 8(c), which provides a catch-all for any abuse not covered in the other abuse of dominance provisions. A complainant must show that the dominant firm's conduct cannot be justified on any technological, efficiency or other pro-competitive gains.

In terms of section 9, price discrimination by a dominant firm is prohibited, unless the differentiation can be justified.

Sections 12 and 12A define what constitutes a merger and sets out the analytical framework for the assessment of mergers, respectively.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

No, there are not.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

Parties may approach the Commission for advisory opinions in the following cases:

- to determine whether or not specific conduct will be viewed by the Commission as a contravention of the Competition Act; or
- to determine whether a particular transaction constitutes a notifiable merger.

While an advisory opinion may provide some comfort to the party requesting it, it is not binding on the Commission or any other competition authority. It does not preclude the Commission from later changing its views on a particular issue, particularly where it has been presented with incomplete or insufficient facts. However, if a party has relied on an advisory opinion and the practice is subsequently found to have contravened the Competition Act, the mere fact that an advisory opinion was sought and was acted upon may significantly reduce the risk of an administrative penalty being imposed.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

A complaint may be initiated at any time if a party believes that there has been a contravention of the Competition Act. In terms of section 49B(2), any person may: (a) submit information concerning an alleged prohibited practice in any manner or form; or (b) submit a complaint against an alleged prohibited practice in the prescribed form (Form CC1, which can be found on the Commission's website at www.compcom.co.za) to the Commission. The following information is required to be included in the Form CC1:

- its name;
- the name of the party being complained about;
- a brief description of the practice that has resulted in the complaint;
- a statement indicating whether the conduct is still continuing, if not, the date on which it ceased; and
- a written submission setting out, in detail, the cause for the complaint, how it arose, the parties involved, relevant dates and any other information that may be relevant to the complaint.

It is important to provide as much information to the Commission which would facilitate its investigation of the complaint.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

The Commission's most recent Annual Report (2007/08) states that 193 cases were dealt with during this period of which 16 complaints were initiated by the Commission. Accordingly, the vast majority were as a result of third party complaints.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

A complaint is initiated by the completion and submission of a Form CC1 to the Commission and from the moment the Commission receives the Form CC1, it has one year to investigate a complaint from a third party. The Commission has an indefinite period to investigate its own complaints. The following are the key stages involved in an investigation of a complaint:

- on receiving a complaint, an investigator is appointed by the Commission;
- a fax is usually sent to the complainant acknowledging receipt of the complaint and confirming that it is investigating it and drawing the complainant's attention to the interim relief mechanism which is at its disposal;
- the complainant should try to have a meeting with the Commission as soon as possible, preferably before the Commission sends out its meeting request as this ensures that

the Commission fully understands the nature of the complaint;

- the Commission usually commences its investigation with an oral or written request for information directed at the respondent. The respondent is usually afforded 14 days to respond, though this period may be extended by the Commission, if properly motivated; and
- a response to its information request normally prompts the Commission to direct an information request to the complainant, or alternatively a meeting. The Commission may also request site visits in order to better understand the relevant markets.

If, after a year, the investigation has not been concluded, the Commission may (with the consent of the complainant), alternatively by way of an application to the Tribunal, extend the period for the investigation.

The investigation period is completed once the Commission has issued a decision on the outcome of the complaint proceedings. In essence, two outcomes are possible:

- *Referral*: if the Commission found that a prohibited practice has occurred, the complaint must be referred to the Tribunal for final adjudication, which can be done at any stage within the period of a year afforded to it; and
- *Non-referral:* in all other cases, the Commission must issue a notice of non-referral to the complainant in the prescribed form. Both the complainant and the respondent will receive a fax advising them of the outcome and of the complainant's right to refer the matter to the Tribunal within a 20-day period. A notice is also published in the Government Gazette.

If the Commission has not referred the complaint to the Tribunal and has not extended the time period for its investigation, it is deemed to have issued a notice of non-referral.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

The Commission enjoys extensive powers of investigation which include:

- the power to enter and search a firm's premises, during which it can search any person on the premises, seize or make copies of any book or document, or use any computer system on the premises. In most instances a search and seizure operation will be carried out in terms of a warrant issued by a judge of the High Court or a magistrate;
- the power to summon for interrogation any person who is believed to be able to furnish any information on the subject of the investigation; and
- the power to summon any person who is believed to have possession or control of any book, document or other object that has the bearing on the subject of the investigation to deliver or produce it.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

When investigating prohibited practices (which include abuse of dominance), the Commission may:

- apply to a judge or magistrate for a warrant to enter and search premises, if, from information on affidavit, there are reasonable grounds to believe that a prohibited practice has, or is likely to, take place on the premises or that something connected with an investigation may be found on the premises;
- enter and search a premises without a warrant where it believes, on reasonable grounds, that a warrant would be issued and that the delay occasioned in obtaining a warrant would defeat the purpose of the entry and search;
- remove articles from the premises, use computer systems and copy documents found on the premises; or
- summons any person it believes may be able to furnish information in relation to an investigation to appear before the commissioner (or designated person) for the purpose of either being interrogated, or to produce specific documentation or recordings.

The Commission is further empowered to investigate any firm or person connected or associated with an anti-competitive act. In particular, these powers include the right to conduct investigations on company premises without prior notice - commonly referred to as dawn raids.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

The Commission may ask questions about anything related to the subject matter of the raid. However, the Supreme Court of Appeal, in the *Pretoria Portland Cement* matter, held that section 49(3)(a) and (b) of the Competition Act will "*enjoin the person executing the warrant to allow the person in control to exercise the right of being assisted by an advocate or attorney*".

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

The Commission investigators may remove items from the premises, but are obliged to issue a receipt for any documentation or item that is removed from the premises. The investigators may make copies of documents if they so wish. However, in terms of section 49(5) of the Competition Act, a person may refuse to permit the inspection of or removal of an article or document on the grounds that it contains privileged information. If the privilege is questioned, the investigator may request the registrar or sheriff of the High Court to attach and remove the article or document for safe custody until the court determines whether or not the information is privileged.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

The Commission investigators may use any computer on the premises, or request assistance in the use of the computer. In addition, the investigator may search any data on the computer, reproduce any record from that data, and seize any output from that computer for examination and copying.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The Act does not empower the Commission to use surveillance powers. However, there is a view that the competition authorities may be able to make use of the services of the South African Police Service for this purpose.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

The Commission generally commences its investigation with a request for information directed at the party accused of the anti-competitive conduct. This correspondence usually contains the particulars of the complaint and the respondent is normally afforded 14 days to respond. Subsequent to receiving the response, the Commission may request a meeting or site visit which will further enable an accused party to make submissions in response to the complaint.

4.9 How are the rights of the defence respected throughout the investigation?

It is not settled in our law whether a respondent against whom a complaint has been initiated has a right of hearing during the investigation. In the *Seven-Eleven/Simelane* matter, the High Court ruled that a respondent had a right of hearing during the investigation phase. However, in subsequent matters (see *Novartis/Commission* and *Commission/Federal Mogul*) the Tribunal has held that a respondent's rights to procedural fairness are sufficiently protected by a right to a hearing before the Tribunal.

4.10 What rights do complainants have during an investigation?

Once a complaint has been lodged with the Commission, a complainant has no rights in relation to the investigation itself as this is driven by the Commission. However, after having completed its investigation, and in circumstances where the Commission decides not to prosecute the complaint (i.e. issues a notice of non-referral), the complainant has a right to independently refer the matter to the Tribunal. In addition, at all times prior to a referral, a complainant has a right to apply for interim relief.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Third parties do not have any specific rights in relation to an investigation. However, an informant (that may later choose to become a complainant) may submit information to the Commission and has a right to claim its identity, as well as the information supplied, as confidential. If, however, the informant later chooses to become a complainant, then anonymity must be relinquished.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

In terms of section 49C of the Competition Act, at any time, whether or not a hearing has commenced into an alleged prohibited practice, the complainant may apply to the Tribunal for an interim order in respect of the alleged practice. The Tribunal must give the respondent a reasonable opportunity to be heard and may grant an interim order if it is reasonable and just to do so, having regard to certain stipulated factors. An interim order may not extend beyond the earlier of the conclusion of a hearing into the alleged prohibitive practice or a date that is six months after the date of issue of the interim order.

The Tribunal has the power to order the following remedies in relation to prohibited practices, in terms of section 58 of the Act:

- issue an interdict to prevent the continuance of the prohibited practice;
- impose interim measures on the firm committing the prohibited practice;
- order a party to supply or distribute goods or services to another party;
- order a divestiture of a firm's assets and impose administrative penalties of up to 10 percent of the firm's annual turnover in South Africa (including its exports) for the firm's preceding financial year; or
- declare conduct of a firm to be a prohibited practice in order to establish the basis for a civil action.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

A complaint, either by a third party or by the Commission, must have been initiated within three years of the prohibited practice having ceased.

7 Co-operation

7.1 Does the competition authority in South Africa belong to a supra-national competition network? If so, please provide details

Our authorities are members of the International Competition Network (ICN), which provides competition authorities from developed and developing countries with a platform for addressing convergence and co-operation on practical enforcement and policy concerns.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

Any third party (local or foreign) can provide information to our competition authorities which can in turn be used to use to institute proceedings locally. Similarly, any approaches or guidelines discussed at the ICN may be implemented practically in South Africa by our authorities.

8 Leniency

8.1 Does the competition authority in South Africa operate a leniency programme? If so, please provide details.

Yes. In South Africa, the exposure of cartel behaviour is encouraged and rewarded under the Commission's Corporate Leniency Policy (CLP). The purpose of the CLP is to improve the detection and prevention of cartel activities. The CLP enables the Commission, in its discretion, to grant a cartel member who is first to approach the Commission, immunity or indemnity for its participation in the cartel activity.

Only a firm that is first through the door to confess and provide information to the Commission in respect of particular cartel activity qualifies for complete immunity, subject to the

Commission's discretion. Those members of a cartel who are not the first to confess, but subsequently co-operate fully with the Commission, although not qualifying for immunity, could qualify for a reduction in any administrative penalty imposed.

The granting of immunity under the CLP to a firm will not accordingly shield an individual from any criminal action.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

The Tribunal has the power to order the following remedies in relation to prohibited practices, in terms of section 58 of the Act:

- issue an interdict to prevent the continuance of the prohibited practice;
- impose interim measures on the firm committing the prohibited practice;
- order a party to supply or distribute goods or services to another party;
- order a divestiture of a firm's assets and impose administrative penalties of up to ten percent of the firm's annual turnover in South Africa (including its exports) for the firm's preceding financial year; or
- declare conduct constituting a prohibited practice in order to establish the basis for a civil action.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

The competition authorities can regulate the enforcement of the Competition Act through the following actions and remedies:

- the imposition of administrative penalties;
- criminal sanctions;
- positive measures or orders;
- interdicts;
- consent orders and informal settlements; and
- declarators.

An administrative penalty may not exceed ten percent of the firm's annual turnover in South Africa and its exports from South Africa during the firm's preceding financial year.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

Any decision, judgment or order of the Commission, Tribunal or CAC may be served, executed and enforced as if it were an order of the High Court, in terms of section 64 of the Competition Act.

Section 71 sets out that it is an offence if a person fails to appear at the time and place specified or to remain in attendance until excused, or attends as required, but refuses to be sworn in or make an affirmation, or fails to produce a book, document or other item as ordered, if in the possession of that person, if summoned to do so. Further, in terms of section 72, it is an offence if a person, having been sworn in or having made an affirmation, fails to answer any question fully and to the best of their ability, or gives false evidence, knowing or believing it to be false.

Section 73(1) sets out that a person commits an offence who contravenes or fails to comply with an interim or final order of the Tribunal or the CAC. Further, section 73(2) sets out various further offences such as: doing anything calculated to improperly influence the Tribunal or the Commission concerning any matter connected with an investigation; anticipating any findings of the Tribunal or Commission concerning an investigation in a way that is calculated to influence the proceedings or findings; does anything in connection with an investigation that would have been contempt of court if the proceedings were taking place in a court of law; knowingly provides false information to the Commission; defames the Tribunal or the CAC or a member of either of them in their respective official capacities; wilfully interrupts the proceedings or misbehaves in the place where the hearing is conducted; acts contrary to a warrant to enter and search; without authority, but claiming to have authority, enters or searches premises, or attaches or removes an article or document.

The penalties imposed on any person convicted of an offence in terms of the Competition Act are set out in section 74 and include:

- in the case of a contravention of section 73(1), a fine not exceeding five hundred thousand rand or imprisonment for a period not exceeding ten years, or both; or
- in any other case, a fine not exceeding two thousand rand or imprisonment for a period not exceeding six months, or both.

10 Commitments

10.1 Is the competition authority in South Africa empowered to accept commitments from the parties in the event of a suspected competition law infringement?

Yes. A party who has infringed the Competition Act, particularly if likely to face an administrative penalty, may elect to conclude a settlement agreement with the Commission. Once these agreements are confirmed by the Tribunal, they are referred to as consent orders.

10.2 In what circumstances can such commitments be accepted by the competition authority?

The Tribunal cannot confirm a consent order if the investigation phase has expired. However, the CAC ruled in the *GlaxoSmithKline/Lewis* matter that the parties may nonetheless enter into a settlement agreement outside of the law relating to consent orders. These settlement agreements may at any time be made an order or court by the CAC or by the Tribunal, provided the latter acts in a lawful, reasonable and procedurally fair manner.

10.3 What impact do such commitments have on the investigation?

Once the Tribunal, or CAC, has confirmed a settlement agreement as a consent order or an order of court, this would bring the investigation to an end.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

No. The CAC may consider an appeal arising from the Tribunal in

respect of:

- any final decision of the Tribunal, other than a consent order; or
- any of its interim or interlocutory decisions that are final in their effect.

An appeal from a decision by the CAC lies with the Supreme Court of Appeal or the Constitutional Court, subject to leave to appeal being granted by the CAC and subject to their respective rules.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Yes. A decision by the Commission to grant, refuse or revoke an exemption with respect of prohibited practices may be appealed to the Tribunal. The following steps are involved:

- the appellant must file a Notice of Appeal with the Tribunal within 20 business days after notice of the relevant decision is published in the Government Gazette. This Notice of Appeal must be served on each respondent within three business days after filing it;
- the Commission must file a record of the exemption proceedings in the Commission within 20 business days after being served with the notice to Appeal;
- the registrar of the Tribunal will inform the parties of the date and time of the hearing;
- 15 days before the hearing, the appellant must file and serve its Heads of Argument with the Tribunal and each respondent; and
- 10 days before the hearing, each respondent must file and serve its Heads of Argument on the appellant.

As stated above, in question 11.1, a decision by the Tribunal may be taken on review to the CAC. In this regard the following steps are involved:

- the appellant prepares a Notice of Appeal, which must be filed with the CAC within 15 days of the date of the decision or order that is the subject of the appeal. This Notice of Appeal is served on anyone who was a party to the proceedings before the Tribunal;
- a respondent who wishes to cross-appeal, must file a Notice of Cross-Appeal with the CAC and serve the notice on all relevant parties within ten days of the date on which the Notice of Appeal was served;
- within 40 days after filing a Notice of Appeal, the appellant must serve a copy of the Tribunal Record on the Commission and on each respondent. In addition, four copies of that record must be filed with the registrar of the CAC, one of which must be certified by the Tribunal;
- the registrar of the CAC will then inform the parties of the date, time and place of the hearing;
- 15 days before the hearing (or an earlier date as determined by the Judge President of the CAC), the appellant must file four copies of its Heads of Argument with the CAC; and
- the respondent must file four copies of their Heads of Argument no later than ten days before the hearing (or any earlier date determined by the Judge President).

As stated above, an appeal from a decision by the CAC lies with the Supreme Court of Appeal or the Constitutional Court, subject to leave to appeal being granted by the CAC and subject to their respective rules.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

Section 65 of the Competition Act stipulates that if, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of the Competition Act, that court must not consider that issue on its merits but that the issue should be referred to the Tribunal to consider on its merits.

Where the Tribunal has made a determination of a prohibited practice, the affected party may bring a claim for civil damages in a civil court, provided that party has not been awarded damages under a Tribunal consent order.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

See above in question 12.1.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Private competition law litigation in civil courts, other than the administrative bodies, as allowed in the US (DoJ and FTC) is not possible in South Africa.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

A person who has suffered loss or damage as a result of a prohibited practice must file with the clerk of the relevant civil court a certificate issued by the Chairperson of the Tribunal or the Judge President of the CAC certifying that the conduct constituting the basis for the action has been found to be a prohibited practice under the Competition Act.

Currently, no civil claims for damages or other remedies have been finalised in our national courts, but a few claims have been instituted arising out of the *SAA/Nationwide/Comair* matters, given that the Tribunal issued a certificate in favour of Nationwide.

14 Miscellaneous

14.1 Is anti-competitive conduct outside South Africa covered by the national competition rules?

Section 3 of the Competition Act stipulates that it applies to all activity within, or having an effect within, South Africa. Accordingly, restrictive practices which occur outside of South Africa's borders may fall within the jurisdiction of our authorities if the effects of those activities in South Africa are substantial, direct and 'possibly foreseeable' (see *Natural Soda Ash* case).

14.2 Please set out the approach adopted by the national competition authority and national courts in South Africa in relation to legal professional privilege.

South African law of evidence and procedure protects various forms of public and private privilege. Legal professional privilege, as a form of private privilege, protects the interests of a firm by preventing the disclosure of admissible evidence. Our courts and authorities have accepted this privilege in respect of - (1) legal advice privilege in a litigious or non-litigious sense; and (2) litigation privilege in the context of pending or contemplated litigation.

In the contexts of dawn raids, a party may refuse to permit the inspection or removal of a document on the grounds that it contains privileged information. To assert a claim of privilege, the party must be able to demonstrate that:

- the document was created for the purpose of securing or dispensing legal advice;
- the legal advisor was acting in a professional capacity;
- the document was shown to the legal advisor in confidence;
- the document was shown to the legal advisor for the purpose of obtaining legal advice; and
- the communication must not have been made with criminal objectives.

If a dispute arises regarding the status of a document, the registrar or sheriff of the High Court may attach and remove an article of document for safekeeping until the court has determined whether or not the information is privileged.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to South Africa in relation to matters not covered by the above questions.

Proposed amendments to the Competition Act include the introduction that managers or directors of a firm that is found to have contravened the *per se* provisions of the Competition Act, could have criminal sanctions imposed on them individually. The Competition Act Amendment Bill has not been enacted yet, but it is anticipated to be promulgated shortly.

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Webber Wentzel

As one of South Africa's leading corporate law firms, with over 125 partners and more than 300 professionals, Webber Wentzel has a proud history of providing insightful legal advice and assistance to government organisations, international corporations and financial institutions. The firm's enviable reputation as a consistent provider of appropriate and valuable legal assistance is backed by a vast team of highly-accomplished attorneys whose unmatched knowledge and extensive experience ensures that Webber Wentzel remains the legal firm of choice for South African businesses and major corporations.

The Webber Wentzel Competition Practice Group consists of 16 professionals, including 6 partners, amongst them the former Deputy Commissioner, and 3 senior associates. They are supported by economic consultants and compliance specialists, including the former Chief Economist of the South African Competition Commission. As such, it enjoys an enviable reputation as a provider of world-class legal services across the full spectrum of competition law, including Merger Filings, Cartel Investigations, Competition Litigation, Exemptions and Compliance and Regulatory advice. We have at various times represented a number of South Africa's most recognisable companies, amongst them: AECI, Anglo American, BA/Comair, Chemserve, De Beers, Diageo plc, GlaxoSmithKline, Heineken, Law Society of South Africa, LNM Holdings, Mittal, Netcare and Sasol.

Spain

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Howrey Martínez Lage

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Spain? If more than one, please describe the division of responsibilities between the different authorities.

The authority charged with enforcing Spanish and EU competition law at national level is the *Comisión Nacional de la Competencia* (National Competition Commission, hereinafter "CNC"). The CNC is composed of a Council and a Directorate for Investigation (DI). The Council is the decision-making body, composed of a President and six members appointed by the Government after a parliamentary hearing for a unique mandate of six years. The DI is in charge of investigating restrictive practices and making proposals to the Council who then adopts the final decision.

All main Spanish regions (Galicia, Castilla y León, País Vasco, Aragón, Cataluña, Comunidad de Madrid, Comunidad Valenciana, Castilla-La Mancha, Extremadura, Murcia and Andalucía) have created their own regional competition authorities, charged with the enforcement of Spanish competition law to restrictive practices (but not mergers) that affect competition in their respective region exclusively (i.e. not in two or more regions or at national level).

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The CNC is responsible for applying competition law horizontally across all sectors. However, the Spanish Competition Act (SCA) envisages appropriate mechanisms to ensure coordination between the CNC and sector regulators, such as the *Comisión del Mercado de las Telecomunicaciones* (CMT) or the *Comisión Nacional de la Energía* (CNE). In particular, the CNC and sector regulators are required to inform each other of their respective activities. Sector regulators are required to inform the CNC of any restrictive practices they might have had knowledge of, submit non binding opinions in infringement proceedings initiated by the CNC and request the CNC an opinion in regulatory proceedings with a significant impact on the conditions of competition. The sector regulators must also submit non-binding opinions in mergers concerning their respective regulated sector.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Spain?

The CNC may initiate proceedings *ex officio* or following a complaint if there are rational indications of the existence of an infringement. *Ex officio* proceedings are initiated by the DI on its own motion or upon request of the Council. After the entry into force of the new Competition Act 15/2007 on 1 September 2007, the CNC published the "CNC Launching Plan (2008-2009)" where it identified its priorities for the 2008-2009 period. According to the Plan, the CNC will act based on a number of priorities by sector or markets and taking into account the importance of the identified competition concerns, the impact on consumers/the public interest and the relative position of the CNC and other authorities to address these concerns. More specifically, the CNC announced in the Launching Plan that it would focus on cartels, liberalised sectors such as telecommunications and energy, the market for the sale and purchase of audiovisual contents, professional services, transport, public tenders and regional retail commerce regulations.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

Article 1 and Article 2 SCA essentially mirror Articles 81 and 82 EC as to the prohibitions of restrictive agreements and the abuse of dominant position. However, potentially stricter rules apply as regards collective recommendations and conscious parallel behaviour, which are expressly prohibited by Article 1(1) SCA. Article 1(4) SCA provides that the prohibition of restrictive agreements set forth in Article 1(1) does not apply to practices complying with EC block exemption regulations even if they do not affect trade between Member States, thus ensuring that the application of Spanish law is consistent with the application of Community law also in cases that do not trigger the uniformity obligations set forth in Article 3(2) of Regulation 1/2003.

Somehow peculiar to the Spanish system is Article 3 SCA that provides for the possibility for the CNC and the regional competition authorities to pursue unfair competition acts when they affect the public interest by distorting competition. The SCA also includes a substantive *de minimis* provision by expressly excluding the application of the prohibitions laid down in the Act to practices that are not capable of appreciably affecting competition. Unlike the *de minimis* rule developed by the European Court of Justice, the *de minimis* rule set forth in Article 5 SCA also applies to abusive conducts (and unfair competition acts falling within the scope of application of Article 3 SCA).

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

Sector-specific rules establishing regulatory obligations apply in regulated sectors, such as telecommunications and energy. Although inspired in the general competition rules, these *ex ante* rules are of a regulatory nature.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

The SCA no longer envisages the possibility of obtaining a prior authorisation of restrictive agreements that fall within the prohibition of Article 1(1) SCA but fulfil the conditions for an exemption under Article 1(3) SCA. Instead, it provides for a legal exception system in line with 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 (Official Journal L 1, 04.01.2003, p.1-25; hereinafter "Regulation 1/2003).

However, the CNC may adopt inapplicability decisions declaring that the prohibitions on restrictive agreements and abuse of dominant position (Articles 1 and 2 SCA) do not apply to a given practice. These decisions can only be adopted *ex officio* when public interest so requires.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

Any natural or legal person, being or not an interested party, may lodge a complaint in relation to practices prohibited under the SCA. Annex I of the SCA Implementing Regulation (Royal Decree 261/2008 of 22 February 2008) establishes the minimum content of complaints. The CNC announced in its Launching Plan its intention to adopt a Communication setting forth guidance on how to lodge a complaint.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

According to the last available CNC Annual Report for 2007, approximately 79% of the proceedings initiated in 2007 were prompted by a complaint (73 out of 92 proceedings), 14% (13 proceedings) were initiated *ex officio* and the rest (6 proceedings) related to individual exemptions under the old Competition Act 16/1989. Statistics for 2008 are not yet available, but the proportion of *ex officio* proceedings is likely to increase.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

Even before initiating formal infringement proceedings the DI may carry out a preliminary investigation which is not subject to any time limit.

The initiation of infringement proceedings is a formal decision of the DI, which is notified to interested parties. Infringement proceedings shall be concluded within an 18-month term as of the date of the decision to initiate proceedings. The investigation stage should be concluded within the first 12 months as of this decision.

After carrying out the investigation, the DI notifies a Statement of Objections to the interested parties, who are granted a 15-day term to submit their observations and request any relevant evidentiary measures. The DI then issues a proposal for resolution which is notified to the interested parties who can make observations. Such proposal is referred to the Council jointly with a report by the DI.

The Council is entitled to order additional evidentiary measures *ex officio* or upon request of any interested party. It is also entitled to change the legal qualification of the relevant restrictive practice contained in the proposal by the DI, in which case it will grant the interested parties a 15-day term to submit observations. Upon request of the interested parties, the Council may hold an oral hearing. It will then take the final decision after having informed the European Commission pursuant to Article 11(4) of Regulation 1/2003.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

The CNC can request any natural or legal person, as well as public administrative bodies, to provide any kind of data and information in their possession which may be necessary for the application of the SCA. The addressees of the request for information are under an obligation to provide the requested data and information and may be fined for not doing so or providing incomplete or inaccurate information.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

The CNC is empowered to carry out inspections of undertakings and associations of undertakings for the purposes of applying the SCA. The CNC has the following inspection powers:

(a) to enter the premises, land and means of transport of the undertakings concerned, as well as the homes of businessmen, directors and members of the staff;

(b) to examine books and records, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies from such books or records;

(d) to retain such books or records for a maximum term of 10 days;

(e) to seal premises, books, records or any other assets for the period and to the extent necessary for the inspection; and

(f) to ask any representative or member of the staff for explanations on facts or documents relating to the subject-matter of the inspection and to record the answers.

The powers under (a) and (e) can only be exercised with the prior express consent of the interested party or judicial authorisation.

Undertakings and associations of undertakings are under an obligation to submit to an inspection ordered by the DI. A judicial authorisation is only required if the undertaking or association opposes the inspection, although it may be obtained beforehand as a precautionary measure.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

As indicated, the CNC has the power to ask any representative or member of the staff for explanations on facts or documents relating to the subject-matter of the inspection and to record the answers. However, it is not empowered to undertake interviews within the meaning of Article 19 of Regulation 1/2003 either during the course of searches or otherwise.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

See question 4.3 above.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

The CNC is empowered to take copies of the books and records held at the inspected premises in any form, including those held in electronic form. In practice, the CNC has made a wide use of its powers, sometimes copying entire hard disks for further examination at its premises.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The CNC does not have surveillance powers.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

The SCA expressly provides for the right of the parties to submit observations to the Statement of Objections and the proposal for resolution issued by the DI. Moreover, the parties may request that an oral hearing be held before the Council. They are also entitled to submit observations on the Council decision to adopt a different legal qualification of the facts investigated by the DI, if any.

4.9 How are the rights of the defence respected throughout the investigation?

As indicated under question 4.8 above, the parties accused of anti-competitive conducts have a right to submit observations at various stages of the proceedings and may request an oral hearing. The Spanish competition authorities have also expressly acknowledged that the alleged infringers also enjoy a right not to self-incriminate and to be informed of the accusation should they be required to provide information within the preliminary investigation that may precede the opening of formal infringement proceedings. Moreover, the parties to infringement proceedings have also a right not to disclose to the CNC any legally privileged documents (see question 14.2 below).

4.10 What rights do complainants have during an investigation?

The complainant has a right to be notified the CNC decision not to initiate proceedings. If proceedings are initiated, the complainant that shows legitimate interest to qualify as an interested party pursuant to general administrative law provisions is entitled to have access to the file, submit observations (in particular, to the Statement of Objections), request evidentiary measures and an oral hearing and take part in any such hearing.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Third parties that show legitimate interest to qualify as interested parties pursuant to general administrative law provisions may have access to the file, submit observations (in particular, to the Statement of Objections), requests evidentiary measures and an oral hearing and take part in such an hearing.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The CNC has the power to adopt interim measures *ex officio* or upon request of interested parties. Interim measures are aimed at ensuring the effectiveness of the final decision. They may consist, *inter alia*, in orders to desist from a given conduct, imposition of conditions aimed at avoiding the damages which may result from such a conduct or payment of a deposit for the purposes of damages compensation.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The SCA provides for limitation periods of four years for very serious infringements, two years for serious infringements and one year for minor infringements. Moreover, the SCA provides for a limitation period of four year for sanctions for very serious infringements, two years for sanctions for serious infringements and one year for sanctions for minor infringements.

Very serious infringements include restrictive practices between competitors, such as cartels, and abuses of dominant position committed by companies active in a recently liberalised market, having a market share close to monopoly or enjoying special or exclusive rights. Serious infringements include restrictive practices between non competing undertakings, abuses that are not expressly qualified as very serious, and unfair competition acts that distort competition within the meaning of Article 3 SCA. Minor infringements include supplying incomplete, incorrect, misleading or false information in response to a request for information, refusing to submit to an inspection ordered by the DI and otherwise obstructing the inspection.

7 Co-operation

7.1 Does the competition authority in Spain belong to a supra-national competition network? If so, please provide details

The CNC belongs to the European Competition Network (ECN), the International Competition Network (ICN) and other international forums, such as the association of European

Competition Authorities (ECA) and the *Foro Iberoamericano de Competencia* (Iberoamerican Competition Forum).

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

The CNC can exchange information with the European Commission and the national competition authorities of the EU Member States for the purposes of applying Articles 81 and 82 EC. It may use in evidence any matter of law or fact, including confidential information, within the limits of Article 12 of Regulation 1/2003.

8 Leniency

8.1 Does the competition authority in Spain operate a leniency programme? If so, please provide details.

The new SCA 15/2007 has for the first time introduced a leniency programme, which came into force on 28 February 2008. Under the programmer total immunity may be obtained by the first undertaking to submit evidence enabling the CNC to carry out an inspection or to find an infringement, provided the CNC did not already have sufficient elements to carry out such an inspection or find an infringement and subject to fulfilment of certain specified conditions (full, continuous and diligent cooperation throughout the administrative proceedings; ending participation in the cartel except where the CNC deems it necessary to preserve the effectiveness of an inspection; not destroying evidence; not disclosing the intention to make a leniency application or its content; not having taken measures to coerce others to take part in the infringement).

The SCA also provides for reduction of fines for undertakings that, while not qualifying for total immunity, submit evidence which provide significant added value with respect to the evidence the CNC already has and comply with the rest of the conditions established for total immunity. The level of the reduction varies from 30-50% for the first undertaking that submits such evidence, to 20-30% for the second one and up to 20% for any subsequent one.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

The CNC may adopt a decision finding an infringement, in which case it may also order the undertakings concerned to bring the infringement to an end and remove its effects, impose structural or behavioural remedies and fines.

The CNC may alternatively find that there is no evidence of an infringement or that the practice at issue is not capable of appreciably affecting competition.

Infringement proceedings may also end with a commitment decision (see section 10 below).

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

The SCA provides for a system of scaled fines, ranging from up to 1% of the undertaking total turnover in case of minor infringements, up to 5% in case of serious infringements and up to 10% in case of very serious infringements. Moreover, a fine of up to €60,000 may be imposed on legal representatives or directors of the undertaking concerned.

The SCA also provides for the possibility of imposing periodic penalties to compel undertakings to bring an infringement to an end, remove its effects, comply with commitments or conditions, otherwise comply with a decision or requirement of the CNC, comply with the duty of cooperation or with interim measures.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

The CNC may impose periodic penalties of up to €12,000 to compel undertakings/individuals to comply with their duty of cooperation.

Moreover, the CNC may impose a fine of up to 1% of the turnover to undertakings that do not supply the requested information, supply incorrect, incomplete, misleading or false information, refuse to submit to an inspection ordered by the DI, or otherwise obstruct the investigation, in particular, by (i) failing to produce the requested books or records or producing them in incomplete, inaccurate or misleading form, (ii) failing to answer the CNC questions or answering them in incomplete, inaccurate or misleading form and (iii) breaking any seals affixed by the CNC.

10 Commitments

10.1 Is the competition authority in Spain empowered to accept commitments from the parties in the event of a suspected competition law infringement?

The CNC is empowered to accept commitments proposed by the alleged infringer(s) at any time during the infringement proceedings prior to the referral of the case to the Council.

10.2 In what circumstances can such commitments be accepted by the competition authority?

Commitments must address the competition concerns arising from the practices under investigation and sufficiently safeguard the public interest.

10.3 What impact do such commitments have on the investigation?

The CNC decision accepting the proposed commitments will make them binding on the undertakings concerned. It will identify the parties bound by the commitments, their scope of application and object and establish a supervision regime. No reference is made to the existence of an infringement of the competition rules. Failure to comply with a commitment decision is qualified as a very serious infringement that may be sanctioned with a fine of up to 10% of the total turnover of the undertakings concerned. Moreover, the CNC may impose periodic penalties to compel undertakings to comply with a commitment decision. It may also initiate new infringement proceedings.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

An appeal may be lodged before the Council of the CNC against decisions and acts of the DI that may jeopardise the parties' rights of defence or cause irreparable damage. The appeal shall be lodged within a term of 10 days. The parties may submit observations within a term of 15 days. Compared with the situation existing under the previous Act, however, the possibilities of appeal have been significantly restricted, since decisions to close the case (and dismiss a complaint) are now taken by the CNC and can therefore only be appealed judicially.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Final decisions of the CNC may be appealed before the *Audiencia Nacional*. Final decisions of the regional competition authorities may be appealed before the *Tribunal Superior de Justicia* of the respective region. The appeal may be lodged by persons having a right or legitimate interest within two months as of the publication or notification of the appealed decision. The competent court hears appeals on the merits and may set aside the appealed decision in whole or in part, as well as reduce the amount of any fines imposed on the undertakings concerned. Judgments of the *Audiencia Nacional* may be appealed before the Supreme Court.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

In addition to their review role, national courts may also provide assistance to the competition authorities within the framework of an inspection. In particular, the *Juzgado de lo Contencioso-Administrativo* may issue an authorisation for the inspection of any relevant premises when the affected party refuses to submit to the inspection ordered by the DI or there is a risk that such refusal may occur.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

The European Commission and the CNC may submit information or written observations before national courts, on their own initiative or upon request of the court, on issues relating to the application of Articles 81 and 82 EC or Articles 1 and 2 SCA. With the permission of the court, they may also submit written observations. Regional competition authorities have similar powers in relation to the application of Articles 1 and 2 SCA within their field of competence.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

The new SCA has empowered national courts to directly apply Articles 1 and 2 SCA in line with their right to directly apply Article 81 and 82 EC pursuant to the Community Court case law and Regulation 1/2003. Private parties may bring standalone actions aimed at obtaining a finding of infringement of the relevant competition law provisions and possibly damages. They may also bring follow-on damages actions further to an infringement decision of the CNC or the European Commission.

Private claims for the application of both EC and Spanish competition law shall be brought before the *Juzgado de lo Mercantil* (Commercial court). Unclearness of the relevant jurisdictional provisions has led to some uncertainties as to whether this court is also competent to hear damages claims or whether the latter should instead be brought before the *Juzgado de Primera Instancia* (Civil court). In both cases, general tort rules will usually apply to the substance of the case (although contractual damages may be claimed by direct buyers in cartel cases), allowing the injured party to claim compensation for both the loss suffered and lost profit, as well as interest. The competent court may request an opinion from the CNC on the criteria to quantify damages resulting from an infringement of Spanish competition law.

In standalone actions, the court may suspend proceedings if the case is also pending before the European Commission or Spanish competition authorities to avoid conflicting decisions.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

The first court decision awarding damages for an infringement of Spanish competition laws was adopted in 2005 in a follow-on action under the old Competition Act 16/1989. Under Article 13(2) of this Act damages actions for infringement of Spanish Competition law could only be brought after a final decision by the competition authority established the existence of the infringement. Based on this provision, in 2005 the broadcaster Antena 3 was awarded €25 million in damages for an abuse of dominant position by the national football league (LNFP), namely the sale of broadcasting rights to the national league and cup competitions on an exclusive basis to Spain's public regional broadcasters (FORTA) for eight seasons. However, the first instance decision was then quashed on appeal.

Another case where damages were granted based on, *inter alia*, the infringement of Article 82 EC was the Conduit case. The telephone directory service provider *Conduit* was awarded €639,003 in damages for a refusal by the incumbent telephone operator Telefónica to grant it non discriminatory access to its databases.

There are currently several damages claims pending before the civil and commercial courts.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Spain covered by the national competition rules?

Article 1 SCA prohibits bi- and multilateral practices which have as

their object or effect the prevention, restriction or distortion of competition within part or whole of the national market. Similarly, Article 2 SCA prohibits the abuse of dominant position within part or whole of the national market. While these provisions are broad in scope -in particular Article 1 SCA- and could in principle catch conduct occurred outside Spain but having effects on Spanish territory, to our knowledge this has not occurred in practice.

14.2 Please set out the approach adopted by the national competition authority and national courts in Spain in relation to legal professional privilege.

Pursuant to the practice of the Spanish competition authorities, as set forth in the Pepsi-Cola/Coca-Cola decision (case r 508/902), legal privilege operates as a limit to the inspection powers of the competition authority when three conditions are fulfilled. First, only communications between external lawyers and their clients may be deemed legally privileged. Secondly, these communications must be exchanged within the context and for the purposes of the client rights of defence. Thirdly, it is for the inspected undertaking to show that the communication at issue is legally privileged.

Without prejudice to the above, with the entry into force of the new SCA, the CNC seems to have recently taken a more restrictive approach to legal privilege, which has given rise to a number of appeals against its decisions currently pending before the *Audiencia Nacional*.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Spain in relation to matters not covered by the above questions.

In the field of merger control law, under the new SCA, the CNC will usually have the final say in any merger proceedings. The Government may only intervene exceptionally against a decision prohibiting a merger or making its clearance subject to conditions. In such cases the Government will have the power to amend the CNC's decision on relatively broad grounds of public interest, such as national security and defence, public health or the environment.

Any concentration lacking "Community dimension" must be notified to the CNC prior to its implementation if one of the following thresholds is met:

- if the market share acquired or increased as a consequence of the concentration is equivalent to or represents more than thirty percent of the Spanish market or of a defined geographical market within that market; or
- the total volume of sales in Spain of all the participants together exceeds €240 million and at least two of the participants have an individual turnover in Spain of more than €60 million.

Any concentration subject to notification must not be put into effect until it has obtained clearance, although it is possible to request a derogation of the obligation to suspend.

The CNC has a one-month deadline for first phase investigations and another two months if the merger goes into phase two. Should the Government exceptionally intervene the proceedings may last another six weeks.

The SCA now provides for the possibility of offering commitments to address the competition concerns identified by the CNC, both in phase one and two of proceedings. Regarding the substantive test, Spanish law has from the beginning used the "significant impediment of effective competition" test which the Community legislator introduced in Regulation (EC) 139/2004.

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The Madrid team works with a variety of Spanish and international companies operating across a range of sectors including food, consumer goods, tobacco, media, sports, pharmaceuticals, energy, telecommunications, steel, cement, film distribution, air transport, electronics and mechanics.

In addition to Spanish, languages spoken at the Madrid office include English, French, German and Italian.

Switzerland

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Switzerland? If more than one, please describe the division of responsibilities between the different authorities.

The Cartels and Other Restraints of Competition Act (ACart) is enforced by way of administrative procedure and civil litigation.

The Competition Commission (FCC), an administrative body, has primary responsibility for investigating cases of an appreciable economic importance; preliminary and regular investigations are conducted by the FCC's Secretariat (Secretariat). All decisions made by the Secretariat or the FCC are subject to judicial review by the Federal Administrative Court. Further appeals can be made to the Federal Supreme Court.

Under exceptional circumstances, the Federal Council may authorise competitive arrangements and practices of dominant undertakings that have been declared unlawful by the competent authority, provided that is necessary for the implementation of prevailing public interests (Article 8 ACart).

The initiative to bring private claims before civil courts lies with the claimant (Articles 12 *et seq*. ACart). In order to ensure some coherence between administrative and private competition procedures, a case may be referred to the FCC for an opinion if the lawfulness of a restraint of competition is questioned in the course of a civil proceeding (*Question 12.2*); the same definition of restraint of competition applies in both procedures. Decisions of the civil courts in competition matters can be appealed before the Federal Supreme Court.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

As a rule, the responsibility lies with the FCC to enforce the ACart in all sectors. However, other authorities are also confronted with competition issues. In particular:

- Under the Act on Railways and the relating Network Access Ordinance, the Federal Office of Transport is responsible for setting the fees for the use of the infrastructure, whilst the Arbitral Commission for Railway Transport is vested with the exclusive jurisdiction over any disputes concerning access to the network and the consideration for the use of infrastructure.
- When assessing whether an undertaking has a dominant position for the purposes of the Telecommunication Act, the Federal Office of Telecommunication must consult the FCC (Article 11a (2) of the Telecommunication Act). The jurisdiction lies with the Telecommunication Commission to decide disputes concerning access to telecom networks.
- The Price Surveillance Authority monitors prices in various sectors (e.g., the health sector, utilities and communication services); in particular, pursuant to Article 16(2) of the Act on Price Surveillance (PSA), it examines whether a price for a good or service may be regarded as exploitative, in which case it may request the dominant undertaking to adjust its price.
- If a concentration of banks is deemed necessary by the Swiss Financial Market Supervisory Authority (FINMA) in order to protect the interests of creditors, such interests may be given priority. In such case, the FINMA shall take the place of the FCC, which it shall invite to submit an opinion on the concentration under investigation (Article 10(3) ACart).

The FCC is also in charge of the co-operation with the authorities of the European Community (EC) pursuant to Article 11 of the Treaty on Air Transport between Switzerland and the EC. If an undertaking in Switzerland opposes an inspection in proceedings pursuant to this provision, investigative measures pursuant to Article 42 ACart (*Question 4.2*) can be instituted upon the European Commission's request (Article 42a(2) ACart). The Treaty on Air Transport with the European Community is Switzerland's only international treaty which provides for judicial assistance in the investigation of competition matters.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Switzerland?

The FCC and its Secretariat dispose of an important level of discretion in this respect and will generally focus on more serious infringements of competition law. Since the 2003 amendment to the ACart, which has introduced direct sanctions for hard-core restrictions of competition (*Question 9.2*), the FCC is expected to investigate infringements that are subject to first-time infringements fines.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The ACart regulates binding and non-binding arrangements and concerted practices, which have, as their object or effect, the restriction of competition in Switzerland (Article 4(1) ACart). The ACart distinguishes between three types of competitive (horizontal

or vertical) agreements:

- agreements that do not significantly affect competition: such agreements are lawful;
- agreements that significantly affect competition: such agreements are lawful if they may be justified on grounds of economic efficiency (Article 5(1) and (2) ACart); and
- agreements that eliminate effective competition: such agreements are unlawful (Article 5(3) and (4) ACart).

Pursuant to Article 7(1) ACart, practices of undertakings having a dominant position are deemed unlawful when such undertakings, through the abuse of their position, prevent other undertakings from entering or competing in the market or when they adversely affect trading partners. Article 7(2) ACart lists exemplary behaviours that are deemed unlawful. The concept of abuse in Swiss law covers both exploitative and exclusionary practices. The determination of an abusive dominant position is based on objective criteria. A dominant position is given, when one or more undertakings are able, as regards supply or demand, to behave in a substantially independent manner with regard to the other participants in the market (competitors, suppliers or buyers) (Article 4(2) ACart).

Concentrations, including foreign-to-foreign mergers, are subject to merger control where the thresholds set by the ACart are reached (Articles 9 and 10 ACart). A planned concentration must also be notified to the FCC whenever it appears that the FCC has already asserted the existence of a dominant position of one (or more) of the undertakings involved in Switzerland, and the concentration relates to the market in which the undertaking holds a dominant position, or to a neighbouring market (Article 9(4) ACart).

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

The ACart does not contain any sector-specific offences and exemptions. The general justification of agreements for economic efficiency is available in all sectors. Similarly, dominant undertakings in all sectors may request justification on the basis of legitimate grounds.

The ACart does not apply where other statutory provisions establish an official market or price system (e.g., agricultural production) or when such provisions entrust a specific undertaking with the performance of tasks in the public interests, granting them special (monopoly) rights in this connection (e.g., health services) (Article 3(1) ACart). Furthermore, the ACart does not apply to effects on competition that result exclusively from intellectual property laws; however, the ACart applies to any import restrictions based on intellectual property laws (Article 3(2) ACart).

Pursuant to Article 6 ACart, the FCC has published commendations, some of which are focused on particular sectors of economy (e.g., motor vehicle or sporting goods industry). Civil courts are not bound by these commendations.

As far as concentrations are concerned, the ACart contains special rules to determine and calculate the relevant thresholds for businesses in specific areas (such as insurance companies and banks).

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

A mechanism of notification and opposition procedures applies for the purpose of legal certainty. This mechanism allows undertakings to formally notify an agreement or behaviour entailing a potential restraint of competition to the FCC before said agreement or behaviour becomes effective (Article 49a(3) ACart). Once the filing has been made, the undertaking is allowed to perform the notified agreement or adopt the notified behaviour without facing any risk of direct sanctions (*Question 9.2*) as long as the FCC does not inform the undertaking about the opening of a (preliminary or regular) investigation. The FCC has five months to decide whether an investigation should be opened; there is no longer any risk of fines should the authority decide not to open an investigation within the five-month deadline. In December 2004, the FCC issued a specific notification form, which must be filed in triplicate in one of the official Swiss languages. Supporting documents can be in English. Undertakings with a domicile abroad must use a Swiss address for notification.

In a judgment dated 29 February 2008 (upheld by the Federal Supreme Court in December 2008; case 2C_292/2008), the Federal Administrative Court held *inter alia* that, where undertakings have not started implementing their practices, they cannot request that the FCC render a decision ascertaining that their arrangements or practices conform with the ACart (case B-4037/2007).

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

There is no formal procedure for filing a complaint with the competition authorities. The Secretariat accepts oral or written complaints and does not charge any fee to the complainant; (by contrast, if protection is sought before civil courts, the losing party will be liable for judicial and legal costs). However, there is no obligation for the Secretariat to open an investigation of any type (preliminary or regular) following a complaint.

In practice, investigations may be opened by the FCC on its own initiative following an application for leniency programme filed by an undertaking that has participated in hard-core restrictions of competition (*Question 8.1*). An application for full immunity or leniency must be submitted either on a leniency application form (in German, French or Italian), which must be filed in triplicate by hand, post or fax (but not by e-mail or by phone), signed and dated, or orally (i.e. in person at an interview).

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

There are no official statistics. It is within the discretion of the Secretariat to open a preliminary investigation (Article 26 ACart) either on its own initiative, or at a concerned party's request, or on the basis of a third party's complaint. If there are reasons to believe that there is an unlawful restraint on competition, the Secretariat shall, with the approval of a member of the FCC's Presidency, open a regular investigation (Article 27 ACart).

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

The procedure is subject to general rules set out by the Federal Act on Administrative Procedure 1968. When the FCC decides to open

a regular investigation (Article 27 ACart), it publishes a notice in the *Federal Bulletin* and the *Swiss Official Commercial Gazette* (Article 28(1) ACart). The Secretariat collects information (e.g., by sending questionnaires to the targeted undertakings and to other market participants) and organises the evidence-gathering process. In an investigation, the Secretariat is not subject to any time limits.

Based on its investigative measures, the Secretariat issues a draft FCC's decision. This draft is submitted to the parties to the investigation for comment (Article 30(2) ACart). Both the draft decision and the parties' comments are then referred to the FCC. Before closing the investigation, the FCC may conduct hearings and instruct the Secretariat to take additional steps in view of the requirements of the investigation, or require that the reasoning on which the draft decision is based be amended. If the amendment relates to essential findings, an amended draft decision must be submitted to the parties concerned for comment.

The FCC closes the investigation proceedings either with an amicable settlement (*Question 9.1*) or with a formal binding decision on the compatibility of the cartel or behaviour with the ACart.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

The parties to the investigation, as well as interested third parties, must provide the FCC with the information and the documents it requests (Articles 40 and 42(1) ACart). Undertakings that do not provide information or produce documents, or only partially comply with the requirements, are liable to a fine (*Question 9.3*). In *Auskunftsverfügung IMS Health GmbH*, the FCC got an opportunity to confirm what constitutes "interested third parties" within the meaning of Article 40 ACart. IMS Health, the third party in that case, refused to voluntarily provide the requested information on the parties' market shares, thereby forcing the FCC to impose the requested collaboration by way of a decision. IMS Health was thus forced to provide that information because interested third parties within the meaning of Article 40 ACart are any third party active on the same market or having a business relationship with one of the parties involved in the proceedings (DPC 2006/3, 510).

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

The power of the FCC to order searches of premises and seizures of documents and data is one of the substantial amendments of the ACart of 2003 (Article 42(2) ACart, Articles 45-50 Federal Administrative Criminal Code). These measures are to be requested by the Secretariat and to be approved by a member of the FCC's Presidency. When issuing a search warrant, the FCC must be satisfied, *inter alia*, that there are reasonable grounds for suspecting that there are, within the premises to be searched (business premises, private homes and vehicles of company management or employees), documents which are relevant to the investigation, and the principle of proportionality must be respected throughout searches. Any searches of business and residential premises are carried out by representatives of the Secretariat as well as members of the cantonal police force. The search warrant must be produced.

Companies whose premises are searched, or their external lawyer, may request that seized documents or electronic data (PCs, CD-ROMs, USB-keys, etc.) be sealed if this material is either privileged (*Question 14.2*) or beyond the scope of the investigation. The Swiss Criminal Court will then decide, upon request, whether or not the seized documents and data may be examined by the competition authorities (*Question 11.1*).

In April 2005, the Secretariat issued a short Notice on Dawn Raids, which sets out how in practice the Secretariat conducts searches of premises and seizures of documents and data. According to this Notice, any company subject to a cartel investigation is entitled to appoint an external counsel who may advise the company throughout the investigation process. However, the CEO (or in his/her absence the most senior company representative) is the only contact person for the Secretariat, to the exclusion of the external counsel.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

Pursuant to Article 42(1) ACart, the Secretariat can require the parties to the investigation to make statements. Representatives of the Secretariat may also require an explanation of the documents or information to be supplied in the course of searches; as a rule, no interviews are conducted during searches.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

The competition authorities can remove original/copy documents as the result of searches being undertaken.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

The competition authorities can take electronic copies of data held on the computer systems using forensic IT tools.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The FCC's investigatory powers are limited to searches of premises, seizure of documents and data and examination of parties and witnesses. The FCC and its Secretariat do not have any particular surveillance powers (e.g., bugging). Further, the FCC has no power to order the arrest of individuals.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

The party suspected of having anti-competitive conduct has the right to hear the case against it and to submit its response (*Question 4.9*). In *Vertrieb von Tierarzneimitteln*, the FCC pointed to the rules and procedure governing the application of Article 28 of the Federal Act on Administrative Procedure 1968, which provides that documents whose access is refused to a party have to be summarised verbally or in writing, the right to be heard on the content of this evidence having in addition to be guaranteed (DPC 2002/4, 714).

Pursuant to Article 25(4) ACart, the FCC must ensure that the business secrets of the party accused of anti-competitive conduct are not disclosed. The protection of business secrets, which has been specified in an explanatory note on business secrets issued by

the Secretariat in April 2008, is generally within the competence of the Secretariat, although the FCC itself may be involved in this process from time to time. As a matter of principle, documents necessary to the establishment of the anti-competitive behaviour of the targeted parties, such as unlawful agreements under the ACart, are not to be considered as business secrets (*Vertrieb von Tierarzneimitteln*, DPC 2002/4, 698).

4.9 How are the rights of the defence respected throughout the investigation?

The rights of the defence are respected insofar as the parties to the regular investigation have the right to access the file and to be heard (*Question 4.8*).

On the other hand, the parties must provide the FCC with the information and the documents it requests (*Question 4.2*). The investigatory powers of the FCC are, in principle, limited by the right against self-incrimination; although the ACart and the legislation to which it refers do not provide for the right of an undertaking to refuse to answer questions from the authority when such answer would entail the admission of a breach of the law, it is the prevalent view that an undertaking should enjoy such right given the criminal character of the administrative sanctions.

Any company subject to searches is entitled to appoint an external lawyer. However, according to the Secretariat's Notice on Dawn Raids (*Question 4.3*), the Secretariat does not wait for the external lawyer to proceed. The Secretariat immediately starts to search business premises and to seize information or data. Seized pieces of evidence are set aside. Upon arrival, the external lawyer may review the seized items and request sealing for certain documents or data, if appropriate.

4.10 What rights do complainants have during an investigation?

The complainant has usually a right to stay anonymous *vis-à-vis* its competitors and other market participants during a preliminary investigation because the procedure does not imply the right to access the file. However, if a regular investigation is opened, the complainant's identity is usually known because the parties to the investigation have the right to access the file (*Question 4.9*).

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

The Secretariat may begin preliminary investigations in response to third party complaints. However, third parties cannot request that the FCC initiate preliminary or regular investigations.

Pursuant to Article 43(1) ACart, the following third parties can take part in a regular investigation concerning a restraint of competition:

- competitors for which access to a market is impeded because of an infringement of competition rules;
- professional or economic bodies that have bye-laws which authorise them to defend their members' economic interests, provided that the members of such bodies would be entitled to participate in the investigation; and
- organisations of national or regional importance that work for consumer protection under the terms of their by-laws.

In order to join the proceedings, third parties must apply within 30 calendar days of the announcement of the start of the investigation (Article 28(2) ACart). Third parties that have applied within the time limit can give written opinions on the Secretariat's proposal (*Question 4.1*). Participation in the investigation also implies a right to consult files and the right to be heard.

The Secretariat may request that, in cases of more than five participants with identical interests, one common representative be appointed, if otherwise the investigation would be unduly complicated (Article 43(2) ACart).

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The FCC has the power to order interim measures in case of a suspected competition infringement, subject to the following conditions:

- favourable forecast that the conduct will be held to be illegal in the final decision and that the same measures as those requested as interim relief will be ordered in the final decision;
- risk of substantial prejudice to the requesting party which may not be avoided by any other means;
- urgency of the relief requested; and
- proportionality of the relief requested.

Interim measures are ordered to avoid or to terminate a restraint of competition. All appropriate and reversible measures are possible, e.g. the interim obligation to enter into a contract, to supply or to grant admission to a trade fair. Interim measures may be ordered even without the prior hearing of the defendant, in case of high urgency; the defendant will be heard only after the first decision and the court will then reconsider the interim remedies. Nevertheless, the FCC is rather reluctant to grant interim measures, doing so only in presence of prevailing public interests (e.g., *Sellita Watch/ETA SA*, DPC 2003/3, 653).

Interim measures may also be ordered by civil courts (Article 17 ACart; Articles 28c to 28f of the Swiss Civil Code). The claimant has to show the credibly of its application and supply *prima facie* evidence that his main action is justified and that the prejudice he would incur during the course of the proceedings if no interim remedies were to be granted would be irreversible. In *Speedy Garage SA/BMW (Suisse) SA*, the Vaud Cantonal Tribunal emphasised that a request to impose positive obligation by judicial means, in a summary proceeding, was subject to strict conditions, in particular regarding the appreciation of the evidence and the balance of the interests at stake (DPC 2008/3, 530).

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

No sanction can be imposed by the FCC when a competition restraint has ceased to have effects for the previous five years (Article 49a(3) let. b ACart).

The time limit for procedural infringements by individuals is five years for breaches of amicable settlements and administrative decisions and two years for other breaches (Articles 54 and 55 ACart). The limitation period for procedural infringements by undertakings is not regulated in the ACart. In the literature, a time limit of one year has been suggested for such infringements; however, in the absence of an explicit rule it cannot be excluded that this limitation period may be up to five years.

7 Co-operation

7.1 Does the competition authority in Switzerland belong to a supra-national competition network? If so, please provide details

The FCC does not belong to a supra-national competition network. The FCC is an independent authority.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

Proceedings and sanctions as a result of information received from other competition authorities are not of practical importance, since there is no legal basis for the transmission of information. The FCC may, however, start proceedings based on information available publicly, such as media communications about investigations in other countries. As Switzerland is not a member of the European Union, there is no possibility to ask authorities in EU member states to carry out inspections.

8 Leniency

8.1 Does the competition authority in Switzerland operate a leniency programme? If so, please provide details.

The FCC operates a leniency programme, which applies to restrictive agreements that are subject to fines (*Question 9.2*) because they contain hard-core clauses that eliminate competition (e.g., resale price-fixing, allocation of exclusive commercial territories to distributors within a distribution network that excludes even passive sales) (Article 49a(2) ACart). Restrictive agreements are also prohibited if they contain clauses that restrict competition in an appreciable manner (Article 5(1) ACart), but it is uncertain whether sanctions can be imposed on these types of clause. It is also uncertain whether the leniency programme is available when a single undertaking abuses its dominant position.

Pursuant to Article 8 of the Ordinance on Sanctions, full immunity from fines is available for the first undertaking that reports its involvement in a qualified hard-core cartel, delivers information enabling the Secretariat to start a regular investigation and meets the following conditions:

- it must not have coerced any other undertakings to participate in the cartel activity;
- it must not have instigated the cartel activity;
- it must not have played the main part in the cartel activity;
- It must spontaneously supply all available information and evidence relating to the infringement under examination;
- it must maintain complete, continuous and prompt cooperation with the Secretariat throughout the proceedings; and
- it must cease participation in the prohibited activity either at the time of disclosure or when so directed by the Secretariat.

A reduction in fines by up to 50% (leniency) is available, at any time in the procedure, to an undertaking that does not qualify for full immunity (e.g., if it is not the first to qualify) and can be granted to several undertakings involved in the same activity. In order to qualify, cartel participants must cooperate spontaneously with an investigation and end their involvement in the prohibited agreement at the time evidence is provided.

An up to 80% reduction of fines is also available to applicants that qualify for leniency if they disclose a second (still hidden) hard-core cartel.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

The FCC closes proceedings either with an amicable settlement or by issuing a formal binding decision on the compatibility of the cartel with the competition rules and specifying the appropriate measures that should be taken to restore competition (Article 30(1) ACart). The FCC can take any measures necessary to remove the cartel or practice's unlawful effects (e.g., dissolve an association). Its decision must be notified to the targeted parties and may also be notified to third parties having taken part in the proceedings (*Question 4.11*).

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

Since its 2003 revision, the ACart provides direct administrative sanctions (i.e. fines) for companies that enter into a prohibited horizontal or vertical agreement that is deemed to eliminate competition (hard-core cartels) or abuse their dominant position. Fines can amount up to 10% of the turnover in Switzerland in the previous three business years. The assessment criteria for quantifying fines are set out in the Ordinance on Sanctions. The fine may be fully or partially exempted if the undertaking co-operates with the FCC (*Question 8.1*).

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

Undertakings that do not provide information or produce documents, or only partially comply with the requirements, can be fined up to CHF100,000 (Article 52 ACart). Failure to comply with a decision of the competition authorities concerning the obligation to provide information is also a criminal offence, and individuals, if they acted intentionally, can be required to pay a personal fine of up to CHF20,000 (Article 55 ACart).

Undertakings can also be fined for failing to comply with previous administrative decisions or orders issued by the FCC (e.g., by violating a previous decision or breaching an amicable settlement approved by the FCC) (Article 50 ACart). Infringements of a previous FCC's decision or of an amicable settlement can also amount to criminal offences; an additional fine of up to CHF100,000 can be imposed on the individuals responsible for the infringements or violations (Article 54 ACart).

10 Commitments

10.1 Is the competition authority in Switzerland empowered to accept commitments from the parties in the event of a suspected competition law infringement?

When the Secretariat considers that a restraint of competition is unlawful, it can propose an amicable settlement to the undertakings

involved suggesting ways of removing the restraint (Article 29). The settlement must be made in writing and be approved by the FCC in the form of a decree; this decree is subject to appeal by all parties. The approval of the amicable settlement may be limited by the FCC to a certain period of time; such a limitation allows the FCC to re-examine the expected effects of the measures taken on competition (*Kreditkarten-Interchange Fee*, DPC 2006/1, 115).

In *Richtlinien VSW über die Kommissionierung von Berufsvermittlern*, the FCC confirmed that reaching an amicable settlement does not rule out direct sanctions (*Question 9.2*) in respect of the infringement that took place before the conclusion of the amicable settlement (DPC 2007/2, 234).

10.2 In what circumstances can such commitments be accepted by the competition authority?

The settlement must be written and approved by the FCC (*Question 10.1*).

10.3 What impact do such commitments have on the investigation?

If the FCC approves a commitment, the investigation is closed.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

When they are notified separately, procedural decisions are subject to an immediate appeal before the Federal Administrative Court (i.e. without the need to wait for a final decision on the merits) if it appears that they may cause irreparable prejudice to the parties concerned; by way of example, decisions regarding business secrets are considered as procedural decisions that give rise to an immediate appeal (*Vertrieb von Tierarnzeimitteln*, DPC 2002/4, 698). The Federal Administrative Court conducts a full review of the case (i.e. it can re-assess factual and legal questions as well as the reasonableness of the decisions). Decisions by the Federal Administrative Court can be appealed before the Federal Supreme Court, whose review is in principle limited to legal issues.

The competent authority to decide on the seals after the undertaking's opposition to the investigative measures (*Question 4.3*) is the Federal Criminal Court (*Bundesstrafgericht*). The decision by the Federal Criminal Court to leave the seals is subject to an appeal before the Federal Supreme Court (see case 1B_101/2008).

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

The appeal process against a final infringement decision follows the ordinary rules of Swiss administrative procedure law. Any appeal against final decisions of the FCC is to be brought in the Federal Administrative Court, which has full discretion of case review and can thus reverse due to dissenting on legal, factual or reasonableness bases. Decisions of the Federal Administrative Court are subject to appeal before the Federal Supreme Court.

In principle, third parties have the right to appeal against FCC's decisions regarding cartel infringement or abuse of a dominant position if they were involved in the procedure (*Question 4.11*), if they were particularly affected by the decision, and if they have an interest that the decision by the FCC be revoked.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

National judicial bodies have a review role in the private enforcement procedure only (*Question 13.1*).

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

The ACart does not exclude bringing private competition actions before a civil court if the FCC is already investigating into an alleged anti-competitive conduct or has already decided on a case. On the contrary, it is fairly typical that private actions be follow-on actions, i.e. be commenced only after an investigation by the FCC (*Question 13.1*). Civil courts are not bound by the FCC's decisions. Nevertheless, in practice, civil judges seldom deviate from the FCC's opinion. If the legal and factual situation is comparable, even an infringement decision of a foreign competition authority could be taken into consideration by the Swiss judge, since the judge is free under Swiss law as to how he/she assesses the evidence produced by the parties.

A case may be referred by a civil court to the FCC for an opinion if the lawfulness of a restraint of competition is questioned in the course of a civil proceeding, so as to ensure some coherence between the administrative and the private competition procedures (Article 15 ACart). However, the FCC restricts itself to an evaluation of the facts submitted by the civil court; in particular, the FCC does not conduct its own investigations regarding the facts.

The FCC is bound by professional secrecy. Information collected in the performance of its duties may be used only for the purpose of the investigation (Article 25(1) and (2) ACart). In particular, the FCC is not allowed to disclose any information that it has received during an administrative procedure to a civil court.

As a matter of principle, the court is not allowed to take administrative fines (*Question 9.2*) into account when calculating the amount of damages, insofar as the claimant does not receive any compensation from such fines (see *Question 13.1*).

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Undertakings that are restrained from exercising or entering into competition by an unlawful restraint of competition are entitled to bring private claims in courts (Articles 12 *et seq*. ACart). Any person or entity who has suffered harm caused by an unlawful

restraint of competition is allowed to sue, irrespective of his quality as an actual or potential direct competitor of the infringer and of the fact he had or not direct dealing with the harmful undertaking. However, according to the prevailing doctrine, only undertakings have a right to sue; consumers have no standing to sue. In case of unlawful agreements, the adverse party is one or several undertakings involved in such agreement; in case of abuse of dominant position, the adverse party is the undertaking having a dominant position in the market.

Pursuant to Article 12 ACart, the claimant may request the removal or cessation of the obstacle, damages and reparations in accordance with the Swiss Code of Obligations, or remittance of illicitly earned profits in accordance with the provisions on conducting business without a mandate. These claims can be asserted cumulatively. Pursuant to Article 13 ACart, the courts may decide that contracts are null or void in part, or that the person at the origin of the obstacle to competition must conclude contracts on market terms. Other remedies may be requested.

Damages awarded by civil courts are limited to the actual losses, which include property loss and loss of profits caused by the infringer. Punitive damages are not available. Generally speaking, the damage results in the difference between the value of assets (and liabilities) of the injured party at the time of the judgment and the hypothetical value of assets of the injured party at the time of the judgment assuming that no restraint of competition had occurred.

The ACart contains some special procedural rules for civil proceedings, but the majority of the procedural rules derive from the cantonal civil procedure laws (that will be replaced by the Federal Code of Civil Procedure, once entered into force).

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

Only a few private enforcement actions have been brought before Swiss courts so far. Private competition enforcement is not very common in Switzerland, mostly owing to the burden of proof, lying with the claimant, and the costs and duration of judicial proceedings.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Switzerland covered by the national competition rules?

According to the so called "effects doctrine", the ACart is applicable as soon as the restraint of competition has effects on Swiss markets (Article 2(2) ACart). This means that national competition rules apply also to cartels concluded outside Switzerland but having a substantive impact on Swiss economy. However, it may be complex to enforce a decision by national competition authorities against parties which are located exclusively outside Switzerland.

14.2 Please set out the approach adopted by the national competition authority and national courts in Switzerland in relation to legal professional privilege.

According to the Secretariat's Notice on Dawn Raids (*Question 4.3*), the legal privilege only covers attorney-client correspondence pertaining to the client's defence in the current investigation; any other document or attorney correspondence found at the client's premises that does not refer to the ongoing investigation procedure may be seized. However, on 28 October 2008 the Federal Supreme Court reiterated that correspondence from external attorneys is not privileged under Swiss law whenever it is kept in client's premises (case 1B_101/2008); the Federal Supreme Court also determined that, as a rule, in-house lawyers (with or without Bar exam) cannot invoke their professional secrecy in matters of this type insofar as they lack the necessary independence from the company.

With regard to civil procedures (*Section 13*), it is unclear whether the attorney-client privilege is limited to the defence correspondence or whether the attorney is entitled to refuse the disclosure of any information in connection with his client. According to some cantonal civil procedure laws, the attorney-client privilege only applies to documents that are in the attorney's custody.

In April 2009, the Federal Council proposed to regulate the profession of internal legal lawyers. According to the preparatory works on the draft law, it is the intent of the Federal Council to introduce a legal privilege for internal legal lawyers in connection with civil, administrative or criminal procedure in which their company is involved. However, this privilege would only cover the objects having a direct connection with the counsel activity (e.g., correspondence, expertises and other similar documents); other information, such as clients' data, accounting elements or companies' strategies would be excluded from the privilege.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Switzerland in relation to matters not covered by the above questions.

A governmental evaluation of the effectiveness of the ACart is currently under way, which may, in the medium term, result in governmental proposals for amendment of the ACart. Administrative sanctions against individuals might be introduced. Private enforcement might also be encouraged by making new legal instruments available to consumers and their associations (burden of proof, capacity to claim damages, etc.).

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TAVERNIER TSCHANZ

Tavernier Tschanz's Competition Practice has extensive experience of advising on the competition and regulatory aspects of mergers and acquisitions, and of representing Swiss and foreign clients before the competition authorities. The team also assists clients in identifying competition problems with their pricing, marketing and business policies. Recent matters include notifications and the representation of clients in the chemical, pharmaceutical, media, books, sport, luxury, fine art auctioning and industrial equipment industries. Lawyers of the firm specialising in this practice area are major contributors to the leading commentary on Swiss competition law.

United Kingdom

Lesley Farrell

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in the UK? If more than one, please describe the division of responsibilities between the different authorities.

The UK's principal competition enforcement authority is the Office of Fair Trading ('OFT'). The OFT's responsibilities include the investigation and enforcement of the rules prohibiting anti-competitive agreements and the abuse of a dominant position in the UK. It obtains information in relation to qualifying mergers and carries out the first stage review after which it must refer those mergers which may or will substantially lessen competition to the Competition Commission. It also plays a major role in the investigation of criminal cartels and has brought the only two criminal prosecutions which have been commenced to date pursuant to the criminal cartel offence contained within the EA 02 (s188). Namely, the UK criminal prosecution of individuals for criminal offences arising out of the *Marine Hose* cartel and the *BA/Virgin fuel surcharges* cartel, each cartel having been investigated by both the UK and US competition authorities.

The Serious Fraud Office ('SFO') (see OFT 547, 'Memorandum of Understanding between the Office of Fair Trading & Serious Fraud Office' dated October 2003) also has powers in relation to the criminal cartel offence. It can carry out criminal cartel offence investigations together with the OFT where such cases involve suspected, serious or complex fraud and can commence proceedings against individuals for the s188 offence.

The Competition Appeal Tribunal ('CAT') is a specialist competition tribunal which hears appeals against OFT decisions. It can also hear private damages claims following on from a prior competition authority decision. The High Court (England & Wales) also has jurisdiction to determine competition claims.

The Competition Act 1998 ('CA 98') established the UK's Competition Commission which conducts in-depth inquiries into mergers, market investigations and investigates certain issues of concern in relation to the regulated industries referred to it by another authority, typically the OFT.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

In relation to its sphere of activity, each of the relevant regulators for communications, gas and electricity, water and sewerage, railway and air traffic services has concurrent competition enforcement powers with the OFT pursuant to the relevant sectoral legislation. These regulators, along with the OFT, have been designated as the UK's national competition authorities for the purpose of applying Articles 81 and 82 of the EC Treaty. The existence of concurrent jurisdiction is dependent on the subject matter of the relevant agreement or conduct as opposed to the identity of the parties involved. Where more than one of the national competition authorities has jurisdiction to exercise the prescribed enforcement functions, they are required to agree amongst themselves who alone will exercise the functions in a given case pursuant to the Competition Act 1998 (Concurrency) Regulations 2004.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in the UK?

The OFT may launch a formal investigation if it has reasonable grounds for suspecting that competition law has been breached but it is not obliged to do so. Section 25 CA 98 sets out the six cases where the OFT may conduct an investigation. When deciding whether to investigate, it will take into consideration its resources and casework priorities, as set out in its Competition Prioritisation Framework dated October 2006. When deciding whether to proceed with a case, amongst other factors, the OFT will have reference to the strategy for CA 98 enforcement (as set out in the latest OFT Annual Plan), consider the direct consumer benefit from, and the deterrent effect of, any intervention as well as any aggravating/mitigating factors, the OFT's resources and the likelihood of an infringement decision being obtained.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The key two pieces of UK competition law are the CA 98 and the EA 02. The CA 98 mirrors Articles 81 and 82 of the EC Treaty (the 'Treaty') in terms of its prohibition of anti-competitive agreements (the so-called Chapter I prohibition) and the abuse of a dominant position (the Chapter II prohibition) albeit that these are concerned with agreements or conduct which have an effect on trade within the UK. The EA 02 introduced the criminal cartel offence which makes it an offence for an individual who dishonestly agrees with one or more other persons to make or implement, or cause to be made or implemented, one of the following anti-competititive arrangements, namely, arrangements which would fix prices, limit

supply, limit production, share supplies to customers, share customers and bid rigging.

In addition, where the alleged anti-competitive agreement may affect trade between Member States (within the meaning of Article 81 of the Treaty), the OFT is obliged to apply Article 81. Similarly, if the OFT applies national law to any abuse prohibited by Article 82 of the Treaty, it must also apply Article 82.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

Alongside their regulatory functions, each of the sector regulators can enforce UK competition law in relation to their sector pursuant to the relevant sectoral legislation (see further OFT 405, 'Concurrent application to regulated industries' dated December 2004).

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

It is no longer possible to approach the OFT to obtain prior approval for agreements or conduct. Instead the parties must themselves assess their compliance with CA 98 (so called 'self assessment'). Where a case raises a novel or unresolved legal issue, parties can seek an informal, non-binding written opinion from the OFT to aid self-assessment. To date only one such OFT opinion has been produced, dated 22 October 2008 concerning the legality of commercial arrangements between newspaper and magazine publishers and wholesalers.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

There is no formal procedure. The OFT relies heavily upon individuals providing information in relation to alleged anti-competitive agreements/conduct. It encourages such complainants to contact it by telephone so that it can consider whether any competition issues are raised and, if they are, what information will need to be included in the subsequent written, reasoned complaint.

If such information is provided and the complainant's interests are likely to be materially affected by the agreement/conduct in question, the OFT may afford the complainant "Formal Complainant Status" (a term used in the OFT's April 2006 guidance note entitled 'Involving third parties in Competition Act investigations'). See further response to question 4.10 below.

3.3 What proportion of investigations occurs as a result of third party complaints and what proportion occurs as a result of the competition authority's own investigations?

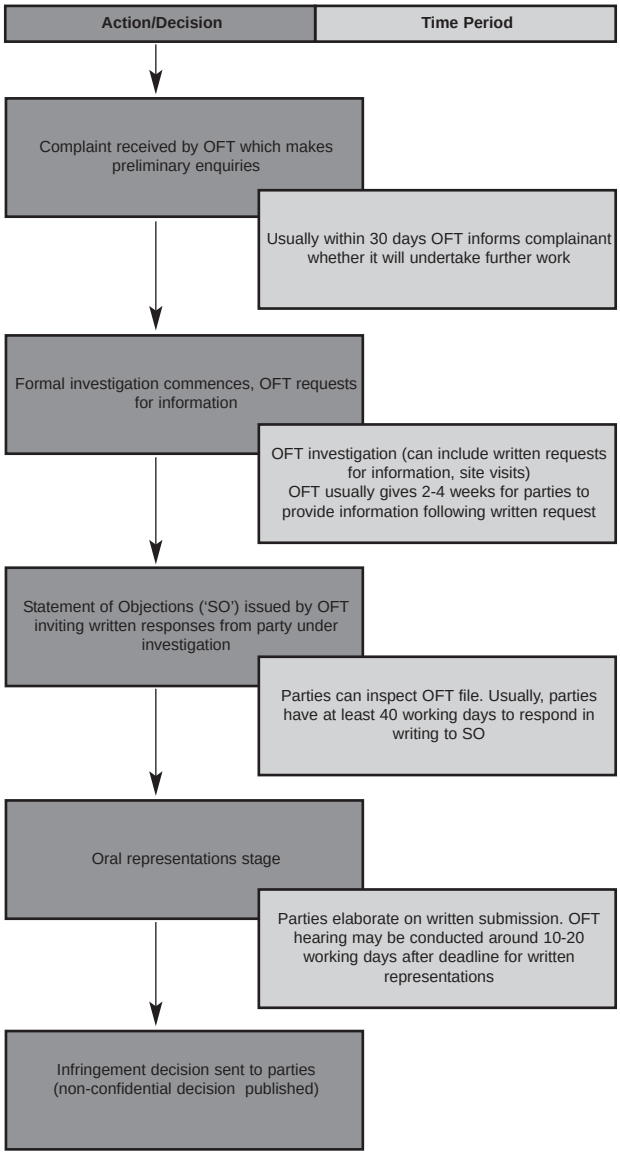
There are no detailed statistics from the OFT. The OFT Annual Report for 2007-8 states that the OFT opened files in respect of 937 cases of alleged anti-competitive activity (under the CA 98 or the cartel provisions of the EA 02) in this period. During that year, the OFT received 12 applications for leniency involving 12 separate cases.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

The diagram below shows the key stages in the competition investigative process, as outlined by the OFT. The timeline assumes that the case is not closed by the OFT. The time periods set out are indicative only. In reality, the total time taken from complaint to infringement decision varies hugely depending upon the facts and complexity of the case. For example, the OFT investigation in relation to the multilateral interchange fees ('MIF') provided for in the UK domestic rules of *MasterCard* UK Members Forum Limited lasted for over 5 years. It started in 2000 with the notification of the agreements and very shortly thereafter a complaint and ended in 2005 with the OFT's final infringement decision.

INDICATIVE TIMELINE FOR AN OFT INVESTIGATION COMMENCING WITH A COMPLAINT



4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Yes. The OFT has the power to require any person to produce a specified document/information which it considers relates to any matter relevant to its investigation. The OFT will send a written notice to the relevant party, which must include certain details (s26 CA 98, s193 EA 02).

The OFT can also require the compilation and production of specified information that is not already in recorded form such as market share information or a description of a particular market.

The power extends to requiring a person, where the document is not produced, to state, to the best of his knowledge and belief, where it is.

If a document is produced, the OFT can take copies of/extracts from it and can require the producing party (or one of its present or past officers) to provide an explanation of the document.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

OFT ABILITY TO ENTER AND SEARCH WHEN CONDUCTING INVESTIGATIONS (for further details see the OFT guidance 'Powers of Investigation' dated December 2004 and 'Powers for Investigating Criminal Cartels', January 2004).

TYPE OF ENTRY & SEARCH	REQUIREMENTS
1. Entry of business premises without a warrant	Possible under Section 27 CA 98. Need written OFT authorisation. Occupier need not be suspected of competition infringement. Generally, written notice to occupier two or more working days before intended date of entry. No notice needed if OFT has reasonable suspicion that premises are/have been occupied by a party to an alleged anti-competitive agreement/which has abused its dominant position. Can enter if the OFT has taken all such steps as are reasonably practicable to give notice but has been unsuccessful.
2. Entry of business premises with a warrant	Possible under Section 28 CA 98. Judge needs to grant warrant. OFT needs to convince judge that there are reasonable grounds for suspecting one of a list of factors. Namely: **a.** the non-production of documents (on premises) following written OFT request; **b.** the non-use of a written request by OFT for fear that the documents will be concealed, removed, tampered with or destroyed; or **c.** an unsuccessful previous attempt at entry by OFT without a warrant. If premises unoccupied, the OFT must take reasonable steps to inform the occupier of the intended entry and give them/their lawyers a reasonable opportunity to attend search.
3. Entry of domestic premises with a warrant	Possible under Section 28A CA 98. Judge needs to grant warrant. OFT needs to convince judge that there are reasonable grounds for suspecting grounds a. or b. above.
4. Entry of premises in course of a criminal investigation with a warrant	Possible under Section 194 EA 02. Judge needs to grant warrant. OFT needs to convince judge that there are reasonable grounds for believing one of a list of factors. Namely: ■ documents are on the premises which OFT could require production of via written request but: ■ here has been a failure to comply; ■ it is not practicable to serve such a notice; or ■ the service of such a notice in relation to the documents might seriously prejudice the investigation.

BASIC OFT POWERS Available for all OFT entries and subsequent searches	ADDITIONAL OFT POWERS Available in specified circumstances
Equipment: take such equipment as appears to it to be necessary; Documents: **a.** require persons on-site to produce and then explain documents; **b.** require anyone to state to the best of their knowledge and belief the location of a document; **c.** take copies of, or extracts from, any document produced; and **d.** take any steps which appear to be necessary to preserve/prevent interference with documents e.g. sealing rooms. Electronic records: require any information which is stored in electronic form and is accessible from the premises to be produced in a form which can be taken away and then readily produced in a visible and legible manner.	Use of Force: ■ Can be used whenever entry is with a warrant. ■ Can enter specified premises using such force as is reasonably necessary for the purpose albeit not against a person. Possession of Documents: ■ Where entry under CA 98 (i.e. civil investigation) the OFT can take possession of any documents (and retain them for up to three months) appearing to be of relevant kind if (i) such action appears to be necessary for preserving/preventing interference with the documents; or (ii) it is not reasonably practicable to take copies of the documents on the premises. ■ Where entry under EA 02 (i.e. if entry is for a criminal investigation), wider power to take possession of documents appearing to be of relevant kind (so (i) and (ii) above do not need to be met). Power to Seize Materials: ■ The OFT enjoys additional powers pursuant to s50 Criminal Justice and Police Act 2001 ("CJPA 01") allowing it to seize items which (i) it has reasonable grounds to believe may be or may contain something for which it is authorised to search or (ii) usually it would have no power to seize but in which something over which it does have seizure powers is comprised, where it is not reasonably practicable to determine these issues/separate the property whilst on-site (in practice these powers relate to electronically stored material). ■ These powers can be used where search of business premises with warrant (under CA 98 or EA 02).

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

The OFT's wide powers of investigation under the EA 02 enable it to require individuals to answer questions provided that the appropriate written notice has been given (s 193(1)). Such a notice may require the individual to attend an interview to answer questions concerning any matter relevant to the investigation (called a 'compulsory interview' by the OFT) for which they will be entitled to seek legal advice. It is an offence to fail to comply with this requirement, punishable with a fine or imprisonment or both.

During an EA 02 search an individual is not required to be cautioned before being asked questions needed to conduct a proper and effective search (e.g. the provision of computer passwords).

The OFT has stated that generally it will not conduct interviews under caution or using the abovementioned compulsory powers during a search under warrant. However, if a person voluntarily decides to produce information during the search an interview under caution may be conducted and the interviewee can seek legal advice.

At any stage where a person is suspected of having committed a criminal cartel offence, they will be advised that they are free to seek legal advice before being interviewed under the standard criminal caution (namely, Code of Practice C of the Police and Criminal Evidence Act 1984 which concerns amongst other things the questioning of persons.). When the interview is voluntary, the interviewee may refuse to answer questions. Under the standard criminal caution, the interviewee's answers or failure or refusal to answer may be given in evidence to a court in a prosecution. Further, the answers may be used in a CA 98 investigation against undertakings.

Where the interview is compulsory, all questions must be answered. Accordingly, certain safeguards are extended to the interviewee. The information obtained cannot be used in evidence against that person in a criminal prosecution except in certain limited circumstances (i.e. in a prosecution for knowingly or recklessly making a false or misleading statement (s 201(2) offence) or in a non-cartel prosecution in which the individual makes a statement which is inconsistent with the EA 02 compulsory investigation information).

In terms of CA 98 investigations, the OFT's powers are far narrower. Statements made by a person in response to a requirement imposed by the OFT using its compulsory investigation powers under CA 98 may only be used in evidence in a EA 02 cartel offence prosecution if the individual or his representative makes a statement which is inconsistent with it (s 30A CA 98).

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

See response to question 4.3 above.

In those cases where the OFT is entitled to seize material in the course of its CA 98 or EA 02 investigation using the additional powers granted by the CJPA 01 (see Additional OFT Powers section of response to question 4.3 above), s52 CJPA 01 requires it to give a written notice to the occupier of the premises which sets out what has been seized using such powers, the grounds for exercise of the powers and the protections built into the CJPA 01 (s59 to 61). Those protections include the ability to apply to a judicial authority for the return of the whole or part of the seized property, for example, because the seized material is or contains legally privileged material.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

See the response to question 4.3 above. To assist the OFT, experts such as computer technicians who are named in the warrant can accompany the OFT on its CA 98 and EA 02 searches.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

In relation to criminal cartel investigations (not CA 98 investigations), the OFT has intrusive surveillance powers pursuant to s199 EA 02 ('covert surveillance'), amending the Regulation of Investigatory Powers Act 2000 ('RIPA'). These powers enable the use of surveillance devices in residential premises (e.g. hotel bedrooms) and private vehicles for the prevention or detection of serious crime such as the cartel offence. RIPA gives the OFT powers to follow and watch people when not on private property ('directed surveillance') and use covert human intelligence (e.g. the use of informants) for the purposes of cartel investigations under CA 98 as well as the EA 02.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

If, following an investigation, the OFT proposes to make an infringement decision, it must give the party accused of anti-competitive conduct written notice (the SO) and give them an opportunity to make representations (s31 CA 98). The OFT's Rules (SI 2004/2751) state that the SO must contain the facts on which the OFT relies, its objections and its proposed course of action (with the underlying reasons). Thereafter, the recipient must be given an opportunity to make written representations and can request a meeting with OFT officials to make oral representations. The recipient will also be given a reasonable opportunity to inspect the documents in the OFT's file.

4.9 How are the rights of the defence respected throughout the investigation?

The response to question 4.4 above sets out the procedural protections which accompany OFT interviews in the context of a criminal investigation. In addition, s30A CA 98 makes it clear that any statements made by a person in response to the OFT's use of its CA 98 powers of investigation (s26-s28A) can only be used in a cartel offence prosecution in the very limited circumstances set out in that section.

In terms of the right against self-incrimination, whilst the OFT may compel an undertaking to produce documents/information relating to facts (for example, whether a particular employee attended a particular meeting), it cannot compel the provision of answers which might involve an admission of a breach of competition law by the undertaking.

4.10 What rights do complainants have during an investigation?

The status of a "Formal Complainant" may be conferred on a party. A Formal Complainant will be consulted at various milestones during the OFT's administrative process including a proposed decision to stop an investigation, the publication of a fully reasoned non-infringement decision or, if the investigation proceeds, the publication of a non-confidential version of the SO.

The OFT will grant this status where it is requested by a complainant which has submitted a written, reasoned complaint to the OFT and whose interests are, or are likely to be, materially affected by the agreement or conduct which is the subject matter of the investigation. The OFT hopes that its policy of formal consultation of well-informed complainants during its competition investigations will promote robust decision-making.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

At the early stages of an investigation, third parties (such as competitors, suppliers, customers and trade associations) may be required to supply documents and information to the OFT. Generally thereafter, third parties can be involved in the competition investigation if they so request.

Even if not involved in the process as a Formal Complainant, a third

party can request a non-confidential version of the SO. The OFT may provide the SO and consult with such third parties where they are likely to be both materially affected by the alleged infringement and of material assistance to the OFT investigation (see the OFT's 2006 guidance note Involving third parties in Competition Act investigations).

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

On its own initiative or after receiving a request from a third party, the OFT may give interim measures directions pending its final decision where urgent action is needed either to prevent serious, irreparable damage to a particular person or to protect the public interest (s35 CA 98). The serious damage test may be satisfied where a person may suffer considerable competitive disadvantage (financial loss, goodwill and reputation) likely to have a lasting effect on their position. The interim measures may, for example, require a party to modify or terminate an agreement or conduct.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The amendments to the CA 98 in 2004 following the entry into force of EC Council Regulation 1/2003 (the 'Modernisation Regulation') included changes to the OFT's powers to investigate alleged competition infringements. Sections 25(6) and 25(7) CA 98 (for such purposes, it is immaterial whether the agreement in question is extant) now permit the OFT to investigate infringements carried out 'at some time in the past' which is similar to the European Commission's ability to find that an infringement has been committed in the past (Article 7 of the Modernisation Regulation). It is not clear what is meant by the reference to 'at some time in the past' and this has not been tested in the courts but it is unlikely to be prior to the CA 98 coming into force for Chapter I and II infringements.

7 Co-operation

7.1 Does the competition authority in the UK belong to a supra-national competition network? If so, please provide details

Yes, the UK competition enforcement authorities are members of the European Competition Network ("ECN"). The OFT, together with the UK Competition Commission, is also a member of the ICN.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

At an EU level, Article 12 of the Modernisation Regulation states that for Article 81 and 82 cases, the Commission and national competition authorities in the EU can provide one another with and use in evidence any matter of fact or law including confidential information. That Article sets out some detailed rules in relation to the use of such information including whether it can be used in evidence to impose sanctions on individuals.

For cases which involve the parallel application of national competition law information exchanged under Article 12 may in some circumstances also be used for the application of national competition law. National competition law application does not differ.

Whilst Article 12 allows the use, subject to certain conditions, of such evidence to impose sanctions on an individual involved in a breach of Article 81 or Article 82 EC Treaty, the OFT has made it clear that leniency-derived information received from the Commission will not be used either as intelligence or in evidence for the purposes of prosecuting individuals under the cartel offence.

8 Leniency

8.1 Does the competition authority in the UK operate a leniency programme? If so, please provide details.

Yes. The UK operates leniency regimes in relation to civil and criminal liability for competition law infringements as summarised in the OFT's 2008 guidance note on leniency and no-action.

In terms of the criminal regime, individuals who come forward with information about their involvement in a criminal cartel offence under the EA 02 may be granted immunity from prosecution via a no-action letter issued by the OFT (s190(4) EA 02). The individual will be guaranteed a no-action/comfort letter if they admit participation in the criminal offence before any other individual/company provided that no competition investigation has been commenced.

In terms of the CA 98 civil regime, an application can be made to obtain immunity from or a reduction in a financial penalty imposed by the OFT. Automatic complete immunity ("Type A immunity") is subject to strict conditions being met including being the first member of the cartel to come forward with relevant information in relation to an alleged infringement which has not been investigated.

Short of Type A immunity, the OFT has discretion to grant total immunity in other cases where there is a pre-existing investigation underway ("Type B immunity") or to grant reductions to any fines imposed. Importantly, where a company qualifies for Type A or B *immunity*, all of the company's current and ex-employees and directors will receive full protection from the criminal cartel offence and director disqualification order regime.

The UK leniency regime does not alter the fact that (i) an anti-competitive agreement may be void, (ii) individuals/companies which suffer harm as a result of anti-competitive conduct may commence private law actions or (iii) extra-territorial competition authorities, including the European Commission, can impose a penalty. Individuals or undertakings considering leniency applications may, before doing so, approach the OFT for informal guidance on a no-names basis.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

Following an investigation under the CA 98, the OFT may make a decision establishing that there has been a competition infringement in which case it must be published. There is a CA 98 Public Register of such decisions on the OFT website.

In infringement decision cases, the OFT may impose penalties on the undertakings which have committed the infringement and give

such written directions as it considers appropriate to bring the infringement to an end (for example, to modify or terminate the offending agreement or conduct). Usually, such directions will have immediate effect. If they are not complied with and there is no reasonable excuse, the OFT can seek a court order requiring compliance, a breach of which will be contempt of court.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

Section 36 CA 98 provides for fines against companies found by the OFT to have infringed UK or EC competition law intentionally or negligently. The maximum fine is 10% of the undertaking's worldwide turnover for the preceding business year. The exact level of the fine will be determined via the 5-step approach set out in the OFT guidance as to the appropriate amount of a penalty (December 2004). Notice of such a fine must be given to the party in writing and state the deadline for payment which must be at least as long as the period in which an appeal against the penalty can be brought (see section 11 below).

For individuals convicted of the criminal cartel offence, the maximum penalty is 5 years imprisonment or an unlimited fine or both.

Finally, directors of companies which breach the prohibitions can be disqualified from acting as directors or in any way, whether directly or indirectly, being concerned or taking part in the promotion, formation or management of a company for up to 15 years by means of a Competition Disqualification Order. In 2008, a UK Crown Court judge imposed such an order on 3 directors who pleaded guilty of participating in the marine hose cartel.

Agreements that infringe Chapter I or Article 81 are void and unenforceable (Art 81(2) and s2(4) CA 98). Under English law it may be possible to sever the offending provisions of the contract from the rest of the terms which remain valid and enforceable. In each case it will need to be determined whether, post-excision of the offending clauses, the contract continues to adequately reflect the original bargain struck between the parties. The case law reveals that severing certain anti-competitive clauses can render the entire contract unenforceable due to a subsequent lack of consideration or because it has so changed in character that it is not the contract that the parties intended to enter into at all.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

It is an offence, punishable with a fine, to fail to comply with a competition investigation as listed in s42 CA 98, namely, to fail to produce information following an OFT written request or pursuant to an on-site inspection at business or domestic premises. A person who intentionally obstructs an OFT officer conducting a search of business premises without a warrant can also be fined.

More seriously, intentionally obstructing an OFT officer acting under a warrant can result in a maximum penalty of two years imprisonment, a fine or both. Similarly, where a party is required to produce a document and intentionally/recklessly destroys, disposes of, falsifies or conceals documents (or causes or permits the latter), the maximum penalty is 2 years' imprisonment or a fine or both. The same penalty can be imposed on parties who knowingly/recklessly provide false or misleading information to the OFT whether directly or via a third party.

In addition, there are specific sanctions relating to the obstruction of cartel investigations.

10 Commitments

10.1 Is the competition authority in the UK empowered to accept commitments from the parties in the event of a suspected competition law infringement?

The OFT is able to accept binding promises relating to the business's future conduct instead of making an infringement decision. Commitments may be structural and/or behavioural (for example, modifying or ceasing specific conduct, terminating an exclusive arrangement or licensing specific assets) and are generally adopted for a specified period of time (for example, an early set of commitments accepted by the OFT in 2004 related to the British Horseracing Board Limited and the Jockey Club's Governance Agreements. The commitments, generally lasting for four years, covered numerous issues such as the allocation of fixtures (e.g. BHB introducing a meaningful bidding process for BHB fixtures and by BHB providing access to sufficient BHB fixtures to enable new racecourses to participate in British horseracing).

10.2 In what circumstances can such commitments be accepted by the competition authority?

The OFT has a discretion as to whether or not to accept commitments. It is likely to be amenable to commitments where the competition concerns are readily identifiable and fully addressed by the commitments offered and they are capable of being implemented effectively and, if necessary, promptly. Only exceptionally will the OFT accept commitments in cases involving cartels or the serious abuse of a dominant position. The OFT is unlikely to accept commitments offered at a very late stage in its investigation such as when it has considered representations in relation to its SO (see paragraph 4.16 of OFT's 2004 guidance note on Enforcement).

10.3 What impact do such commitments have on the investigation?

The effect of such commitments is to terminate the competition investigation. Thus there can be no interim measures directions or infringement decision. However, the investigation can be re-opened where there are reasonable grounds for believing that there has been a material change of circumstances, non-adherence to the terms of the commitments or there is concern that the information underlying the commitments decision was incomplete, false or misleading in a material way.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

The UK legislation lists those OFT decisions which can be appealed to the CAT whose jurisdiction extends to the whole of the UK (s46 CA 98). No distinction is drawn between appealable decisions which are taken during a competition investigation and those which are final decisions (such as an infringement decision). That said, a distinction is drawn between the appeals which can be brought by parties to an agreement/conduct which is the subject of an OFT decision (s46 CA98) and those which can be brought by third

parties provided that the Tribunal considers that they have a sufficient interest in the decision (s47 CA 98).

Such "decisions" include decisions (i) as to whether the Chapter I, II, Article 81 or 82 prohibition has been infringed, (ii) cancelling a block or parallel exemption, (iii) withdrawing the benefit of a EC block exemption regulation and (iv) in relation to commitments.

Appeals must be commenced by sending the CAT a notice of appeal, to be received within 2 months of the date when the Appellant was notified of or, if earlier, publication of the relevant decision.

The CAT hears appeals on the full merits by reference to the grounds of appeal in the notice of appeal (paragraph 3(1) of Schedule 8 CA 98). This was confirmed in the case of *VIP Communications Ltd v OFCOM* wherein the CAT rejected the argument that it could not make a decision that T-Mobile had abused its dominant position as that would be to confuse the roles of the administrative decision-maker (OFCOM) and CAT (appellate body). The powers of the CAT are significant, it being able to confirm or set aside the whole or part of the OFT decision which is the subject of the appeal as well as set aside an OFT finding of fact. It can also remit a matter to the OFT, impose, revoke or vary the amount of a penalty, give such directions or take steps which the OFT could have taken or make any other decision which the OFT could have made. Such CAT decisions will take effect and can be enforced in the same manner as OFT decisions.

The CAT's decision may, in certain circumstances, be subject to a further appeal to the Court of Appeal or Court of Session in Scotland (s49 CA 98).

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

See response to question 11.1 above.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

As detailed above (question 4.3), the UK courts are involved in the issuing of warrants on the application of the OFT, which are needed to enter and search business and domestic premises. They are also involved as appellate bodies hearing either appeals on the full merits (i.e. the CAT) or, in the case of the higher Court of Appeal, on points of law only (permission to make such an appeal must be granted by the CAT or the Court of Appeal itself). In addition, they play a role in enforcement by hearing private claims (see the response to question 13.1 below).

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

Pursuant to paragraph 3 of the Practice Direction 'Competition Law - Claims relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998; where a case in the High Court or Court of Appeal raises a UK or EC competition issue, the party raising the issue is required to notify the OFT. This is to enable the OFT to determine whether to exercise its right to submit written and, with permission, oral observations to the court. In turn, the OFT will notify the European Commission where appropriate to enable the Commission to consider whether it wishes to submit observations in cases in which Articles 81 and 82 are raised. The OFT has stated in its 2004 guidance note on Enforcement that it does not intend to submit such observations frequently.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Third parties adversely affected by an agreement or conduct which they believe infringes UK/EC competition law may take action in the UK courts to stop the behaviour or seek damages or both. This can be done in addition to, or instead of, making a complaint to the OFT.

A distinction needs to be made between those damages actions which 'piggy-back' onto an existing competition infringement decision by the EC or UK competition authorities, called 'follow-on actions', and stand alone actions where the claimant must establish the competition law breach as well as causation and loss, called 'stand alone actions'.

A number of follow-on actions have been brought for damages or other monetary sums before the CAT pursuant to s47A CA 98. In terms of the prior infringement decision, this can be an infringement decision of the OFT, European Commission or CAT (following an appeal against an OFT decision). Follow on actions can also be commenced in the High Court.

Alternatively, a standalone action can be brought in the High Court (Chancery Division, see the Practice Direction referred to in the response to question 12.2 above) for damages based on a breach of competition law in the absence of a prior infringement decision.

It should also be noted that there is a possibility of specified bodies bringing 'representative' proceedings before the CAT on behalf of at least two named individual consumers who 'opt-in' to the action (s47B CA 98). Such consumer claims must be claims to which s47A 98 applies, i.e. follow-on claims. To date, only The Consumers' Association (now known as Which?) has specified to bring such proceedings.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

A number of claims for damages arising out of competition law infringements have been and are currently being brought, although many cases are settled by the parties prior to trial. In 2008, a claim was brought on behalf of consumers under s47B CA 98, by The Consumers' Association against JJB Sports plc before the CAT. This was based on the OFT's 2003 infringement decision concerning price-fixing in relation to replica football shirts. In early 2008 a settlement agreement was reached which provided for, amongst other things, a £20 payment to each consumer who had joined the claim and had bought one of the relevant shirts within a certain period of time.

14 Miscellaneous

14.1 Is anti-competitive conduct outside of the UK covered by the national competition rules?

The UK competition provisions are concerned with the effect on trade within the UK (whether part or the whole of the UK) or the EU, where Article 81 or 82 is being applied. Further, in relation to the Chapter I prohibition, s2(3) CA 98 makes it clear that the prohibition applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK. This UK legislation therefore adopts the implementation doctrine, in line with the ECJ position in Wood Pulp (as opposed to the effects doctrine, to which the UK government has been traditionally hostile).

The Chapter II drafting is less specific, but again refers to the need for the dominant position to be within the UK and for an effect on trade within the UK.

14.2 Please set out the approach adopted by the national competition authority and national courts in the UK in relation to legal professional privilege.

In its national investigation, the OFT is not able to require the disclosure of legally privileged documents, whether by a written request or during an inspection (s30 CA 98, s196 EA 02). Legally privileged documents include communications between a client and its external legal advisers or in-house lawyers, provided they are made for the purpose of giving legal advice. Communications made in connection with, or in contemplation of legal proceedings and for the purposes of such proceedings are also considered legally privileged. However, when another European national competition authority provides the OFT with communications either from lawyers qualified outside the EU or in-house lawyers where in accordance with EC EC law, such information is not covered by legal privilege, the OFT can use such documentation in its investigation.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to the UK in relation to matters not covered by the above questions.

Not applicable.

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Lesley has considerable experience in both contentious and non-contentious matters relating to European and Competition law and has been involved in a number of matters before the Office of Fair Trading, the European Commission, the Competition Commission and the UK courts. She has particular experience in relation to litigation before the UK courts relating to both European Competition law and the UK Competition Act.

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Melanie Collier is an Employed Barrister in the EU & Competition department at SJ Berwin LLP. She is a law graduate of Cambridge University and has a Post-Graduate Diploma in EC Competition Law from King's College, London. After spending some time working for The Treasury Solicitor's Department in the UK, Melanie was seconded to DG Internal Market in the European Commission, Brussels. From there she spent some time working for Lovells in Brussels before moving back to London. Within SJ Berwin LLP, Melanie specialises in UK and EC competition law and public procurement law.

sjberwin

SJ Berwin's EU & Competition department has extensive experience of advising on and defending alleged cartel cases before the European competition authorities, including the European Commission and the national competition authorities of the Member States. This includes advising on compliance programmes, fines, leniency applications and strategy, handling on-site inspections and subsequent investigations by the authorities. It also has extensive experience in EU and Member State level competition-related litigation, including judicial review, as well as applications for injunctions and damages and defending such applications. SJ Berwin represents clients in a number of significant cases before the European Court of Justice as well as the national courts of the Member States.

SJ Berwin's EU and competition department has been a core practice area of the firm since its establishment. The department is widely recognised as one of the leading practices in EU regulatory and competition law, operating from Brussels, London, Madrid, Milan, Munich and Paris. Three times voted 'Competition Team of the Year' in the UK Legal Business Awards, the team regularly features in the Global Competition Review's 'GCR 100', a survey of the world's leading competition practices.

Unlike many other European law firms, SJ Berwin's EU and competition practice spans not only competition law but also a broad range of other areas of EU law, which includes an active regulatory practice in pharmaceuticals, telecoms, energy and chemicals, an established trade law practice and a cutting edge EU/competition law litigation practice before both national and EU courts.

USA

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in the USA? If more than one, please describe the division of responsibilities between the different authorities.

The Antitrust Division of the Department of Justice (Antitrust Division) and the Federal Trade Commission (FTC) are the primary authorities responsible for enforcing national competition laws in the United States.

The Antitrust Division has both civil and criminal enforcement authority and may launch investigations and pursue litigation in federal court.

The FTC is an independent regulatory agency with five Commissioners. The FTC may seek legal remedies for civil violations of the antitrust laws either in federal court or before an administrative law judge (ALJ) at the agency. The FTC does not have criminal enforcement authority but may refer potential criminal matters to the Antitrust Division.

The FTC and Antitrust Division share overlapping jurisdiction for civil enforcement and have developed informal clearance procedures, based largely on the industry sector at issue, to determine which authority will pursue a potential civil violation.

In addition to the federal authorities, state attorneys general may bring proceedings in state or federal court to enforce their own state's competition laws, or under certain circumstances federal competition laws. The federal authorities, however, tend to play a leading role with respect to competition law matters that have a significant multi-national dimension.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

Aside from the authorities discussed in question 1.1, other federal agencies also may have jurisdiction to enforce competition laws, or otherwise regulate competition, within their industries. For example, the Federal Energy Regulatory Commission may prohibit anticompetitive manipulation of energy markets. Other federal agencies with authority to take action against certain anticompetitive acts and/or mergers include the Federal Communications Commission, the Surface Transportation Board, and the Office of the Comptroller of the Currency.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in the USA?

Information concerning why an antitrust authority chooses to conduct a particular investigation is not typically disclosed. The Antitrust Division focuses its criminal enforcement on so-called "hard core" violations such as price fixing, bid-rigging, or market allocations. With respect to civil enforcement, both the Antitrust Division and FTC tend to target sectors of the economy where consumer spending is high and the agency believes enforcement will have the greatest benefit for consumers. Investigations may stem from customer, supplier, and/or competitor complaints or based on materials the authorities receive during investigations or through press reports.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The Sherman Act, the Clayton Act, the Robinson-Patman Act, and the FTC Act are the principal competition laws in the U.S. Section 1 of the Sherman Act prohibits contracts, combinations or conspiracies that unreasonably restrain trade. Section 2 targets the conduct of single firms, making monopolisation or attempts to monopolise illegal. Criminal enforcement is confined, as a matter of Antitrust Division policy, to violations of Section 1.

The Clayton Act provides further prohibitions on specific anti-competitive practices that may substantially lessen competition. Section 3 includes specific prohibitions on tying and exclusive dealing agreements. Section 7 prohibits mergers or acquisitions that may substantially lessen competition, or create a monopoly, while Section 8 prohibits persons from serving as officers or directors of two or more substantially competing corporations.

The Robinson-Patman Act is a complex statute, which, at its core, prohibits sellers from engaging in price discrimination by selling essentially the same product to different buyers at different prices, if the price discrimination harms competition.

Section 5 of the FTC Act gives the FTC general authority to prevent unfair methods of competition and allows the Commission to use an administrative hearing process, rather than a federal court proceeding, to stop parties from engaging in unfair methods of competition.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

There are no competition laws applicable only to specific sectors. However, as described in question 1.2 above, the agencies that regulate specific sectors may have jurisdiction to enforce competition laws, or regulate competition, as part of their activities. Section 5 of the FTC Act exempts certain industries — including banks, certain savings and loan institutions, and some common carriers and air carriers — from the statute's reach.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

The FTC may issue a formal advisory opinion to parties requesting one, where the parties' proposed action involves substantial or novel questions of fact or law or where publication of Commission advice would be of significant interest. The FTC will not undertake enforcement action where a party has acted in a good faith reliance on the Commission's opinion, but may revoke the opinion when the public interest so requires. The FTC also issues staff opinions where the criteria for Commission review are not met. Though it rarely does so, the FTC may rescind staff opinions and pursue an enforcement proceeding.

The Antitrust Division does not issue formal advisory opinions, but offers a business review process, which is initiated by a written request. Business review letters set out the Division's current enforcement position with respect to a party's proposed course of action, but do not bind the Division.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

There is no formal procedure for filing a complaint with the FTC or Antitrust Division, though both authorities encourage and rely upon complaints from individuals. They accept complaints by mail, email, or over the phone and provide guidance for submitting complaints on their websites. Complaints can be made regardless of whether an investigation already is underway.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

The FTC and Antitrust Division do not release this information. Either agency may begin an investigation on its own initiative or based on third-party complaints, information learned in the press, or information revealed during the course of another investigation. A substantial number of criminal investigations begin as a result of applications to the Division's corporate leniency programme.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

There are no set procedural methods or specific timelines for FTC investigations, which can range from months to several years in duration. Often investigations begin with informal inquiries to a party, followed by compulsory process (discussed in question 4.2) if the Commission decides to pursue the investigation. During the investigation, the targeted party typically meets with the investigating staff and senior officials. If the investigation matures into a complaint, the FTC issues an administrative complaint and tries the case before an administrative law judge (ALJ) at the agency, whose initial determination presumptively must be entered within one year of the end of the administrative proceedings. The ALJ's decision is then subject to an appeals process explained in Section 11.

The Antitrust Division's civil investigation process is similar to that of the FTC, and can last from months to years. The Division may make informal requests for information, as well as use compulsory process to compel disclosure of information. After gathering information, the Division may decide to initiate an enforcement action in federal court or close the investigation.

The Antitrust Division may initiate a criminal investigation upon approval from the Department of Justice's Director of Criminal Enforcement after submitting a memorandum explaining its grounds for an investigation, which may include public information or information brought to the Division by a leniency applicant as described in Section 8. The Division may make informal inquiries of the parties or convene a grand jury to further investigate possible violations. Once the decision is made to convene a grand jury, the Division can issue grand jury subpoenas or may obtain a search warrant from a court to obtain further information. The grand jury considers both testimony of witnesses and documents produced, and ultimately decides whether the government has sufficient evidence of an antitrust violation to return an indictment. It may take months or years for the Division to file formal charges following initiation of an investigation. A party under investigation may agree to a plea during the grand jury investigation, following the return of an indictment, or during trial.

State's attorneys general follow the same general process described above for investigations. States often work in conjunction with each other and with the national competition authorities in investigations and filing complaints.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Both the FTC and the Antitrust Division can initiate compulsory process as part of an investigation. The FTC may proceed with an investigation by executing compulsory process requests in the form of subpoenas or civil investigative demands (CIDs) which can require the submission of written answers and/or oral testimony. Though compulsory process requests are not self-enforcing, the FTC may obtain a court order to compel the recipient's compliance.

In a civil investigation, the Antitrust Division may also issue CIDs requiring production of documents for inspection, written answers to interrogatories, or oral testimony. The recipient of a CID from the Antitrust Division may refuse to comply, forcing the Division to petition a court to enforce the CID.

Criminal investigations rely on grand jury subpoenas and sometimes court-issued search warrants to obtain information. Generally a search warrant is executed by agents from the Federal Bureau of Investigation (FBI), although officials of the Antitrust Division may participate. A search warrant permits a search of physical locations and seizure of documents and things whereas a grand jury subpoena compels a targeted party, or other individual, to provide testimony and frequently to produce documents and/or data. Failure to comply with a grand jury subpoena may lead to criminal prosecution for obstruction of justice.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

The competition authorities have no intrinsic authority to enter the premises during a criminal investigation. However, the Antitrust Division can obtain a search warrant from a court where it can demonstrate probable cause to believe that a search of the subject premises will lead to the discovery of evidence of a criminal violation.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

Representatives from the Antitrust Division or FBI agents may seek to interview individuals during the course of a search. However, individuals are not required to consent to such an interview; a search warrant only gives agents permission to search the premises and seize evidence, not to compel interviews.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

Original documents may be seized in the course of a search if the documents were located on the property described in the search warrant and are within the scope of the warrant. An officer present for the search must prepare an inventory of all property seized. A searched party may move a court for return of the seized property. Generally, the Antitrust Division will provide a copy of any seized documents to the party. Originals are returned once an investigation is closed or a case is decided.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

Electronic documents or data that can be accessed at the premises being searched may be seized by downloading a copy when executing the search warrant.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The Antitrust Division has the ability to petition a court to use wiretaps in criminal antitrust investigations. The Division must demonstrate probable cause to believe that communications regarding violations of the Sherman Act are being carried out on the device the Division seeks to tap.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

In neither civil nor criminal investigations does a party have any right to hear the allegations against it until a case is initiated in court or in an administrative proceeding. However, in the event of plea negotiations in a criminal case, the government will typically reveal some general information about its case. Additionally, when a search warrant is executed a copy of the warrant must be provided to the person or party from whom property is seized. The warrant will state in general terms the probable cause supporting its issuance, so the party may garner some information that way.

4.9 How are the rights of the defence respected throughout the investigation?

The Fifth Amendment of the U.S. Constitution provides a privilege against making self-incriminating statements. This privilege can be invoked to avoid testifying in either civil or criminal matters, provided the individual would be exposed to criminal liability based on his or her testimony. The privilege only applies to individuals, not corporations. An individual can invoke the privilege whether he is responding as an individual witness or a corporate representative. Testimony may still be compelled if a court orders that the witness receives immunity for any crimes as to which he may incriminate himself. Although a person who is compelled to testify based on immunity may not have his own statements used against him, he still may face prosecution for the same crime he testifies about based on other evidence.

4.10 What rights do complainants have during an investigation?

Under the policies of the FTC and the Antitrust Division, complainants have a right to confidential treatment of their competitively sensitive information during the course of the investigation. A complainant subpoenaed in the course of a civil investigation also has the same rights as any other party to resist the subpoena, forcing the competition authority to obtain a court order to compel compliance.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Third parties generally do not have rights regarding an investigation, other than confidentiality rights and rights applicable when compulsory process is used to seek information from them directly.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The competition authorities do not have intrinsic authority to implement interim measures. However, both the Sherman and Clayton Acts provide federal courts with express authority to issue an injunction against anticompetitive conduct prior to the final determination of a violation. Injunctions are a form of equitable relief requiring a party to refrain from, or undertake, certain actions specified in the order. Failure to adhere to an injunction may result in civil or criminal fines or penalties.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

Criminal antitrust actions are subject to a general five-year statute of limitations, applicable to most criminal claims brought by the United States, although the government can prosecute an entire conspiracy if it can show that the conspiracy continued into the limitations period, even if it began earlier. A four-year statute of limitations applies to civil actions for violations of the Clayton Act. The civil statute of limitations may be extended if the defendant has "fraudulently concealed" its violation. There is effectively no statute of limitations for government prosecution of antitrust merger violations, as under the "time of suit" doctrine the legality of the transaction is to be determined at the time a suit is brought, not at the time when the transaction was carried out.

7 Co-operation

7.1 Does the competition authority in the USA belong to a supra-national competition network? If so, please provide details

The U.S. agencies participate in a variety of supra-national competition networks. The United States also has bilateral competition cooperation agreements with several jurisdictions, including Australia, Brazil, Canada, Germany, the European Communities, Israel, Japan, and Mexico. These agreements allow the agencies to coordinate their investigations, but they do not supersede U.S. laws that prohibit the sharing of confidential information absent the consent of the provider.

Informal cooperation with non-U.S. competition agencies occurs frequently on both a bilateral and multilateral basis. Where national laws prevent the sharing of confidential information, the parties frequently waive the confidentiality protections for the limited purpose of allowing other competition agencies to access the information. The U.S. agencies participate in the Competition Committee of the Organization for Economic Cooperation and Development and International Competition Network, as well as other regional organisations.

Finally, the U.S. has signed various mutual legal assistance treaties, which are not specific to competition law, providing for broad cooperation between the U.S. and non-U.S. governments in criminal matters, including the sharing of confidential information.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

To the extent information is provided in accordance with any local law regarding the confidentiality of information, the U.S. agencies will utilise any information relevant to their investigation, whatever the source.

8 Leniency

8.1 Does the competition authority in the USA operate a leniency programme? If so, please provide details.

The Antitrust Division has adopted both Corporate and Individual leniency policies, under which successful applicants can avoid federal criminal prosecution for the reported activity provided they cooperate fully with the Division's investigation. Under the Corporate Leniency Policy, all employees of the applicant who cooperate with the leniency application receive immunity as well. These policies have been a key driver of Antitrust Division criminal enforcement, particularly in the cartel area, in recent years — with numerous high-profile prosecutions initiated as a direct result of leniency applications.

In the U.S., only one company may receive leniency per conspiracy, which makes timing of the approach to the Antitrust Division especially important. In this regard, the Antitrust Division has developed a widely publicised "marker" system, which allows a firm to come forward and secure its place in line for leniency while continuing to investigate the particular details of its involvement in the unlawful activity.

Leniency does not extend to liability for civil antitrust damages resulting from unlawful conduct. However, to the extent that it also cooperates with civil plaintiffs, an amnesty applicant also may qualify for a "de-trebling" of antitrust damage awards.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

While the Antitrust Division must bring all enforcement actions in federal courts, the FTC can prosecute antitrust violations through its own administrative proceedings as well as file civil suits in federal court seeking injunctive relief. Like the Antitrust Division, state attorneys general must also bring all actions to enforce federal competition laws in federal court, but may bring actions to enforce state competition laws in state court.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

In civil matters, the FTC can seek an order from the district court requiring companies to cease unfair methods of competition or practices. The FTC can then ask the court to impose civil penalties for noncompliance with the order or a final agency rule. The Antitrust Division can bring a civil suit in court to recover damages.

Criminal sanctions for Sherman Act violations include up to ten years jail time for individuals and fines up to $100 million for each violation for a corporation. Corporate criminal penalties may be further incurred beyond the $100 million statutory maximum to an amount equal to "double the gain or loss" resulting from cartel activities.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

Although they may not impose these sanctions on their own, the FTC and Antitrust Division may seek district court orders imposing

sanctions on those who fail to comply with agency investigations. Sanctions may include penalties for contempt of court and obstruction of justice.

10 Commitments

10.1 Is the competition authority in the USA empowered to accept commitments from the parties in the event of a suspected competition law infringement?

Both the FTC and Antitrust Division have authority to negotiate consent decrees that impose restrictions on a company's future business conduct. Typically consent decrees provide that the decree expires after a specified duration. States also have authority to negotiate a consent decree to impose behavioural remedies, and often do so jointly with the national authorities.

10.2 In what circumstances can such commitments be accepted by the competition authority?

The FTC and Antitrust Division have discretion in negotiating consent decrees. Under FTC procedures, when the parties reach an agreement, the consent decree, along with other related materials are published and public comments are solicited for thirty days, at which time the FTC may issue a final order in the same form as the consent decree, modify the consent decree, or withdraw acceptance of the consent decree entirely.

Antitrust Division consent decrees must be submitted to a federal court for approval and must comply with the Antitrust Procedures and Penalties Act (the "Tunney Act"). The Tunney Act requires publication of the consent decree and a "competitive impact statement" that includes a description of the proposed consent, the remedies available to private parties, and the alternatives considered. Public comments are solicited generally for a sixty-day period, after which a court considers whether the agreement is in the public interest.

The procedures and requirements for consent decrees negotiated by states vary. Such settlements must typically, though not always, be approved by a court in the state.

10.3 What impact do such commitments have on the investigation?

FTC or Antitrust Division acceptance of a final consent decree typically ends the investigation. Similarly, a consent typically ends a state's investigation. Either the antitrust authorities or the parties may seek to modify or terminate a consent decree if there are material changes in the relevant circumstances.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Parties have limited opportunity for appellate relief during an investigation. The recipient of a grand jury subpoena in a criminal case may move a federal district court to quash a subpoena issued to it — but not a third party — on the grounds that compliance would be unreasonable or oppressive. In a civil investigation, the recipient of an FTC CID can petition the Commission to limit or quash the CID. If a party fails to comply with a CID, the FTC may initiate enforcement proceedings in court, at which time the recipient can object to issuance of the CID. The recipient of an Antitrust Division CID can request an order modifying or setting aside the CID directly from a federal district court. The Antitrust Division must go to federal court to enforce the CID.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

The Antitrust Division and state attorneys general do not have unilateral authority to impose fines or decisions of violation; rather, they must bring action in court to adjudicate alleged violations.

A defendant found in violation following trial has a right to appeal the final decisions or remedies imposed to the federal circuit court of appeals and ultimately, the Supreme Court.

For FTC actions before an administrative law judge (ALJ) at the Commission, the only remedy available is injunctive relief. Following the initial decision of the ALJ, the parties may appeal to the Commission and then to a federal circuit court of appeals.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

Because the Antitrust Division and state attorneys general must bring an action in a federal court to enforce federal competition laws, the federal courts are involved in adjudicating alleged violations of competition laws and imposing remedies if violations are found. Federal circuit courts also are involved in adjudicating appeals from final decisions of the FTC for civil actions first brought before that body.

Additionally, federal district courts are involved in the investigatory process by issuing search warrants and grand jury subpoenas. Federal district courts also may be asked to enforce civil investigative demands or other compulsory process requests.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

In all criminal competition cases and some civil competition cases, the Antitrust Division, the FTC, and/or state attorneys general are involved as the plaintiffs bringing an action. When not the plaintiff, the U.S. agencies or state attorneys general may still be involved by filing briefs as a "friend of the court" (*amicus curiae*), attempting to influence the court's determination. More rarely international competition authorities will seek to participate in a competition action before a United States court as amicus curiae.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Third parties may pursue civil claims in federal and state courts to seek damages and/or an injunction to stop the anticompetitive behaviour. Private litigation often follows an investigation by the competition authorities into the same industry or conduct.

Claims can be brought either by an individual party or as a class action on behalf of a group of similarly situated individuals. Treble damages -- three times the amount of the injury — are generally available for successful claims. Under federal anti-trust law, only direct purchasers (those who bought directly from a conspirator) have standing to seek civil damages. However, indirect purchasers have the ability to assert damage claims for anti-trust violations under various state laws.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

Private litigation concerning anti-trust violations is commonplace in the United States with thousands of actions brought in state and federal court each year. While many cases are settled by the parties, private litigants have had success in demonstrating a violation of the competition law such that monetary compensation is awarded.

14 Miscellaneous

14.1 Is anti-competitive conduct outside the USA covered by the national competition rules?

Under the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), anti-competitive conduct occurring outside of the United States is actionable under the U.S. anti-trust laws so long as such conduct has a "direct substantial and reasonably foreseeable effect" on U.S. domestic commerce, U.S. import commerce, or the export business of a U.S.-based exporter. While the presence of such an effect would be sufficient to confer jurisdiction for a U.S. government anti-trust investigation or prosecution, application of the FTAIA to private enforcement rights is more complex. In the typical case, recovery will be limited to injuries incurred in U.S. domestic commerce or resulting from U.S. import transactions. Recovery for damages sustained outside of U.S. commerce, such as purchases of U.S. exports or purchases in entirely non-U.S. transactions, will be far more difficult to obtain.

14.2 Please set out the approach adopted by the national competition authority and national courts in the USA in relation to legal professional privilege.

Both the FTC and the Antitrust Division recognise the basic law of privilege. The attorney-client privilege arises whenever a communication is made between an attorney and a client for the purpose of giving or obtaining legal advice. The related "attorney work product" doctrine applies to materials prepared in anticipation of litigation by an attorney or her agent, and the client or her agent. These privileges apply equally to in-house and outside counsel.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to the USA in relation to matters not covered by the above questions.

Under the U.S. anti-trust regime, potential penalties for anti-competitive conduct can be severe, including both potential incarceration and substantial fines for criminal violations, and "joint and several" treble damages liability to civil plaintiffs. In light of the timing issues that arise under the Antitrust Division's Corporate Leniency Policy, and the often complex interaction between criminal and civil anti-trust actions in the U.S., it is crucial that knowledgeable counsel be engaged at the earliest possible moment that a firm learns that it may have exposure for anti-competitive conduct even arguably affecting U.S. commerce.

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